THE HIGH COURT

[2014 No. 132 P]

BETWEEN

TERESA McFADDEN

PLAINTIFF

AND

ANDREA NEUHOLD

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 7th day of April 2017.

1. These proceedings arise as a result of a road traffic accident which occurred on 21st September, 2011, on the Business Park Road, Letterkenny, Co. Donegal and which involved a collision between two vehicles, one driven by the Plaintiff and the other by the Defendant.

2. A full Defence has been delivered to the Plaintiff's claim containing a plea that the proceedings are statute barred to which a Reply has been delivered pleading that the Defendant is estopped from relying on the Statute on grounds which are particularised.

3. On the face of it the proceedings are statute barred. It is accepted that an application in respect of the claim was not made to the Injuries Board (the Board) within 2 years from the date of the accrual of the cause of action as provided for by the Statute of Limitations Acts 1957 and 1991, (the Statute) as amended by s.7 of the Civil Liability and Courts Act 2004 (the Act of 2004).

4. The parties agreed that this aspect of the case should be tried as a preliminary issue and as to that have delivered pleadings from which it is apparent that the reasons and most probable explanation for the failure to make the application to the Board in time are fundamental to the resolution of the issue under consideration.

5. At the outset the Court is satisfied on all of the evidence that this is not a case where the Plaintiff or her solicitor were unaware of the limitation period or where the limitation expiry date was overlooked, quite the contrary, the approach of the limitation expiry date was appreciated which begs a number of core questions relevant to the issue:

> (i) Why then was the application not made in time?
>
> (ii) To what extent, if at all, was the failure to make the application attributable to the words and conduct of the Defendant's representative, Liberty Insurance (Liberty)?
>
> (iii) Were there other factors, including those attributable to persons unconnected with the Defendant or for whom the Defendant is not legally responsible which explain what happened and why?

6. What emerges from the evidence is that information which the solicitor received (a) from the Plaintiff when she consulted him, (b) from the Board when he enquired as to whether an application, if made, would be accepted and processed and (c) the content of a letter dated 22nd July, 2013, sent by Liberty in response to the solicitor's letter of July 16th calling for an admission of liability, unquestionably influenced his decision making and contributed to the state of affairs which has given rise to these proceedings. To achieve a comprehensive understanding of these matters it is considered necessary that they be placed in the factual context from which they arise.

Background.

7. The accident circumstances were investigated by Garda Conor Molloy and by Michael Bond, Regional Claims Manager (RCM) of the Defendant's road traffic insurer Quinn, subsequently Liberty. On the day following the accident, Mr. Bond contacted and introduced himself to the Plaintiff. At his request she gave a signed statement concerning the accident circumstances and the injuries which she had sustained.

8. Mr Bond also spoke to the investigating police officer; he expressed the view that the Defendant was responsible for the accident. Having completed his investigations a report was prepared for Liberty in which Mr Bond expressed the opinion that as the Defendant had executed a right hand turn across path of the Plaintiff's oncoming car she would be found liable for the accident, a view which he also communicated to her.

9. Three claims arose; one for material damage to the car, one for personal injury suffered by a passenger, Mr. Samuel McFadden, the Plaintiff's father, and, finally, the Plaintiff's claim. The material damage and passenger claims were settled directly with Mr. Bond who also tried, unsuccessfully, to settle the Plaintiff's claim. At the conclusion of direct negotiations between them he advised the Plaintiff that Liberty were not going to pay any more than €20,000 plus expenses, a sum which she felt was insufficient; he also advised that she should consult a solicitor, advice which she took.

10. There was some controversy between the parties as to whether an offer as such was made and whether or not there was more than one conversation in which a settlement sum was actually mentioned. Either way the Plaintiff made an appointment to see her solicitor whom she first consulted on the 23rd May, 2013. His understanding of the information received was that an offer of €20,000 plus expenses had been made to settle the claim. Subsequently, he made an undated memorandum for the file in those terms which was made available to the Court. The evidence of the Plaintiff and her solicitor was that advice was neither sought nor given in relation to the sufficiency of the offer.

11. The Plaintiff is not under any legal disability nor is there a date of knowledge issue; she was aware that she suffered injuries and that the car which she was driving at the time had been damaged; accordingly, her cause of action accrued on the date of the accident.

12. Having regard to s.7 of the Act of 2004 and the provisions of the Personal Injuries Assessment Board Act, 2003 (the PIAB Act), it follows that an application had to be made to the Injuries Board (the Board) in respect the claim by not later than the 20th of

September 2013 if the running of time was to be stopped.

13. When the Plaintiff first consulted her solicitor on 23rd May; he gave her advice concerning the limitation period and requested that she furnish him with certain information so that he could process the claim, though he did not consider himself instructed until 12th July when he next met with the Plaintiff.

14. Following that consultation he wrote a number of letters to the Plaintiff, each dated the 15th July. He also wrote a letter to the Defendant on the 16th July, which was copied to Liberty, in which, significantly with regard to the issue, he called for an admission of liability.

15. Liberty replied by letter dated 22nd July in which it was stated that "*…we are currently investigating this incident, however, should liability not be an issue we would encourage you to agree a settlement timeframe and costs with our Regional Claims Manager at the stage of initial contact. In the event that these terms are not agreeable, kindly confirm by return and Liberty Insurance will be happy to allow this case to proceed and be assessed by the Injuries Board*".

16. That letter also requested certain personal details in relation to the Plaintiff such as her full name, address, date of birth, PPS number, injuries sustained and the identity of her medical attendants; in conclusion it was stated that " Our Regional Claims Manager, Michael, will be in contact with you in the next few days."

17. Mr. Bond's evidence was that he followed up on the letter by calling the solicitor's office and leaving a message with a secretary but to which there was no response; the solicitor gave evidence that he was unaware of the contact. Either way it is clear that apart from sending a letter, dated 29th July, furnishing the Plaintiff's personal particulars which had been sought no further contact was made between the solicitor and Liberty until the following November, by which time the limitation period had expired.

18. A number of matters arise from the letter of the 22nd July which are of potential significance in the context of the issue under consideration which are as follows:

(i) the invitation to agree a settlement timeframe and costs went unanswered,

(ii) no clarification was sought in relation to the issue of liability, which had not been conceded, and,

(iii) when nothing was heard from Mr Bond, the solicitor did not communicate with him despite having his contact details, which included his personal mobile number.

19. Instead, the solicitor wrote two letters on the 13th August, one to a Garda Inspector in Letterkenny looking for a Garda abstract together with any statements and the other to Dr. McFadden, the Plaintiff's GP, looking for a medical report. These were followed by a letter dated 19th August sent to another physician whom the Plaintiff had attended, Dr Khavia, also seeking a medical report receipt of which was acknowledged by letter dated 24th September, 2013.

20. On 11th October, 2013, the solicitor made an application for assessment of the claim. The Board acknowledged the making of the application as having been completed on the 14th October, by which date the limitation period had expired. In the event Liberty wrote to the solicitor on the 25th November advising that as the Plaintiff's claim was statute barred the company had decided to reject the application.

21. This decision is particularly relevant since it prevented the Board from assessing the claim notwithstanding that a copy of the letter of the 22nd July accepting assessment by the Board had been enclosed with the application, a letter which the solicitor viewed in the context of the limitation period about which he was conscious, as 'a letter of comfort'.

22. A fundamental question which arises from that letter germane to the issue is whether, against the background of the information which he had obtained from his client, it was reasonably open to the solicitor to infer and whether he did infer from the content of the letter that liability was not or would not be in issue and that the claim would be assessed and, if so, did that result in the solicitor being lulled into a false sense of security and thus a justifiable belief that the statute would not be used to defeat the claim thereby rendering it unnecessary to make an application on or before 20th September.

23. Having regard to the submissions which have been made in relation to the conduct of Liberty, which the Plaintiff contends was unconscionable and dishonest, the circumstances which preceded the letter of the 22nd, including the course of conduct between Liberty and the Plaintiff before she consulted her solicitor, are material to the question and require be referred to in some detail.

Direct communications between the Plaintiff and Liberty.

24. Prior to 23rd May, the Plaintiff and Mr. McFadden had dealt directly with the RCM, Mr. Bond, who had implemented the company's claims policy which was to attempt to dispose of claims directly at the earliest opportunity on best possible terms thereby avoiding recourse by claimants to solicitors or the Board and thus minimising claims costs.

25. Mr. Bond's evidence was that he had followed insurance company guidelines and had advised the Plaintiff from the outset about the options for pursuing her claim which were open to her, namely (a) by direct negotiations, (b) through a solicitor and/or (c) by going to the Board. This was not the Plaintiff's recollection; as far as she was concerned it was her solicitor who had told her about the Board not Mr. Bond, however, she did recall a discussion about the legal costs involved in retaining a solicitor and that she had been encouraged to deal directly with Mr. Bond, which she did.

26. A number of progress reports compiled by Mr. Bond concerning his course of dealing with the claims were made available to the Court; the reports detail the conversations which he had with the Plaintiff from the time he first met her on the day after the accident up to and including events which occurred subsequent to the refusal by Liberty to permit the claim to be assessed by the Board.

27. The Plaintiff and Mr. Bond gave evidence. While there were some differences between them on certain matters , it was common case, corroborated by the progress reports, that Mr. Bond was in regular contact with the Plaintiff concerning her progress towards recovery and that ultimately the purpose of this was to discuss settlement.

28. In the context of the issue it is also of some significance that whether an offer of €20,000 was made on several occasions, as stated by Mr. Bond, or whether that was a figure which was merely indicated once, as stated by the Plaintiff, it is clear on the evidence of either account that the Plaintiff had been informed that Liberty was not going to pay more than that sum, that she

considered this to be insufficient, a view shared privately by Mr Bond, and that he had then advised her to consult a solicitor.

29. On any view of the evidence it is also abundantly clear, and I am so satisfied, that by the time the Plaintiff consulted her solicitor in May, 2013, she had already decided that a figure of €20,000 plus her expenses was insufficient and that the course of direct negotiations to dispose of the claim was at an end, furthermore, as far as the Plaintiff was concerned she had placed further progress of her claim in the hands of her solicitor.

30. Consistent with this conclusion it is apparent from the progress reports that during the week preceding 17th May the Plaintiff had requested Mr Bond to arrange for the return of her medical information, which included MRI scans of her neck and back taken in November, 2012 and January, 2013 respectively. That request was complied with and when the Plaintiff attended the consultation on 23rd May, she brought the MRI scans which the solicitor photocopied.

The Plaintiff's instructions.

31. The Plaintiff's solicitor practised for over 37 years in partnership in the firm of O'Gorman Cunningham & Co. Solicitors, Letterkenny. His expertise was in the area of conveyancing and probate law. Litigation, particularly personal injury litigation, was handled by his partner. Towards the end of May 2013 there were discussions between the partners which ultimately led to the dissolution of the partnership in early June following which the solicitor moved to premises nearby and established a practice under his own name in early July.

32. Although his practice involved conveyancing and probate work, as well as some work in the District Court, the solicitor was aware of the two year limitation period for claims involving personal injuries and was aware that the running of time would be stopped by making an application to the Board.

33. The evidence of the Plaintiff and of her solicitor was that when they first met on 23rd May, the solicitor had given advice and had expressed views about the following:

(i) the 2 year statutory time limit for bringing the claim;

(ii) that she had left it very late to pursue her claim;

(iii) that she ought to have consulted a solicitor after the accident rather than engaging in direct negotiations with Liberty;

(iv) that the other claims should not have been settled without independent legal advice, and that

(v) certain information, which he specified, including a medical report, would be required in order to proceed with an application to the Board.

34. At that meeting the solicitor was given to understand that Mr. Bond had dealt with the Plaintiff on the basis that liability for the accident was not an issue, a fact corroborated by Mr. Bond's evidence that he would not have received instructions to offer €20,000 plus expenses if there had been such an issue.

35. The information requested by the solicitor on the 23rd was subsequently furnished by the Plaintiff on 27th May. Thereafter nothing appears to have happened to progress the claim until the 12th July, when she next met with the solicitor. Whatever the reason or combination of reasons for the delay in proceeding with the claim, another two weeks of the limitation period had elapsed.

36. The solicitor fairly accepted that he was unfamiliar with the procedure for processing a claim with the Board but his former partner had assisted him by furnishing certain information and documentation including a form which was habitually used by O'Gorman Cunningham in connection with processing claims through the Board and, subsequently, through Court where necessary.

37. That form was used in connection with the Plaintiff's case but was only filled in after an authorisation had been received from the Board. A 'New Matter' form had been utilised earlier which also contained provisions relating to the Statute, but that too had not been completed correctly because a computerised system to which the entries related had not yet been commissioned in the new office.

38. A perusal of the client file shows that no note was made of the rapidly approaching limitation expiry date, however, as stated at the outset of this judgment, I am satisfied that this is not a case where the limitation expiry date was unknown to or was overlooked by the solicitor, on the contrary he was particularly conscious of it and had emphasised to his client the restriction on the available time within which to make a claim that had resulted from the delay in consulting him.

Solicitor's view of the correspondence between himself and Liberty.

39. The solicitor described the intimating letter of 16th July, as a 'standard letter' which he would write in every case. The call on the Defendant to admit liability was not to be construed as meaning that he considered liability was in issue or would be in issue. On the basis of the instructions received, he had formed the view that liability would not be an issue, moreover, the view he took of the letter of 22nd July from Liberty was that too was a 'standard letter'. Similarly his request for a Garda abstract was a matter of form which he would follow even in a case where liability had been admitted.

40. No satisfactory explanation was offered as to why that would be so in a case where a clear concession on liability had been made; such a course would involve unnecessary expense the recovery of which in the course of the claim would in such circumstances be open to dispute; as it is whatever had been said during the course of direct communications concerning liability or responsibility for the accident in this case, the position being taken by Liberty when called to admit liability by the solicitor was to protect its position in the way that it did and from which it is clear that liability was not then being conceded for legal purposes. Nevertheless, the solicitor's view was that liability was open and shut; after all Liberty had agreed to the claim being assessed by the Board.

Solicitor's knowledge of the PIAB Act; making an application and contact with the Board.

41. Although the solicitor was unfamiliar with the practice of making claims to the Board, he was aware of the provisions of s. 11 of the PIAB Act and the PIAB Rules S. I. No. 219 of 2004 which specified the documentation which had to accompany the application form, including a medical report. On a date about which he could not be specific other than that it was definitely after the 22nd of July' and having discussed it with the Plaintiff, he contacted the Board to ascertain a view whether the application would be dealt with in the absence of the report.

42. His evidence was that he had been informed that there had to be strict compliance with the statutory requirements in default of which the application would be returned. Critically, he accepted the correctness of the information he was given and thus formed the belief that he could not make the application without a medical report before the limitation period expired.

43. Although aware that the limitation expiry date was approaching, he did not mention the statute in the course of his discussions with the representative of the Board though he did refer to the letter of the 22nd which he had received from Liberty which he was advised to enclose with the application notwithstanding that by October 11th the application was 'obviously out of time'.

Solicitor's view on Liability; failure to make the application in time:

Conclusion.
44. As the only direct contact between Liberty and the solicitor concerning liability for the claim was the letter of the 22nd July, I am satisfied that his view that liability would not be in issue had to be founded on the information which he had obtained from the Plaintiff and Mr. McFadden and not otherwise.

45. Furthermore, on the basis of that information his view on what had been stated concerning investigations into liability was that these had already been completed; he knew that the other claims had already been settled and that Mr. Bond had dealt with the these and the claim of the Plaintiff as assessments. As to what was to happen in the event that he was not contacted by Mr Bond or that it was not otherwise possible to agree terms, the view formed was that Liberty was happy to have the claim assessed by the Board.

46. In my judgment, the categorisation by the solicitor of the letter of 22nd July as 'a letter of comfort' and the contact with the Board to ascertain whether or not an application would be accepted and processed without a medical report is entirely consistent with an awareness that the time for making an application was running out, furthermore, it was the acceptance of the correctness of the advice that he had been given and the view which he took of the statement by Liberty that they were happy to have the claim assessed which most likely explains why an application was not made to the Board in time pursuant to s. 11 of the PIAB Act.

Applications to the Board; the Law.
47. The limitation period for an action to recover damages in respect of personal injuries was reduced from 3 to 2 years by s. 7 of the Act of 2004.

48. With certain exceptions, claims for compensation in respect of personal injuries must first be processed through the Board before proceedings may be issued. In the ordinary way it is the issue of the proceedings which stops the running of the statute, however, s. 50 of the PIAB Act provides that the period beginning on the making of an application under s. 11 in relation to the claim and ending six months from the date of issue of an authorisation is to be disregarded in the computation of the limitation period, accordingly, it is the making of the application to the Board which stops the running of time.

49. The date on which an application is deemed to have been made to the Board has been the subject matter of interpretation by this Court in a number of cases. It was the apparent conflict on the face of it between the provisions of s.11 (1) and the provisions of the Rule 3 of the PIAB rules 2004, which gave rise to an issue which was considered in these cases, namely, the date on which, for the purposes of the Statute, an application is made to the Board.

50. In *Figueredo v. McKiernan* [2008] IEHC 368 it was contended that, having regard to the provisions of Rule 3 (3) of the PIAB Rules, 2004, the relevant date for the purposes of s. 11(1) was the date on which the application was acknowledged in writing as having been received by the Board. As to that Dunne J. observed:

> *"If the contention on behalf of the defendant is correct, it would appear that the effect of Rule 3(3) of S.I. No. 219 of 2004 is that a plaintiff could be statute barred in circumstances entirely outside their control. Clearly, such a consideration could result in significant hardship for a plaintiff. Whilst one might be critical of a plaintiff for leaving the issue of proceedings or, in the case of personal injuries applications the making of an application under s. 11 until the last moment, nonetheless the Statute of Limitations 1957 has fixed a specific period within which to commence one's proceedings and it seems somewhat harsh, to say the least, that having taken every step that one can take in order to commence proceedings, that one could become statute barred by the actions of a third party over whom one has no control, in this case, the Personal Injuries Assessment Board."*

51. In the circumstances of that case, where the Plaintiff had made the necessary application to the Board, within time, by post, and where in the ordinary course of the post the application would have been in received in time, the learned trial judge rejected the defendant's contention and concluded by stating:

> *"I do not see how the administrative act of affixing a date stamp on the application by P.I.A.B. can oust the statutory provisions in relation to the limitation period."*

See also the judgment of Clarke J. in *Fogarty v. McKeogh Brothers (Ballina) Ltd* [2010] 4 I.R. 374, *O'Callaghan v. Hannon* (Unreported, Birmingham J, High Court 15th June 2010) and *Kiernan v. J. Brunkard Electrical Ltd and Quebec Construction Ltd* [2011] IEHC 448.

52. The decision of Birmingham J. is particularly apposite having regard to the information given on behalf of the Board to the Plaintiff's solicitor in this case. In O'Callaghan the Plaintiff's solicitor had submitted certain correspondence to the Board, by way of application, but had omitted certain information, namely a medical report. The Board wrote acknowledging receipt of the correspondence but required that additional documentation be furnished before the application could be accepted as complete. Noting that s. 11 of the PIAB Act was a two part provision, he held that although the application to the Board had been made in the absence of the medical report, it was still an application for the purposes of the Statute of Limitations since the provisions of s. 11 (1) had been satisfied.

53. The solicitor very fairly accepted that in his discussion with the Board he did not mention or address the approaching limitation expiry date. It would be inappropriate for the Court to speculate as to whether he would have received different advice had he done so. As it is I am satisfied on the authorities that insofar as the solicitor relied upon the correctness and accuracy of the information which he was given by the Board to found the view that he could not and thus did not make an application for the purposes of the statute, such was unfortunately incorrect.

54. In circumstances where he was conscious of the limitation expiry date and had made contact with the Board for the purpose of ascertaining whether the application would be accepted, it seems highly likely that had the solicitor appreciated he could have made

an application without the medical report sufficient to satisfy the provisions of s. 11 (1), and thus the running of time, that he would have done so; the failure does not fall at the feet of the Defendant.

55. However, that does not dispose of the matter. Notwithstanding the impact of the information received from the Board on his decision making, it remains necessary to consider whether in the circumstances of the case there was unconscionable and dishonest conduct on the part of the Defendant which raises an estoppel or which would otherwise make it inequitable to permit the Defendant rely on the Statute barred plea.

Estoppel; The Law.
56. The first point of departure in the context of this aspect of matters concerns the duty which a solicitor owes to a client where instructions have been received to prosecute a claim for personal injuries. As to that, first and foremost there is an over riding obligation to ensure that if the claim is not settled within the relative limitation period where the claim is governed by the PIAB Act, that an application is made to the Board or, where an authorisation has issued, or, where the claim is not governed by the Act, that proceedings are issued in order to protect the rights of the plaintiff.

57. In his judgment in *Doran v. Thompson Ltd* [1978] 1 I.R. 223 Griffin J. at p. 231 and p. 232 observed:

> *"It is the invariable practice of some solicitors, upon first receiving instructions and opening a new file in a case in which personal injuries are received in an accident, to put in bold figures, on the outside of the file, the date prior to which a plenary summons must be issued unless the case is settled. This, or some appropriate variation of it, is a practice which might, with advantage, be universally adopted. If the action has not been settled by the date which appears on the outside of the file, prudence requires that a plenary summons should be issued though not necessarily served."*

58. A failure to make the application to the Board or issue proceedings in time will likely result in the plea, as it has done in this case, that the claim is statute barred. In the ordinary way that is a perfectly proper and justifiable defence provided by limitation statutes one of the principle objects of which is to deal with the mischief which would otherwise be caused by permitting stale claims to be pursued, claims which can be difficult to defend, as to which, Geoghegan J. in *Murphy v. Grealish* [2009] 3 I.R. 366 at p. 377 observed that:

> *"in the absence of substantial unfairness, a court will not allow a defence of statute bar properly raised to be defeated."*

This is an important part of the statutory background against which the estoppel which the Plaintiff seeks to establish in this case has to be considered.

59. Written and oral submissions were made on behalf of the parties which the Court has considered but which it is not proposed to summarise. In legal argument there was little if any disagreement between the parties as to the Irish authorities relevant to the issue under consideration and in this regard the Court was referred to the following cases *O'Reilly v. Granville* [1971] 1 I.R. 90; *Doran v. Thomas Thompson & Sons Ltd* [1978] 1 I.R. 223; *Traynor v. Fegan* [1985] I.R. 587; *Ryan v. Connolly* [2001] 1 I.R. 627; *Yardley v. Boyd* [2004] IEHC 385; *Murphy v. Grealish* [2006] IEHC 22; *Evanson v. McColgan* [2006] IEHC 47 and the decision of the Supreme Court in *Murphy v. Grealish* [2009] 3 I.R. 366 all of which have also been considered by the Court.

The principal of estoppel.
60. An estoppel may arise where one party has by words or conduct made a clear and unambiguous promise, assurance or representation to the other party which was intended to be acted upon so as to effect the legal relations between them and the other party has acted upon the promise, assurance or representation by altering his position to his detriment, the party who gave the promise, assurance or representation cannot afterwards be allowed to revert to the previous legal relationship as if no such promise assurance or representation had been made and that party may be restrained in equity from acting in a way which is inconsistent therewith.

61. It is an essential requirement to the founding of such an estoppel that the representation promise or assurance must be clear and unambiguous though that does not mean that the representation must be one incapable of more than one interpretation. Where more than one construction is possible the meaning relied upon must clearly emerge from the context and circumstances of the case though in other circumstances or contexts the words or conduct might bear a different meaning. The party relying on the promise, representation or assurance must establish that such was reasonably understood by that party in a sense inconsistent with the allegation against which the estoppel is attempted to be set up. See the judgment of Griffen J, in *Doran v. Thompson*.

62. At the outset it is to be observed that in that case and in *Ryan v. Connolly* there was no ambiguity in relation to the question of liability; put simply no admission was made by or on behalf of the defendants whereas in Murphy v Grealish the defendant's insurer had made a clear and unambiguous admission of liability in writing to the plaintiff's solicitor. On the other hand, in *Yardly v. Boyd*, whilst there had been correspondence about it, the defendant's position in relation to the issue of liability was ambiguous and to that extent the decision is an authority which has a particular relevance to the circumstances of this case.

63. Apart from the clear and unambiguous admission of liability in *Murphy v. Grealish* there were negotiations in relation to establishing quantum and settling the claim which continued up to and beyond the expiry of the limitation period whereas in this case not only had direct negotiations between the Plaintiff and Liberty come to an end, the invitation to the Plaintiff's solicitor to make contact with a view to agreeing terms went without response. Instead his attention focused on obtaining information, including a medical report, for the purposes of making an application to the Board.

64. In *Evanson v. McColgan*, a case which bears resemblance to *Yardley v. Boyd* (both cases involved a plea that the plaintiff's claim was barred by virtue of the provisions of s. 9 (2) of the Civil Liability Act 1961) there had been an abandonment of liability and a clear course of negotiation and conduct between the parties, irrespective of their unawareness of the limitation period, on foot of which the plaintiff had refrained from issuing proceedings, an important factor which does not apply in the circumstances of this case.

65. These authorities underscore the significance which the circumstances in any given case will have or are likely to have on the outcome in relation to the issue under consideration here. From these authorities a number of important factors emerge which may be summarised as follows:

> *(1) In considering an estoppel in the context of a plea of statute bar where there has been no request to withhold the issue of proceedings, a clear and unambiguous admission of liability is singularly important. Absent a clear and unambiguous promise, assurance or representation by words or conduct or a combination of both in the sense as explained from which it was reasonable to infer and from which it was inferred that liability would be admitted on foot of*

which the plaintiff has refrained from making an application to the Board or, on receipt of an authorisation, from issuing proceedings or has refrained from issuing proceedings not governed by the PIAB Act, the requirements necessary to constitute an estoppel cannot satisfied.

(2) In circumstances where it is reasonable for a solicitor to expect that an offer of settlement might be made as a result of negotiations but where the expiry of the limitation period is approaching and the position adopted by the defendant when called upon to admit liability is ambiguous contradictory or is one of silence, there is an obligation on the plaintiff to seek clarity on the position and obtain a satisfactory reply and if none is received that an application is made to the Board or proceedings are issued, as the case maybe, before the limitation period expires.

(3) Notwithstanding a clear and unambiguous concession on the issue of liability, it does not follow that it is reasonable for a plaintiff to defer the making of an application or the issuing of proceedings beyond the statute; it is not the law that the Plaintiff can ignore the relevant limitation period with impunity. By way of example, where liability has been conceded and the claim is for assessment only, in the absence of negotiations or, where negotiations have taken place but have concluded without agreement or for some other reason negotiations have become dormant, the failure to make an application or institute proceedings may result in a plaintiff being unable to rely on the principle.

66. Written and oral submissions have been made by the parties which have been read by the Court but which it is not intended to summarise here. Suffice it to say that counsel for the plaintiff, Mr. McGonagle S.C. submits that in the circumstances of this case even if the strict requirements to found an estoppel are not satisfied, the conduct of Liberty is unconscionable and the plea of statute bar is dishonest to the point of rendering it inequitable to permit the Defendant to rely on the plea. In this regard it is said that the conduct of the defendant has reduced to a critical point the time within which the Plaintiff could have made, or arrange to have made, an application to the Board in respect of her claim; the conduct was such as to substantially deprive the Plaintiff of the benefit of the limitation period within which she could bring the claim. The content of the RCM's reports and the internal memoranda made after the application date was evidence of a continuing male fides on the part of Liberty

67. Furthermore, it was submitted that the statement in the letter of 22nd July to the effect that Liberty was currently investigating the incident and inviting the Plaintiff's solicitor to agree a settlement time frame and costs, should liability not be an issue, was disingenuous and constituted conduct which was unconscionable and dishonest. The truth about investigations was otherwise; these had long since been carried out and had been concluded; Liberty knew that liability was hopeless and that the claims arising had been dealt with accordingly, a position which in these circumstances ought to have been reflected in the letter of 22nd July.

68. Moreover, there was a duty on the part of Liberty to advise the Plaintiff's solicitor that liability for the claim would not be in issue in circumstances where for all practical purposes it had dealt with the claims to date as assessments following investigations which had long since been concluded by the time the letter of the 22nd of July was written instead of which the insurer intimated that investigations were still ongoing and that liability might yet be an issue; the letter not only failed to reflect the truth but portrayed a wholly incorrect and inaccurate state of affairs for which there was no factual basis.

69. Mr. McCarthy S.C. on behalf of the Defendant submitted that there was ample time within which an application could have been made; significantly negotiations had concluded without agreement and the offer which had been made had not been accepted. Nothing had been said or done by Liberty from which it was reasonable to infer that it was unnecessary to make the application in time.

70. Against the background where there were no ongoing negotiations, or any arrangements for these to take place, and where previous negotiations had concluded without agreement and the Plaintiff had retained a solicitor to pursue her claim there was nothing about the conduct or correspondence of Liberty from which it was reasonable for the Plaintiff's solicitor to infer, particularly as the limitation expiry date approached, that the claim was going to be disposed of other than via the Board and, if necessary, litigation; absent negotiations or arrangements for negotiations the only reasonable inference was that this was the only way the claim could be disposed of. In such circumstances the solicitor was under a continuing obligation to ensure that an application was made to the Board in time.

71. Even if it was open to the Plaintiff's solicitor to construe from the Defendant's conduct and correspondence, such as it was, that the claim was an assessment only, particularly as negotiations had concluded, he could not reasonably infer that it was unnecessary to make the application by the 20th September.

Decision.

72. It seems to me that even if the conduct of Liberty was contradictory in the sense that the position adopted by Mr. Bond in negotiations and the response of the insurer to the Plaintiff's solicitors intimating letter was inconsistent, it is clear from his evidence that the solicitor did not infer from or otherwise rely upon the letter of the 22nd July in so far as it concerned the issue of liability, on the contrary, he had already formed the view that liability would not be in issue on the basis of the instructions which he had received, a view which he confirmed in one of the letters of 15th July which he sent to the Plaintiff in which he opined that she had a good stateable case.

73. The fact that it is a regular feature on the landscape of personal injuries litigation that insurers engage in negotiations and dispose of claims as early as possible in order to minimise costs, especially in circumstances where the insurer concludes that the insured is likely to be held liable, and that this results in an approach to the negotiation and disposal of claims as assessments could not be used, in the absence of a clear and unambiguous representation or assurance by words or conduct from which it was reasonable to infer and from which is was inferred that it was unnecessary to make an application to the Board or to issue proceedings within the limitation period, as the basis for depriving a party of the right to plead all such defences in the suit as are open and recognised by the law, including pleas which put the Plaintiff on full proof of the claim made in the proceedings.

74. The conduct of negotiations facilitates the disposal of claims which might otherwise have to be determined by the courts. That parties should be encouraged to settle the differences between them rather than resorting to trial is a policy which underlines certain rules of court such as those relating to letters of offer, tenders, lodgements and costs.

75. I am quite satisfied on the evidence that once the Plaintiff went to her solicitor any informality which had previously attended the direct negotiations came to an end; the positions of the parties took on a formal and legal framework within which the claim would be disposed of as is evidenced by the subsequent correspondence. Although he may have considered what he described as a standard letter to be a formality, the intimating letter was the start of a legal process which called upon the defendant to admit liability.

76. Negotiations had not only become dormant, they had concluded without agreement; in the absence of a response to the

invitation to agree terms, the only way the claim could be processed was by making an application to the Board, something which had to be done by the 20th September, 2013.

77. On the question of liability, the response of July 22nd was at best ambiguous. No doubt the solicitor expected from what he knew that liability would be admitted but, critically, that concession had yet to be made to the solicitor. The position of Liberty in relation to liability as adopted in the letter of July 22nd and the approach of the limitation expiry date, to quote the words of Henchy J. in *Doran v. Thompson* at p. 226:

> *"…cried out for a direct question to be put to them asking whether liability was being admitted or not, and if a satisfactory reply were not received, for an originating summons to be issued."*

or in the circumstances in this case, for an application to be made to the Board.

78. In the mistaken belief that he could not make an application without a medical report, it is clear from his evidence that the solicitor fell back and relied upon the statement in the letter that Liberty was willing to have the claim assessed by the Board as a protection against the Statute.

79. Apart altogether from the failure to respond to the invitation to agree a settlement timeframe, absent a clear and unambiguous representation or assurance in relation to liability, in my judgment the statement could not reasonably have been relied upon independently of those matters and thus interpreted or understood by the solicitor as a promise assurance or representation that come what may the case would be assessed and that the statute would not be relied upon either to prevent the Board from making an assessment or in the event of proceedings being issued following authorisation, as happened, that the Statute would not be used to defeat the claim.

80. For the sake of completeness, I should add that even if there had been a clear and unambiguous concession on the issue of liability and the letter of 22nd July was otherwise as written, in circumstances where the negotiations had ended without agreement, there had been no response to the invitation to agree terms and there was silence from Liberty so that the only way to bring the claim to conclusion was by making an application to the Board, it could not reasonably be inferred that it was unnecessary to make the application within the limitation period.

81. I note in passing that although the Board is required to deal with all claims on the basis that they are assessments, where no assessment is made, or where an assessment is rejected, the right of the Defendant in any subsequent proceedings to put liability in issue is preserved.

82. Having regard to the findings made and conclusions reached whilst the conduct of Defendant might be disapproved of and be reasonably be criticised it was in my judgment not such as to render it unconscionable nor dishonest, accordingly, it is unnecessary to consider whether a plea of statute bar can be defeated by words or by conduct which though unconscionable is not such as to give rise to an estoppel.

83. In the course of his judgment in Doran, Henchy J. observed at p. 227:

> *"As many a would-be plaintiff has learned, it is a fact of life in the world of insurance that a not unusual way for insurers to dispose of unprosecuted claims is to allow them to die of inanition."*

For the reasons already given a critical error which occurred here as the limitation expiry date approached was the failure to obtain clarity in relation to liability from Liberty. I have little doubt that the solicitor reasonably believed that the case would ultimately be settled or disposed of as an assessment, however, and unfortunately for the Plaintiff in the circumstances of this case, in my judgment that belief arose from the view he formed from information received from the Plaintiff rather than as the result of any words or conduct on the part of Liberty.

84. Even accepting as far as the solicitor was concerned that he first received instructions on 12th July, there was undoubtedly sufficient time within which to make an application to the Board; in the circumstances of this case he remained under an obligation to so before the 20th September.

85. I am quite satisfied from her evidence and from observing the demeanour of the Plaintiff as she gave her evidence, that she was well aware of her rights and entitlements in terms of bringing a claim. She was aware that by consulting her solicitor in respect of the claim expense would likely arise. She didn't need Mr. Bond to tell her that, indeed, she had previously used her solicitor in connection with the sale of a house which in the ordinary way would have resulted in a professional fee being incurred.

86. Whilst I have no doubt that Mr. Bond encouraged her to deal with him rather than consult a solicitor, on my view of the evidence there is nothing which would warrant a finding that the Plaintiff had been pressurised or misled by Mr. Bond in relation to the conduct of her claim rather I am quite satisfied that her choice to deal directly with the RCM was made freely, moreover, when she was unable to reach what she considered to be a satisfactory settlement not only was she advised to consult her solicitor but she was happy to do so.

87. If it were a case that the Plaintiff had been deprived of the benefit of the full limitation period by the actions of Mr. Bond, the Court has no jurisdiction to extend the limitation period beyond what is provided for by the Statute of Limitations (Amendment) Act 1991.

88. Had the RCM so conducted himself as to induce the Plaintiff into continuing negotiations with a view to reaching a settlement up to and beyond the expiry of the limitation period and the Statute was then relied on to defeat the claim other considerations would apply from which an estoppel might well arise, however, there is no such conduct here.

Rule.

89. In the circumstances of this case and having regard to the reasons given and conclusions reached, the Court finds that the onus of proof which lies on the Plaintiff to establish an estoppel has not been discharged. Accordingly, the Defendant is not estopped from relying on the plea that the Plaintiff's claim is statute barred and the Court will so Order.