Neutral Citation Number: [2006] IEHC 22

THE HIGH COURT

[2003 No. 7297 P]

BETWEEN

DAVID MURPHY

PLAINTIFF

AND

MICHAEL GREALISH

DEFENDANT

Judgment of Mr. Justice John MacMenamin dated the 11th of January 2006.

By notice of motion dated 2nd day of March, 2005 the defendant seeks the following relief in the above entitled proceedings

(a) an order dismissing the plaintiff's proceedings herein pursuant to the provisions of s. 11(1)(2) of the Statute of Limitations Act 1957 as amended by s. 3(1)(2) of the Statute of Limitations Act 1991;

(b) further or in the alternative an order directing the trial of a preliminary issue namely whether the proceedings herein are statute barred pursuant to the provisions of s. 11(1)(2) of the Statute of Limitations Act 1957 as amended by s. 3(1)(2) of the Statute of Limitations Amendment Act 1991.

Background

A number of matters are not in dispute.

1. The plaintiff was born on 2nd November, 1963. He is a cab driver and resides in County Galway. He was involved in an accident on 12th May, 2000 when he was sitting in his car which was stationary on the public highway at or near the Great Southern Hotel at Eyre Square in the city of Galway. The defendant's car was driven into the rear of the plaintiff's stationary car as a result of which he sustained significant injuries to his neck and back.

Thereafter significant correspondence took place between the plaintiff's solicitors (O'Dea and Company), the defendant's insurers (Quinn Direct Insurance) and the solicitors who thereafter came on record for the defendant, Erne Solicitors.

2. It will be necessary to deal with this correspondence in some detail in order to arrive at a complete understanding as to the respective understandings of the parties regarding what occurred. While some of that correspondence was headed "without prejudice", the defendant's counsel, Mr. Paul Henry O'Neill BL has quite properly indicated at the hearing of this motion that no reliance will be placed upon any contention of privilege.

3. Insofar as documentary evidence is available to this court therefore, the first letter in sequence appears to be one of the 1st of August, 2000 from Quinn Direct addressed to the plaintiff personally. It is headed "without prejudice" and states

"Dear Mr. Murphy we write to advise that an independent motor assessor has agreed repairs on your vehicle at IR £1,849.53.

Please complete the enclosed acceptance form and return it to us. On receipt of same we will issue a cheque in the amount of IR £1,849.53 in your favour in full and final settlement of this claim.

We trust this meets with your approval. We look forward to your early reply.

Yours faithfully

Deborah O'Reilly

Claims Department."

4. Thereafter Messrs O'Dea and Company respond on behalf of the plaintiff. By letter of 17th August, 2000 they state:

"Dear Sirs

We confirm we act on behalf of Mr. Murphy. We refer to your letter of 1st inst. You might confirm that the figures were agreed with McCormack Car Sales Limited.

Our client suffered personal injuries in relation to the accident. You might confirm that you are prepared to deal with the material damage at this stage.

Yours faithfully

O'Dea and Company".

5. By letter of 31st August, 2000 Quinn Direct respond to O'Dea and Company. This letter which was again headed "without prejudice" stated:

"Dear Sirs

> We confirm receipt of your letter to our insurer dated 17th August, 2000 the contents of which have been noted. We have received the completed Accident Report Form from our insurer and we are satisfied that liability will not be an issue.
>
> We advise that is not the policy of this company to deal with claims on a "piece-meal basis", therefore we will not be in a position to settle the material damage claim, separately from a claim for personal injury. However if your client can prove that he is not the registered owner of the vehicle we will be in a position to deal with the material damage.
>
> Please outline in detail the nature and extent of the injury sustained by your client, along with the name and address of his attending G.P. and consultants, so that we may arrange our own medical examination, if necessary. Please also advise your client's age, occupation, marital status and VAT status and confirm if he was wearing a seat belt at the time of the incident.
>
> We await your reply."

6. Matters rested thus in correspondence until 18th June, 2001, when Quinn Direct contacted O'Dea and Company. By letter of that date they stated:

> "Dear Sirs
>
> We refer to the above and to previous correspondence.
>
> Please could you confirm if your client is still pursuing his injury claim and if so we would appreciate if you could outline in detail the nature and extent of his injuries and his medical attendance.
>
> We await your early reply."

To this letter Messrs O'Dea and Company responded on 5th July, 2001 indicating that

> "Our client is pursuing a claim in relation to the matter. We have Circuit Court proceedings drafted and same will be served presently."

7. By letter of 22nd October and 9th November, 2001 Quinn Direct again contacted the plaintiff's solicitors indicating that to date they have not received any indication of the nature and extent of the plaintiff's injuries, that no further correspondence had been received since the letter of 1st July, 2001, and that if no further contact took place that Quinn Direct would be closing their file in the matter as they will not be in a position to proceed. A letter, which is not exhibited of 8th November appears to have been sent from O'Dea and Company. On 13th November Quinn Direct respond to the following effect:

> "Dear Sirs
>
> We write further to your letter of 8th November last.
>
> You still have not provided the names and addresses of your client's G.P. and consultants.
>
> This was first requested in our letter to you of 31 August, 2000.
>
> We await details of the same within the next seven days."

In response to that letter O'Dea and Company state on 20th November, 2001:

> "We refer to yours of 13th inst. Our client is at present awaiting an orthopaedic examination. Upon receipt of the results we shall revert to you."

On the following day a further letter was sent by O'Dea and Company to Quinn Direct indicating the identity of the plaintiff's medical advisors. On 5th December, 2002 a further letter was sent by Hugh McGrath Regional Claims Manager of Quinn Direct to the plaintiff's solicitor. This letter comes within a different category to those of the 1st August, 2000 and 31st August. The former two letters were both headed without prejudice. For that reason the defendant indicates they were not exhibited in the grounding affidavit sworn in this application. However the latter letter of 5th December, 2002 was not exhibited either. The reason for such omission is stated to be that such letter was sent by Mr. McGrath Regional Claims Manager of Quinn Direct from his home although it is on company notepaper. For this reason the defendants state they were unaware of its existence until this application was made and the letter was referred to by the plaintiff's solicitors. The letter of 5th December, 2002 is not headed "without prejudice". It is addressed to Donal Downes Solicitor of O'Dea and Company Solicitors acting on behalf of the plaintiff Mr. McGrath states:

> "Dear Donal
>
> I refer to the above matter and to previous correspondence concerning same.
>
> Could you let me know as soon as possible if:
>
> > You would be prepared to share medicals with Quinn-direct in this case and if you are prepared to discuss settlement of the claim. Liability is not an issue.
>
> Trusting to hear from you at your earliest convenience."

8. By letter of 5th February, 2003 the plaintiff's solicitor informed Mr. McGrath of Quinn Direct insurance that the plaintiff's x-rays

were being reviewed by an orthopaedic surgeon at an appointment for March of that year. It was presumed that that surgeon would give an addendum to his report confirming his findings. The plaintiff's solicitor indicated "we will have no difficulty in sharing this". It will be opportune to recollect at this point that the date of the accident was 12th May, 2000. Therefore all subsequent correspondence took place outside the three year limitation period.

The report from the consultant orthopaedic surgeon was dated 21st May, 2003. This report of Mr. Michael Gilmore FRCS is exhibited in the course of the proceedings.

9. Mr. Gilmore points out that a scan taken at the MRI centre Bon Secour Hospital on 13th May, 2003 showed degenerative change at T6/7, T7/8, and T9/10. It went on to state: "at the T7/8 level there is a moderate disc protrusion which does indent (sic) the thecal sac and thoracic spinal cord but there is no evidence of any damage to the spinal cord itself and nor is there any evidence of nerve root compression. Likewise there is a smaller disc protrusion at the C6/7 level which again does indent the thecal sac." Mr. Gilmore's opinion was that the plaintiff continued to have disability with his back as a result of the injury sustained "now three years ago". The MRI scan showed a problem at the thoracic spine which would account for this ongoing disability but he did not consider that any surgical intervention was indicated. Indeed his view was that the only treatment that may be justified was a localised injection in the tender area in his back and it was for the plaintiff himself to decide when this should be done. He concluded that the plaintiff would have an ongoing disability in his back as a result of the injury which has led to the degeneration and bulging of these discs.

10. While this report from Mr. Gilmore is dated 21st May, 2003 it clearly had not been received by O'Dea and Company by 26th May. This may be inferred from their letter of 26th May, 2003 addressed to Mr. Hugh McGrath the Regional Manager which stated:

> "Dear Hugh
>
> > The plaintiff had his MRI scan on Tuesday 13th May, 2003 but we imagine it is a couple of weeks before Mr. Gilmore gets to read it. He missed a previous appointment."

Thereafter, on 17th June, 2003 Messrs O'Dea and Company furnished the MRI scan results to Mr. McGrath.

11. On 21st July, 2003, Ms. Catriona McCaffrey an official of the Claims Department of Quinn Direct wrote to O'Dea and Company. This letter stated:

> "We refer to previous correspondence and write to advise that we have arranged an appointment for a medical examination for your client as follows
>
> > "Medical Practitioner: Mr. A.L. Wilson
> >
> > Address: 2 The Crescent
> >
> > Galway
> >
> > Co. Galway
> >
> > Date and Time: Wednesday 20th August, 2003 at 3 p.m.
> >
> > Please advise your client to bring to this appointment any relevant x-rays or documentation they may have regarding their injuries.
> >
> > Kindly confirm that your client will be able to attend this appointment as a non attendance fee applies.
>
> Should you have any queries in relation to the above please contact the undersigned.
>
> Yours faithfully."

12. This appointment appears not to have been convenient for, on the 21st August, 2003 a further letter was sent from Ms. McCaffrey re-arranging a consultation for the 13th October, 2003 with Mr. Wilson.

13. On 21st October, 2003 O'Dea and Company wrote to Quinn Direct. They indicate their understanding from their client that he missed his appointment with Mr. Wilson which had been fixed for 13th October and offering to discharge any non attendance fee. On 28th October, 2003 Ms. McCaffrey responds, and furnishes a copy of the invoice from Mr. Wilson which O'Dea and Company had agreed to pay on behalf of their client. Ms. McCaffrey goes on to state that Quinn Direct were arranging another medical appointment. By letter of 5th November, 2003 Ms. McCaffrey contacted O'Dea and Company and arranged for a further appointment for 24th November, 2003.

14. On 19th January, 2004 O'Dea and Company Solicitors contacted Mr. Hugh McGrath of Quinn Direct. This letter stated:

> "Dear Sirs
>
> > We refer to your telephone call of 16th inst. High Court proceedings were issued in this matter though you do not seem to have nominated solicitors. Please do so now." Ms. McCaffrey of the Claims Department of Quinn Direct responded to this letter on 27th January, 2004 noting its contents and indicating that a copy of the letter had been forwarded to the Regional Claims Manager Mr. McGrath who would contact O'Dea and Company in the "forthcoming days".

15. On 5th May, 2004 the following letter was sent by Ms. McCaffrey of the Claims Department to O'Dea and Company Solicitors:

> "Re: Your Reference 00/19660FB
>
> Your Client: Mr. David Murphy

Our Insured: Ms. Sarah Grealis (sic)

Incident dated: 12 May, 2000

Dear Sir

> We refer to the above incident and to your facsimile dated 04 May 2004 enclosing a copy of the Plenary Summons.
>
> We note that the date the summons was issued was outside the three year period after the date of the accident and is therefore Statute Barred.
>
> Under the circumstances we will not be dealing with any claims from your client and we are therefore closing our file of papers.

If you have any queries in relation to the above please not hesitate to contact the undersigned".

By letter of 17th May, 2004, O'Dea and Company respond that the proceedings were issued after the date of the accident but before the receipt of any medical report by Mr. Murphy in respect of his medical condition. They contend the proceedings are not statute barred and request the nomination of solicitors to accept service.

16. By letter of 27th May, 2004 O'Dea and Company transmitted the plenary summons to Quinn Direct. The plenary summons claiming damages for personal injuries was actually issued on 18th June, 2003.

17. The Proceedings
The proceedings are grounded upon an affidavit of Mel Bourke, solicitor. In the course of his brief affidavit of five paragraphs Mr. Bourke sets out the date of birth of the plaintiff, the date of issuance of the proceedings and the fact that the plenary summons was not served within a year of its being issued with the consequence that it was necessary for the plaintiff to apply to extend the plenary summons for a further six months which application was made on 26th July, 2004. Mr. Bourke refers to a booklet of correspondence passing between the plaintiff's solicitors and Quinn Direct Insurance and Erne Solicitors (who are in-house solicitors acting on behalf of the insurers).

18. In a replying affidavit of Donal Downes solicitor on behalf of the plaintiff the deponent points out that only some of the relevant correspondence had been exhibited in the affidavit of Mr. Bourke. In particular he pointed out that the Quinn Direct letter dated 1st August, 2001 referred to above was not exhibited. He also states that the letter of 31st August, 2000 (referred to above) was not exhibited.

19. He also states at paragraph 6 of his affidavit: "It is greatly significant that the single most important letter that ever passed between the parties, that of 5th day of December, 2002 has not been exhibited in that booklet of correspondence or at all." At paragraph 7 of his affidavit Mr. Downes states this letter from Quinn Direct to this office clearly and unambiguously admits liability on behalf of the defendant. At paragraph 8 of his affidavit Mr. Downes states that at all times from the date of the accident, the defendant and the defendant's servants or agents, representatives and insurers have always admitted liability and never once denied that the accident was entirely the defendant's fault. He states that at all times the defendants knew that the plaintiff was an adult and was not suffering from any incapacity. Furthermore he states that even after receipt of the plenary summons herein one year outside the limitation period the defendants insurers and solicitors demanded that the plaintiff file a statement of claim and that the plaintiff had done so. In the circumstances Mr. Downes contends that the defendant is estopped from denying liability by raising the statute of limitations having caused the plaintiff to believe that at all times for three years a resolution of the case was merely a matter of agreeing in quantum, thereby prejudicing his position.

20. In a further affidavit dated 12th April, 2005 Peter Kelly Solicitor of Erne solicitors responds that the letter of 1st August was not exhibited because it was a "without prejudice" letter. He further states that the defendant is prepared to waive privilege. He states that the letter of the 1st August, 2000, is of no relevance to the application. A similar contention is made relating to the second letter of 31st August, 2000. The deponent then deals with the omission of the letter of 5th December, 2002. He states that this letter was sent by Mr. Hugh McGrath the Regional Claims Manager of Quinn Direct from his home address and a copy was not furnished to Quinn Direct. Hence, he states, that it was not exhibited as it was not in "our possession". In any event, Mr. Kelly contends that the plaintiff's solicitor is mistaken in his contention that the letter means that it was not necessary to issue proceedings. He states that it is a daily occurrence that insurance companies admit liability but submits that this does not indicate or mean that proceedings should not be instituted. Referring to the decision of the Supreme Court in *Ryan v. Connolly* [2001] 2 ILRM 174 Mr. Kelly deposes that the mere fact that a defendant had expressly and unambiguously conceded the issue of liability did not necessarily mean that it was reasonable for a plaintiff to assume that he could defer the institution of proceedings beyond the limitation period. He adds that in the absence of a statement from an insurance company from which it was reasonable to infer that, in the event of proceedings not being institution (sic) within the limitation period, they would refrain from relying on a Defence under the Statute, the insurance company should not be precluded from relying on such a defence. Mr. Kelly adds: "And (fairly similar to the situation herein) the court held that no such unambiguous representation had been made by the insurance company and the proceedings were, accordingly, statute barred."

21. When the matter came first before me I considered that, in the interests of justice, the plaintiff's solicitors should be entitled to file a supplemental affidavit dealing with the question of his understanding of the conduct of the defendant insurance company. On 24th November, 2005 Mr. Downes swore an affidavit wherein he stated that the plaintiff's solicitors relied on the defendants insurers admission of liability. He added that the extent of his reliance on that admission of liability was as follows:

> (i) Quinn Direct, the defendant insurance company had stated (without prejudice) in writing as early as 31st August, 2000, that it was "satisfied that liability will not be an issue".
>
> (ii) Quinn Direct had previously attempted to settle the plaintiff's claim directly with the plaintiff on a without prejudice basis.
>
> (iii) by letter dated 5th December, 2002 Quinn Direct Regional Claims Manager Mr. Hugh McGrath advised the plaintiff's solicitors that "liability is not an issue". This was an open admission of liability.

(iv) Quinn Direct had, through its Regional Claims Manager, sought and received agreement to share medical reports.

(v) Mr. McGrath had contacted the plaintiff's solicitors on several occasions and it was clear that he is anxious and willing to settle the plaintiff's claim.

(vi) in the light of the foregoing it never entered his consciousness that Quinn Direct would subsequently attempt to rely on the statute of limitations for the purpose of resiling from its open admission of liability and the issue or non issue of proceedings within the time provided by the statute was thus not something to which he gave consideration.

Consideration of the correspondence and affidavits
A number of relevant facts arise from a consideration of the correspondence and the affidavits which have been sworn herein. I do not accept that the contents of the letters of 1st August, 2000 and the 31st August, 2000 are not relevant to this claim as contended by Mr. Kelly in his affidavit. The first letter contains an agreement of the repair figure on the vehicle, encloses an acceptance form, and states that on receipt of that a cheque in the amount claimed would be furnished "in full and final settlement of this claim".

22. In the second letter that of the 31st August, 2000 it is specifically stated at the penultimate line of the first paragraph: "we are satisfied that liability will not be an issue". It might be noted here parenthetically that the phraseology employed in the letter was that liability would not be *an* issue rather than *in* issue which is the more normal phraseology.

23. I now turn to the letter of the 5th December, 2002. Again I reject Mr. Kelly's contention that this letter does not contain material which is of relevance. As cited earlier, it clearly contains an invitation to share medical reports with Quinn Direct, to discuss settlement of the claim, and contains a representation that liability is not an issue. Mr. Kelly states that this letter was sent by Mr. McGrath, the Regional Claims Manager from his home address and that a copy was not furnished to Quinn Direct. While this statement is borne out on the face of Mr. McGrath's letter, it is nonetheless unsatisfactory that relevant correspondence, which on its face is material to this application, should not have been exhibited. I would add that it is inappropriate in my view for affidavits to contain legal submissions relating to the law or to contain material which is of an argumentative nature.

24. The original plea of privilege is, however, of some relevance to this claim for, in order for it to succeed, the party claiming it must establish that the communication in question was made (i) in a *bona fide* attempt to settle a dispute between the parties; and (ii) with the intention that, if negotiations failed, it could not be disclosed without the consent of the parties.

25. Legal Effect of "Without Privilege" Plea
As a matter of law, it has been pointed out that although the designation of a communication by a party as "without prejudice" is a prima facie indication that the communication is in furtherance of settlement negotiations, those words "possess no magic qualities" and will not be regarded as conclusive (see *South Shropshire District Council v. Amos* [1987] 1 All E.R. 340 at p. 344 and *O'Flanagan v. Ray-ger Limited* (High Court, Costello J. 28th April, 1983 at p. 13; See also *Ryan v. Connolly* [2001] 2 I.L.R.M. 174, 181). In the course of the affidavit evidence it has been suggested that the omission of these letters by the defendant was *mala fides*. I do not consider that there is evidence to substantiate this contention. However, the fact that the question of privilege was raised is not without consequence, albeit it was subsequently waived. For it seems to me that, to rely on privilege at all, necessitates a reliance on the proposition that there were in existence *bona fide* negotiations between the parties as and from the dates of the two letters in August, 2000.

26. It will further be seen that the correspondence between the parties continues for a considerable period after the time limit under the Statute of Limitations expired. This correspondence from May, 2003 onwards relates to the sharing of medical reports and also to the identification of a suitable date for medical examination of the plaintiff by the defendants' solicitors. The contention that the plaintiff's claim is statute barred is first raised only on 5th May, 2004. There are thus seven separate pieces of correspondence emanating from Quinn Direct or their in-house solicitors, after the expiry of the three-year time limit, all of which relate to the negotiation and settlement of the plaintiff's claim, an arrangement for the sharing of medical reports, fixing dates for medical examinations, and reciting the plaintiff's solicitor's undertaking made by letter of 21st October, 2003, that he would discharge the fee for his client's non-attendance on the defendants' medical consultant owing to his having missed such appointment.

Having regard to the foregoing facts, which are undisputed, the court is entitled to infer that until 5th May, 2004 not only did the plaintiff's solicitor consider that negotiations were ongoing, but that this view was shared not only by the defendant's insurers but their solicitors also. The issuing of the plenary summons on 18th June, 2003 does not alter this view. Indeed, to a degree it may support the inference, having regard to the fact that it was not actually served, was renewed in the circumstances set out earlier and was ultimately served on 27th April, 2004. It is also to be noted that on 27th October, 2004, even after the question of the Statute had been raised, Mr. Burke of Erne Solicitors wrote to O'Dea & Company on behalf of the plaintiff, requesting the furnishing of a statement of claim within twenty-one days, and threatening that in the absence thereof a motion would be brought *to dismiss the claim for want of prosecution*. It appears such a motion was actually drafted and issued: the correspondence discloses that on 7th January, 2005 the defendants' solicitors enclosed a notice of motion and grounding affidavit to the plaintiff's solicitors. This documentation was not exhibited. One can only surmise as to the relief sought in that notice of motion. In any case, the notice of motion in suit raising the Statute of Limitations was not issued until 2nd March, 2005.

27. Legal principles
In the course of argument substantial reliance was place by counsel on two Irish authorities. These are *Ryan v. Connolly* [2001] 2 I.L.R.M. 174 *and Doran v. Thompson* [1978] I.R. 223. In the first place it may be noted that in both cases the defendant insurers had not in fact admitted liability. Does an equitable estoppel arise?

Such estoppel may be said to arise when one party, by representation or conduct, either actively *or passively* leads another party to alter his position on the basis of that representation or conduct, and the representor, or party so conducting himself, is precluded from resiling from his representation, or the consequences induced by his conduct.

Estoppel may accordingly be invoked to counter a defence based on the running of time, but the success of such invocation like that of Laches, will depend on the court's view of the facts of the particular case. Thus the representee's inference from the words or conduct upon which he is relying to raise an estoppel must be reasonable. In the course of his judgment in *Doran*, 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 statute, 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 mislead the plaintiff into a feeling of security on the issue of liability and thereby, into a justifiable belief that the statute would not be used to defeat his claim to escape liability by pleading the statute." (at p. 225)

28. In *Doran* the plaintiff was injured in an accident on 20th July, 1972 while working for the defendant. The plaintiff consulted solicitors in October of that year and the latter wrote to the defendant claiming compensation for injuries and loss. The defendant's insurers replied on December 18, 1972 stating they were investigating the accident and asking for arrangements to be made for the plaintiff's examination by the insurers' doctor. The plaintiff's solicitors experienced such difficulty in arranging for the plaintiff's doctor to be present at this examination that, in May 1975, they agreed to an examination without the plaintiff's doctor being present and that examination took place on July 29th, 1975. The insurers did not inform the plaintiff's solicitors of the results of their investigation of the accident, nor did they notify them that liability was being denied, nor did they discuss the quantum of liability or damages with the plaintiff or his solicitors.

29. The plaintiff instituted proceedings in the High Court in February, 1976 and was met with a plea that his claim was statute barred. The plaintiff replied that the defendant was estopped by the acts and representations of his insurers from pleading the statute. The main thrust of the plaintiff's argument was summed up by Costello J. in his judgment in the High Court that it would be unjust and inequitable to allow the defendant to plea the Statute since it could be inferred from the conduct of the defendants' insurers that they had accepted that they would pay damages and they had intimated that liability was not in issue.

30. Costello J., bearing in mind the views expressed in the Supreme Court on the statute in the cases of *Baulk v. Irish National Insurance Co. Ltd.* [1969] I.R. 66 and *O'Reilly v. Granville* [1971] I.R. 90, concluded that to permit reliance on the statute in the circumstances would allow the defendant to resile from a situation which the words and conduct of the defendant and insurers had created.

In allowing the defendants' appeal, the Supreme Court considered that any misapprehension in the minds of the plaintiff or his solicitors was not shown to have been induced by any representation made by the defendants or the defendants' insurers. However the court did not question the use of estoppel in such cases should the circumstances so warrant, and it was the interpretation of the circumstances in that case which led that court to a different conclusion from that reached by Costello J. In the course of his judgment, Henchy J. observed:

> "As many 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. That is what happened here."

31. In the course of his concurring judgment, Griffin J. added at p. 230:

> "Where one party has by his words or conduct made to the other a clear and unambiguous promise or assurance which is intended to affect the legal arrangements between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to his previous legal relations as if no such promise or assurance had been made by him and that he may be restrained in equity from acting inconsistently with such promise or assurance. The representation, promise or assurance must be clear and unambiguous to found such an estoppel; see Bowen L.J. at p. 106 of the report of *Low v. Bouverie*, but this does not mean that the representation must be one positively incapable of more than one *possible* interpretation. Where, however, more than one construction is possible, the meaning relied upon must clearly emerge from the context and circumstances of the case although in other contexts and other circumstances the same words might possibly have borne a different construction. In addition, the party relying on the representation must show that the representation was reasonably understood by him in a sense materially inconsistent with the allegation against which the estoppel is attempted to be set up: see Cairns L.J. at p. 306 of the report of the decision of the Court of Appeal in *Woodhouse Ltd. V. Nigerian Produce Ltd.*, where he explained and analysed the celebrated passage of Bowen L.J. in *Low v. Bouverie*."

Continuing, Griffin J. stated:

> "If the defendants' insurers had made a clear and unambiguous representation (in the sense I have explained) that liability was not to be in issue and the plaintiff's solicitor had withheld the issue of proceedings as a result, I would have held that the defendants were estopped from pleading the Statute of Limitations. In my opinion however, on the agreed facts there was no promised assurance or representation made by the insurers to the plaintiff's solicitor and none can be inferred from the correspondence, the telephone conversations, or the conduct of the insurers. Apart from stating in the first letter that they were investigating the circumstances of the accident, the insurers thereafter made no reference, express or implied, to the circumstances of the accident or the question of liability."

32. One turns then to the second main authority, that of *Ryan v. Connolly*. 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.

33. 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 earlier, 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.

Thus, in the course of his judgment on behalf of the court, Keane C.J. stated at p. 183:

> "I would make one further comment on the statement of the law in *Doran v. Thompson Ltd*. 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 an insurance company within days of the accident accepts that no issue of liability arises – e.g. in the case of a passenger wearing a safety belt – but for some reason the subsequent negotiations become dormant, the plaintiff may well find himself unable to rely on the principle under consideration if he permits 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 proceedings not being instituted within the limitation period it would refrain from relying on a defence under the statute, there seems no reason in principle why the insurance company should be subsequently precluded from relying on such a defence."

It has been submitted on behalf of the plaintiff herein that the above former quotation from the judgment in *Ryan* is obiter, the latter cited below forming the *ratio decidendi* of the case. Even if this view is incorrect however, the correspondence admitting liability cited earlier, together with the statements and conduct of the defendant up to the 5th May, 2004, are very significantly at variance from that of the defendants in *Doran* and *Ryan*. On any reading, the negotiations in the instant case were far from dormant, and continued albeit at intervals for a period of almost exactly one year after the Statute had expired. The reason for the defendant's subsequent volte force and reliance on the statute has not been explained.

34. Turning to the latter quotation from *Ryan* Keane held:

> "On any view, however, it is clear that a plaintiff who seeks to rely on the law as laid down in *Low v. Bouverie* and *Doran v. Thompson Ltd*. 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 in issue from which it was reasonable for the plaintiff to infer that the institution of proceedings was unnecessary …"

35. In considering the legal principles applicable to the facts in this case, considerable assistance can be obtained from the judgment of Kenny J. in *Doran*, also concurring. In the course of consideration of the facts of *Doran*, Kenny J. observed regarding the plaintiff's argument at p. 238 of the report:

> "The other argument was that it would be inequitable to allow the defendants to rely on the Statute of Limitations*. If the defendants had accepted* liability *and had entered into negotiations to arrive at an agreed* sum and if *the plaintiff's solicitors had refrained from bringing proceedings* because they *relied on the admission of liability or the negotiations being* conducted it *would be inequitable to allow the defendants to rely on the time bar.* (Italics added). But they never accepted or admitted liability and never represented that they did, nor did they carry on any negotiations for the purpose of settling the case. They did nothing which could give the plaintiff's solicitors the impression that they need not issue proceedings nor did they mislead them in any way. I cannot see how the conduct of the insurers was dishonourable in any respect and I do not think that anything they did makes it inequitable for them to plead and rely on the Statute of Limitations. If the plaintiff's solicitors thought that liability was being admitted the defendants and insurers did nothing to cause or contribute to that belief."

36. Kenny J. added:

> "Counsel for the plaintiff relied strongly on the decision of this court in *O'Reilly v. Granville.* That was an application to add a party as a defendant in a motor accident case. Objection to this step was taken on the ground that, at the date of the application the time limit of three years had expired. Complicated questions as to the effect of Order 15, rule 13 were discussed but this has no relevance to the present case. In that case the defendants' insurers within the statutory period of three years wrote to the plaintiff's solicitors asking for details of the special damages and added: 'We shall see if we can arrange a settlement with you'. Subsequently the defendants' insurers asked the plaintiff's solicitors by letter how much the plaintiff expected to be paid in settlement of his claim apart from special damages which (the letter added) 'no doubt can be agreed by negotiation'. It was in these circumstances that O'Dalaigh C.J. said that a plea of the Statute of Limitations 'would not only be wholly unmeritorious but, I feel it my duty to add, unconscionable and plainly dishonest'. Therefore there was conclusive proof that an admission of liability had been made by the defendants' insurers: in this case no such admission was made either expressly or by implication and so *O'Reilly v. Granville* does not help the plaintiff."

37. Kenny J. concluded:

> "The question whether an admission of liability without more makes it inequitable to rely on the Statute of Limitations or whether the admission of liability must have been relied on by the plaintiff's solicitors as a ground for not issuing proceedings was not discussed in argument and in any event does not arise. I find it difficult to reconcile the remarks of the former Chief Justice with the reasoning in the *Sauria* on this point and so I reserve this for future consideration."

38. Counsel on behalf of the respondent herein in the course of argument did indeed rely on the decision in the *Sauria* [1957] Vol. 1 Lloyds List Law Reports, August 7, 1957. In that case there was an unqualified admission of liability by the defendants in correspondence. However, nothing in the correspondence amounted to what was stated to be a binding contract to waive the right to plead the statute if the plaintiffs did not start proceedings until the statutory period had run out. The accident in question in that

case occurred on 16th June, 1953. The time limit for the bringing of proceedings was two years. While significant correspondence took place regarding the determination of quantum by arbitration, no summons was issued until June, 1957. While under s. 8 of the Maritime Conventions Act of 1911 the court might be entitled to extend the time within which proceedings might be issued, no sufficient grounds had been adduced to justify such extension of time. Consequently the Court of Appeal held that, having regard to the very great delay after June, 1955, there was no ground shown which would justify an exercise of the discretion in the proviso to s. 8 whereby time might be extended. The essence of the decision, therefore, was whether by virtue of the contractual agreement made, the parties had agreed to waive the statutory time limit insofar as it concerned any subsequent claim in relation to the quantum of the claim as opposed to the issue of liability itself.

39. It seems to me that the authority of the *Sauria* is unhelpful here for the following reasons. First, it appears to be reliant entirely upon the contractual nature of the agreement between the parties and what was in contemplation thereby. Second, the terms of the Maritime Convention Act, 1911 appear quite different from those of the Statute of Limitations, 1957 as amended. Under the Statute of Limitations no extension of time is permissible. Third, in the *Sauria* no issue arose as to conduct on the part of the defendant which might render it inequitable, unconscionable or dishonest to rely upon any limitation period.

40. In the instant case the facts are distinct from these authorities. I say this for the following reasons. First, on foot of the correspondence referred to earlier, it was clearly and unambiguously stated that liability would not be an issue in the case. This was stated not once but several times within the limitation period. Second, while elapses of time undoubtedly occurred within the limitation period, the evidence does not support the contention that what is in issue here was, to paraphrase Henchy J. in *Doran*, an unprosecuted claim being allowed to die of inanition. Indeed, it is clear that the prosecution of the claim acquired significant momentum in the period running up to the expiry of the limitation period and thereafter. Third, the court must have regard to the reliance (albeit temporary) on the question of privilege. While this was waived subsequently, it is consistent with a belief on the part of the defendants that there were *bona fide* negotiations occurring between themselves and the plaintiff and his advisers. Fourth, one turns then to the nature of the representation. As pointed out by Henchy J. in the course of his judgment in *Doran v. Thompson Ltd*., at p. 225:

> "It is sufficient if, despite possible ambiguity or lack of certainty on its true construction it bears the meaning that was drawn from it. Nor is it necessary to give evidence of an express intention to deceive the plaintiff. An intention to that effect will be read into the representation if the defendant has so conducted himself that, in the opinion of the court, he ought not to be heard to say that an admission of liability was not intended."

Is there objective evidence of this nature in the instant case? I consider that there is. This evidence consists in the admissions of liability, the continuance of correspondence and steps towards settlement for a period just short of one year after the expiry of the limitation period, during which time no mention whatsoever was made of the statute until 5th May, 2004. This correspondence, already referred to, consists of arrangements of various types which were necessary for the identification of the plaintiff's injuries and for the resolution of the question of general damages. One cannot ignore the fact that even as late as October, 2003, the plaintiff's solicitor undertook to pay for the consultation with the defendants' medical consultant which the plaintiff had been unable to attend. Further, there is the correspondence which took place in November, 2004, threatening the dismissal of the plaintiff's claim for want of prosecution. Whether this culminated in a notice of motion or not has not been vouchsafed to this court. Taken together, these objective facts remove this case from the realm of subjective "idée fixe" (to paraphrase Henchy J.) on the part of the plaintiffs solicitors.

41. What is also significant in all this material is the extent to which it is indicative of the *defendant's* mind, directed to the somewhat dilatory nature in which the plaintiffs were prosecuting the claim rather than any question of that claim itself having become time barred. Nor can the court ignore the fact that no affidavit has been adduced from Mr. McHugh, the author of the letter of 5th December, 2002, which in anyway controverts the plaintiff's evidence as to his understanding of the position which was thereafter to obtain. Finally no explanation has been furnished to this court as to the apparent volte face of the defendants as and from the 5th May, 2004 where quite plainly there is a change of mind or attitude on the part of the defendant as to their conduct of the defence.

42. There is, additionally, one other principle which emerges clearly in the earlier decision of *O'Reilly v. Granville* [1971] I.R. While the facts of the case are quite distinct Walsh J. observed at p. 100 of the report

> "The statute of limitations does not exist for the purpose of aiding unconscionable and dishonest conduct and I fully agree with the view expressed by the Chief Justice that in the circumstances of this case if the statute of limitations were to be invoked it would be for the purpose of sustaining and maintaining unconscionable and dishonest conduct".

43. While Walsh J's judgment was in the minority, the sentiments expressed there are equally strongly expressed in the judgment of O'Dalaigh C.J. on behalf of the majority. Having referred to the facts of that case he stated

> "A plea of the statute of limitations in the circumstances, would be not only wholly unmeritorious but, I feel it my duty to add unconscionable and plainly dishonest".

44. I certainly do not go so far in this case. It is sufficient to observe that in my view on the facts the plea of the Statute is unconscionable. Moreover, (although it is not necessarily a material consideration) the defendant has not been able to demonstrate any prejudice which has arisen as a result of the elapse of time which has occurred.

45. For the reasons set out therefore I consider that the court should decline the relief sought in the notice of motion herein.