Court of Appeal before Thorpe LJ, Judge LJ. 26th June, 1997

J U D G M E N T LORD JUSTICE JUDGE:

1. This is an appeal against the decision of His Honour Judge Briggs sitting at Middlesbrough County Court on 12 January 1997 when on the hearing of a preliminary issue he concluded that the defendants could not successfully rely on the Limitation Act 1980. His decision depended on two considerations: first, the defendants had waived any entitlement to rely on any limitation point; and, second, that if they had not done so, the provisions of Section 11 of the 1980 Act should be disapplied.

2. The plaintiff claimed damages to compensate him for deafness which he allegedly suffered as a result of fault exposure to excessive noise while in the course of his employment by the defendants. He worked for them for different periods between 1963 and 1975 for a total period of about four years. Quite apart from the daily noise to which he was exposed, in 1970 an explosion occurred only a few feet away from him. Hardly surprisingly that affected his hearing for a while afterwards but he made no claim. In 1975 he first became aware of some deterioration in his hearing and to use his own words "at times" he put the loss down to his employment with the defendants. The judge found that: *"his main cause of complaint relates to symptoms much later in 1975 which 'he suspected' his hearing loss was caused by work and by the late seventies early eighties he thought it was something to do with work".*

3. The plaintiff was a member of a trade union. He received no information about the dangers of excessive noise exposure and he did nothing whatever about making any claim for damages until July 1990 because, again as the judge accepted, "he knew nothing about the possibility of legal action" until then. As a result of talking to a friend who told him that he was making a claim for deafness he consulted Mr Atha, a solicitor in practice in Middlesbrough, who was by then acting for a very large number of plaintiffs with claims for deafness. On 18 February 1991 the plaintiff was medically examined. His hearing loss was ascribed to exposure to chronic industrial noise. The date when such exposure was last recorded was 1980. On 25 March 1991 a letter of claim was sent on his behalf to the defendants who were invited to pass the letter on to their insurers, which they did. The letter itself spoke of the solicitor's understanding that the plaintiff had worked for the defendants between 1961 and 1965. In May 1991 the medical report was also served. In view of the contents of both the medical report and the letter of claim any possible limitation point would have been starkly obvious to any insurance company.

4. Litigation was started on 28 February 1994, just under three years from the date of the letter of claim. In addition to taking issue generally the defendants relied on and pleaded limitation. Although the plaintiff did not formally reply by alleging waiver or estoppel it was not suggested to Judge Briggs nor to this Court that this omission precluded argument on the waiver issue.

5. As already indicated the plaintiff was by no means the first individual to consult Mr Atha with a view to a claim for deafness, nor were the defendants the only employers in the region to be at the sharp end of proceedings. During the early 1980s many thousands of claims were made. To make the best of what would have been a very complicated and difficult situation the Iron Trades, the insurers for the defendants, and as I understand it, other insurers, entered into a laudable arrangement with the relevant trade unions to assist in the process of settling claims for deafness on a reasonable basis which fairly reflected the many uncertainties and hazards which both sides would have faced if the issues had been litigated. This agreement was known as the Iron Trades Union Scheme. It seems clear that as an offshoot of this scheme Mr Atha entered into a practical working arrangement with the defendants' insurers in 1988 which, according to the judge's finding, eventually ended in August 1993, the purpose of which was to process and settle claims made by Mr Atha on behalf of his clients. The agreement was not formalised. However on 17 October 1988 Mr Atha wrote to Mr Rotchell, the claims superintendent for the Iron Trades Insurance Group after a visit from Mr Rotchell, that:
"I confirm that I will be prepared to advise my clients to settle their claims in line with the scale of damages which you have negotiated with the Major Trade Unions. I have no doubt that the majority of our clients will accept such advice although there will inevitably be the odd one who will insist that his claim is somehow unique and merits more compensation than the rest. No doubt we can discuss such claims if and when they arise. As agreed I am enclosing a list of approximately fifty clients on whom you have already made offers which were below the scale figures. Could you please review them in the light of our discussions.....Although many of our clients have been

employed solely by your Insured BSC there are a substantial number who have had numerous employers since the date of knowledge all of whom must be identified and followed up."

6. There was a discussion about the appropriate standard rate of costs to be paid to Mr Atha in relation to each such claim. The reference to the *"odd"* claimant insisting on settlement in excess of the appropriate scale was resolved in practice by Mr Atha ceasing to act for the particular client and sending him elsewhere for legal advice.

7. The working arrangement was implemented, and over a period of nearly five years Mr Atha acted for over eight thousand clients who made claims within it. In 1990 Mr Atha became concerned that although no limitation point had been taken by the insurers he should seek some formal confirmation that no limitation point would be taken in the future. He spoke to Mr Rotchell, indicating his concerns, and asked him whether it would be necessary *"to issue proceedings in those cases approaching the expiry of the limitation period when in reality most cases were likely to be resolved without the necessity for litigation"*. Mr Rotchell responded by letter dated 16 November 1990, and formally confirmed:
"...that in those noise induced hearing loss cases which are being processed under the terms of our 'working arrangement' we are prepared to allow a general extension of time outside the normal limitation periods for the service of a writ.
"We are prepared to accept the date of the letter of claim as being the date of issue of a writ in such cases for the purposes of interest.
"You have written to us in several cases and we do not propose to respond in each individual case. You may take this letter as formal confirmation of our position."

8. Much attention has been focused on the terms and effect of the letter, which was the last relevant correspondence on this topic.

9. The letter undoubtedly confirms that the arrangement between Mr Atha and the Iron Trades was regarded as an ongoing one, in force when the letter of claim on the plaintiff's behalf was sent to the defendants on 25 March 1991. The receipt of the letter was followed by correspondence involving both Mr Atha and the Iron Trades and other insurers with a possible interest in the case, and without setting out the documents in detail it is clear that after the defendants' insurers received the letter of claim the plaintiff's claim was regarded as yet one more of the many cases within the working arrangement envisaged by Mr Atha's letter in October 1988. The judge made a number of findings of fact which, on the basis of the correspondence and evidence before him, are not only unassailable but which conveniently summarise a number of features of the case,
"The plaintiff's claim continued to be under consideration by the defendants until the termination of the working arrangement in 1993. There is nothing to indicate it had been rejected prior to the termination of the working arrangement. In the defence solicitor's affidavit it was originally suggested that this case was not within the working arrangement but it clearly was. It was also suggested that as it post-dated the Rotchell letter, it was not covered by it. This in my view is wrong and the point has been abandoned. It (the letter) applies to any cases being processed during the currency of the agreement. It must have contemplated cases continuing to be brought after the inception of the agreement and letter."

10. The judge plainly regarded the letter from Mr Rotchell as critical to the issue of waiver. On behalf of the defendants it is argued that the Rotchell letter is self-contained and to use the phrase used in the skeleton argument that the court "need not stray" from it. In my judgment however this letter cannot be considered in isolation. It underlines the existence of the scheme between Mr Atha and the defendants' insurers, the object of which was that the deafness cases on behalf of his clients should be settled if possible without adding unnecessarily to the defendants' potential liability. Although the general extension of time refers to service of the writ and does not state in terms that writs need not be issued, nor indeed make any express reference to waiver of limitation points, the context in which it was written was the working arrangement, beneficial to both sides to potential litigation, which had already been in place for two years. In response to the concern of Mr Atha about possible limitation points, the letter speaks of allowing a general extension of time outside normal limitation periods in the context of "the service of a writ" and accepts the date of the letter of claim as equivalent to the issue of a writ for the purposes of interest. It contains no reservations of the insurer's position in relation to limitation periods.

It is general and not specific to a single client and it anticipates that each fresh case in the same category will be approached in the same way. When the plaintiff's claim was notified it was so treated. Thereafter it was anticipated that his claim would be settled in accordance with the scheme and although a potential limitation point was obvious, it was never suggested that it would or might be taken.

11. This clearly accorded with the invariable practice adopted in every one of the eight thousand cases handled by Mr Atha under the scheme. In his evidence he said: *"There was never any discussion on limitation at all. Iron Trades settled a large number of claims which were clearly statute barred. They settled a large number of claims which were clearly non statute barred.... It just wasn't an issue."*

12. In his evidence Mr Rotchell was asked about limitation periods which had *"expired prior to the case coming under the umbrella of the working arrangement"*. He replied: *"If it had existed within the terms of the working arrangement, I don't think any retrospective issue would have been taken."*

13. He was also asked what would happen to the *"defence of limitation"* in cases where the working arrangement had ceased. He replied: *"Right, all issues would have become live again and the period prior from his date of knowledge would have been a live issue."*

Significantly he did not suggest that limitation points would have been *"live"* when the working arrangement or scheme was in force.

14. The judge summarised the evidence:
"Mr Atha says that during the currency of the agreement a limitation defence was not raised to defeat any arrangement claim. Mr Rotchell on behalf of the insurers was unable to recall any. In my view it is clear that a decision had been made not to raise this in relation to the scheme claims, and to deal with claims subject to proof of deafness, exposure to high noise and employment. The insurers must have been aware that some of the claims settled could have been defeated by the Limitation Act, but chose not to raise it."

15. Although this finding has been criticised by Mr Coghlan QC on behalf of the defendants, and he analysed the relevant evidence in close detail, it was, in my judgment, open to the judge to conclude as a matter of inference from the way in which the scheme worked in practice, that the limitation issue was irrelevant, and that in relation to claims put forward by Mr Atha under the working arrangement between him and the insurers was waived. This represented an advantage to his clients to be set against the huge benefits to the insurers of avoiding complicated and expensive litigation, not only in general terms, but indeed in relation to limitation periods and applications to disapply them which would inevitably follow the rejection of a claim on limitation points alone.

16. The defendants were entitled to terminate the scheme, and in August 1993 they did so. The plaintiff immediately sought legal aid and formally began proceedings in February 1994. If successful on liability his claim for interest on damages will be calculated not from February 1994 but from March 1991. The question which arises is whether the termination of the scheme precluded the defendants (or their insurers) from relying on any relevant limitation point in cases which had been notified to them but remained unsettled. Having concluded that the defendants had *"waived"* any limitation point in claims notified under the scheme, the judge concluded that the waiver continued to bind the insurers in litigation after its termination. In reaching this conclusion he took into account that having pursued his claim under the scheme the plaintiff could not now be restored to the position in which he would have found himself if he had litigated in early 1991 rather than sought an out-of-court resolution of his claim under the scheme.

17. It was of course inherent in the scheme that the participants were prepared to exchange the uncertainties of litigation for the certainty of settlement on a fixed scale basis, and for this purpose to accept that the sacrifice of potentially advantageous points should be balanced by the adverse consequence of decisions in litigation which would be welcome to the other side. In other words each participant and the insurers aknowledged and accepted advantages and corresponding disadvantages. Evaluating the judge's conclusion and the criticism of it begins with the common ground that the scheme could be terminated by either side at any time and without notice. Unfortunately express provision had not been made within the scheme for the consequences of its termination on claims which had been notified and were being processed but which had not been finally settled at the date of termination. It was however

accepted that any individual claimant (such as the plaintiff) was personally entitled to withdraw from the arrangements at any time before his claim was settled and it was implicit that the rights in subsequent litigation of any plaintiff who did so would not be prejudiced.

18. The argument for the plaintiff by Mr Holmes was that the advantages of the scheme for the insurers were substantial. So, indeed it was, but only for as long as the insurers considered that the scheme reasonably reflected its commercial interests. He then argued that if it elected to terminate it could not do so in such a way that prejudice would be caused to the interests of those claims which were already under consideration. In an attractive argument he pointed out the areas of disadvantage which the plaintiff had endured by allowing himself to become involved in the scheme. These included that he would be prepared to settle for less than the full value of the claim, that his case in potential litigation would become less cogent, that he waited for the insurers' processes to produce a cheque which in the end was not forthcoming, and that he endured the delay inherent in the assessment of his compensation.

19. Carried to its logical conclusion this argument in effect means that although any party to the scheme was entitled to withdraw from or terminate it at any moment, the insurers were locked into obligations under the scheme for all the claims which had been notified to them. Nevertheless, so far as this plaintiff is concerned, the obligations imposed on the defendants' insurers under the scheme were unilateral. As the present claim demonstrates the plaintiff did not regard himself as bound to limit his claim to his entitlement under the scheme. He is litigating for the full value of his claim for personal injuries loss and damage consequent on deafness caused by wrongful exposure to excessive noise while in the course of his employment with the defendants. What is asserted on his behalf therefore is that although his own rights to litigate were unaffected by his participation in the scheme, the rights of the insurers in meeting his claim for damages were reduced by the arrangements incorporated in the scheme, notwithstanding its termination. This contention would not be without its attractions if it could be suggested that the insurers had behaved wrongfully or contrary to or outside the scheme by terminating it, but it is common ground that they were simply exercising their rights under the scheme and acting in accordance with the mutual understanding of its effect when they did so.

20. In my judgment any detriment suffered by the plaintiff as a result of his willing participation in the scheme and its subsequent termination by the insurers was not consequent on any breach by the insurers of its terms but rather their reliance on their rights under it. The termination of the scheme entitled the participants in it (whether plaintiffs or defendants) to litigate untrammelled by its terms. Any waiver of its rights by either side within and for the purposes of the scheme did not extend to litigation and accordingly the defendants' insurers were entitled to defend the litigation by the plaintiff by relying on the limitation points which would not and could not have been taken if the claim had been settled within the scheme.

21. In these circumstances the remaining question is whether the decision of the judge to disapply the limitation periods under Section 33(1) of the Limitation Act should be set aside. It is clear that the judge carefully reminded himself and considered each of the particular features identified in Section 33(3) of the Act. In the context of the defendants' conduct after the cause of action arose he focused attention on the scheme. He clearly regarded the scheme as critical to his decision, describing the arrangement as *"highly important if not completely decisive"* and explained that "where it has been indicated that claims will be considered on a particular basis - i.e. not be regarded as dead because of a limitation period being raised - then that position is changed" adding *"the claim despite the passage of time is regarded as live for a considerable period, and then that changes"*. It is difficult to avoid the conclusion that the judge was taking an adverse view of the fact that the defendants exercised their rights under the scheme.

22. In my judgment the scheme undoubtedly was one of the circumstances to be considered. On a fair estimate its effect had been to delay the litigation for some three years at a time when the primary limitation period had long since expired. Even assuming that the potential benefit which the plaintiff hoped to enjoy from acting as a willing participant in the scheme should have been disregarded, at most the way in which account should have been taken of it would have been to disregard the additional three year period of delay and attempt to take an overall view of what was equitable by treating the claim as having been started and actively advanced in 1991. In this way, without any inappropriate

mathematical calculation, proportionate weight in the overall circumstances would have been given to the scheme and the consequences of the plaintiff's participation in it.

23. In my judgment the judge misdirected himself by attaching excessive significance to the scheme adverse to the defendants and they were wrongly penalised for exercising their right to terminate when they did. Accordingly his decision to disapply the provisions of the Limitation Act must be re-examined in the light of the statutory criteria and well known principles.

24. The present litigation will involve investigation into questions which, even in 1991, were nearly twenty five years old, and include an explosion at the defendants' premises in 1970. Approaching the matter as generously as possible to the plaintiff, by not later than 1980, on the judge's findings, the plaintiff knew that his hearing had deteriorated and that the deterioration was attributable to conditions in the course of his employment with the defendants which had finally ceased five years earlier. He did nothing about the problem because he was "an unassertive man content to take things as they come (who) ... accepted his deafness as one of the things about which nothing much could be done" and because "he knew nothing of the possibility of legal action until 1990". For present purposes I am content to adopt the judge's assessment of the plaintiff and his conclusions about his personality, and his explanation, such as it is, for having done nothing for so many years. Once aware of the possibility of claim the plaintiff acted promptly, and indeed once the scheme had been terminated, he began litigation with appropriate expedition.

25. When examining the conduct of the defendants the judge focused exclusively on the scheme and its termination. Without repeating the judge's error about the true relevance of the scheme (which had potential advantages to a plaintiff whose claim was already outside the primary limitation period) I also note that the judge did not deal expressly with the fact that no criticism of the defendants after the accrual of his cause of action could be advanced. In particular the plaintiff was not misled nor refused any relevant information either before he first became involved in the scheme, or during its operation, or indeed after its termination.

26. The effect of the delay prior to 1991 was inevitably to make the evidence in the case less cogent. While acknowledging this undoubted fact the judge noted that delay was not an uncommon feature in this class of litigation which while adding to the difficulties of the decision making process in court did not prevent a just outcome. He regarded the effect of the delay as equally prejudicial to both sides. In doing so he did not specifically address the particular and in my judgment not insignificant complication in the present case that the defendants were not required to meet a claim by a plaintiff whose deafness was consequent on a single lengthy period of employment with them many years earlier, but a claim based on four separate periods of employment many years earlier, and a deterioration in his hearing which occurred at a time when his employments with the defendants were interspersed with other employments elsewhere during which he had, according to the medical evidence, also been exposed to industrial noise.

27. The judge correctly concluded that if he did not disapply the normal limitation period the plaintiff would be left without any remedy. No valid criticism could be advanced against his solicitors. The prejudice to the defendants was self-evident. If the application were refused the plaintiff would be deprived of any prospect of a successful claim for damages: to describe him has having lost compensation to which he would have been entitled presupposes certain success in the litigation. If on the other hand the application were granted the defendants would be at risk of having to pay compensation very many years after any possible negligence and the expiry of the normal limitation period.

28. Although a number of authorities were drawn to our attention it is unnecessary to refer to them for the purposes of deciding whether the limitation period should be disapplied in this particular case. The problem is not entirely straightforward, and its solution is not made any easier by the delay since 1991 when the plaintiff became involved in the scheme. On careful reflection on each of the relevant circumstances I have concluded that notwithstanding the consequent prejudice to the plaintiff it would not be equitable for the limitation period in this case to be disapplied.

29. Accordingly the appeal by the defendants must be allowed.

LORD JUSTICE THORPE:

30. In approaching the question of waiver it is necessary to establish the nature of the agreement between Mr Atha and the insurers. In determining that question I find the letters of October 1988 and November 1990 of very limited value. The earlier letter made no endeavour to define a legal agreement with any precision or completeness. It was merely a confirmation of the general approach to be put to trial. Equally the later exchange amounts to little more than the successful request for reassurance. Obviously the limitation risk, properly analysed, was likely to have arisen at the outset since not all the cases that Mr Atha would be instructed to submit to the new procedure would be of recent origin. Thus in determining the nature of the agreement the decisive consideration is the conduct and practice of the parties over the extensive period between commencement in October 1988 and termination in August 1993.

31. This was in essence the adoption by mutual consent of an alternative dispute resolution procedure as an alternative to litigation. The practice that developed may well have been more extensive and different in detail from that envisaged at the first exploratory meeting. Essential features are that Mr Atha operated the ADR scheme exclusively. He regarded it as incompatible with resort to litigation against this insurer. Thus if any potential client rejected the offer of the ADR procedure Mr Atha sent him elsewhere. Significantly 8000 cases were handled under the ADR scheme without the insurer challenging liability in any case. It is irrelevant to look to the insurer's practice in dealing with any other solicitors or any other plaintiffs.

32. Thus it is upon the basis of that conduct that the question arises did the insurer waive limitation defence in respect of any claimant whose case was advanced for compromise by Mr Atha under the ADR procedure? The right of either Mr Atha or the insurer to withdraw from the ADR scheme is not disputed. Each had an interest distinct from that of the employee and employer. Mr Atha had to make a living out of approximately 1300 cases a year paid at a fixed fee of approximately £225 each. The insurers had to be satisfied that the cost saving and the ability to settle on the agreed scale outweighed the cost of forfeiting liability arguments. Obviously post termination no newcomer to Mr Atha's office could claim entry to a terminated scheme and if he opted to sue all defences were open to the insurer. But what about cases in the pipeline awaiting payment on the ADR scale? Are they entitled to the double benefit of moving on to judicially assessed quantum free from the hazard of limitation defences? Presenting the other side of the same coin do the insurers face litigation in which they can contest quantum but not liability where the limitation period is exceeded? In my judgment the answers to these questions must be negative. Once the pipeline claimant moves into litigation he exposes himself to the risk of limitation defence even though that point would not have been taken under the ADR procedure. I also would not uphold the judge on waiver.

33. Turning to section 33 the judge was plainly wrong to approach the discretionary exercise on the basis that there had been a waiver and that that was a highly important factor. Thus the exercise of discretion is vitiated and we must carry out the exercise on the adjusted basis that the pre-existing history is not highly important but a relevant circumstance to which weight must be given. I can not disagree with my Lord's analysis and conclusion that it would be inequitable to disapply the limitation period. I regret that conclusion because the plaintiff entered the ADR scheme with the reasonable expectation of compensation for industrial injury and waited a considerable time in the queue for payment before being caught by the insurer's termination.

ORDER: Appeal allowed; costs in court below to appellant; costs order not to be enforced without leave; order nisi against the Legal Aid Board for costs of appeal; Legal Aid taxation for defendants.

MR J COGHLAN QC with MR P LIMB (Instructed by Messrs Jacksons, Newcastle-upon-Tyne) appeared on behalf of the Appellants/Defendants.

MR J HOLMES with MR LARIZADN (Instructed by Messrs Atha & Co, Middlesbrough, Cleveland) appeared on behalf of the Respondent/Plaintiff.