

THE HIGH COURT

[2022] IEHC 391
RECORD NO. 2020/212CA

BETWEEN

LERATO TSIU

PLAINTIFF

AND

CAMPBELL CATERING LTD T/A ARAMARK IRELAND

DEFENDANT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 28th day of June 2022

Introduction

- 1.** The Plaintiff is described as a catering assistant who was employed by the Defendant at the Royal Hospital, Donnybrook.
- 2.** The relevant accident giving rise to the proceedings is pleaded to have occurred on 4 December 2013, when a fellow-employee pushed a trolley into the Plaintiff from behind, catching the Plaintiff's right ankle and causing her to sustain personal injury, loss, damage, inconvenience and expense.
- 3.** The relevant Circuit Court Personal Injuries summons was issued on 22 December 2016.
- 4.** At para. 1 (iii) of the Defence it is admitted that the Plaintiff was injured on 4 December 2013 in the course of her employment with the Defendant; and the Plaintiff is not required to prove that the incident occurred as a consequence of the negligence and breach of duty of the Defendant, its servants or agents.
- 5.** However, by way of preliminary objection, a plea is made with reference to the Statute of Limitations in a Defence delivered on 18 May 2017.
- 6.** The Defendant accepts that a 'Form A' had to be lodged with the injuries Board within 2 years, namely, by 3 December 2015. In fact, the form was deemed accepted by the injuries Board 5 days *late*, namely, on 8 December 2015.
- 7.** An affidavit of discovery was sworn on behalf of the Plaintiff on 16 September 2019.
- 8.** By means of a motion issued on 25 October 2019, the Plaintiff's solicitors sought an order striking out the Defence of the Defendant by reason of their failure to deliver an affidavit of discovery, contrary to an agreement to make voluntary discovery which was reached on about the 31st of August 2018.
- 9.** On 9 January 2020, an affidavit of discovery was sworn on behalf of the Defendant by a Mr Greg Dunphy, claims manager, of Zurich insurance, being the Defendant's Insurers.
- 10.** By order made on 13 January 2020 before the relevant County Registrar, the Plaintiff's motion seeking leave to enter judgement was struck out, on consent, with costs to the Plaintiff, to be taxed in default of agreement.

The Plaintiff's Motion

- 11.** The motion of significance for present purposes was issued by the Plaintiff's solicitors on 9 June 2020, seeking an order pursuant to Order 34, rule 1 of the Circuit Court Rules ("CCR") directing the trial of a preliminary point of law, namely: -

"Whether the Plaintiff's claim is statute barred pursuant to section 11 of the Statute of Limitations 1957, as amended by section 3 of the Statute of Limitations (Amendment) Act, as amended by the Personal Injuries Assessment Board Act, 2003, and the Civil Liability and Courts Act 2004."

12. At paragraph 5 of his affidavit grounding the June 2020 motion, the Plaintiff's solicitor, Mr Damien O'Reilly, avers *inter-alia* that, whilst the CCR do not provide for any pleading by way of a reply to the Defence, the response to the plea that the claim is statute-barred is that:

"a) the Defendant is estopped from pleading the Statute of Limitations and/or

b) the Plaintiff is entitled to rely on the 'discoverability' provisions of the Statute of Limitations (Amendment) Act, 1991."

13. The case comes before this Court in circumstances where her Honour Judge Linnane made an order in the Circuit Court, on 19 December 2020, determining that the Plaintiff's claim was statute-barred and should be dismissed.

14. The matter proceeded before this court by way of a *de novo* hearing. It should be noted that the Plaintiff did not seek to rely on the 'discoverability' provisions in the Statute of Limitations (Amendment) Act of 1991.

15. A second Motion was issued by the Plaintiff, on 26 October 2021, and sought an Order pursuant to Order 61, Rule 8 of the Rules of the Superior Courts permitting reliance on an Affidavit sworn by Mr. Reilly on 22 January 2021. At the outset, Counsel representing both parties agreed that, for the purposes of determining the appeal, this Court could have regard to same and, in these circumstances, it was not necessary for the Court to engage further with that second motion.

Submissions

16. Before proceeding further, I want to thank Mr O'Neill SC for the Plaintiff, and Ms McNally SC for the Defendant, both of whom furnished the Court with detailed written submissions which were of great assistance. Both Counsel also made oral submissions with clarity and skill during the hearing which took place on 3 May 2022 and, again, this greatly assisted the Court. In reaching this decision, I have carefully considered all submissions, both written and oral, and will refer to the principal submissions during this judgment.

Certain relevant legal principles

17. It is fair to say that there was no material disagreement between the parties as to the relevant legal principles. Rather, the disagreement concerned the application of the principles themselves. During the hearing, both sides made reference to various passages of the Supreme Court decision (Geoghegan J.) in *Murphy v. Grealish* [2009] I.R. 366, which concerned an appeal by the Defendant from an order of this Court (MacMenamin J.) refusing to dismiss a personal injuries action instituted by the Plaintiff. In essence, the Plaintiff's case was that the Defendant had admitted liability and that, thereafter, negotiations proceeded. Given that in *Murphy v. Grealish*, Mr Justice Geoghegan looked so closely at a range of relevant authorities and identified the principles which emerge, it is useful, at this juncture, to quote paras. [17] to [22] from the learned Judge's decision, as follows:

"[17] Although it is not appropriate to include legal arguments in an affidavit, Mr. Peter Kelly, solicitor of Erne, the firm acting for the appellant, did just that in an affidavit affirmed on the 12th April 2005. Because what he says is at the heart of the argument I find it useful to quote it as an introduction to my discussion of the law. He says in the middle of paragraph 3 the following:

"It is a daily occurrence that insurance companies admit liability, but I respectfully submit that this does not indicate or mean that proceedings should not be instituted. The law is clear, as laid down by the Supreme Court in Ryan v. Connolly [2001] 2 ILRM 174. The case held 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. 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 instituted 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. 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'."

[18] I would respectfully suggest that that is a selective statement of the law and, indeed if the law was as simple as that, the courts would have an easier task. The first point to be made is that although Ryan v. Connolly [2001] 1 I.R. 627 is the latest relevant Supreme Court decision, an earlier decision of this court Doran v. Thomas Thompson and Sons Limited [1978] I.R. 223 is even more relevant, particularly as it is perfectly clear from a reading of the single judgment of Keane C.J. in Ryan v. Connolly that the former Chief Justice was intending to follow the principles laid down in Doran v. Thompson Ltd. There is the further difficulty that although there were three reasoned concurring judgments in Doran v. Thompson Ltd. i.e. those of Henchy, Griffin and Kenny JJ., they do not seem to me to be absolutely identical at least in so far as some aspects of the problem are emphasized. This may be why Keane C.J. seemed almost exclusively to rely on the judgment of Griffin J. In my opinion, 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. Indeed on one reading of the judgment of Henchy J., in particular, one might almost believe that it was a determining factor. I do not believe, however, that he or either of the two other judges in that court would have intended to convey that. In that particular case, there was in fact no admission of liability.

[19] The second factor which emerges from the two cases is the useful correction in this regard made by Keane C.J. and cited by Mr. Kelly in his affidavit. 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. It is in that context that Keane C.J. uses the word "necessarily" in the passage cited. Indeed Keane C.J. develops this with an example. He postulates the case where an insurance company within days of the accident accepts that no issue on liability arises but that for some reason the subsequent negotiations become dormant at p. 633: -

"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."

[20] That clearly correct cautionary note must be balanced against what Henchy J. said at p. 225 of Doran v. Thompson Ltd. [1978] I.R. 223: -

"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 and 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 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 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."

[21] Another passage in the judgment of Henchy J. has indirect relevance to this case. It is at p. 226 and reads as follows: -

*"Secondly, it was held that it was reasonable for the solicitor to expect that an offer of settlement would be made after the Defendant's surgeon had carried out a medical examination. Doubtless it was reasonable for him to cherish that expectation, but not to the extent of ignoring the period of limitation. As the three-year period drew to its close, the Insurers' silence on the issue of liability cried out for a direct question to be put to them asking whether liability was being admitted or not, and if a satisfactory reply were not received, for an originating summons to be issued. The issue of the summons would have cost little; it did not even have to be served to defeat the statute; it would have been valid for 12 months; and it could have been renewed at the end of the twelve months. However, such routine precautions never crossed the solicitor's minds. The self-induced *idée fixe* that he had formed diverted his attention from the palpable and imminent disaster. His preoccupation with the quantum of damages to the exclusion of the issue of liability was the cause of his inactivity, and not anything in the nature of a representation by the Insurers."*

[22] In neither *Doran v. Thompson Ltd* [1978] I.R. 223 nor *Ryan v. Connolly* [2001] 1 I.R. 627 was there an admission of liability and that is the key point in both cases. Although in each case, the decisions of the High Court (Costello J. in *Doran v. Thompson Ltd* and Kelly J. in *Ryan v. Connolly*) were reversed, this was largely on the basis that the Supreme Court judges did not consider that the inferences in favour of the Plaintiffs drawn by the High Court judges were warranted but it does not seem to me that they had any criticism of the basic approach of the respective High Court judges which was essentially to consider whether there was an equitable estoppel by reason of the general surrounding circumstances, those circumstances constituting an implied representation rendering it unconscionable to allow the reliance on the statute."

18. It is the principles which emerge from the foregoing analysis that have guided this court in its approach to determining the question before it. Later in this judgment, I will return to *Murphy v. Grealish* and will also consider other authorities which featured at the hearing. Before doing so, it is appropriate to turn to the evidence in order to identify certain relevant facts.

Relevant facts

19. From a careful consideration of the evidence before the court, comprising the sworn affidavits and exhibits, the following facts emerge, which, for ease of reference, I propose to detail in chronological order:

8 July 2015

20. On 8 July 2015, the Plaintiff's solicitor wrote to the managing director of 'Aramark Food Services', giving notice of the accident; calling for an admission of liability and for the preservation of any CCTV footage and any 'accident report form' concerning the incident; and threatening legal proceedings in default. Mr Reilly avers that *Aramark Food Services* was the name that the Plaintiff understood to be her employer. This letter was sent some 4 months *prior* to the relevant 'Form A' deadline.

11 August 2015

21. On 11 August 2015, having ascertained that the legal entity trading as Aramark was Campbell Catering Ltd, a follow-up letter was sent to same by the Plaintiff's solicitor. Nothing particular turns on this, in circumstances where the relief at para. (b) of the Plaintiff's motion was not pursued at the hearing before me.

24 August 2015 (4:20 p.m.)

22. At or about 4:20 p.m. on 24 August 2015, Mr Dunphy, of Zurich, telephoned the office of the Plaintiff's solicitor; and he avers at paragraph 4 (iv) of his 2 October 2020 affidavit that the purpose of phoning the Plaintiff's solicitors was to advise them: "...that Zurich Insurance were the Defendant's Insurers and with the intention of advising them that insofar as the appearance of the accident was concerned, that liability was not going to be contested." In circumstances where Mr Damien Reilly, solicitor, was unavailable, Mr Dunphy left the following message:

"Damien, it's Greg Dunphy in Zurich Insurance here. I'm ringing you in connection with your client Lerato Tsiu. Your reference is TSIO001/0001. I'm acting for Aramark. **I'm wondering if you have a medical report you'd like to share.** My claims number is 638457. Thanks, Bye." (emphasis added)

23. As averred by Mr Reilly, the Plaintiff's solicitor did not yet have a medical report. However, the foregoing message from the Defendant's Insurer was (i) entirely consistent with liability not being in issue; and (ii) constituted the taking by the Defendant's Insurer of practical steps aimed at trying to settle the Plaintiff's claim.

24 August 2015 (4:28 p.m.)

24. Later, on 24 August 2015, by means of an email (sent at 16:28) Mr Dunphy of the Defendant's Insurer wrote to the Plaintiff's solicitors, referring to the 8 July letter addressed to Zurich's insured, and stated: "Our investigations are complete and we will not be disputing liability."

25. The foregoing made several things clear: (i) that there had been investigations; (ii) that these had come to a conclusion; (iii) that as a result of the completion of same, the Defendant's Insurer was making contact to confirm that liability was not disputed; (v) this confirmation was being made in 'open' correspondence; (vi) it was an absolute acknowledgment, in that it was not conditional in any way, i.e. from then and into the future liability was admitted; and (viii) in addition to not being time-limited, the Insurer did not purport to impose on the Plaintiff an obligation to do, or say, anything within any specific period, by way of a response.

26. It will be recalled that Mr. Justice Geoghegan, in *Murphy v. Grealish*, described an admission of liability as being "all important" on the Statute of Limitations issue. There was undoubtedly one in the present case. Insofar as Geoghegan J. indicated in his judgment that some added facts, but "not much addition", would be required to create an estoppel, it is important to note that the 24 August 2015 email from Zurich did not end with the unambiguous statement that liability was admitted. Rather, it went on to state the following:

"Are you prepared to **share your medical report** with us? If not, please advise us of the name and address of your client's doctor so that we may **make arrangements for a medical examination...**" (emphasis added)

27. Thus, building on an explicit and unconditional admission of liability, the foregoing statement spoke to practical steps aimed at reaching settlement. Against the backdrop of liability having been admitted, the sharing of a medical report (or having the Plaintiff medically examined) could have had no other purpose than to advance a settlement of the Plaintiff's claim.

28. At the risk of stating the obvious, in the wake of admitting liability, Zurich was *not* asking for a copy of legal proceedings, whether in draft form or as issued. Rather, the Insurer was anxious to see a medical

report and, if none was available, to have the Plaintiff medically examined. This was plainly to focus exclusively on the settlement of the claim in respect of which liability had been admitted.

29. In terms of the relevant timeline, it might also be noted that 24 August 2015 was over 3 months *prior* to the expiry of the relevant period in respect of the delivery of a 'Form A'. In the manner observed earlier, the Defendant's Insurer did not call for a response by any specific date.

30. At para. 4 of an affidavit sworn on 13 November 2020 by the principal in the firm of McKeever Rowan, solicitors for the Plaintiff, Mr Robert Brown solicitor makes *inter-alia* the following averment:

"... the Defendant planned to have the Plaintiff medically examined in advance of the intended settlement meeting and this was arranged for the 1 October 2015 ..."

31. There was no affidavit sworn on behalf of the Defendant in response. Thus, the state of the evidence before this court at the hearing was that the foregoing constituted uncontested averments. Notwithstanding this, Counsel for the Defendant submitted that the Defendant did not arrange for the Plaintiff to be medically examined, submitting also that there was no specific date arranged for any settlement meeting. With regard to the foregoing submission, Counsel for the Defendant referred to the affidavits of discovery sworn on behalf of the Plaintiff and Defendant, respectively, and emphasised that the correspondence and documents from the relevant files disclosed no arrangement for the Defendant's doctor to examine the Plaintiff and disclosed no appointment set up for settlement discussions.

32. On this issue, Mr O'Neill SC for the Plaintiff submitted that this was something which had been raised after the affidavits had been sworn, but he made clear that it was appropriately raised by Ms McNally SC. The Plaintiff's stance was to accept that the medical examination in question took place in the context of the employer/employee relationship (as opposed to arising from the relationship as between the Defendant and its Insured). He made clear that the Plaintiff was prepared to concede that the October 2015 medical examination was *not* at the request of the Defendant's Insurer.

33. For reasons which will presently be set out, I do not believe that the outcome to this application hinges on whether or not (i) a specific date had been arranged for settlement discussions and/or (ii) the Defendant arranged for the Plaintiff to be medically examined. I accept for the purposes of determining this hearing that *no* settlement meeting had been arranged and that the Defendant's Insurer did *not* arrange for the Plaintiff to be medically examined. Despite the foregoing, it is beyond doubt that the Defendant made explicit its willingness to do *both* and, in the manner explained in this judgment, such was the position which pertained at the time when the relevant Statute of Limitations period came and went. I now return to the chronology of relevant facts.

23 October 2015 (3:03 p.m.)

34. Shortly after 3 p.m. on 23 October 2015, Mr Dunphy of Zurich insurance company telephoned the Plaintiff's solicitors, leaving a voicemail message with his details (the typed note of same noting the time of the message as 15:03). There was no indication of any alteration in the position of the Defendant; no frustration expressed with any perceived delay; it was not alleged that there had been any failure to respond; and the Insurer did not set any time-limit or any other conditions in respect of the response which the Defendant's Insurer was seeking.

23 October 2015 (3:05 p.m.)

35. On 23 October 2015, the Defendant's Insurer emailed the Plaintiff's solicitors again (sent 15:05) enclosing Zurich's previous email of 24 August and stating "*I look forward to hearing from you*". At the risk of stating the obvious, this was not any alteration of the Defendant's position. On the contrary, Zurich's position

remained as *per* their 24 August 2015 communication. In other words, as of 23 October 2015, the Defendant's Insurer not only admitted liability but was focussed on trying to settle the Plaintiff's claim and was 'chasing up' the Plaintiff's solicitor in that context (but without setting any conditions or deadlines, insofar as the sought-after response was concerned).

Medical report

36. It is clear from the averments made by the solicitors acting for the Plaintiff that no response was made to the 24 August and 23 October 2015 communications, in circumstances where a medical report was not, by that point, available. On this issue it is appropriate to quote the following uncontested averments made by Mr Damien Reilly, solicitor for the Plaintiff, in his 19 January 2021 affidavit:

"4. On 24th August 2015 Mr Dunphy sought a medical report and asked about a settlement meeting. At that time, I did not have a medical report and did not respond. Mr Dunphy phoned again on 23rd October 2015, but I still did not have a medical report.

*5. Shortly afterwards I received a report from Dr Zielinski... On my perusal of same I noted there were serious errors in same. It refers to a distortion of the **left** ankle whereas the Plaintiff injured her right ankle. It also gives the date of the medical examination as the 24/10/2013, which is before the accident occurred.*

6. On 28 October 2015, I emailed Dr Zielinski asking him to correct the factual errors in his report... At this point I was not concerned about the statute date, believing that liability was not in issue and the priority was to get a corrected report so that I would engage with Mr Dunphy."

Errors in Medical Report

37. In addition to the foregoing averments, at para. 5 of his 13 November 2020 affidavit, Mr. Browne avers that there was a problem with the Plaintiff's medical report in that *"...the doctor unfortunately referred to the wrong leg, and the report was not suitable for exchange in advance of the planned settlement meeting"*

38. Accepting, for the purposes of this court's decision, that there was no settlement meeting arranged, it is nonetheless clear from the foregoing that (i) the Plaintiff's solicitors, after 23 October 2015, received a medical report in respect of the Plaintiff; (ii) there were errors in it; (iii) as a result of those errors, the Plaintiff's solicitor did not furnish the report to the Defendant's Insurer at that stage; (iv) on 28 October 2015, the Plaintiff's solicitor requested the doctor to correct the errors; (v) this was with a view to engaging with the Defendant's Insurer to settle the Plaintiff's case, in circumstances where (vi) the position of the Insurer was that liability was not disputed and there was a desire on its part to settle the case; and the Insurer was seeking a medical report in that context.

39. In the manner I will presently refer to, it seems that there was a delay on the part of a Dr Zelenski in responding to the Plaintiff's solicitor regarding his request to correct the errors in the report. The chronology of events continues, as follows.

23 November (3:58 p.m.)

40. On 23 November 2015, shortly before 4 p.m., Mr Dunphy again telephoned the Plaintiff's solicitor leaving inter-alia the following message: *"...we insure Aramark and Lerato Tsiu is your client. Just looking for a copy medical and we'll try to get the thing settled...Cheers, see you, bye."* The typed version of that phone call notes the time as 15:58.

41. It is fair to say that there was nothing in the 23 November 2015 message to suggest that the Defendant's previous stance had altered in any way. On the contrary, the Insurer made explicit, on 23 November 2015, that that it was willing to try and *settle* the case (in respect of which liability had been

admitted) and its focus was on trying to get a copy *medical report* (which was of obvious relevance to quantum) with a view to progressing such settlement.

Liability / Settlement

42. As a matter of first principles there is a difference between, firstly, making clear that *liability is not disputed* and, secondly, making it clear that one is *anxious to settle the case* in question and *taking steps to try and secure* a settlement.

43. To put it another way, stating the *first* does not imply or necessarily involve the *second*. These are materially different issues, both of which are within the 'gift' of a relevant Defendant/Insurer and depend on separate decisions being made regarding same.

44. On the facts of the present case, the Defendant's Insurer did not merely make the *first* of these things clear (on 24 August 2015), it went further and was explicit as regards the *second* (as late as 23 November 2015). In terms of the relevant 'time-line', this was a mere 10 days before the expiry of the relevant Statute of Limitations period.

45. Notwithstanding the imminent expiry of the Statute of Limitations period, the Insurers did *not* state, for example, that the Plaintiff's medical report which the Insurer was looking for had to arrive within a specific period failing which it would alter its willingness to try and settle the case.

46. As a general proposition, is hardly controversial to say that it is far better to respond to communication than to leave same unanswered. It also seems clear from the evidence before the Court that it was Mr Dunphy, representing the Defendant's Insurer, who was 'making the running', in that he was the instigator of the communication from 24 August 2015 onwards. It is equally fair to say, however, that – notwithstanding the previous communications from the Defendant's Insurer of 24 August and 23 October – nothing in the 23 November 2015 communication even hinted that (i) the Defendant's Insurer was becoming frustrated with what it perceived as any lack of response or engagement, or (ii) that if there was no response by a particular deadline, the position of the Defendant's Insurer would change in any way.

47. In other words, the Insurer's position was *not* that attempts to settle the Plaintiff's claim were in any way conditional or time-limited (e.g. that the Insurer was only willing to try and settle the claim up to, but no later than, say, the 2-year anniversary of the events giving rise to it, i.e. 4 December 2015). That was *not* said on 23 November 2015, nor was it *ever* said, including in the communication of 24 August and 23 October 2015.

48. It seems clear from the evidence that the Plaintiff's solicitors had not responded to Mr Dunphy's 23 November 2015 communication when the relevant date for the purposes of the Statute of Limitations (3 December 2015) came, and went, as regards the lodgement of the relevant 'Form A'. Equally important to emphasise, however, is that there was no change whatsoever in the Defendant's position as communicated by its Insurer *prior* to, *on*, or immediately *after* 4 December 2015.

The Insurer's attitude to the claim after the expiry of the Statute

49. In response to the question: *What was the Defendant's stance with regard to the Plaintiff's claim as of, say, 5 December 2015 i.e. after the expiry of the Statute of Limitations period?* the answer which emerges from an analysis of the evidence is that it was as follows:

- (i) *liability* was expressly and unambiguously admitted (as it had been since 24 August);
- (ii) furthermore, the Insurer had also made clear mere days earlier (23 November) that it was anxious to *settle* the Plaintiff's claim;

- (iii) in addition to the foregoing, the Insurer wished to get the Plaintiff's *medical report* (having previously made clear its willingness to have her medically examined – such proposal never having been withdrawn);
- (iv) given that liability was not in issue, the medical report which the Insurer wanted, was obviously sought as it spoke to the issue of *quantum*;
- (v) the Insurer's wish to settle the claim and the request for a medical report were not said to be in any way time-limited, or conditional, or made with reference to any deadline;
- (vi) neither the Plaintiff, nor her solicitor, rejected the Insurer's request for a medical report or the request to try and settle the case in the period beginning 23 November (or at any time);
- (vii) the Insurer said nothing between 23 November and 5 December, inclusive, and, thus, its stated position, as of 23 November, remained the *same* as of 5 December (i.e. *after* the Statute of Limitations period expired).

Factual position v. Legal stance

50. The foregoing was *factual* position, as regards the Defendant's attitude to the Plaintiff's claim, in the immediate aftermath of the expiry of the relevant Statute of Limitations period (*per* communication by its Insurer to the office of the Plaintiff's solicitor), irrespective of the *legal* stance subsequently pleaded (in the Defence which was delivered on 18 May 2017).

7 December 2015

51. By letter dated 7 December 2015, the Plaintiff's solicitor wrote to PIAB enclosing, *inter alia*, the relevant 'Application for Assessment' form (i.e. 'Form A') as well as a medical report by Dr. Marek Zelenski. It is not in dispute that the relevant form bears the date 28 October 2015. As to the circumstances in which it was submitted to PIAB, Mr Reilly, solicitor for the Plaintiff, makes the following uncontested averments at para. 7 of his 19 January 2021 affidavit:

"When the form was sent to PIAB on 7th December, I had waited for some six weeks, but received no response from Dr. Zelenski. At that point, and in the absence of a correct report that could ground a settlement meeting, I instructed my assistant to proceed to lodge the application. I did not instruct her to lodge it by any particular date, as I did not believe the accident anniversary to now be an issue of importance."

52. A careful examination of the evidence also allows me to hold that, as a matter of fact, the formal issuing of legal proceedings (or the making of any formal PIAB application) was not an issue which had ever featured up to, or indeed beyond, the expiry of the relevant statute of limitation period, in circumstances where the sole focus of all communication from the Defendant's Insurer, from 24 August 2015 onwards, was directed towards trying to *settle* the Plaintiff's claim, with reference to the medical report sought.

11 December 2015

53. On 11 December 2015, Mr Dunphy of Zurich telephoned the Plaintiff's solicitor and spoke to Mr Reilly, who was to revert to him. This is something Mr Dunphy avers at paragraph 4 (viii) of his affidavit. It is fair to say that there is no suggestion made by Mr Dunphy to the effect that, as of 11 December 2015, the Insurer had altered its stance in any way. This is despite the fact that 11 December 2015 was 7 days *after* the expiry of the relevant date for the lodging of a 'Form A' with PIAB.

8 - 18 December 2015

54. PIAB acknowledged receipt of the Plaintiff's 'Form A', as of 8 December 2015, and did so by means of a letter, dated 18 December 2015. PIAB furnished a formal notice of the Plaintiff's claim to the Defendant.

22 December 2015

55. By email dated 22 December 2015, Mr Dunphy of Zurich wrote to the Plaintiff's solicitor referring to previous correspondence and phone calls of 24 August; 23 October and 23 November. His email went on to state:

"We are now in receipt of your client's application to the Injuries Board which they confirmed was received by them on 8 December. The statute had expired at that stage. I have advised them that we do not require them to assess the claim, because the statute has expired, and it is for the same reason that we will no longer discuss your client's claim with you."

56. On any analysis, it represents a complete *volte face* on the part of the Insurer to refuse, as of 22 December 2015 and thereafter, to discuss the claim any further, given that (i) since August 2015, it had made clear that liability was accepted and, in addition, (ii) the Insurer had actively tried to progress settlement of the claim, doing so in very explicit terms as late as 23 November 2015 and, (iii) as I have remarked, doing so without laying down any pre-conditions or time-limits, the sole focus being on obtaining a medical report, which would obviously be important to the quantum of such settlement.

57. In the manner examined earlier, it is also a matter of fact that even *after* the expiry of the Statute of Limitations period, the Defendant's stance was to acknowledge that liability was not in issue; to confirm it wished to settle the case; and to seek a medical report in that regard. In other words, it was *not* the expiry of the Statute of Limitations period which brought about the complete change in attitude on the part of the Defendant. Had the *volte face* been in response to the passing of the Statute of Limitations period, one would reasonably have expected, firstly, for the Insurer to make it clear in its 23 November 2015 communication that its attitude would change in default of a satisfactory response before December; and, secondly, for this to have been said on 4 December 2015. In fact, it appears that the 'sea change' in the Defendant's stance arose simply because it learned, *via* PIAB, that the 'Form A' had been submitted on 8 December.

58. The immediate response by the Plaintiff's solicitor in an email, also sent on 22 December, was to draw the Insurer's attention to the decision in *Murphy v. Grealish*. To complete the chronology, and as I observed earlier, a Personal Injuries Summons issued on behalf of the Plaintiff on 22 December 2016.

Discussion and Decision

59. Although, during the hearing, the Plaintiff's solicitor was criticised (not unfairly) for not responding to the Defendant's Insurer's various communications, it seems to me equally fair to say that the *fact* of repeated contact from the Defendant's Insurer's (of 24 August; 23 October; 23 November; and 11 December) and the *nature* of that communication (i.e. not only was *liability* not in issue, the Insurer was also keen to *settle* the case and sought a medical report, of obvious relevance to quantum) could, in objective terms, reasonably have given the recipient comfort (indeed repeated and, thus, progressively *more* comfort) that the 'Statute' was not of particular importance in the present case.

60. This was also the subjective belief of the Plaintiff's solicitor. The latter is clear from the averments made by Mr Reilly at para. 7 of his 19 January 2021 affidavit quoted *verbatim* earlier in this judgment. On the issue of his subjective belief, Mr Reilly also averred, with respect to the Insurer's 24 August 2015 communication, that: "*Having received that, I was reassured that no liability issue would be taken, including I assumed, any issue of limitation.*" (See para. 3 of his 19 January 2021 affidavit).

61. In the Supreme Court's decision in *Doran v. Thompson & Sons Ltd* [1978] IR 223, (which was cited at para. [18] of Mr. Justice Geoghegan's decision in *Murphy v. Grealish*) the Court stated *inter alia*:

"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 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 bears that meaning..."

62. In the present case, the Defendant's Insurer made absolutely clear that liability was not in issue. It also went *further*. In the manner examined, the stance adopted by the Insurer immediately prior to and indeed, as of, and beyond, the expiry of the Statute of Limitations period was (i) liability was not in issue; (ii) it was anxious to settle the case and (iii) was seeking a medical report in that regard, and (iv) was doing so without reference to any time-limit or any other conditions. Although there is no evidence of any intention to deceive the Plaintiff, the foregoing was, in my view, to mislead the Plaintiff's solicitor into a justifiable belief that the Statute would not be used to defeat the Plaintiff's claim.

63. Three decades after *Doran*, in the Supreme Court's 2009 decision in *Murphy v. Grealish*, [2009] IR 366, the Plaintiff's case was that the Respondent had admitted liability and that, thereafter, negotiations proceeded. The letter from the Insurer in that case stated *inter-alia*:

"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 in issue"

64. In my view, the material facts in the present case are similar, in that there was (i) an unambiguous statement that liability was not in dispute; (ii) an explicit desire to settle the claim; and (iii) a request for the Plaintiff's medical report with a view to progressing settlement. Indeed, that was the Defendant's attitude (*per* communication by its Insurer to the office of the Plaintiff's solicitor) when the statutory period came and went.

65. The following statement of principle made (at p. 376-377) by Mr Justice Geoghegan in *Murphy v. Grealish* addressed the distinction between *estoppel* and *unconscionability*: -

"The classic legal estoppel involving a clear statement made by one party on which the other party relied does not seem to be relevant here. This case's history involves a combination of conduct which can reasonably be construed as an implied representation combined with a consequence that in all the circumstances it would be unconscionable to resile from the implied representation arising from the conduct".

66. It seems to me that the foregoing statement applies equally in the present case, having regard to the facts as examined earlier. It will be recalled from the passages quoted earlier in this judgment that, having referred to *Ryan v. Connolly* [2001] 1 IR 627 and to the Supreme Court's 1978 decision in *Doran* (wherein three, concurring, albeit not identical, judgments were delivered), Mr Justice Geoghegan stated, at para. [18] in *Murphy v. Grealish*, that:

*"When the judgments 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)

67. He went on to cite from the judgement of Keane C.J. in *Ryan v. Connolly* [2001] 1 IR 627, wherein 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)

68. With regard to the foregoing principles, the evidence in this case undoubtably includes the 'all important' unconditional confirmation by the Defendant that liability is not in issue, but that is not where matters rest. There are undoubtedly *other* facts which demonstrate that, building on the admission of liability, the Defendant, through its Insurer, at all material times, up to and beyond the expiry of the Statute of Limitations period, expressed itself willing to try and settle the case and anxious to obtain a medical report concerning the Plaintiff in an obvious desire to try and achieve such a settlement.

69. At para. 24 of the Supreme Court's decision in *Murphy v. Grealish*, Geoghegan J. stated (at p.375) the following:

*"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 acknowledgements by the Defendant's Insurers that there was in fact no liability issue would be likely to lull the Plaintiff 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)

70. In the present case there was, without doubt, the clearest of acknowledgements by the Defendant's Insurer that liability was not in issue. To decide to contact someone is to act in a certain manner with a particular aim. In the present case, there was repeated contact from the Insurer, which constituted conduct directed at trying to settle the case. The fact and nature of this conduct and communication, as examined earlier in this decision, amounts, in my view, to the type of "added facts" which are necessary to create an estoppel, *per* the principles emerging from *Murphy v. Grealish*. In light of the very particular facts and circumstances in the present case, I take the view that it would be unconscionable to permit the Defendant to rely on the Statute.

Reliance on McFadden v. Neuhold

71. Unlike the case before this Court, there was no admission of liability in *Doran v. Thompson* or in *Ryan v. Connolly*. Nor was liability admitted in the more recent decision of Barton J. in *McFadden v. Neuhold* [2017] IEHC 240, being a decision upon which the Defendant placed considerable reliance. In that case, the relevant Insurer indicated that they were investigating the incident and stated that, should liability not be in issue, the Plaintiff was encouraged to agree a settlement timeframe and costs with the relevant claims manager. Furthermore, although an offer was made, the Plaintiff herself rejected it; no further negotiations were offered; and the Plaintiff's solicitor did not call upon the Insurer to agree a timeframe. Against that foregoing factual background (materially different to the facts in the case before this Court), Mr Justice Barton reviewed the authorities and stated the following (at para. 62 of his judgement): -

"At the outset it is to be observed that in that case [Doran v Thompson] and in Ryan v. Connolly there was no ambiguity in relation to the question of liability; put simply, no admission was made by or on behalf of the Defendants whereas in Murphy v. Grealish the Defendant's Insurer had made a clear and unambiguous admission of liability in writing to the Plaintiff's solicitor. On the other hand, in Yardley v. Boyd, whilst there had been correspondence about it, the Defendant's position in relation to the issue of liability was ambiguous and to that extent the decision is an authority which has a particular relevance to the circumstances of this case."

72. In refusing to find estoppel or unconscionability, having regard to the facts before him, Barton J. stated *inter alia* (at para. 76) that "negotiations had not only become dormant; they had concluded without agreement". The foregoing is starkly different to the facts in the present case. Moreover, the learned judge

(at para 77) described the Defendant's stance on the question of liability as being "at best ambiguous", again, materially different to the facts in the present case. Later, (at para. 83) Barton J. held that "a critical error which occurred here as the limitation expiry date approached was the failure to obtain clarity in relation to liability from Liberty". In the present case, there was no lack of clarity regarding the Insurer's attitude to liability, once more underlining how very different the facts are in the present case. In the penultimate paragraph of his judgement, Barton J. stated the following with respect to the Regional Claims Manager ("RCM") of the Defendant's Insurer in that case:

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

73. In the present case, the 23 November 2015 contact from the Defendant's Insurer to the office of the Plaintiff's solicitor, stating: "**Just looking for a copy medical and we'll try to get the thing settled**" (which communication did not indicate that a response was required by any particular date) was, in fact, to invite a response which *prima facie* was equally welcome (i) prior to, (ii) on, or (iii) after the expiry of the 2-year anniversary of the underlying accident. Thus, it was to induce the Plaintiff to negotiate with a view to reaching a settlement beyond, as well as before, the expiry of the Statute. As well as being starkly different to the factual situation in *McFadden v. Neuhold*, the case before this court involves a particular set of facts which, in my view, set up the estoppel and/or render it unconscionable that the Defendant would rely on the 'Statute'.

74. I also reject the submission made on behalf of the Defendant that the position of the Plaintiff comes within the description at no, (3) of the following extract from Mr Justice Barton's decision in *McFadden v. Neuhold*:

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

In considering an estoppel in the context of a plea of statute bar where there has been no request to withhold the issue of proceedings, a clear and unambiguous admission of liability is singularly important. Absent a clear and unambiguous promise, assurance or representation by words or conduct or a combination of both in the sense as explained from which it was reasonable to infer and from which it was inferred that liability would be admitted on foot of which the Plaintiff has refrained from making an application to the Board or, on receipt of an authorisation, from issuing proceedings or has refrained from issuing proceedings not governed by the PIAB Act, the requirements necessary to constitute an estoppel cannot [be] satisfied.

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

Notwithstanding a clear and unambiguous concession on the issue of liability, it does not follow that it is reasonable for a Plaintiff to defer the making of an application or the issuing of proceedings beyond

the statute; it is not the law that the Plaintiff can ignore the relevant limitation period with impunity. By way of example, where liability has been conceded and the claim is for assessment only, in the absence of negotiations or, where negotiations have taken place but have concluded without agreement or for some other reason negotiations have become dormant, the failure to make an application or institute proceedings may result in a Plaintiff being unable to rely on the principle."

75. On the facts of the present case there was, without doubt, a clear and unambiguous admission of liability which, as Barton J makes clear, at para. (1) "*is singularly important*". On the facts of the present case, it was entirely "*reasonable for [the Plaintiff's] solicitor to expect that an offer of settlement might be made*" (per para. (2) of Barton J's decision). Indeed, matters went much further in the present case, given that the Defendant's Insurer explicitly stated the following, merely 10 days before the expiry of the Statute: "***Just looking for a copy medical and we'll try to get the thing settled.***" For the Insurer to have said the foregoing was to make clear that there would be an offer to settle (the medical report being of obvious importance to *quantum*, given that liability was not in issue).

76. When explicitly referring to settlement, the Insurer did not state or in any way suggest that the medical report had to be furnished and/or that negotiations had to be concluded within the following 10 days. Nor, as I observed earlier, did the Insurer express any frustration whatsoever, on 23 November 2015, about what it perceived to be any lack of response or any lack of progress; and there was no hint in the 23 November 2015 communication that, unless there was a response within a set period (be that of days or weeks), the Insurer's stance would change.

77. Thus, given the Insurer's stance as of 23 November 2015, there was no obligation on the Plaintiff to seek any "*clarity*" as to the position of the Defendant. The Defendant's position was perfectly clear as of 23 November 2015 and it remained clear throughout the period which followed, namely, liability was not dispute, but, more than that, the Defendant's Insurer was keen to settle the claim (which, self-evidently involves the making of a settlement offer, in respect of which a medical report would be of obvious relevance to quantum, and the Insurer was actively seeking such a report).

78. Regarding para. 3 of Barton J's decision (and at the risk of repeating points made elsewhere with regard to the Defendant's purported reliance on para. 19 of *Murphy v Grealish*) the position in the present case is *not* that negotiations had taken place without agreement or had become 'dormant'. On the contrary, the prospect of negotiations was very 'live' indeed and, on the facts, had not taken place due to the absence of a satisfactory medical report. In this regard, the averments at para 5 of Mr Brown's 13 November 2020 affidavit and at paras 5 and 6 of Mr. Reilly's affidavit (quoted earlier in this judgment) are of relevance. Importantly, the Insurer did *not* regard matters as dormant and such was the position prior to and subsequent to the Statute expiring.

79. Counsel for the Defendant also laid particular emphasis on para. 19 of *Murphy v. Grealish*, which, it will be recalled, concerned the analysis by Geoghegan J. of the decisions in *Doran v. Thompson* and *Ryan v. Connolly* and which, for the sake of convenience, I now repeat:-

*"[2] The second factor which emerges from the two cases is the useful correction in this regard made by Keane C.J. and cited by Mr Kelly in his affidavit. 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. It is in that context that Keane C.J. uses the word "necessarily" in the passage cited. Indeed, Keane C.J. develops this with an example. He postulates the case **where an insurance company within days***

of the accident accepts that no issue on liability arises but that for some reason the subsequent negotiations become dormant at p. 633:-

'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.'" (emphasis added)

80. The Defendant contends that the foregoing is precisely what happened in this case. It is submitted that negotiations were *dormant* and that the Defendant's Insurer did *nothing* which could give the Plaintiff's solicitor the impression that proceedings need not be issued (or more particularly, that an application need not be made to the Injuries Board). For the reasons explained in this decision, I disagree.

81. On the facts of the present case, it is not the position that matters were 'dormant' when the Statute expired. As late as 23 November 2015 (being just 10 days prior to the last day for the submission of a 'Form A' to PIAB) the Defendant's Insurer made explicit that it was "**Just looking for a copy medical and we'll try to get the thing settled.**" Plainly, the Defendant's Insurer did not regard the prospect of settling the case as dormant or as having been abandoned by it or by the Plaintiff; and this was so at precisely the point at which the relevant date came and went for the purposes of the Statute of Limitations. Nor had there been any rejection by the Plaintiff of what were clearly very 'live' and active efforts to settle her claim.

82. Furthermore, it is not the case that nothing occurred on the Plaintiff's side after the Defendant's Insurer made explicit on 24 August 2015 that liability was not disputed. The Plaintiff's solicitor did in fact obtain a medical report, shortly after 23 October 2015, but one in which Mr Browne avers that "*the doctor had unfortunately referred to the wrong leg, and the report was not suitable for exchange...*" and Mr Reilly, solicitor, emailed the doctor, on 28 October 2015, asking him to correct the factual errors in his report. Unfortunately, some 6 weeks later, there still had been no response from the doctor. These efforts by the Plaintiff's solicitors to secure a medical report free of inaccuracies were plainly in the context of the knowledge that the Defendant's Insurer was keen to settle the claim and wanted only a medical report to progress matters and the evidence entitles me to hold that the Plaintiff's solicitors relied on that knowledge.

"Sole contact"

83. A principal submission made on behalf of the Defendant is that there was only "*one*" piece of relevant conduct on the part of the Defendant, namely, the 24 August 2015 acknowledgement that liability was not disputed. This and similar submissions were made to the effect that, in the present case, there are no "*added facts*" over and above the 24 August 2015 confirmation that liability was not disputed. Among the submissions made on this issue was that "*The sole contact between the Defendant's representative and the Plaintiff's solicitor was the email of the 24th August 2015*". Regardless of the skill with which these submissions were made, I am required, in light of the facts, to reject them. I do so because they are submissions which ignore the fact that the Defendant did significantly *more* than merely state, on 24 August 2015, that liability was not disputed. In the manner examined, the Defendant's Insurer actively sought the Plaintiff's medical report as well as indicating a willingness to have the Plaintiff medically examined. The Insurer repeatedly contacted the Plaintiff's solicitor without ever making any criticism of the Plaintiff's failure to respond to prior communications and without altering its stance or flagging any intention to do so; and the Insurer made explicit that it was keen to settle the case. Most significantly in my view, the Defendant's Insurer made perfectly clear, on 23 November 2015, (just 10 days prior to the expiry of the relevant Statute of Limitations) that it was willing to try and *settle* the case and sought a *medical report* in that regard.

"Unrequited love"

84. The Defendant's Counsel argued with great skill that the position was akin to "unrequited love", in that the Defendant's solicitor had not responded to the Defendant's Insurer. The gravamen of the submission was that the failure by the Plaintiff's solicitor to respond meant that there could be no estoppel. Although the Plaintiff's solicitor could fairly be criticised for not responding, it does not seem to me that the failure to respond is determinative of the issue before this court. This is because the 24 August 2015 email was plainly *not* the only contact between the Defendant's Insurer and the Plaintiff's solicitor. Further contact was undoubtedly made by the Insurer (i.e. on 23 October; 23 November; and 11 December 2015) and I regard myself as obliged to reject the suggestion that, because no response was made to that contact, this court should ignore the *fact* of and *nature* of the contact made. On the contrary, the nature of the contact seems to me to be highly important, in particular, the Insurer's stance *per* the message left on 23 November 2015 (i.e. it plainly remained anxious to *settle* and invited a *medical report* in that regard, with no conditions or deadlines being suggested). That contact, as well as being later in chronological terms and very close to the expiry of the Statute, also went further than the initial contact of 24 August 2015. In short, the Insurer did not, on the facts of this case, ever regard its 'love' as having become 'unrequited'. It continued with its contact and communication, in what was plainly a very 'live' and no doubt very professional effort to settle the claim.

Theoretical scenarios

85. The outcome to this appeal might well be different if the Defendant's Counsel was correct in the submission that the "*sole contact*" was confined an email sent on 24 August 2015, which, she contended, did no more than state that liability was not disputed. Given the facts which emerge from the analysis of the evidence the foregoing is not an accurate characterisation of what occurred. Furthermore, the factual position would be materially different if, in response to an invitation by an Insurer to forward a medical report and try to settle the case, such a lengthy period of time had elapsed that (i) the Insurer took the view that this protracted silence from the Plaintiff amounted refusal to engage and/or (ii) this was reasonable to infer, having regard to the length of time in question, in the context of the other facts and circumstances in that theoretical scenario.

86. This court is not, however, dealing with theoretical scenarios. Rather, its judgement must flow from the facts. An analysis of the evidence reveals very clearly that, whilst it gave an unambiguous confirmation, on 24 August, that liability was not disputed, this was by no means the limit of what the Defendant said and did, via its Insurer, with a view to trying to settle the case (in particular, the contact of 23 November which imposed no temporal or other conditions on what were ongoing efforts by the Insurer to settle the case).

Efforts to distinguish *Murphy v Grealish*

87. In attempting to distinguish the present position from that which pertained in *Murphy v Grealish*, counsel for the Defendant referred *inter alia* to the fact that, in that case, there had been an omission from the exhibits, of certain correspondence admitting liability. In my view nothing turns on this. Of far more relevance is a fact that, in the present case, just as in *Murphy v. Grealish*, there was an acknowledgement of liability on the part of the Defendant. It bears repeating that, of the various authorities to which this court's attention was directed, *Murphy v. Grealish* is the only one where, just as in the present case, there was an admission of liability.

88. I am equally satisfied that the principles emerging from *Murphy v. Grealish* do not cease to be of relevance to the case before this court merely because certain "*without prejudice*" correspondence was exchanged in that case and "*arrangements were made regarding the sharing of medical reports*". As the evidence before this court demonstrates, there was an 'open' willingness on the Defendant's part to try and

settle the case and the Plaintiff's medical report was sought in that regard. Furthermore, at no stage did either the Defendant or the Plaintiff indicate that it regarded attempts to settle the case as having run their course; or being futile; or having been terminated (whether actively, or as a result of no response having been provided). In other words, matter is remained 'live' insofar as the potential to, and the Insurer's very explicit desire to, try and settle the case before, during, and after the expiry of the relevant Statute of Limitations period.

Reliance on *Creedon v. Depuy International Ltd* [2018] IEHC 790

89. I am also satisfied that the Defendant's reliance on this court's decision (O'Hanlon J.) in *Creedon v. Depuy International Ltd* does not constitute a basis to oppose the relief sought. In that case the Plaintiff received, on 22 May 2007, a right total hip replacement using an articular surface replacement ("ASR") metal-on-metal hip prosthetic manufactured by the relevant Defendant. On 27 June 2007, he received a left total hip replacement using the same prosthetic. The prosthetic in question was found to be defective and, in August 2010, the Defendant conducted a 'worldwide voluntary recall' of the product. In October 2010, the Plaintiff's surgeon alerted the Plaintiff to the defect and the Plaintiff initiated proceedings against the Defendant on 22 November 2010. A personal injuries summons, seeking damages for negligence, breach of duty, breach of statutory duty and breach of the Liability for Defective Products Act 1991 was issued on 3 March 2011.

90. The single issue which came before the Court in *Creedon* was whether or not the Plaintiff's action against the Defendant came within the ambit of s. 3(d) of the 2003 Personal Injuries Assessment Board Act, specifically, whether the Plaintiff ought to have applied to PIAB prior to maintaining a claim for personal injuries against the Defendant, or whether the action was contained within one of the exclusionary categories described in s. 3(d). Thus, the facts and circumstances in *Creedon* were very different to those in the present case and it was in that very different factual context that O'Hanlon J. stated the following (at para. 24) upon which the Defendant in the present case places particular reliance:

"24. Throughout their extensive correspondence between initiating proceedings and furnishing the defence, which the Court has examined thoroughly, the Defendant made no representation, either direct or indirect, on the subject of PIAB authorisation. With no representation whatsoever in the correspondence, it is difficult to see what could reasonably have created the impression that the Defendant would not use the Plaintiff's failure to obtain PIAB authorisation in their defence. While the Plaintiff was perhaps entitled to be under the impression that the Defendant would not raise the issue of PIAB authorisation, the Defendant was equally entitled to remain silent on this during correspondence, as long as it was formally pleaded. In these circumstances, it appears that any assumption the Plaintiff may have arrived at that the Defendant would not use PIAB authorisation as a defence was entirely of the Plaintiff's mind. Where it is unable to find that any type of representation has been made, the Court is unable to find that the Defendant is estopped from pleading PIAB authorisation in its defence."

91. It is clear from the learned judge's decision in *Creedon* that O'Hanlon J regarded herself as unable to depart from the decision in *Murphy v. Depuy International Limited* [2015] IEHC 153 to the effect that authorisation from the PIAB must be sought before an action of the type under consideration was initiated. In *Murphy v. Depuy International Limited*, Faherty J. found that the ordinary meaning of the exclusions under s. 3(d) of the PIAB Act did not encompass a claim in respect of a defective hip implant where the claim did not allege negligence in the provision of a health service by the Defendant, but instead sued the Defendant *qua* manufacturer and supplier. It was in light of that judgement that O'Hanlon J. held that a PIAB authorisation

must be sought prior to the action being initiated. Thus, not only do the facts and circumstances in *Creedon* bear no similarity to those in the present case, the *ratio* of the decision is of no assistance in my view.

92. Furthermore, as the Plaintiff's Counsel pointed out in his replying submissions, in the Court of Appeal's judgment in respect of the appeal against Ms Justice O'Hanlon's decision, Donnelly J. (Collins and Binchy JJ. concurring) concluded that "...the intention of the Oireachtas in providing exclusions within s. 3(d) of the PIAB Act from the general requirement to obtain a PIAB authorisation is that the Plaintiff's action for personal injuries against a Defendant manufacturer in respect of an allegedly defective hip implant that he received during surgery does not require such a PIAB authorisation" and the appeal was allowed.

Conclusion

93. Guided by the principles set out by Geoghegan J. in *Murphy v. Grealish*, it seems to me that, in *objective* terms, the conduct and communication by the Defendant's Insurer could reasonably be said to have lulled the Plaintiff / Plaintiff's solicitor into a sense of security that issuing proceedings within the statutory time-limit was not of importance in the specific case. There is also clear evidence that it was the *subjective* belief of the Plaintiff's solicitor that there was no Statute of Limitations issue and that he did not believe that issuing an application by the relevant anniversary was an issue of importance. For the reasons set out in this judgment, I am satisfied that the actions of the Defendant, *via* its Insurer, were such as to estopp the Defendant from relying on the plea that the Plaintiff's claim is 'statute barred' and it would be unconscionable to permit reliance on the Statute, in the particular facts and circumstances of this case.

94. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically:
"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

95. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. My preliminary view is that there are no facts or circumstances which would justify a departure from the 'normal' rule that 'costs' should 'follow the event', the 'event' being the success by the Plaintiff/Appellant. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days.