THE HIGH COURT

[2023] IEHC 645

[2022 132 P]

BETWEEN

DAVID MURPHY

PLAINTIFF

AND

DENIS FOLEY

DEFENDANT

JUDGMENT of Mr. Justice Heslin delivered on the 16th day of November, 2023.

Introduction

1. In the relevant personal injuries summons, the plaintiff claims damages arising from an incident on 25 June 2018. The plaintiff pleads inter alia that he was attending a funeral and, when standing in a church car park, was suddenly and without warning struck by a motor vehicle driven by the defendant.

2. Following delivery of the Defence, the defendant issued a motion seeking an order pursuant to O. 25, r. 1 and/or O. 34, r. 2 directing the trial of a preliminary issue, namely, that the plaintiff is not entitled to maintain this claim pursuant to the provisions of s. 11 (2) of the Statute of Limitations, 1957, as amended by s. 3 (1) of the Statute of Limitations (Amendment) Act 1991 as amended by s. 7 of the Civil Liability and Courts Act, 2004 (the 'statute').

Preliminary issue

3. The defendant delivered a Reply to defence, dated 24 November 2022, denying that the plaintiff's claim is 'statute barred' and making the following plea, at para. 5 :-

> *"5. The defendant is estopped from relying on the statute of limitations in its defence in circumstances where it would be unconscionable and/or inequitable for the defendant to raise and/or rely on a limitation Defence by virtue of, inter alia, the conduct of the defendant, his servants and/or agents prior to the lodgement of the plaintiff's claim with the Personal Injuries Assessment Board and the subsequent issuance of proceedings*".

4. The defendant's motion was before the court on 16 February 2023, when Meenan J. directed a trial of the statute point, by way of a preliminary issue.

5. There is no dispute between the parties in relation to the following chronology:-

- The index accident occurred on 25 June 2018;

- The plaintiff's then-solicitors sent a letter of claim on 22 November 2018;
- The 'statute' expired in respect of the submission of a claim to the Personal Injuries Assessment Board ("PIAB") on 24 June 2020;
- The plaintiff submitted an application to PIAB some 11 months later on 13 May 2021;
- An authorisation was issued by PIAB on 7 September 2021;
- The personal injuries summons issued on 14 January 2022;
- An appearance was entered on 10 February 2022;
- The defendant pleads that the plaintiff's claim is statute barred*, per* the defence delivered on 27 May 2022;

The Hearing

6. When the matter came before me for hearing on 26 October 2023 it was common case that there was no 'date of knowledge' issue. Thus, the proceedings were, in fact, issued outside the statute and the burden of proof rested upon the plaintiff to establish unconscionable conduct on the part of the defendant in the manner pleaded in the Reply to defence. There was no dispute between the parties in relation to relevant legal principles.

Certain relevant legal principles

7. Before proceeding further, it is useful to note the following. In the Supreme Court's decision in *Murphy v. Grealish* [2009] IESC 9; [2009] IR 366, Geoghegan J., having examined the earlier decisions in *Doran v. Thompson Ltd.* [1978] IR 223 and *Ryan v. Connolly* [2001] 1 IR 627 stated, at para. [18] :-

> ". . . *when the judgments in both cases are carefully studied, two important factors emerge. The first is that an admission of liability is all important in considering an issue of estoppel preventing reliance on the Statute of Limitations".* (emphasis added)

8. Commenting on the decision of Keane C. J. in *Ryan v. Connolly*, Geoghegan J. proceeded, at para. [19] to hold :-

> "*It clearly could not be the law that merely because there was an admission of liability a plaintiff could ignore the Statute of Limitations with impunity".*

9. In *Ryan v. Connolly* the then Chief Justice stated that :-

> "*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".* (emphasis added)

10. Later in *Murphy v. Grealish*, Geoghegan J. stated (with respect to a case in which the defendant's car was driven into the rear of the plaintiff's stationary car, thereby injuring the plaintiff) :-

> "*It is obvious from the facts of the accident itself that there could not be a liability issue. Whilst that of itself would not be enough to raise an estoppel, the clear acknowledgments*

by the appellant's insurers that there was in fact no liability issue would be likely to lull the respondent and/or his solicitor into a sense of security that the issue of proceedings within a particular time limit was not of importance. Again, some added facts would be necessary to create an estoppel but not much addition would be required". (emphasis added)

The evidence

11. Whilst, later in this judgment, I will make further reference to relevant legal principles, it is appropriate at this stage to turn to the evidence, in order to see what facts are disclosed.

12. The first affidavit was sworn by Ms. Emma O'Neill, solicitor, of Messrs Gleeson McGrath Baldwin, the solicitors on record for the defendant. Ms. O'Neill's affidavit was sworn on 17 June 2022 to ground the defendant's motion.

13. In response, an affidavit was sworn by Ms. Karen Lydon, solicitor, of Messrs Pearse Mehigan & Company, the solicitors on record for the plaintiff. It should be made clear, however, that whilst these are the plaintiff's *current* solicitors, a different firm was on record for the plaintiff when the statute expired. In the manner presently examined, no affidavit has been proffered by the plaintiff's *former* solicitors.

14. The third and final affidavit was sworn on 25 January 2023 by Mr. Denis Hayes in his capacity as a claims handler in Allianz plc ("Allianz"), being the insurer providing indemnity acting on behalf of the defendant.

Communication

15. Whilst I will presently look at various averments made, it is useful to note that the only communication between the parties, which is disclosed in the affidavits, is as follows.

28 November 2018 (Letter of claim)

16. On 22 November 2018 the plaintiff's former solicitor sent a letter of claim to Allianz. A copy comprises Exhibit "KL1" to Ms. Lydon's affidavit. As well as giving brief details of the incident, and putting Allianz on notice that the plaintiff had sustained "*severe personal injuries, loss and damage"*, the letter stated the following with regard to its purpose:-

"*The purpose of this letter is to hereby formally call upon you to admit liability and to furnish us with your reasonable proposals to compensate our client within fourteen days from the date hereof.*

In the event that we fail to hear from you within the said fourteen-day period we confirm that we have our client's instructions to immediately issue proceedings on his behalf without further notice to you…". (emphasis added)

17. Allianz did not write any letter or send any email, in response (whether within the said fourteen–day period or otherwise) admitting liability. Furthermore, despite indicating that (*per*

their client's instructions) legal proceedings would "*immediately issue"* in default of such a response, the plaintiff's former solicitor did not 'make good' on that threat. No proceedings issued until well after the statute had expired. In short, whilst this letter can be called a 'letter before action', in the manner presently examined, it was followed by inaction.

18. In para. 5 of his affidavit, Mr. Hayes avers that the aforesaid letter, dated 22 November 2018, was the first notification of the incident and of the plaintiff's intention to bring proceedings. He also avers, *inter alia*, that this letter of claim, sent some five months after the incident, was outside the requisite two-month statutory period laid down by s. 8 of the Civil Liability and Courts Act 2004, which was operative at the relevant time. These are uncontroverted averments.

29 November 2018 (Allianz reply)

19. Mr. Lyons avers, at para. 9, that Allianz replied by way of letter dated 29 November 2018. I pause to observe that this was, on any objective analysis, a very prompt response by the Insurer. A copy of that response comprises Exhibit "DF1" to the affidavit sworn by Mr. Hayes. This letter is marked "*WITHOUT PREJUDICE*" and begins in the following terms:- "*Dear sirs, we have received your letter of 22 November 2018. This case is under investigation…".* The letter went on to request certain information (including details of injuries; the plaintiff's PPS number; full address and date of birth; copy medical report "*on the usual terms*"; or, alternatively, confirmation of the identity of the plaintiff's medical attendant etc.). In addition, the letter attached a copy of the Allianz "*Data Protection Fair Processing Notice*" for the attention of the plaintiff. The letter concluded "*We look forward to hearing from you in due course"*.

20. This letter made no concession in relation to negligence on the part of the insured. Nor was liability admitted. No settlement proposals were made, suggested, or invited. In short, there was nothing in the body of the letter which constituted any concession or admission. In addition, it was plainly marked 'without prejudice', further underlining the foregoing facts. A final observation is merited, i.e. this prompt reply called for information to be supplied which, on any reasonable analysis was necessary in order for the Insurer to carry out a meaningful investigation of the claim 'flagged' by the plaintiff in the initial 'letter of claim' dated 22 November 2018. Taking together, the speed of the reply from Allianz and the obvious relevance of the information called for by Allianz, one might reasonably have expected a prompt response from the plaintiff side. That is not what occurred.

No response by the Plaintiff / Solicitors

21. At para. 11, Mr. Hayes proceeds to make the following averments with respect to the aforementioned 29 November 2018 letter, which he sent on behalf of Allianz:-

> "*11. I say that no response was received from the plaintiff and/or his legal advisors to the said letter and indeed no communication was received from the plaintiff and/or on his behalf between the 22nd November 2018 until the 5th March 2021, almost three years following the index incident. I say contact was made by Ms. Keira O'Reilly of Keane's solicitors to your deponent by way of email on the 5th March 2021….".* (emphasis added)

22. The foregoing are uncontroverted averments made by the author of the 29 November 2018 letter, being the relevant person dealing with the matter in Allianz.

23. As noted earlier, the reference to Ms. Keane is to the plaintiff's *current* solicitors who, as of 29 November 2018, were not acting for the plaintiff. Nor was Ms Keane's firm acting for him when the statute of limitations period came and went. Thus, it was not that firm which, for whatever reason, did not reply to the letter from Allianz. Importantly, therefore, Ms Keane's firm has no first-hand evidence whatsoever to give to the court in respect of relevant events. Furthermore, the only party who could potentially have relevant evidence to give has, for whatever reason, sworn no affidavit. For these reasons it has not been necessary to refer in this judgment to emails between the plaintiff's current solicitors and Allianz, which commenced in March 2021 (i.e. some 9 months *after* the statute expired on 24 June 2020). Suffice to say that I have considered this communication which post-dates relevant events and does not provide a basis for making any relevant findings of fact.

24. Thus, the state of the evidence is that, as a matter of fact, the totality of the communication between the parties, *prior* to the expiry of the statute, was the following:-

(i) a single 'letter of claim' in which the threat of *immediately* issuing proceedings (in default of an admission of liability and compensation proposals being received within 14 days) was not 'followed up'; and

(ii) a 'without prejudice' response (wherein no admissions and no compensation proposals were made) which called for relevant information, but which was never provided by, or on behalf of, the plaintiff.

The Defendant's Reply

25. In furtherance of the contention that it would be unconscionable and/or inequitable for the defendant to rely on the statute, the following pleas are made in the defendant's reply:-

> "*6. It is understood that it was at all material times conceded by and on behalf of the defendant that the defendant drove his car negligently on the date of the incident the subject of these proceedings and that the defendant, his servants or agents conceded liability and engaged in discussions with the plaintiff's former solicitor in relation to same. The full extent of these discussions are currently unascertained due to the inability of the plaintiff's former legal advisors to locate the plaintiff's file. Updated particulars will be provided in due course as may be necessary once discovery has been received."* (emphasis added)

26. Before proceeding further, it appears that the (missing) file maintained by the plaintiff's former solicitors never came to light. Thus, no further particulars were provided of the type anticipated in the final sentence in para. 6 of the aforesaid Reply.

27. At paras. 7 and 8 of the defendant's Reply, the following pleas are made:-

"*7. The defendant was at all material times on notice of the circumstances of the incident and the plaintiff's claim arising therefrom, following receipt of early notification by the plaintiff to the defendant on 22 November 2018 and had every opportunity to investigate same. It is understood that there were numerous related claims which arose from the same incident.*

8. Further, there appears to have been ongoing discussions at an early stage between the defendant, his servants and/or agents, namely his insurer, and the plaintiff, his servants and/or agents namely the plaintiff's former legal advisors". (emphasis added)

28. Leaving aside the fact that the first notification came five months after the incident, it is a matter of fact that *no* reply was sent to the aforementioned letter of 29 November 2022, (in which Allianz requested very obviously relevant information, on a 'without prejudice' basis).

29. Thus, irrespective of what, or how many, *other* claims arose from the incident in question, basic information to enable Allianz to further any investigation, and which Allianz called for promptly (i.e. within seven days of receiving the initial letter of claim) was *not* furnished, despite months turning into years, during which period, the statute expired.

Pleadings v. Evidence

30. Whilst I have quoted from the plaintiff's Reply, it is important to emphasise that pleadings are *not* evidence. Thus, it is necessary to examine the averments which are said to underpin the foregoing pleas.

31. At para. 5 of her affidavit, Ms. Lydon makes the following averments :-

"*….I say and am advised by and on behalf of the plaintiff's former solicitor, that there were 6 other related claims arising out of the same incident, that liability was admitted at an early stage and that all claims except for the plaintiff's claim have now been settled."*
(emphasis added)

No first-hand account

32. Several observations can fairly be made in relation to the foregoing. First, the deponent has no first-hand knowledge of matters, and does not profess to have same. This is far from a criticism, in circumstances where Ms. Lydon's firm simply did not commence acting for the plaintiff until *after* the statute had expired.

33. It is, however, a glaringly obvious fact that, as I have previously observed, there *is* someone who could assist the court by giving a first-hand account of matters as they know them to be, if it is contended that there are any relevant matters. That party is of course the plaintiff's former solicitors (given that, in the manner I will return to later in this judgment, the plaintiff has chosen not to swear any affidavit for the purposes of this hearing).

Hearsay/inadmissible

34. In light of the foregoing it seems to me that the account which Ms. Lydon gives (of the account which the plaintiff's former solicitor has chosen, for whatever reason, *not* to give to this Court) must be regarded as hearsay and inadmissible to establish the facts deposed to.

35. Leaving the foregoing aside, the very 'height' of what emerges from para. 5 of Ms Lydon's affidavit appears to be that (i) there were six *other* claims in respect of the same incident; and (ii) that liability was admitted and settlement reached in those *other* claims.

Told?

36. If Ms. Lydon is purporting to say that she was told (by the plaintiff's former solicitor) that they were told (by the defendant or the Insurer) that liability was admitted in respect of *all* cases arising out of the same incident (i.e. *inclusive* of the plaintiff's claim) this is not at all clear. Even if this were asserted, such a 'third hand' account would not, in my view, constitute admissible evidence, probative of any facts.

When?

37. Furthermore, given that the statute expired on a specific date (24 June 2020) this Court is utterly 'in the dark' in relation to the date *when* (according to Ms. Lydon's account, of such account as may have been given to her by the plaintiff's former solicitor) liability was admitted in respect of the plaintiff's claim (if this is contended). In particular, it is entirely unclear whether the plaintiff's former solicitor contends that they were told liability was admitted prior to, or after, the *expiry* of the statute.

Who?

38. Nor is any information given in relation to the person, or persons, representing the defendant or the defendant's Insurer, who is supposed to have informed the plaintiff's former solicitor that liability was admitted (if, as I say, this is contended).

Reliance

39. Even if one were to leave all of that aside (and for obvious reasons this Court cannot) there is simply no averment, third-hand or otherwise, to the effect that, on foot of what the defendant's former solicitor was allegedly told, the plaintiff *refrained* from instituting proceedings within the statute of limitations period.

40. Thus, the vital element of *reliance* on a representation (whether explicit, or one which could be reasonably inferred) is entirely missing, even from the hearsay evidence tendered. In my view, the foregoing is fatal from the plaintiff's perspective.

41. As to the significance of reliance, in the Supreme Court's judgment in *Doran v. Thompson Ltd.,* Henchy J made clear (at p. 225 of the reported decision) that:-

"*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 of limitations, the defendant will be held estopped from escaping liability by pleading the statute. The reason is that it would be dishonest or unconscionable for the defendant, having misled the plaintiff into a feeling of security on the issue of liability, and thereby into a justifiable belief that the statute of limitations would not be used to defeat his claim, to escape liability by pleading the statute. The representation necessary to support this kind of estoppel need not be clear and unambiguous in the sense of being susceptible of only one interpretation. It is sufficient if, despite possible ambiguity or lack of certainty, on its true construction it bore the meaning that was drawn from it."* (emphasis added)

Representation

42. With respect to the antecedent issue of whether a *representation* was made that liability would be admitted (as opposed to reliance on same), this Court has no evidence whatsoever from any party who might be in a position to say that the defendant wrote or said *words,* or engaged in *conduct* of any sort (namely, the solicitor who represented the plaintiff up to the expiry of the statute, or the plaintiff).

43. By contrast, this Court has sworn evidence from the very individual who was dealing with the matter in Allianz and who replied to the single letter which was sent on behalf of the plaintiff by his former solicitors.

None

44. The uncontroverted first-hand evidence by Mr. Hayes, to which I have referred, allows this Court to say that the following passage from the judgment in *Doran v. Thompson Ltd.* (p.225 of the reported decision) is of equal application in the present case, given the facts found :-

"W*hat representation did the defendant's insurers make as to the issue of liability? The answer is, 'None'. Aside from the first letter written by the plaintiff's solicitor…. in which a query was put as to what proposal the defendants had for compensating the plaintiff, and the insurers' neutral reply saying that the circumstances of the accident were being investigated, not a word was written or spoken during the three-year period of limitation on the question of liability."* (emphasis added)

Oversight / omission

45. I am fortified in this view by the averments which Ms. Lydon makes at para. 7 of her affidavit:-

"I say that, unfortunately, as a result of an oversight, it appears that no application was lodged by the plaintiff's former solicitor within the PIAB within a period of 2 years from the date of the incident. The plaintiff was informed of this apparent omission by his former firm of solicitors by letter dated 23 March 2021…" (emphasis added)

46. The foregoing averments allow for a finding that the *reason* there was a failure to comply with the statute of limitations period was *not* due to reliance on any representation made by the defendant. On the contrary, the reason was "*an oversight*" being an "*omission"* by the plaintiff's former solicitor.

47. Given the foregoing averments, it can fairly be said that, from at least 2 December 2022, the plaintiff has been fully aware that his case became 'statute barred', not because of anything the defendant or their Insurer did or failed to do, but due to an *omission* by his former solicitor. That is made perfectly clear at para. 7 of Ms Lydon's 2 December 2022 affidavit and it is a statement of the obvious that this court can take it that the plaintiff *saw* the affidavit sworn on his behalf (be that in advance of, or at the time of swearing).

Inevitability

48. In light of the foregoing, it does not seem unfair to say that there was an inevitability about the outcome of the dispute on this issue and, in a manner I will presently return to, one might reasonably express some surprise that, 10 months later, the plaintiff, having filed no affidavit [and his current solicitors having filed no further affidavit(s)] insisted on a hearing by this court.

Human frailty

49. As to the true reason why the statutory deadline was 'missed', it must be emphasised that, in a world of human frailty, mistakes can, and not infrequently do, happen. A mistake occurred in the present case, and it would be unfair to direct criticism at any individual, in a personal sense, for what is no more or less than an expression of human imperfection.

50. However, there is simply no question of the statutory deadline having been 'missed' by reason of unconscionable conduct by the *defendant*. Rather, the evidence discloses that it was the conduct of the *plaintiff's* former solicitors, who omitted to lodge the application with PIAB on time, which has given rise to the statute of limitations defence.

Inequitable

51. From a first–principles analysis, it cannot be *inequitable* for the defendant to rely on a statute of limitations defence where the defendant's conduct played no part whatsoever in the statute being missed.

52. Nor was any authority opened to me to the effect that, where the plaintiff's solicitor omitted to ensure that proceedings were brought on time, this Court nonetheless enjoys a discretion to extend time for the purposes of bringing personal injuries proceedings.

"Unique circumstances"

53. On behalf of the plaintiff it is submitted that the court is presented with a unique set of circumstances namely:-

(i) a serious accident;

(ii) not confined to the plaintiff/respondent;

(iii) where five or six people received similar, or perhaps worse, injuries;

(iv) where the insurer has settled those five or six claims in the context of negligent driving; and

(v) where there is no prejudice to the insurer in investigating this case.

Prejudice

54. On the question of prejudice, it will be recalled that, by letter dated 29 October 2018, Allianz called for information and documentation including details of injuries and the plaintiff's medical advisor, making clear that the matter was under investigation. There was no reply to this letter and, at para. 18 of his affidavit, Mr. Hayes makes uncontroverted averments which speak directly to the question of prejudice. He avers, *inter alia*, that the passage of time:-

> "*…has necessarily impacted the defendant's ability to defend the within proceedings. Particularly, the defendant has lost the opportunity to obtain expert evidence with regard to the plaintiff's injuries in the aftermath of the index accident. I say this loss of opportunity, together with the inevitable fading of memory of any further witnesses as to fact and/or that of the plaintiff's treating experts has prejudiced the defendant's ability to properly and robustly defend the within proceedings"* (emphasis added)

55. The foregoing averments allow for a finding that, as a matter of fact, the defendant has suffered prejudice in respect of defending the plaintiff's claim, through no fault of the defendant or his Insurer.

"Serious criticism"

56. Counsel for the plaintiff made clear that no criticism was directed at the defendant or their legal representatives. However, the plaintiff, through his counsel, directed "*serious criticism"* at the Insurer, calling in aid the following passage from the 27 January 2022 decision of Ferriter J. in *GG v. HSE & Ors.* [2022] IEHC 73:-

> "*51. In my view, the case law makes clear that in the absence of a representation inducing the plaintiff not to issue proceedings within the statute period, it is necessary to find unconscionability in the behaviour of the relevant defendant before the court can be in a position to consider the disapplication of any statute defence pleaded by that defendant.…*". (emphasis added)

Unconscionability

57. The plaintiff submits that "*what is unconscionable is unfair, unreasonable and/or wrong*". Through learned counsel, the plaintiff submits that this Court has "*never to date and is unlikely in the future*", to have the "*unique"* situation where five cases were settled, on the basis of blame attaching to the driver, but one case was "*being excluded"*.

Not to settle

58. It was clear from the submissions, made with consummate skill by his counsel, that the plaintiff's opposition to the motion 'nets down' to the claim that the *unconscionability* on the part of the defendant is for his Insurer *not* to have settled the plaintiff's claim. For the reasons set out in this judgment I am satisfied that this cannot be so.

Exclusion

59. Counsel for the plaintiff submits that this *"exclusion"* of the plaintiff, in all the circumstances of the case, "*moves it into the area left open"* by the decision of Geoghegan J. in *Murphy v. Grealish*, wherein (at para. [32] of the reported judgment) the learned judge stated:-

> "*I would leave open the question until it arises in some appropriate case as to whether a plea of statute bar can be defeated in some situations by unconscionable conduct but which could not be said to give rise to an estoppel. Quite apart from the judgments of Ó Dálaigh C.J. and Walsh J. referred to above, the High Court judgments of Costello J. and Kelly J., though reversed on the particular facts, might give some credence to a wider principle of unconscionability rather than the much narrower concept of estoppel with its stricter rules."* (emphasis added)

Facts

60. Regardless of how wide the plaintiff seeks to stretch the principle of unconscionability, it is necessary to return to the facts in this particular case. However unique the plaintiff, through counsel, describes this case, I ask rhetorically*: What was unconscionable in relation to the manner in which Allianz engaged with the plaintiff's former solicitor?* To answer that question, the evidence establishes none. At the heart of this case is nothing Allianz said, wrote, did, or failed to do. At the heart of this case is a - doubtless innocent and unfortunate - mistake by the plaintiff's former solicitors in omitting to issue proceedings on time.

Silence

61. As to the plaintiff's criticism of Allianz, the evidence discloses that, on 29 October 2018, Allianz asked the plaintiff's former solicitor for basic, but essential, information and documentation. The response to that request was *silence.* No reply was sent by the plaintiff's former solicitors.

62. Silence from the plaintiff's side begat silence on the part of the defendant's Insurer and this silence endured until long after the statute expired.

Breaking point

63. It would be to ignore binding Supreme Court authority and expand the principle of unconscionability far beyond breaking point, and would offend common sense as well as natural and constitutional justice, for this Court to hold that this *silence* on the *plaintiff's* side amounts to *unconscionability* by the *defendant.*

64. On the question of silence, Henchy J. had the following to say in *Doran v. Thompson* (at p. 227 of the reported decision):

> "*The insurers had exercised their right to remain silent on the issue of liability. There was no onus on them to deny the allegation of negligence that had been made in the opening letter. It was for the plaintiff's solicitor to pursue the matter in correspondence and in the absence of a satisfactory reply, to issue proceedings. His failure to do so was not supported by any causative representation by the insurers. 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. That is what happened here."* (emphasis added)

65. It seems to me that the foregoing comments apply with equal force to the facts in the present case.

2 v. 3 year limitation period

66. When *Doran v. Thompson* was decided, the relevant statute of limitations period was 3 years. It is now 2. Applying the logic of the plaintiff's argument, one might ask: "*Is it not unreasonable, unfair, wrong and unconscionable for his claim to be 'statute barred' when, historically, claims which commenced at a greater remove from the index event were not statute barred*? The answer is, of course, the will of the Irish people as expressed through legislation enacted by the Oireachtas, something I will presently return to.

Unfair position

67. The gravamen of the plaintiff's argument, articulated with sophistication by his counsel, is that: having regard to the nature of the incident; the numerous cases which arose; the nature of the injuries; and the position adopted by Allianz "*it would amount to an unfair position if an estoppel is not allowed"*.

Insurer's position

68. As to the position of the Insurer, there is nothing in the evidence before this court which would allow for a finding that, with respect to dealing with the plaintiff's claim, Allianz has acted other than appropriately and professionally. The Insurer's "*position"* was set out in their 'without prejudice' letter. In addition to making no concessions (a stance they were entitled to take) Allianz explicitly called upon the plaintiff's then solicitors to furnish basic, and very obviously relevant information/documentation which was plainly sought with a view to aiding the Insurer's investigation in respect of this accident. There was no failure on the part of *Allianz* to respond. The failure was on the *plaintiff* side. Thus, no criticism of the "*position*" adopted by Allianz in this case is fair.

69. Furthermore, and for very understandable reasons, no authority was opened to me which establishes that, where multiple claims arise out of a single event, and where several such claims are settled by a defendant, that defendant has a legal obligation to settle *all* claims, irrespective of

whether the 'statute' was missed by mistake. Yet, distilled to its essence, this is the alleged unfairness in the Insurer's position. I cannot agree.

Ad misericordiam

70. Irrespective of how eloquently put, the remaining issues which are canvassed by counsel for the plaintiff (namely, the nature of the accident and the seriousness of injuries) seem to me to constitute an *ad misericordiam* plea.

Sympathy

71. Irrespective of the sympathy which this Court must have for any person unlucky enough to suffer serious injury, I am satisfied that the Court simply cannot 'find' an estoppel where none exists (and the facts which emerge from an analysis of the evidence entirely undermine the existence of same).

Discretion

72. Nor does sympathy for a plaintiff confer on this Court any discretion to extend time with respect to the relevant statutory period. Why this is so can be seen from the words which the Oireachtas chose to use in s. 3 (1):-

> *"3 (1) An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance, or breach of duty (whether that duty exists by virtue of a contract of or a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of 2 years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured"*(emphasis added)

Mandatory words

73. The legislature chose to use the mandatory words "*shall not be brought after the expiration of 2 years*" (emphasis added). It is common case that (*per* s. 11 of the Act) the plaintiff was required to make an application for assessment of his claim to the PIAB. It is a matter of fact that the plaintiff applied to PIAB *after* his claim had already become statute barred. In short, the will of the Irish people is that sympathy for the plaintiff can play *no* part in this Court's determination of the present application.

Separation of powers

74. Having regard to the foregoing it seems to me that it would be a flagrant breach of the sacrosanct 'separation of powers' principle for this Court to *ignore* the will of the Irish people, as expressed in the foregoing statutory provisions enacted by the Oireachtas; and it would be to act without jurisdiction for this Court to 'extend time' in the manner the plaintiff's counsel suggests.

75. Put simply, the statute of limitations confers no discretion on this Court to extend the statute in response to an *ad misericordiam* submission, regardless of how well put, where the facts prevent the plaintiff from relying on the principles in *Doran v Thompson*; and *Murphy v Grealish*.

Insurmountable obstacles

76. In short, and regardless of the force with which submissions are urged on the court, it seems to me that the plaintiff faces insurmountable obstacles, having regard to the following:

(i) as averred on behalf of the plaintiff, the *reason* for the statute being missed was an *oversight* by the plaintiff's former solicitors;

(ii) the facts which emerge from the evidence demonstrate that essential elements of estoppel (i.e. a representation and reliance on same) are entirely lacking;

(iii) the mandatory words used in the statute confer no jurisdiction on this court to extend the relevant time limit (regardless of the nature of the accident; the injuries sustained; or whether other claims, by different persons, were or were not settled).

77. Given that the disclosed *reason* for the proceedings being statute barred is an *oversigh*t and *omission* by the plaintiff's former solicitors (which, axiomatically, rules out the reason being any act or omission by the defendant) the plaintiff cannot rely on the *Doran v Thompson* line of authority, which includes *Murphy v Grealish*. However, lest I be wrong not to do so, I now propose to look at the balance of the averments made by Ms. Lydon.

23 March 2021 (letter from plaintiff's former solicitors)

78. Ms Lydon exhibits a letter, dated 23 March 2021, sent to the plaintiff by his former solicitors. At para. 8, she makes the following averments:

> "*As can be seen therefrom, the plaintiff's former firm wrote to the plaintiff and advised that his claim against the defendant was an assessment only, that there have been ongoing discussions and that, in those circumstances, they were hopeful that the court may permit the matter to be dealt with notwithstanding the passage of time and the expiration of the limitation period."*

79. Before looking at the text of the aforesaid 23 March 2021 letter, it is important to note where it appears in the relevant chronology:

- On 22 November 2018, the plaintiff's former solicitor wrote a letter of claim;
- On 29 November 2018, Allianz sent a 'without prejudice' response, to which no reply was made by or on behalf of the plaintiff;
- On 24 June 2020, the limitation period expired; and
- 9 months after the statute expired, the 23 March 2021 letter was sent.

Contents

80. Turning to its contents, the 23 March 2021 letter is headed " *'WITHOUT PREJUDICE' RE: YOUR CASE* ". There is no averment made that the use of the term "without prejudice" was a mistake. That being so, it seems entirely fair for this Court to infer that it was a letter in which the plaintiff's former solicitor invoked 'litigation privilege' in respect of the communication (i.e. conscious of the

potential for a litigation between the plaintiff and his former solicitors). This inference chimes precisely with the disclosed *reason* for the statute being missed, namely, the *oversight* and *omission* on the part of the plaintiff's former solicitor.

81. The letter goes on to state, *inter alia,* the following:

> "*I advised Debbie that whilst the insurance company were notified of your claim on 22 November 2018 (copy of which is attached hereto) I cannot see any completed Form A being sent to the Injuries Board. Indeed, I do not see a completed Form A at all however, I note Debbie's instructions that you attended at our Lucan office in August 2018 and completed same. I am attaching a further Form A and would be obliged if you would complete same insofar as you are able and return to me at your earliest convenience.*
>
> *As advised, there is a statutory period of 2 years from the date of the accident within which to lodge a claim otherwise the claim is statute barred. It may however be possible to bring an application to Court seeking to have the case dealt with notwithstanding the time delay in circumstances where the case is assessment only, there have been ongoing discussions etc. and this is something that can be looked at into the future…"* (emphasis added)

"one way or another"

82. The letter proceeded to reassure the plaintiff that his claim "*…will be dealt with one way or another, either with Allianz, the insurance company for the Reverend Foley or indeed our own insurance company*" (emphasis added). The letter concluded by stating "*you are advised of your right to obtain independent legal advice however you can be assured that we will be doing our utmost to have this matter resolved as soon as possible…".*

83. The reference to the plaintiff's right to obtain independent legal advice and the claim being met by the insurance company for the plaintiff's former solicitors reflect the reason for the expiry of the statute being a mistake by the plaintiff's former solicitors.

Consistent reason

84. In short, the contents of (i) the letter sent by the plaintiff's *former* solicitors to the plaintiff; and (ii) the averments made by the plaintiff's *current* solicitor are entirely consistent as to the reason for the statute being missed (namely, the oversight/omission of the former). That being so, the facts entirely rule out reliance by the plaintiff on the principles articulated in *Murphy v Grealish*.

"assessment only"

85. Even if I am entirely wrong in that view, the said letter of 23 March 2021 does not take the plaintiff anywhere near establishing an estoppel. Whilst the 'bald' statement is made in the letter that "*the case is assessment only*", the basis for that assertion is entirely unclear. Nor does any

basis for that statement emerge from any evidence before this Court. Rather, the uncontroverted evidence of Mr Hayes, of Allianz, allows for a contrary finding.

"ongoing discussions"

86. Nor is it at all clear what is meant by the statement "*there have been ongoing discussions etc*". That assertion raises a plethora of questions, but, with due respect to the author of the letter, answers none. *What* were these discussions about? *Who* were the discussions conducted with? When did the discussions *begin*? When did the discussions *end* or are they said to be continuing? Were these discussions commenced prior to, or after, the *expiry* of the statute? These, and other, questions readily spring to mind but are nowhere answered.

Solicitors' letter

87. Furthermore, whilst, as a general proposition, it would be unfair to parse the contents of a letter as if one were interpretating a statutory provision, this was a letter written by a firm of solicitors. Words are a lawyer's 'stock in trade' and, as is clear from the invocation of litigation privilege, this was an important letter, drafted with obvious care. That being so, the court is entitled to take it that the use of the word "*discussions*" was deliberate.

88. However, on no objective view does the use of the single word "*discussions*" convey the meaning that "*liability was agreed by the defendant and there were settlement negotiations*". To say this is not for a moment to direct criticism at anyone in a personal sense. Rather, it is for this court to engage, as it must, with the evidence before this Court with a view to determining what facts are, and are not, established.

89. On that point, it is a statement of the obvious that the answers to the manifold questions raised by this letter are within the knowledge of the plaintiff's former solicitors, but this Court does not have the benefit of any affidavit from that party. The only affidavit has come from the plaintiff's current solicitor who, for present purposes, makes reference to a letter which (i) she did not author; and (ii) the contents of which she has no first-hand knowledge of.

Recollection of the plaintiff's former solicitor?

90. It is not for the defendant, or this Court, to advise the plaintiff's proofs. It is clear, however, that if the plaintiff's former solicitor, even in the absence of a file, had even the vaguest recollection that the defendant, or their Insurer, (i) acknowledged liability; and/or (ii) indicated that the matter would be dealt with as an 'assessment only', and/or (iii) signalled a willingness to enter into settlement discussions, they could have sworn an affidavit to that effect. They did not.

91. Similarly, if their subjective position is that the reason for the statute being missed was reliance on the foregoing, they could have made such an averment. They did not.

92. Why an affidavit was not sworn to the foregoing effect is, of course, explained by the single most important fact which emerges from a careful consideration of the evidence before this Court,

namely, the *reason* the plaintiff finds himself in this situation has nothing whatsoever to do with any words or action by the defendant. It stems from a mistake which the defendant did not make, or contribute to.

The plaintiff's recollection?

93. The Law Society Guide to Professional Conduct states *inter alia* the following with respect to the solicitor and client relationship:

> "*A solicitor should keep the client informed of the progress of the matter. Where it is important to notify the client of a particular matter, or to confirm of clarify details with the client, preferably this should be done in writing*". [See Chapter 2 - Proper Standard of Legal Services – Solicitor's Guide to Professional Conduct 4th Edition issued by the Guidance & Ethics of the Law Society].

94. I am not, for a moment, suggesting any breach of the foregoing, or any other, obligation by any solicitor. My point is a different one. Where a plaintiff seeks compensation for serious injury, it seems to me that any agreement by the defendant, or its Insurer, to accept liability; and/or to treat the matter as assessment only; and/or to invite or to engage in settlement negotiations, would constitute important information of which, consistent with the aforesaid duty, the client would be made aware of in a timely manner.

95. Had this plaintiff received any of the foregoing information from his former solicitor prior to the expiry of the statute, it seems inconceivable that they would have no recollection of it (even if no letter or email had ever been sent to them or, for that matter, they could not locate same). My point is that the plaintiff has sworn *no* affidavit with respect to any such recollection.

96. This fortifies me in the view that there is not a shred of evidence to support the facts necessary for this plaintiff to rely on the *Murphy v Grealish* principles. By contrast the evidence makes clear that 'all roads lead' to an unfortunate mistake made by the plaintiff's former solicitor.

97. At para. 18 of her affidavit of 2 December 2022, Ms Lydon makes the following averments:

> *"The within motion issued on 17 June 2022 and a Reply has now been delivered by the plaintiff placing reliance on the plea of estoppel, in circumstances whereby, inter alia, the defendant was on notice of the claim from an early stage, the plaintiff's former solicitors firm has advised that the matter was assessment only, that the related claims had settled and that it appeared that settlement talks were in being or anticipated in this matter and that reliance had been placed on same by and/or the plaintiff, to the plaintiff's detriment."* (emphasis added)

98. The evidence before this Court allows for a finding that the first time the plaintiff's former solicitor advised that the matter was assessment only was in a letter to the plaintiff, invoking 'litigation privilege' which was sent several months *after* the statute had expired. There is simply no evidence that the defendant or the defendant's insurers ever advised that the matter was

assessment only. On the contrary, there is uncontroverted evidence that they did nothing of the sort.

Other claims

99. Whether settlement was achieved in what are described as *"the related claims"* (namely, claims brought by *other* individuals of which this court has, understandably, next to no information) does not seem to me to have any bearing on the present application.

100. It is conceivable that the attitude of Allianz to other claims arising from the same incident gave rise to what the authorities have described as a "*cherished expectation*" on the part of the plaintiff's former solicitor that the present case would also be settled.

Unknown

101. However, it should be emphasised that even this is entirely unknown, in circumstances where the plaintiff's former solicitor has sworn no affidavit. Thus, even if such an expectation was cherished, this Court has no evidence as to whether it was a cherished expectation formed *before* or *after* the expiry of the statute in respect of the plaintiff's claim (the reason for which was mistake).

102. Comparing the averments made by Ms. Lydon with the contents of the letter dated 23 March 2021, it must be said that nowhere in the said letter does the plaintiff's former solicitor state that *"settlement talks"* were *"in being or anticipated"*. Nor does the plaintiff's former solicitor state that he relied on the foregoing. Similarly, the plaintiff does not claim to have relied on the foregoing. Without intending any disrespect, the averments in para. 18 seem to me to go further than the contents of the 'without prejudice' letter sent by the plaintiff's former solicitor on 23 March 2021. If they are reflective of a conversation between Ms Lydon and the plaintiff's former solicitor, that is not made clear. Even if this is the case, the 'gaps' in terms of detail are obvious and include: when did it appear that settlement talks were anticipated? Was this before or after the expiry of the statute?

103. Furthermore, there is plainly a material difference between settlement talks being *"in being"* on the one hand, and *"anticipated"* on the other. That being so, is Ms Lydon's account, of such account as may have been given to her verbally by the plaintiff's former solicitor, based on the latter's account of the attitude of the plaintiff's insurer, to the effect that (i) there were actual settlement talks, or that (ii) settlement talks were subjectively expected, albeit un-commenced; and (iii) if so, when (i.e. before or after the expiry of the statute)?

104. The foregoing analysis is appropriate given the evidence put (and not put) before this court. However, the central point is that there is simply not a shred of evidence to support either a representation or reliance on same for the purposes of estoppel. The fact that the statute was missed due to the *oversight* and *omission* by the plaintiff's former solicitor necessarily and fatally rules out the question of estoppel.

Mistake

105. In short, for the purposes of this application, the 'source of the Nile' is an oversight and omission (i.e. a mistake) on the part of the plaintiff's former solicitor. That being so, and again directing no criticism at any individual(s), it is somewhat surprising that this application was contested up to and including a hearing which took in excess of half a day, following which significant additional resources had to be devoted to the production of this judgment.

Finite Court-resources

106. The resources of this Court are necessarily finite, and the public interest is best served by having available resources devoted to disputes which *require* judicial determination. Whilst the 'milk' has already been 'spilled' in relation to the commitment of scarce court resources to the hearing of this application, and the production of a detailed written judgment, I do have to express some surprise that the plaintiff insisted on a hearing by this court to determine this matter.

107. I do not say this lightly, given the constitutionally-protected right of access to justice. However, in the very particular circumstances of this case, this view appears to be merited. Why? Because, at all material times from 2 December 2022 (when Ms. Lydon swore her affidavit on the plaintiff's behalf) until the hearing before me in October 2023 (over 10 months later) the plaintiff has known that the reason for the statute being missed was the "*oversight*" and "*omission*" of the plaintiff's former solicitors, not any act or omission by the defendant or his Insurer.

108. If calculated from 23 March 2021 (when the plaintiff was assured by his former solicitor that, if necessary, *their* insurance company would meet his claim), the relevant period is 2 years and 7 months. However, given that the letter of 23 March 2021 was marked 'without prejudice', fairness requires that the calculation be from the swearing of Ms Lydon's affidavit (i.e. just in excess of 10 months before the hearing).

109. Thus, it was clear to the plaintiff throughout a 10 month period that, based on facts known to him, there was simply no question of a *representation* by the defendant or reliance on any such *representation* being the reason the statute was missed.

110. There was, as the plaintiff knew for the entire of this 10 months, no question of *estoppel*; or of any *unconscionable* and/or *inequitable* conduct on the defendant's part, in relying on a statute defence.

111. Rather, as the plaintiff knew, the mistake was made by the plaintiff's former solicitors.

112. Nor did the plaintiff swear *any* affidavit which added to the 'factual matrix' in relation this or any other issue (and no affidavit whatsoever was sworn on behalf of the plaintiff *after* Ms Lydon's of 2 December 2022).

113. Having said the foregoing, I want to make clear, once more, that criticism is not directed at any individual(s). That would be entirely unfair given what is (and is not) known to the court. This court also wishes to acknowledge that the matter was conducted by counsel for both parties with skill and professionalism; and counsel provided great assistance to this court in the manner in which they made the positions of their respective clients crystal clear.

114. However, my hope is that the above observations, concerning the use of finite court resources in the context of the public good, may serve as a reminder to others who may in the future be involved in applications of this type, where facts are disclosed, in advance of the relevant hearing, which mean an inevitability as to the result.

115. In such a scenario - and I accept that it may be a very rare one - the public interest would be better served (as would, it seems to me, the interest of a plaintiff, given the likely costs - consequences of being unsuccessful) by a hearing being avoided.

116. By way of a final comment on this matter, I want to make it clear that my surprise that the plaintiff insisted on a trial (despite knowing relevant facts which ruled out reliance on the principles in *Doran v Thompson* etc) has played no part in the outcome of the trial of this preliminary issue. It does, however, fortify me in the views presently expressed in respect of costs.

In conclusion

117. For the reasons set out in this decision, the court has found the following:

(i) the plaintiff failed to make the requisite application to the PIAB within the statutory 2–year period (as the plaintiff has acknowledged at all material times);

(ii) the reason was an oversight and omission by the plaintiff's then solicitor (as the plaintiff has known since 2 December 2022);

(iii) the plaintiff has not established unconscionable conduct on the part of the defendant;

(iv) the plaintiff has not established that it would be inequitable for the defendant to rely on a statute of limitations defence;

(v) there is no basis upon which the doctrine of estoppel, or any other doctrine, operates so as to permit the defendant to invoke the statute of limitations;

(vi) the 'principle' that, because other claims brought by other individuals, arising from the same event, were settled, the defendant/Insurer is obliged to settle all claims, is not known to the law;

(vii) still less could that 'principle' provide a basis for this court extending the statute of limitations period, where the statute was missed by reason of the mistake of solicitors acting for the would-be plaintiff.

118. At the heart of the plaintiff's opposition to this application is, in truth, an *ad misericordiam* argument which cannot succeed. The provisions of the statute of limitations constitute an insurmountable obstacle for the plaintiff. The statute is 'deaf' and 'blind' to individual

circumstances, irrespective of how unique the plaintiff contends his situation to be. The statute is, however, far from 'voiceless', and its injunction is given clear and loud. Legal proceedings of this kind "*shall not be brought after the expiration of 2 years from the date on which the cause of action accrued"*. This Court has no jurisdiction to 'silence' the statute. Doing so would be to usurp the will of the Irish people and engage, without jurisdiction, in wholly impermissible judicial law-making, contrary to the provisions laid down by the Oireachtas.

119. For the reasons set out in this decision, the defendant is entitled to the relief sought and I have no hesitation in saying that the 'normal rule' (which is given statutory expression in s.169 of the Legal Services Regulation Act 2015) should be applied with respect to costs, given that the defendant has been entirely successful. The parties are invited to agree a draft order reflecting the judgment of this Court and to submit same within 14 days. In the event of any dispute, short written submissions should be filed within the same period.