

## Gregory v H J Haynes Ltd [2020] EWHC 911 (Ch): Balancing prejudice, tracing insurers and s33 of the Limitation Act

John-Paul Swoboda instructed by Lynn Yeates of Novum Law successfully acted for the Mr Gregory in this appeal against the decision to refuse to disapply section 33 of the Limitation Act in a pleural thickening claim.

This claim was, on the claimant's own case, nearly 6 years out of time. Bearing in mind that a decision under section 33 is an evaluative judgment, such that, as Mann J put it, it "*should be impeached only if it betrays an error of principle, takes into account an irrelevant factor or fails to take into account a relevant one*" (para 6 of the judgment) it might be thought that any appeal would be difficult to sustain. But the sense of injustice which drove this appeal was that the learned judge below (District Judge Ball, exercising the jurisdiction of a circuit judge) weighed in the scales, when making his s33 decision, a period of time over which neither Mr Gregory nor his solicitors at the time had any control. Namely the period of time when no insurer could be traced against the defunct and dissolved Defendant company<sup>1</sup>. That period accounted for 3 out of the 6 years beyond the limitation period and 6 out of the 9 years from Mr Gregory's date of knowledge which is to say a significant proportion of the period of delay in prosecuting the action. It was only by luck that the solicitor then instructed by Mr Gregory identified the insurer when he did in 2014 as an employer's liability tracing office ('ELTO') search in respect of a different client revealed the material insurer in Mr Gregory's claim.

Mann J found "*I do not consider that the claimant could be in any way to blame for the delay in this period, and that it was wrong [of the judge below] to characterise the delay as culpable on the part of the claimant*" (para 10). As Mann J noted the Defendant was dissolved at the time (such that proceedings would have been a nullity), and any attempt at restoration would have been futile as the Defendant was penniless.

But just because it was shown that the decision below was wrong does not necessarily mean that a different conclusion ought to be reached when the decision is retaken. Mann J set out the passage from *Carroll v Chief Constable of Greater Manchester Police* [2014] 4 WLR 1 (CA) in which the Master of the Rolls set out the key principles in a section 33 trial. As the MR noted in *Carroll* "*the essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice...*". Mann J agreed with the judge below that there had been an inexcusable delay in the prosecution of the claim after the insurer had been traced (a period of about 3 years). But delay does not equate to prejudice and at para 25 Mann J found (as the judge below had also found) that all the prejudice had effectively been accrued prior to 2014 which is to say before the period of culpable delay in prosecuting the claim. Further Mann J found, as the judge below had also found, that a fair trial was still possible. These findings were sufficient for him to reach the conclusion that the claim should be allowed to proceed.

In a parting shot to any who may read this judgment as endorsing a lax approach to bringing a personal injury claim within the limitation period Mann J stated, "*it will normally behove a claimant who discovers a late claim to get on with its pursuit. Even if things are so delayed already that additional delay does not cause any identifiable prejudice, a claimant cannot expect to delay as long as he/she likes on that basis. There will come a point at which the claimant's own delay... will make it unfair to extend the period*" (para 32).

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<sup>1</sup> In fact, the Defendant had been restored to the Companies Register to allow a different action to proceed.

John-Paul Swoboda  
Lynn Yeates

FULL JUDGMENT