IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2022/CLE/gen/00618

B E T W E E N:

PATRICE R. MOXEY

Plaintiff

AND

BAHAMAS FIRST GENERAL INSURANCE COMPANY LIMITED

Defendant

Before: **The Honorable Madam Justice Carla Card-Stubbs**

Appearances: Paula Adderley of Counsel for the Plaintiff
Nadia Wright of Counsel for the Defendant

Application to strike out statement of claim — Defendant pleading Limitation Act – Whether Statement of Claim is pleading in tort for personal injury or for breach of agreement – Whether Plaintiff's Claim statute-barred - Whether Defendant estopped from pleading limitation defence

The suit concerns a traffic accident that took place on April 29, 2002, some 20 years before the filing of the writ. The Defendant pleaded that the Plaintiff's action is statute-barred and contravenes section 9 of the Limitation Act, Chapter 83 of the Statute laws of the Bahamas.

HELD: The claim, as pleaded, is for breach of an alleged agreement. There is no allegation of a tort. Damages sought are not damages for personal injury resulting from a tort. Damages sought is said to be what was promised under the agreement. The claim is for equitable remedies. The filed claim is not subject to sections 5 or 9 of the Limitation Act.

Given the nature of the allegations contained in the Statement of Claim, that is, a claim that could invoke the doctrine of promissory estoppel if proven, then the action is not one that ought to be struck out on the grounds that it is statute-barred. Whether the claim is statute-barred is a live issue.

The Defendant's application is dismissed.

RULING

Card-Stubbs J:

INTRODUCTION

[1.] This is the Defendant's application to strike out the action pursuant to Order 18 Rule 19 of the Rules of the Supreme Court "RSC".

[2.] For the reasons set out below, the application is dismissed.

BACKGROUND

The Application

[3.] The Defendant makes its application by summons filed September 23, 2022. The application is for an Order that the action be struck out and the proceedings dismissed pursuant to:

(i) The relevant provisions of the Limitation Act, Ch. 83 of the Statue Laws of The Bahamas;
(ii) Order 18 Rule 19 (1)(a), (b),(c),(d) of Rules of The Supreme Court and
(iii) Under the inherent jurisdiction of The Supreme Court

The Application is made on "the ground that the Plaintiff's action outlined in the Specially Endorsed Writ of Summons filed herein on the 22nd of April A.D. 2022 is statute barred and is therefore frivolous and vexatious and an abuse of the process of the Court, hence it discloses no reasonable cause of action. "

[4.] The Application also seeks an Order that the Plaintiff pays the Defendant's costs of the application and of the proceedings.

[5.] The Application is supported by the Affidavit of Patrick G Ward sworn and filed on February 9, 2023.

The Action

[6.] The Plaintiff filed a Specially Endorsed Writ of Summons ("the writ") on April 22, 2022. The suit concerns a traffic accident that took place on April 29, 2002, some 20 years before the filing of the writ. The Plaintiff is a former employee of the Defendant. The Plaintiff alleges that she was "T-boned "by an insured driver of the Defendant, resulting in damage to her vehicle and person.

[7.] The Defendant is described in the writ as a registered company under the laws of the said Commonwealth and licensed under the Insurance Act doing business as an insurance company.

[8.] In June 2002, the Defendant compensated the Plaintiff for the damage to the vehicle.

[9.] The Plaintiff alleges that she made the Defendant aware of the personal injuries sustained and that "by way of oral conversations between the Plaintiff and several executives of the Defendant from time to time, in consideration of the Plaintiff agreeing to withhold the commencement of proceedings to enforce her claim against the Insured for damages for personal injuries and loss and expense suffered as a result of the said accident, the Defendant agreed to pay the Plaintiff's claim for damages for the said personal injuries and loss and expense suffered whether or not she commenced such proceedings."

[10.] The Plaintiff alleges that "since about 2019 attorneys for the Plaintiff and the Defendant have engaged in negotiations for the purpose of agreeing the amount to compensate the Plaintiff for damages for personal injuries and loss and expense suffered, but the parties have failed to arrive at an agreement."

[11.] The suit is for the enforcement of the agreement and for damages.

[12.] The Defendant filed a Conditional Notice of Appearance on the 9 May 2022 and an application to set aside the Specially Endorsed Writ of Summons pursuant to Order 12 Rule 7(1).

[13.] Considering the jurisdiction to set aside a writ under Order 12, RSC, the learned Registrar found, inter alia, that there was no evidence of irregularity of issuance or service of the writ filed. The Defendant's application was dismissed by the learned Registrar who also ordered that the conditional notice of appearance stand as unconditional.

[14.] The Defendant filed its Defence on August 29, 2022. Paragraph 1 of the Defence states:

> "This Defence is pleaded on behalf of the Defendant without prejudice to the Defendant's contention that the Plaintiff's action is statute barred and contravenes the relevant provisions of the Limitation Act, Chapter 83 of the Statute laws of the Bahamas. The Defendant also pleads that the Plaintiff's Statement of Claim is an abuse of the process of the Court. For the aforementioned reasons the Statement of Claim should be struck out in respect of the allegations and/or claims made against the Defendant."

[15.] By paragraph 8 of the Defence, the Defendant denies that there was an agreement as alleged or at all "as there was no agreement, implied or express, orally or in writing between the parties as set out and alleged". The Defence puts the Plaintiff "to strict proof of the existence of the agreement as alleged by the Plaintiff".

[16.] On September 23, 2022, the Defendant mounted another application to strike out the action, this time under Order 18 Rule 19 RSC and the inherent jurisdiction of the court.

ISSUE

[17.] The issue before me is whether the Court should exercise its discretion under Order 18 rule19 (1) (a) (b) (c) and (d) RSC to strike out the Defendant's action on the

ground that it is statute-barred and is therefore frivolous and vexatious and is an abuse of process, disclosing no reasonable cause of action.

SUBMISSIONS OF THE PARTIES

Defendant's submissions

[18.] At the outset, I thank Counsel for the Defendant for the helpful research material relied on, and provided to the court, in the conduct of this matter.

[19.] The Defendant relies on the case of **Amber Anderson-Thomas v. Deepak Bhatnagar and The Airport Authority** [2018] 2 BHS J No. 8 for the principle that where a defendant pleads a Defence under the Limitation Act, the issue of limitation may be tried preliminarily or on a strike-out application on the ground that the claim is frivolous, vexatious and an abuse of the process of the Court.

[20.] The Defendant submits that by virtue of Section 9 of the Limitation Act, there is a 3 year limitation period for bringing legal action for damages for personal injury matters and that the Plaintiff's action should have been filed no later than April 29, 2005. The Defendant points out that the Plaintiff's action was filed on April 22, 2022 which is 20 years since the accident occurred and 17 years outside of the statute of limitation.

[21.] The Defendant further argues that the Statement of Claim is deficient as it concerns the alleged agreement relied on by the Plaintiff. The argument is that the pleading is ambiguous and is not sufficiently particularized as required by Order 18 Rule 12 RSC. The Defendant argues that if the Plaintiff is relying on such an agreement, then it must be a clear and unambiguous agreement that ought that to be particularized per **Desmond Ryan, Plaintiff v. Michael Connolly and Anne Marie Connolly, Defendants [S.C. No. 64 of 2000]** which cited the case of **Doran v. Thompson Ltd. [1978] I.R. 223.**

[22.] The Defendant also submits that the pre-action negotiation and any compromise arrived at between parties in litigation is deemed privileged and that, therefore, the plaintiff in this case is unable to rely on pre-action without prejudice communications per **Belt v. Basildon and Thurrock NHS Trust** [2004] All ER.

[23.] The Defendant invokes the relevant rules as well as the Court's inherent jurisdiction to strike out the specially endorsed writ.

Plaintiff's submissions

[24.] The Plaintiff submits that by its application, the Defendant is seeking to re-litigate an issue previously considered by this Court and that the application ought to be dismissed because it is an abuse of process of the Court. The Plaintiff submits that the Defendant previously sought to set aside the Plaintiff's Writ of Summons pursuant to Order 12 Rule 7(1) on the ground that the Plaintiff's action was "statute barred." That application was heard and dismissed by the Registrar. The Defendant did not

appeal the Registrar's Ruling. The Plainitff relies on **Arnold v National Westminster Bank plc [1991] 2 AC 93**

[25.] The Plaintiff also submits that the strike out process ought only be used in 'plain and obvious' cases. The Plaintiff submits that the circumstances of the current case are not 'plain and obvious.' The Plaintiff submits that there are disputed facts and issues between the parties which would require a detailed analysis of disputed facts and issues. The Plaintiff cites the cases of Wenlock **v Moloney [1965] 2 All ER 871** and **Western Broadcasting Services v Seaga [2007] UKPC 19** in support of these submissions.

[26.] The Plaintiff argues that the Plaintiff's claim is "neither a tortious claim nor a personal injury claim." The Plaintiff argues that the claim "is for declaratory relief and specific performance of an agreement" and therefore not subject to section 9 of the Limitation Act. The Plaintiff submits that there is no limitation period where a claim is made in proceedings for equitable relief. Relying on **In re Diplock v Wintle [1948] 1 Ch. 465,** the Plaintiff also argues that "section 5(4) of the Limitation Act provides that the time limit founded on simple contract does not apply to any claim for specific performance of a contract or an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy".

[27.] The Plaintiff also submits that "in so far as the Plaintiff has pleaded that the Defendant has failed to fulfill its obligations under an agreement, the Plaintiff is alleging a continuing breach by the Defendant of the agreement" and therefore the referenced provisions of the Limitation Act do not apply.

LAW AND DISCUSSION

The jurisdiction to strike out

[28.] **Order 18 RSC** deals with pleadings and rule 19 provides for the striking out of pleadings and indorsements. **Rule 19(1) (a)-(d)** of the **RSC** provides:

> 19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an

application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

[29.] A court is empowered to strike out any pleading or indorsement on the grounds set out in Rule 19(1) (a)-(d), RSC. Where the application is made on the ground that the pleading or indorsement "discloses no reasonable cause of action", no evidence is admissible in relation to same. The ground ought to be made out from a perusal of the pleadings or indorsement.

Whether the Action is statute-barred?

[30.] The main prong of the Defendant's argument concerns the submission that the action is "woefully statute-barred".

[31.] With a few exceptions, it is the law that while the Limitation Act does not extinguish a claim, it serves to extinguish a remedy. It is also a general principle of law that filing a claim that is statute-barred is an abuse of process. This is particularly so if the cause of action could have been included in an earlier action or where the pursuit of the action can cause procedural unfairness.

[32.] Relying on section 9 of the Limitation Act, the Defendant argues that the Plaintiff's action is statute-barred. The Plaintiff's response is two-fold. The Plaintiff answers that that matter was already determined by the Registrar and that the Defendant is estopped from raising it again. Secondly, the Plaintiff submits that its claim is not subject to section 9 of the Limitation Act, being a claim "for declaratory relief and specific performance of an agreement".

Issue estoppel

[33.] The Plaintiff's first response can be concisely addressed.

[34.] The Plaintiff argues that the Defendant's application should be dismissed as an application to strike out this action had already been adjudicated and determined by the Registrar. The Plaintiff further argues that to re-litigate this issue would be an abuse of the court's process and that the Defendant is estopped from raising the same issue.

[35.] The Plaintiff in support of this argument relied on the case of **Arnold v National Westminster Bank plc [1991] 2 AC 93, 105** per **Lord Keith of Kinkel:**

> **"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. This form of estoppel seems first to have appeared in *Duchess of Kingston Case* (1776) 20 St. Tr. 355. A later instance is *Reg. v.***

Inhabitants of the Township of Hartington Middle Quarter **(1855) 4 E. & B. 780. The name "issue estoppel" was first attributed to it by Higgins J. in the High Court of Australia in *Hoysted v. Federal Commissioner of Taxation* (1921) 29 C.L.R.537, 561. It was adopted by Diplock L.J. in *Thoday v. Thoday* [1964] P. 181. Having described cause of action estoppel as one form of estoppel per rem judicatam, he said, at p. 198:**

'The second species, which I will call 'issue estoppel' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.'

"Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier."

[36.] I accept that the principle as to Issue Estoppel is as outlined in **Arnold v National Westminster Bank plc.** However, I do not find that that case is applicable here.

[37.] The first application by the Defendant was made pursuant to Order 12, rule 7 RSC which provides:

> 12. (7) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within fourteen days after entering the appearance, apply to the Court for an order setting side the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction.
>
> (2) An application under this rule must be made by summons.

[38.] The learned Registrar in dismissing the application, wrote:

> 10. The Plaintiff submitted that the Court cannot rely upon the O.12 r.7 RSC to grant the Order sought by the Defendant as the Rule pertains to the setting aside the issuance of a Writ or service thereof on the basis of some

> procedural anomaly or irregularity with reference to the issuance or service of the said Writ.
>
> 11. The issue which the Court must consider is whether the ground relied upon by the Defendant falls within the ambit of O.12.r.7 RSC…
>
> 13. The court finds the Butler Affidavit does not disclose any facts in relation to irregularity of the issuance or service of the Writ filed herein. Having regard to the Defendant's submissions that the Plaintiff's claim is "*woefully statute-barred"* requires the production of evidence which this Court cannot determine at this interlocutory stage.

[39.] It is clear from the decision that there was no consideration of the issue, nor was there any need. The Defendant had proceeded under the provision of the rules and the learned Registrar found that the Defendant had not made out the ground contemplated in those rules, namely an irregularity in the issuance or service of the Writ.

[40.] I do note that the learned Registrar also opined:

> 12. …The issue of the expiration of the limitation period and whether there was an agreement between the parties are factual questions which should be determined at trial.

[41.] It is unclear, given the determination of the Registrar, as to whether such a finding was a part of the ratio of the decision. In that regard, I merely note that this court is not bound by any finding or ruling made by the Registrar.

[42.] In this case, I find that there is no "re-litigation" of the issue of whether the action was statute-barred since that issue was never properly considered by the Registrar nor did the Registrar entertain an application pursuant to Order 18 RSC.

The Limitation Act

[43.] A Defendant who wishes to raise the Limitation Act as a defence must plead same. In **Amber Anderson-Thomas v. Deepak Bhatnagar and The Airport Authority** [2018] 2 BHS J No. 8, a case relied upon the Defendant, Justice Charles, as she then was, cited with approval the statement of law as set out in **Ronex Properties Ltd v John Laing Construction Ltd** [1893] Q.B. 398. At paragraphs 64 – 65 of **Amber Anderson-Thomas v. Deepak Bhatnagar and The Airport Authority,** Justice Charles opined:

> [64] The law is that where a defendant pleads a defence under the Limitation Act he can either seek trial of a preliminary issue or in a very clear case, apply to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the Court: **Ronex Properties Ltd v John Laing Construction Ltd** [1893] Q.B. 398, per Donaldson, L.J.
>
> [65] The learned authors of **The Supreme Court Practice 1999** stated at 18/19/11:

> **"Where it appeared from the statement of claim that the cause of action arose outside the statutory period of limitation, it was held that the statement of claim would not be struck out unless the case was one to which the Real Property Limitation Acts applied (see *Price v Phillips [1894] W.N. 213).* However, if the defendant does plead a defence under the Limitation Act, he can seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the Court (see, *per* Donaldson L.J. in *Ronex Properties Ltd v John Laing Construction Ltd* [1983] Q.B. 398). Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the Court (*Riches v Director of Public Prosecutions* [1973] W.L.R. 1019; [1973] 2 All ER 935, CA, as explained in *Ronex Properties Ltd v John Laing Construction Ltd*, above)."**

[44.] In the present case, the Defendant by paragraph 1 of its Defence filed on August 29, 2022, pleaded:

> 1. This Defence is pleading on behalf of the Defendant without prejudice to the Defendant's contention that the Plaintiff's action is statute barred and contravenes the relevant provisions of the Limitation Act, Chapter 83 of the Statue Laws of The Bahamas. The Defendant also pleads that the Plaintiff's Statement of Claim is an abuse of the process of the Court. For the aforementioned reasons the Statement of Claim should be struck out in respect of the Allegations and/or claims made against the Defendant.

[45.] The Defendant in this case is therefore entitled to make the current application under consideration. This court must therefore consider whether "the statement of claim discloses that the cause of action arose outside the current period of limitation".

[46.] Section 9 of the Limitation Act, which the Defendant relies on, governs time limits in actions for damages in respect of personal injuries. The **Limitation Act s. 9** provides**: -**

> **9.** (1) Subject to subsection (6), this section shall apply to ***any action for damages for negligence, nuisance or breach of duty*** (whether the duty exists by virtue of a contract or of provision made by any written law or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty ***consist of or include damages in respect of personal injuries to the plaintiff or any other person.***
>
> (2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of three years from —
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date (if later) of the plaintiff's knowledge.

(3) If the person injured dies before the expiry of the period prescribed by subsection (2), the period as regards the cause of action surviving for the benefit of the estate of the deceased shall be three years from —

(a) the date of death; or

(b) the date of the personal representative's knowledge,

whichever is the later.

(4) For the purposes of this section, "personal representative" includes any person who is or has been a personal representative of the deceased and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(5) If there is more than one personal representative and their dates of knowledge are different, subsection (3) shall be read as referring to the earliest of those dates.

(6) This section shall not apply to an action to which section 12 applies or to an action under the Fatal Accidents Act.

[Emphasis added]

[47.] By response, the Plaintiff submits that the action is not one in tort for personal injury. The Plaintiff also submits, for good measure, that neither does Section 5 of the Limitation Act apply in this instance. Section 5 governs time limits in actions of contract and tort and "certain other actions". The **Limitation Act s. 5** provides**: -**

5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say —

(a) actions founded on simple contract (including quasi contract) or on tort;

(b) actions to enforce the award of an arbitrator where the submission is not by an instrument under seal;

(c) actions to recover any sum recoverable by virtue of any written law;

(d) actions to enforce a recognisance.

(2) An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(3) An action shall not be brought upon any judgment after the expiry of six years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiry of six years from the date on which the interest became due.

(4) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may

> be applied by the court by analogy in like manner as the corresponding written law repealed by this Act has heretofore been applied.
> (5) This section shall not apply to any action to which section 9 or 12 applies or to an action under the Fatal Accidents Act.

[48.] The question therefore is what is the nature of the Plaintiff's claim? Is it caught by either section?

[49.] The Plaintiff submits that the claim is not for personal injury but for breach of a contract/agreement.

[50.] The Claim is discernible from paragraphs 7 to 10 of the indorsement on the Statement of Claim as well as from the relief sought. An examination of the Plaintiff's claim reveals:

> 7. Thereafter, by way of oral conversations between the Plaintiff and several executives of the Defendant from time to time, in consideration of the Plaintiff agreeing to withhold the commencement of proceedings to enforce her claim against the Insured for damages for personal injuries and loss and expense suffered as a result of the said accident, the Defendant agreed to pay the Plaintiff's claim for damages for the said personal injuries and loss and expense suffered whether or not she commenced such proceedings.
> 8. The Plaintiff accordingly did not commence proceedings to enforce her claim against the Insured to cover damages in respect of the said personal injuries and loss and expense.
> 9. From the date of the said accident to the present, the Plaintiff has received medical treatment for the injuries suffered by her as a result of the said accident. Up until 2019 the Defendant has made various payments for multiple medical treatments by multiple providers related to the said injuries suffered.
> 10. Since about 2019 attorneys for the Plaintiff and Defendant have engaged in negotiations for the purpose of agreeing the amount to compensate the Plaintiff for damages for personal injuries and loss and expense suffered, but the parties have failed to arrive to an agreement.
> AND THE PLAINTIFF CLAIMS:
> (1) A Declaration that an agreement between the Defendant and the Plaintiff for the Defendant to pay the Plaintiff damages in respect of the personal injuries and loss and expense suffered by her as a result of the said April 20.2002 accident is binding upon the Defendant.
> (2) An Order for specific performance by the Defendant of the said agreement.
> (3) Damages in addition to or in lieu of specific performance.
> (4) Interest on the said Damages pursuant to the Civil Procedure (Award of Interest) Act, 1992.
> (5) Such further or other relief as the Court deems just.
> (6) Costs.

[51.] It seems inescapable that the claim, as pleaded, is for breach of an alleged agreement. The allegation is that there is "an agreement between the Defendant and the Plaintiff for the Defendant to pay the Plaintiff damages in respect of the personal injuries and loss and expense suffered by her as a result of the said April 20, 2002 accident" and it is that agreement which the Plaintiff wishes to enforce.

[52.] There is no allegation of a tort. The action is not against, as the Plaintiff submitted, the driver. Nor is it against an agent of the driver or based on a breach of duty of the other driver involved in the April 2002 accident. Damages sought is not damages for personal injury resulting from a tort. Damages sought is said to be what was promised under the agreement which amounts to damages for personal injury as alleged to have been promised. While it is clear that the circumstances that gave rise to the suit arose from the accident that occurred in April 2002, the claim is not against a tortfeasor or his agent. On inspection, the claim is in relation to an alleged agreement that is said to have arisen out of communication subsequent to the accident.

[53.] I therefore find that the current action does not constitute a suit in personal injury. It is not an action "for damages for negligence, nuisance or breach of duty …..[including] damages in respect of personal injuries" to the plaintiff or any other person which is captured under section 9 of the Limitation Act.

[54.] It is also apparent that the Plaintiff's claim is for equitable remedies.

[55.] Section 5 provides for a limitation period of 6 years for actions founded, inter alia, on simple contract. Subsection (4) provides for an exemption to a claim for specific performance of a contract:

> 5(4) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as the corresponding written law repealed by this Act has heretofore been applied.

[56.] As already seen by reference to the remedies sought, the Plaintiff's claim is for a declaration and for specific performance. To my mind this case falls within the exemption provided for in Section 5(4). This Claim is therefore not subject to the limitation period in setion 5.

Sufficiency of the particularization of the Plaintiff's claim

[57.] I will now deal with the question of any time bar on the Plaintiff's claim given the nature of the allegation and whether the agreement alleged is sufficiently particularized.

[58.] The nature of the Plaintiff's claim, as alleged, is that she had "oral conversations" with "several executives of the Defendant from time to time," and that the Defendant "agreed to pay the Plaintiff's claim" "in consideration of the Plaintiff agreeing to withhold the commencement of proceedings to enforce her claim against the Insured for damages for personal injuries and loss and expense suffered as a result of the said accident…". That is the allegation in paragraph 7 of the Statement of Claim.

Paragraph 9 alleges that "up until 2019 the Defendant has made various payments" and Paragraph 10 alleges that the parties have engaged in negotiations for the purpose of agreeing an amount but that an amount has not been agreed.

[59.] In essence, the claim of the Plaintiff is that she did not pursue legal proceedings as a result of the agreement made which included an "agreement" on her part "to withhold the commencement of proceedings" in return for the Defendant's "agreement" to pay her.

[60.] The Plaintiff submits that there is no limitation period where a claim is made in proceedings for equitable relief and further, that the Plaintiff is alleging a continuing breach by the Defendant of the agreement. The Plaintiff relies on **In re Diplock v Wintle [1948] 1 Ch. 465.**

[61.] The Defendant submits that the pleading is "ambiguous and not sufficiently particularized" for the Plaintiff to be allowed to rely on same to estop the Defendant from pleading the Limitation Act or to seek to have the action struck out on the basis that the action is statute-barred. The Defendant helpfully provided the case of **Desmond Ryan, Plaintiff v. Michael Connolly and Anne Marie Connolly, Defendants [S.C. No. 64 of 2000]** which cited the case of **Doran v. Thompson Ltd. [1978] I.R. 223.**

[62.] In **Doran v Thompson Ltd.,** the Defendant pleaded that the Plaintiff's claim was statute-barred. The Plaintiff submitted that the Defendant was estopped form pleading the statute as a result of the acts and representations of its insurers. The Court of Appeal found, on the facts, that the failure to sue in time was not induced by any representations made by the Defendant or its insurers, and reversed the decision of the High Court judge that held that the defendant was estopped from pleading the statute. However, by the judgment of Kenny J at page 237, the Court of Appeal confirmed the principle of law as it relates to estoppel in this area:

> Both parties accepted as being correct the statement of the law on promissory estoppel at page 563 of the 27th edition (1973) of Snell's Principles of Equity which has the authority of having been edited by Mr. Justice McGarry (now the Vice-Chanellor) and Professor Baker. It reads:-
>
> > "Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it."

[63.] In **Desmond Ryan, Plaintiff v. Michael Connolly and Anne Marie Connolly, Defendants [S.C. No. 64 of 2000],** the Irish Appellate Court cited **Doran v Thompson Ltd.**, with approval. Keane CJ opined at pages 632-633:

> "That brings me to the second issue. In *Doran v. Thompson Ltd.* [1978] LR. 223, a decision of this court, Griffin J. said at p. 230:
>
> > "Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or

> assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance. The representation, promise or assurance must be clear and unambiguous to found such an estoppel: see Bowen L.J. at p. 106 of the report of *Low v. Bouverie* [1891) 3 Ch. 82."

Applying that general principle to the category of cases in which a defendant may be held to be precluded from relying on a defence otherwise available to him under the Statute of Limitations, the learned judge added:-

> "lf the defendants' insurers had made a clear and unambiguous representation (in the sense I have explained) that liability was not to be in issue, and the plaintiff's solicitor had withheld the issue of proceedings as a result, I would have held that the defendants were estopped from pleading the Statute of Limitations."

In an earlier passage at p. 230, Griffin J had pointed out that, for the principle laid down in Low v. Bouverie [1891) 3 Ch. 82, to apply, it was not necessary that the representation should be one "positively incapable of more than one possible interpretation". A party seeking to rely on the principle cannot, in other words, rely on a strained or fanciful interpretation of the words used, he must show that it was reasonable in the circumstances for him to construe the words used by the other party in a sense which would render it inequitable for that party to rely on the defence under the Statute of Limitations.

I would make one further comment on the statement of the law in *Doran v. Thompson* [1978] LR. 223. 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."

[64.] It seems to me therefore that it is the law that in a case where an agreement is arrived at where one party induces and causes the other party to act to his detriment in compromising a legal right on the basis of a promise made, then if the party making the promise reneges on it, the other party that acted to his detriment may approach the court in equity for a remedy that would cause the other party to carry out the promise made. In circumstances as alleged in this case, where such an agreement is admitted or established or proven, equity will estop the party who induced the other to refrain from commencing proceedings, from subsequently relying on a statutory bar to commencing proceedings as a ground to defeat a claim and a remedy.

[65.] The Defendant submits that the Plaintiff's pleading refers to pre-action negotiations that are privileged and cannot be relied on. Counsel relied on the case of **Belt v Basildon and Thurrock NHS Trust [2004] AER** for this proposition. Only a digest of this case appears to be available. In that case, the claimant alleged in her pleadings that the parties had compromised liability in correspondence and thereby obtained summary judgment. That judgment was set aside on appeal on the ground that the correspondence constituted offers to settle, and not admissions of liability. The claimant then appealed and the appeal was dismissed. Cox J found that the letters were merely offers to settle, and not admissions of liability and that, in any event, they formed part of compromise negotiations and were privileged.

[66.] In **Belt v Basildon and Thurrock**, the court reviewed the documents and the learned judge found that given the context of the letters, they were indeed privileged even though not headed “without prejudice”.

[67.] It seems to me that given the nature of the Plaintiff’s pleadings in this case, a court ought to, and is entitled to, review documents exchanged or hear evidence of “oral conversations” to determine the nature of the communication and whether privilege attaches.

[68.] The rationale for this position is well set out in the judgment of Keane CJ in **Desmond Ryan, Plaintiff v. Michael Connolly and Anne Marie Connolly,** at pages 631-632:

> Two issues arose in the High Court and again in this court. The first was as to whether, given that virtually all the letters emanating from the insurance company on which the plaintiff rely were headed "without prejudice", this correspondence was privileged and could not be taken into account by the court. The second was as to whether, assuming the court was entitled to have regard to the correspondence, the circumstances were such as to preclude the defendants from maintaining the plea under the Statute.
>
> As to the first issue, the law is thus stated in Halsbury's Laws of England (4th ed., vol. 17, para. 212):-
>
> "Letters written and oral communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute and which are expressed or otherwise proved to have been made 'without prejudice' cannot generally be admitted in evidence.”
>
> It is clear that this rule has evolved because it is in the public interest that parties should be encouraged, so far as possible, to settle their disputes without resort to litigation. If parties were in the position that anything they said or wrote in the course of negotiations, even when expressly stated to be "without prejudice" could subsequently be used against them, they would undoubtedly be seriously inhibited in pursuing such negotiations. That is how the rule was explained in *Cutts v. Head* [1984] 1 Ch. 290, and it is clear from that and other authorities that the presence of the heading "without prejudice" does not automatically render the document privileged. In any case where the privilege is claimed but challenged, the court is entitled to look at the document in order to determine whether it is of such a nature as to attract privilege.
>
> The rule, however, although firmly based on considerations of public policy, should not be applied in so inflexible a manner as to produce injustice. *Thus, where a party invites the court to look at "without prejudice" correspondence, not for the purpose of holding his opponent to admissions made in the course of negotiations, but simply in order to demonstrate why a particular course had been taken, the public policy considerations may not be relevant. It would be unthinkable that the attachment of the "without prejudice" label to a letter which expressly and unequivocally stated that no point under the Statute of Limitations*

would be taken if the initiation of proceedings was deferred pending negotiations, would oblige a court to decide, if the issue arose, that no action of the defendant had induced the plaintiff to refrain from issuing proceedings.

It follows that, in a case such as the present, the court is entitled to look at the "without prejudice" correspondence for the purpose of determining whether the circumstances were such that the defendants should not be allowed to maintain their plea under the Statute of Limitations.

[Emphasis supplied]

[69.] I adopt the statements of law as set out in the judgment of Keane CJ in **Desmond Ryan, Plaintiff v. Michael Connolly and Anne Marie Connolly.** It seems to me that it will become a matter of evidence as to whether communications relied on by the Plaintiff are to be deemed privileged and whether the alleged agreement existed and whether the communication formed "a clear and unambiguous promise or assurance which was intended to affect the legal relations between [the parties] and to be acted on accordingly…."

[70.] It is my determination that it is only then, on an assessment of the evidence, can there be a determination of the question of whether there is a time bar and, if so, whether the Defendant is estopped from raising that as a defence.

Lack of Particulars

[71.] The Defendant has complained that the pleadings are not sufficiently particularized. Counsel for the Plaintiff responds that the allegation of the agreement is discernible, if somewhat "convoluted".

[72.] Order 18, Rule 12 provides:

> (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention of other condition of mind except knowledge, particulars of the facts on which the party relies.
>
> (2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed 3 folios, they must be set out in a separate document referred to in the pleading and the pleading must state whether the document has already been served and, if so, when, or is to be served with the pleading.

(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party —

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(6) Where the applicant for an order under this rule did not apply by letter for the particulars he requires, the Court may refuse to make the order unless of opinion that there were sufficient reasons for an application by letter not having been made.

[73.] The purpose behind the rule is to ensure that a party, in this case the Defendant, knows the case being alleged against it and what it will have to meet at trial. It is unfair to have a party respond to allegations in a pleading which lacks material particulars – particulars that must be disclosed if either party is to prevail at trial. A party ought not to be taken by surprise at the trial.

[74.] The failure to supply particulars is not necessarily fatal. A party may request of another, the supply of further and better particulars or of additional information. Alternatively, a party may seek the aid of the court by way of a court order for further and better particulars.

[75.] The question in this case is whether the pleading is so bad that it is incurable.

[76.] I note that missing from the Statement of Claim is any detail as to who the alleged oral conversations were had with or when these conversations were had. These are material particulars that the Plaintiff would have to prove to succeed at trial.

[77.] The Defendant's affiant, Patrick Ward, the Group President and Chief Executive Officer of the Defendant Company, avers that the Plaintiff had been a Claims Manager with the Defendant Company. He also avers at paragraph 7:

> 7. That at no time was a promise or assurance made by the Defendant, its servants or agents on its behalf in writing, verbally or otherwise to the Plaintiff, by me or any other senior member of management with the view to prevent the Plaintiff from exercising her legal right to commence legal proceedings. Nor was there any threat, implied or express, made to the Plaintiff, by me or any member of my senior

management team which would create apprehension in the Plaintiff from pursuing her constitutional and legal rights. The Plaintiff by virtue of her position knew all too well that she ought to have preserved her rights under the law by filing at the very minimum, a Generally Indorsed Writ of Summons which would stop the 3-year Limitation period from expiring. Furthermore, I am advised and verily believe that at common law a Plaintiff cannot attempt to assert that a Defendant's conduct in settling any part of a claim for damages arising from a road traffic accident operates as a waiver of its right to rely on the Statutory Defence of Limitation; nor does there exist a discretionary power of the Court to enlarge a limitation period except in those instances established by statute. I am advised and verily believe that this is not a proper case where an exception to the rule could be invoked.

[78.] As is apparent from the Defendant's affidavit with a wide-sweeping denial of an assurance or promise made, a broad wide-ranging response, rather than a specific focused response has been put to what is a "convoluted" allegation of an agreement. Particulars tend to clarify a party's case and in so doing narrow the issues between the parties. That in turn leads to a more efficient trial and can reduce the expense and length of the trial.

[79.] By the same token, the Defendant's response demonstrates a general appreciation of the Plaintiff's claim. I am satisfied that a reasonable party can discern the nature of the claim from the statement of claim as drafted. It is not incurably bad. Pre-trial exercises such as discovery and the request for further and better particulars are meant to be utilized in instances such as this.

[80.] I bear in mind that striking out a pleading or an indorsement is a draconian step. It can work to drive a litigant from the judgment seat without an examination of the litigant's case. Undoubtedly, there are cases that merit such a step. I am not convinced that that is the nature of the case before me.

[81.] I bear in mind the opinion of Justice Charles, as she then was, in of **Amber Anderson-Thomas v. Deepak Bhatnagar and The Airport Authority** [2018] 2 BHS J No. 8, at paragraphs 60 to 63:

> [60] As a general rule, the Court has the power to strike out a party's case at any stage of the proceedings. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be exercised only in exceptional cases.
>
> [61] In **Walsh v Misseldine** [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the Court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The Court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.

[62] It is also part of the Court's active case management role to ascertain the issues at an early stage.

[63] The Court, when exercising the power to strike out, will have regard to the overriding objective of O. 31A of the RSC and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see O 18 r. 19.

CONCLUSION

[82.] In this case, I therefore find that given the nature of the allegations contained in the Statement of Claim, that is, a claim that could invoke the doctrine of promissory estoppel if proven, that this is not a case that ought to be struck out on the grounds that it is statute-barred. Whether the claim is statute-barred is a live issue.

[83.] I also find that the alleged conversations and agreement are central to the Plaintiff's claim. Those are disputed by the Defendant. Such a dispute requires the examination of evidence which is not appropriate in an application of this nature.

[84.] I find that the Plaintiff's pleading is not incurably bad and can be addressed with pre-trial processes.

[85.] Having regard to the foregoing, the Defendant has not shown that the action is statute-barred.

[86.] Having regard to the foregoing, the Defendant has not shown that the Statement of Claim discloses no reasonable cause of action.

[87.] Therefore, this court cannot accede to the Defendant's application to strike out the action on the ground that it is statute-barred and is therefore frivolous and vexatious and is an abuse of process, disclosing no reasonable cause of action.

[88.] The Defendant's application is dismissed.

COSTS

[89.] The Court's order in this instance is Costs in the cause.

ORDER

[90.] For the foregoing reasons, the order and directions of this Court are as follows.

IT IS HEREBY ORDERED THAT:

1. The Defendant's application is dismissed.

2. Costs shall be costs in the cause.

Dated this 21st day of March 2025

Carla D. Card-Stubbs, J

Court