Neutral Citation Number: [2020] EWHC 911 (Ch)

Case No: CH-2019-000200

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
ON APPEAL FROM THE DECISION OF DJ BALL
SITTING AT THE COUNTY COURT AT PORTSMOUTH
ON 10 JUNE 2019
LOWER COURT CASE NUMBER: D42YM528

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 24/04/2020

Before :

MR JUSTICE MANN

- -

Between :

Christopher Robert Gregory	**Appellant**
- and -	
H J Haynes Limited	**Respondent**

- -
- -

John-Paul Swoboda (instructed by **Novum Law**) for the **Appellant**
Toby Stewart (instructed by **BC Legal**) for the **Respondent**

Hearing date: 22nd January 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is an appeal from a decision of District Judge Bell, exercising the jurisdiction of a circuit judge, in which he declined to extend the limitation period applicable to a personal injury claim of the claimant under an application made pursuant to section 33 of the Limitation Act 1980. It is brought with the permission of Marcus Smith J, on one of the two grounds of appeal set out in the appellant's notice. Underlying the appeal is an averment that the judge mischaracterised a period of delay as being one for which the claimant was culpably responsible, which resulted in the judge misassessing the overall effect of the delay that had taken place in this matter. It is of the essence of the appeal that the judge found the claimant culpably responsible for a period during which he did not know, and could not find out, whether the defendant company, then dissolved, had insurance for the period of his claim.

Background

2. The claimant, Mr Gregory, was a roofer employed by the defendant company from 1959 to 1971/2. It is his case that during the period of his employment he was required to saw, cut and drill asbestos containing materials and was exposed to the dust. As a result he suffers from pleural thickening giving rise to respiratory disability and is at risk of mesothelioma and asbestosis. The relevant chronology, which was not in dispute (or not materially so, for the purposes of the application heard by the judge) was as follows:

> 1972 to 2009 - claimant self-employed and worked for a number of employers in a similar trade.
>
> 22nd November 1985 - Liquidator appointed to the defendant company in a voluntary winding up.
>
> 15th December 1992 - defendant company dissolved.
>
> 21st November 2008 - the claimant first acquired knowledge of his disease. Limitation period of 3 years starts running.
>
> 3rd March 2009 - claimant contacted solicitors with a view to making a claim. The solicitors make enquires with the Employer's Liability Tracing Office (ELTO) in order to identify any relevant insurer covering the period when the claimant was employed by the defendant. None were identified.
>
> 20th July 2010 - claimant's solicitors write to a former director of the defendant to try to identify an insurer, unsuccessfully.
>
> 22nd July 2010 - claimant's solicitors write to another firm specialising in asbestos claim to try to locate an insurer, unsuccessfully.
>
> 30th July 2010 - claimant's solicitors write to another former director seeking details of insurers – unsuccessfully.

30 July 2010 – claimant's solicitors write to an insurance broker identified as a possible successor to the defendant's broker during the period of employment – unsuccessfully.

21 November 2011 – limitation period expired.

2009 to 2012 – a round of further enquiries were made of ELTO to identify possible insurers. None were identified.

12 November 2013 – details of the defendant's insurers were uploaded to the database used by ELTO. This event, as such, was not known to the claimant or his solicitors.

2 September 2014 – an ELTO search in respect of another claim (Mr Makarab's) being dealt with by the same solicitors in relation to the same employer revealed the identity of the defendant's insurers (uploaded on 12th November, 2013, as above) during the relevant period.

25 September 2014 – letter of claim sent by the same solicitors to the defendant's insurers in respect of Mr Makarab's claim for a period from 1965 to 1973/74.

27 March 2015 – the claimant's solicitors send a letter of claim on his behalf to the defendant's insurers.

27th March 2015 - defendant company restored to the register for the purposes of other litigation.

20 April 2015 – a representative of the defendant acknowledges receipt of the claim. A witness statement is asked for.

10 November 2016 – a witness statement and HMRC schedule was sent to to the defendant by the claimant solicitors.

20 January 2017 – claimant discloses a medical report.

28 July 2017 – claim form received by Portsmouth County Court.

5 September 2017 – claim form issued.

3. This chronology demonstrates certain periods of inactivity most of which the defendant sought to characterise as culpable delay on the part of the claimant. As will appear, the judge below accepted that characterisation in most instances. This appeal turns on the effect of his characterisation of the period between March 2009 and September 2014 in terms of that culpability.

What the District Judge decided

4. It was and is accepted that the limitation period did not start running until 2008 when Mr Gregory first found out about his medical condition. The decision of the district judge focused on the period from then until the date proceedings were issued and investigated the reasons for delay and questions of prejudice to the parties. He went through the factors appearing in section 33(3) of the 1980 Act, considering them in turn. He concluded in para 35 that:

> "In my Judgment much more could and should have been done since March 2009 when Solicitors were instructed to establish an insurer for the Defendant as the Claimant and his Solicitors well knew the limitation clock was ticking. Further, there appears to be no good reason why the medical report relied upon was not

> obtained until October 2016. Once the insurer was identified (notwithstanding that this was after the expiry of the limitation period) much more could and should have been done to advance, and possibly settle this claim.… The Claimant's Solicitors were instructed in 2009 but made very little attempt to identify the insurers. Even after the limitation period had expired, and whilst dealing with claims against this defendant for other clients, little if any progress was made on this claim."

He then went on to refer to matters such as the effect of delay, prejudice and the effect on a fair trial (over a number of paragraphs) and concluded that the application made under section 33 to disapply the the limitation period under section 12 should be dismissed. I shall have to return to some of the detail of his findings in due course.

The legal background

5. The relevant statutory provision is section 33 of the Limitation Act 1980 which provides as follows (so far as relevant to this appeal).

> "**33.— Discretionary exclusion of time limit for actions in respect of personal injuries or death.**
>
> (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> or 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> ….
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;

> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

The basis of the appeal

6. This is an appeal from the exercise of a discretion, and is therefore subject to the normal constraints on such appeals. The decision below 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.

7. Ground 1 of the Grounds of Appeal, which is the only ground on which permission to appeal was given, seeks to appeal on the following basis:

> "The learned judge erred in law by taking into account (or alternatively placing significant weight upon) the delay in bringing the claim between March 2009 (when the Claimant instructed solicitors) and 12 November 2013 (when the insurer covering the liabilities relevant to this claim was uploaded to the Employer's Liability Tracing Office database) or alternatively to the 2 September 2014 when the Claimant's legal representatives first became aware of the identity of the material insurer, when deciding pursuant to section 33(1) of the Act, whether it would be equitable, having regard to the degree of prejudice to the

> parties, to allow the claim to proceed outside the primary limitation period."

8. The skeleton argument submitted in support of the application for permission to appeal makes it clear that the complaint is that the judge wrongly found the delay in that period to be delay which was culpable, and that that therefore distorted the balancing exercise which had to be carried out under the Act. Whether or not the delay was culpable was a material factor in that exercise. The argument is that when the correct characterisation is applied (that is to say the delay was not culpable) it becomes apparent that the decision ought to have gone the other way.

Did the judge err and what part did the disputed findings play?

9. The first of these two questions can be dealt with more briefly than might otherwise be the case because Mr Stewart, who appeared for the respondent company, did not seek to defend the actual determinations. The judge divided the periods of delay which had to be considered into various periods when considering the factors required by section 33(3)(a) ("the length of, and the reasons for, the delay on the part of the plaintiff"):

> "There have been numerous delays on the part of the Claimant. The first was between the diagnosis in November 2008 and consulting solicitors in March 2009 but that delay was not unreasonable. Although this delay occurred within the limitation period it is still necessary to take it into account once the limitation period had expired. It is necessary to examine in a little more detail what delays actually occurred. Between March 2009 and the expiry of the limitation period in November 2011, and even on Mr Swoboda's [counsel for the claimant] comprehensive chronology precious little was done by the Solicitors for the Claimant between these dates. There were only four attempts made to identify the Defendant or an insurer. Certainly, other work was carried out for other clients but this other work did not establish the identity of the insurers. It must have been within the knowledge of the Claimant's Solicitors that the limitation clock was ticking but steps were not taken to issue protective proceedings. Between November 2011 and November 2013, when insurance details were uploaded to the ELD database it appears that nothing was done in relation to the potential claim. Between November 2013 and September 2014, when the insurers were identified to the Claimant's Solicitors, again nothing appears to have been done. In September 2014 the Defendant's insurers were identified to the Claimant's Solicitors and one might have expected this to galvanise the Solicitors into action. Early indications were encouraging in that it took only

> three weeks for the relevant letters of claim to be sent in relation to claims by other clients and only two months for a claim to be issued in respect of claims by one of those clients. Sadly, there was a delay of five months from the identification of the Defendant's insurers to the Claimant's Solicitors writing the letter of claim in respect of this Claimant. The final delay was between the letter of claim being sent on 27 March 2015 and these proceedings being received by the Court on 28 July 2017 a delay of two years and four months, and that period of delay is even greater if one considers that the proceedings were not actually issued until September 2017.… I accept that the insurer was not identified to the Claimant's Solicitors until September 2014 and that the Defendant was not restored to the register until 27 March 2015 but that did not prevent proceedings being issued, against this Defendant in respect of another client, in November 2014. In relation to this sub- paragraph therefore, the delay is very nearly 9 years. In my Judgement the reasons for the delay are simply that there was a lack of urgency on the part of the Claimant's Solicitors and the Claimant himself was content for the Solicitors to deal with the claim for him without, himself urging them along. As I have said in paragraph 25 above, this paints a difficult picture for the claimant."

10. The period relevant to the permitted ground of appeal is the period from March 2009 to November 2014. The district judge held that this was culpable delay on the basis that something could and should have been done in this period to further the claim. In my view this was an error. It is not possible to see what more the claimant could realistically and sensibly have done in this period. There was a dissolved and, even if restored, apparently penniless defendant. There was no point in seeking to restore it to the register unless and until it was apparent that there was some money available (or a "paymaster", as counsel before me put it). Searches of the insurer database had been done at least 4 times (by 2012, not by 2011, on the evidence). Reasonable searches had been done and no insurer had been found. There was no insurer on the database until 2013, so even if searches had been repeated daily (which is not a reasonable requirement) nothing useful would have emerged until then. It was not suggested that a search should have been done in early 2014 which would have revealed the insurer earlier than the search which did. Starting proceedings before restoration would not have been wise because they could not have been served and would have been a nullity pending validation by a restoration, which was not on the cards at the time. 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 to characterise the delay as culpable on the part of the claimant. As I have said, Mr Stewart did not seek to defend this finding, and he was right not to do so. What Mr Stewart did say was that the solicitors could and should also have taken a witness statement in this period, but that does not affect the correct view that the criticism of the delay in this period was not justified.

11. When one looks at the rest of the judgment it is apparent that this finding of culpability was a material part of the judge's reasoning in arriving at his conclusion. Paragraph 25 demonstrates that the judge was looking at the whole period of delay in the matter between 2008 and 2017, which is justifiable, but he also observes:

> "At first blush, the delay of almost nine years, with little if anything being achieved reflects badly on the Claimant and his Solicitors."

That implicitly suggests that he was attaching criticism to all periods because that was relevant. This is apparent from paragraph 34:

> "The Claimant's date of knowledge is November 2008 when he received his diagnosis. In my Judgement it is relevant to consider the whole of the period that has elapsed since then and, as proceedings were not issued until September 2017 the relevant delay is very nearly 9 years."

12. It appears that authority does, in one sense, require the whole of that period of delay to be considered, so to that extent the judge below was correct. However, in my view, he was saying more than that. He was saying that there was no distinction to be drawn between any of the sub- periods of the period from 2008 to 2017.

13. The same appears from paragraph 35, which seeks to deal with a submission that the delay before 2014 was not so weighty for the purposes of the application. It starts:

> "In my Judgment much more could and should have been done since March 2009 when Solicitors were instructed to establish an insurer for the Defendant as the Claimant and his Solicitors well knew the limitation clock was ticking."

That clearly suggests that he was attaching weight to culpability for the delay between 2009 and 2014. The same applies to paragraph 39:

> "There have been significant delays on the part of the Claimant and, as I have said, the picture painted by those delays is not an attractive one. The only excusable delay is the time between receiving his diagnosis in November 2008 and consulting Solicitors in March 2009."

14. Paragraphs 46 and 47 again show that his view of the 2009-2014 period of delay was important to his final decision:

> "46. Having considered all the section 33(3) factors and having reviewed the relevant authorities, it is my Judgment that the balancing exercise comes down in favour of the Defendant. I am satisfied that the delay in issuing the proceedings was due to the "drift" that was allowed to occur.… I am satisfied the Claimant did not act promptly once he had his diagnosis and his failure to obtain a medical report until October 2016 is wholly unreasonable.…
>
> 47. Having undertaken the balancing exercise as required, it is my conclusion that the section 33 application should be refused and the claim dismissed."

15. Mr Stewart sought to say that even though the district judge mischaracterised the delay to 2014 in terms of culpability, nevertheless he carried out a proper balancing exercise in which he weighed the delay against prejudice and the risk of a fair trial, and came up with a decision which should not be criticised. That submission assumes that the characterisation of that first period of delay was not taken into account as part of the balancing exercise. That assumption is wrong. The extracts I have set out make it clear that the judge placed significant weight on the delay between 2009 and 2014, and in particular on the claimant's culpability for that delay, as part of the balancing exercise which has to be done under section 33. Had he reached the right conclusion on culpability for that period his reasoning, and therefore perhaps his decision, would have been different. Because the finding of culpability was unjustified, and because that obviously affected the weight given to that period of delay, it follows that the judge took into account an irrrelevant consideration, and that it had a material effect on his ultimate decision. It further follows from that that the first stage of the first ground of appeal is made out and the reasoning in the decision, and as a result a final decision based on it, cannot stand.

Re-taking the decision

16. That conclusion means that the decision on the application has to be re-taken. Neither party suggested that the matter should be remitted, and they both accepted that it should be taken by me on this appeal. I shall therefore embark on that exercise. In doing so I shall not totally ignore the decision below, because the judge came to some assessment type conclusions to which it would be proper to give some respect because he heard evidence which is not available to me. I shall bear relevant findings in mind.

17. The exercise involved is heavily influenced by the question of relative prejudice - see the terms of s33(1) - though it is not wholly governed by it. Some of the other factors are set out non-exhaustively in subs (3). The approach to the factors which arise was

helpfully set out in the judgment of Sir Terence Etherton MR in *Carroll v Chief Constable of Greater Manchester Police* [2014] 4 WLR 1:

> "42. Section 33(3) of the LA 1980 requires the court, when exercising its discretion under section 33(1) , to have regard to all the circumstances of the case but also directs the court to have regard to the five matters specified in subsections 33(3)(a)–(f) . There are numerous reported cases in which the court has elaborated on the application of that statutory direction in the context of the particular facts of the case. In many of the cases the court has stated various principles of general application. The general principles may be summarised as follows.
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> 1. Section 33 is not confined to a "residual class of cases". It is unfettered and requires the judge to look at the matter broadly: *Donovan v Gwentoys Ltd [1990] 1 WLR 472* , 477E; *Horton v Sadler [2007] 1 AC 307* , para 9 (approving the Court of Appeal judgments in *Finch v Francis (unreported) 21 July 1977*); *A v Hoare [2008] AC 844* , paras 45, 49, 68 and 84; *Sayers v Hunters [2013] 1 WLR 1695* , para 55.
>
> 2. The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1) , as is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: *Donovan's* case, pp 477H–478A.
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> 3. The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: *Donovan's* case, p 477E; *Adams v Bracknell Forest Borough Council [2005] 1 AC 76* , para 55, approving observations in *Robinson v St Helens Metropolitan Borough Council [2003] PIQR P128* , paras 32 and 33; *McGhie v British Telecommunications plc [2005] EWCA Civ 48* *8 at [45]. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.
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> 4. The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: *Sayers's* case, para 55.
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> 5. Furthermore, while the ultimate burden is on a claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely

to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant: *Burgin v Sheffield City Council [2005] EWCA Civ 482* at [23]. If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant: *Hammond v West Lancashire Health Authority [1998] Lloyd's Rep Med 146* .

6. The prospects of a fair trial are important: *A v Hoare* , para 60. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why: *Donovan's* case, p 479A; *Robinson's* case, para 32; and *Adams's* case, para 55. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: *Robinson's* case, para 33; *Adams's* case, para 55; and *A v Hoare* , para 50.

7. Subject to considerations of proportionality (as outlined in para 11 below), the defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount: *Cain v Francis [2009] QB 754* , para 69.

8. It is the period after the expiry of the limitation period which is referred to in sub-subsections 33(3)(a) and (b) and carries particular weight: *Donovan's* case, p 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: *Donovan's* case, pp 478H and 479H–480C; *Cain's* case, para 74. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: *Collins v Secretary of State for Business Innovation and Skills [2014] PIQR P19* , para 65.

9. The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: *Cain's* case, para 73. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim.

> 10. Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: *Corbin v Penfold Metallising Co Ltd [2000] Lloyd's Rep Med 247* .
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> 11. In the context of reasons for delay, it is relevant to consider under subsection 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: *A v Hoare* , paras 44–45 and 70.
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> 12. Proportionality is material to the exercise of the discretion: *Robinson's* case, paras 32 and 33; *Adams's* case, paras 54–55. In that context, it may be relevant that the claim has only a thin prospect of success (*McGhie's* case, para 48), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (*Robinson's* case, para 33; *Adams's* case, para 55); *McGhie's* case, para 48), that the claimant would have a clear case against his or her solicitors (*Donovan's* case, p 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (*Robinson's* case, para 33; *Adams's* case, para 55).
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> 13. An appeal court will only interfere with the exercise of the judge's discretion under section 33 , as in other cases of judicial discretion, where the judge has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has made a decision which is wrong, that is to say the judge has exceeded the generous ambit within which a reasonable disagreement is possible: *KR v Bryn Alyn Community (Holdings) Ltd [2003] QB 1441* , para 69; *Burgin's* case, para 16."

18. In the context of the present case three key elements emerge from these matters and from the section - delay and its reasons, prejudice to the parties and the possibility of a fair trial. I shall deal with those matters before turning to consider the individual elements of section 33(3).

Delay and its reasons

19. The delay in bringing the claim in overall terms is apparent. It is considerable. The period of delay starts at the very latest in 1971-72 when Mr Gregory's employment

ceased, and ends with the issue of proceeedings in 2017. However, it is necessary to break that period down as follows:

> 1972 to 2008 (when Mr Gregory first became aware of his illness and the primary limitation period started). The delay is a fact, but an inevitable consequence of the type injury said to have been suffered, which may not (and in this case did not) manifest itself for that considerable period.
>
> 2008 to 2011 (the expiry of the primary limitation period). In this period Mr Gregory knew he might have a claim but could do nothing about it for want of a defendant or identifiable insurers. He went to solicitors to consider the matter, but he is not to blame for not starting a claim in this period. Furthermore, he is not to blame for doing little to prepare his claim, such as the preparation of witness statements (insofar as that was the case). In my view significant expenditure on preparing a claim which it might never be possible to bring would not have been justified. I mention this because Mr Stewart suggested that Mr Gregory might have been putting together a witness statement. He might, and he may even have prepared a proof (we do not know) but he is not to be blamed for not using this period for that purpose. This period is excusable.
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> 2011 to 2014 (expiry of the primary limitation period to the discovery of the insurers). The same applies as to the preceding period. There was nothing useful to be done until the insurers were discovered. Mr Gregory is not to be blamed for failing to find that the insurers had become identifiable by being put on the register in 2013; he is not to be blamed for not doing continuing searches. He was fortunate, not culpable, in discovering the insurers in 2014.
>
> 2014 to 2017. In this period there was culpable or inexcusable delay in objective terms. The delays in this period, which appear above, ought not to have happened. Having discovered the insurers late in the day, Mr Gregory would be expected to get on with his claim with due despatch, and he did not do so. There was inexcusable delay even in sending his letter of claim. He should have issued his proceedings long before he did. I agree with the judge below that this period presents inexcusable delay in terms of the absence of a good reason for it, and Mr Swoboda did not seek to argue otherwise. Even the claimant's solicitors accepted there was "drift".

Prejudice

20. The degree and nature of prejudice likely to be suffered by either party as a result of delay is actually a question of fact. The prejudice to the claimant in not being to bring his claim is obvious. The prejudice to the defendant in being deprived of a limitation defence is equally obvious though less relevant as a single factor. What is more significant is the prejudicial effect of the delays that have occurred in this matter.

21. The main prejudicial effect is likely to be the loss of evidence over the years. In the present case such evidence as there was demonstrated, perhaps not surprisingly, that

little evidence seemed now to be available to the defendant. The evidence of the defendant (through their solicitor Ms Manners) demonstrated that attempts had been made to contact those who had been directors of the defendant at the time of Mr Gregory's employment and subsequently, and inquiries revealed that they were all dead or untraceable. Most of those who had died had done so even before 2008. No company documents have survived the dissolution of the company, and her efforts had apparently not revealed anyone who could give evidence of working practices at the time of Mr Gregory's employment. That, of itself, gives rise to significant disadvantage to the defendant in meeting the claim. The judge made certain findings about this:

> "27. The evidence of Ms Manners shows just how difficult it will be for the Defendants to muster any evidence either by witnesses or documents. In his skeleton argument… Mr Stewart points out that there are no longer any meaningful contemporaneous documents or witnesses available "to enable a fair trial to take place" and he goes on to argue in paragraph 21 that the Court, at any trial would be "quite heavily dependent" on the claimant's account. In my judgement this is a double edged sword as it will not be plain sailing for the Claimant to adduce any independent evidence of the negligence alleged, or working practices that are allegedly in breach of the various statutory duties set out in the particulars of claim. The difficulty in proving the claim may be as great as the difficulty in defending it. Further, under this sub- section I have to ask myself whether or not the evidence to be adduced by either side is less cogent, and if so the extent to which it is less cogent, by reason of the failure to commence proceedings within the limitation period. In this respect I need to consider the position of both parties as at November 2011, the end of the limitation period. Liquidators were appointed in respect of a voluntary winding up in November 1985 but dissolution did not take place until December 1992, almost 7 years later. During that time I suspect efforts were made to liquidate the assets and I further suspect employees were laid off and I am aware that at least two directors died in this period. It is highly likely that by 1992 much of the evidence that either side would wish to adduce had ceased to be available. Even if the claimant had commenced the action before the expiry of the limitation period, there would have been evidential difficulties, which will have increased with the passage of time, but those difficulties would have been the same for both sides. The effect on the cogency of the evidence of the delay is therefore likely to be the same for both sides."

22. The judge returned to the question of prejudice in paragraph 38:

> "However, I have to consider whether or not the Defendant's ability to counter the allegations of the Claimant has been

> prejudiced by the undoubted delays, or if the defendant's position now is no worse than it would have been in November 2011 when the limitation period expired. As at that date the Defendant had been dissolved for nineteen years. On the one hand almost certainly the records and documents would have long disappeared. But on the other hand, there may well have been former employees who could have been called to gainsay what the Claimant would say as to working conditions and practices, although I do take account of the evidence of Miss Manners which was that her enquiries were fruitless."

In paragraph 43 the judge again dealt with the loss of evidence over time:

> "True it may be that documents are long gone and witnesses may be untraceable, but those [are] evidential difficulties that would undoubtedly have been faced by the Defendant in November 2008 or 2011."

And he came back to the same assessment as at the same time in paragraph 46:

> "It is clear from the evidence of Miss Manners that the Defendant will not be able to adduce any or any sufficiently cogent evidence to answer the allegations contained in the particulars of claim. True it may be that there would have been such evidential difficulties if the claim had been started within the limitation period, but a delay of almost 9 years makes such difficulties greater."

23. The general thrust of this is, not surprisingly, that the evidential cases of both sides have been damaged by the delay. The judge suggested that the effect was equal. I tend to doubt that. I consider it more likely that the adverse effect of this will be suffered more by the defendant. The claimant at least has himself as a witness. It is not clear that the defendant will have any.

24. However, again it is not appropriate just to consider the whole period as one period. In a case where the claimant could not reasonably be expected to have commenced a claim for a large part of that period, it is pertinent to consider the extent of this prejudice across elements of the period. It seems to me that the thrust of what the judge below found was that by the time one gets to 2011, or 2014, the damage to the defendant's evidential case had been done in terms of lost evidence. There seemed to be no witnesses left. The judge's paragraph 46 suggests a degradation in the last 9 years. That does not seem to be based on evidence. I suspect that it was more based on judicial

instinct that another 9 years makes a bad position worse. Whether or not that is true depends on how bad the position was at the beginning of that 9 years, and the answer seems to be that it was pretty bad by then anyway.

25. In any event, I do not think that the last 9 years is as significant a period as the period since 2014. If one asks the question whether there has been additional prejudice to the defendant in that more recent period (relevant because 2014 is the first point of a time at which one can fairly say the claimant ought to have sued) then I think the answer is that there has not been. By then the damage to the defendant's evidential case has been done.

26. There is one other area of evidence significant to the defendant, and that is Mr Gregory's exposure to asbestos in the years after he left the employment of the defendant. He continued to work for almost 30 years. The defendant would be entitled to investigate what exposure had taken place in that period. Apparently Mr Gregory was self-employed in that period, so employer records would not be so available. However, again it is not apparent that an investigation into this area would be any more difficult than it already was by 2014.

27. In summary, therefore, there was gathering prejudice in the form of diminishing evidence throughout the whole of the period since Mr Gregory's exposure, but by the time of the identification of insurers all the real prejudice to the defendant had accrued. The same is true, probably, in relation to Mr Gregory's evidential case.

Fair trial

28. On the question of a fair trial, the judge below seems to have found that a fair trial was still possible:

> "38… All the circumstances of the case include whether or not a fair trial is still possible. The fact that a fair trial is still possible is not determinative and a delay of nine years is not insignificant and should be brought into the balance. …"

29. Mr Stewart said that that was not correct because the prejudice was caused by delay, but I consider that that takes the prejudice point too far. I accept the views of the judge below on this point.

Other matters

30. Before turning to my final determination I should deal in terms with all the indicia in section 33(3), as indeed the judge below did.

> (a) Length of, and reasons for the delay, on the part of the plaintiff - I have already expressed my views on that.
>
> (b) The extent to which delay has rendered evidence less cogent - I have expressed my views on that.
>
> (c) Conduct of the defendant after the cause of action arose - nothing arises under this head, as the judge below found.
>
> (d) Duration of disability of the claimant - not applicable, as the judge found.
>
> (e) The extent to which the claimant acted promptly on acquiring knowledge of his condition. He acted promptly in the early periods of the claim, but not subsequently, as appears above.
>
> (f) The steps taken by the claimant to get medical, legal or other advice and the nature of the advice received. Under this head Mr Gregory was subjected to criticism by the judge below in respect of the medical report that was not obtained until 23rd October 2016. He points out that no explanation was given for the failure to get medical evidence in support of his claim in 2009 when he consulted solicitors., and the claimant's steps to obtain medical evidence were few and leisurely. Mr Stewart adopted this point. I consider this criticism to be largely misplaced. Mr Gregory had sufficient medical information to instruct his solicitors in 2009. It is true that the later medical report (produced without seeing him, but on the basis of other material) was produced when it was, but that seems to me to be largely immaterial to the present matter. I think that this indicium relates to something else. What Parliament requires to be taken into account is a failure to get advice promptly so as to reduce the delay in making a claim. If a claimant does not make a claim as early as he might because he does not obtain prior advice as early as he might, then that is a factor to be taken into account. The significance of producing a "late" (whatever that may mean) medical report in this case is of much less significance.

Conclusion

31. I now draw all those strands together. Although what matters is the position as at the ultimate date of the issue of the claim form, I prefer to approach the matter in a couple of stages in order to identify where the real issue lies. No limitation point would have arisen if Mr Gregory's solicitors had managed to identify insurers (and therefore arrange for a restoration of the defendant to the register) between 2008 and 2011. However, he could not do so. If he had sought to commence his proceedings in 2014, or even at the beginning of 2015, and made his current application then, then I consider it highly likely his application would have succeeded. He would have made it at what can broadly be regarded as the first reasonably available opportunity,and while the

defendant would have been prejudiced in the manner identified above, the balance of fairness would clearly have favoured a claimant who sued at the first reasonably available opportunity, taking into account all the matters debated above. The defendant had been identified before then, but the insurers had not. Once they had been, it would have been unfairly harsh on the claimant to say it was still too late, even if the defendant's ability to defend itself had been significantly diminished by the passage of time.

32. That being the case, what should the effect of the passage of another 2 years or more be? So far as the defendant is concerned, its evidential position is probably not worsened by that passage of time. It had had an opportunity to conduct its researches at the beginning of the period when the letter of claim was made, in any event. Nonetheless the claimant (or rather his solicitors) delayed in pursuing the claim for no good reason. In my view it can be said that 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 be able to delay as long as he/she likes on that basis. There will come a point at which the claimant's own delay, in those circumstances, will make it unfair to extend the period. Apart from anything else, the good discipline which delays in a claim really requires would be compromised if parties and their solicitors could just become lazy on the footing that it does not really matter any more in terms of prejudice to the defendant.

33. In my view this case comes close to that, but not quite close enough. Bearing in mind that the delay was apparently attributable to the solicitors and not dilatoriness on the part of the claimant himself, I do not think it is quite enough to deprive the claimant of the disapplication of the limitation period to which he would have been entitled in 2014, or perhaps 2015. It may or may not be the case that if I refused the disapplication because of the delays of the solicitors then Mr Gregory would have had a cause of action against his solicitors, but even if he had that right I do not think it fair to confine him to it in all the circumstances of this case. If there had been any evidence of additional prejudice to the defendant arising out of that last period of delay, my decision would probably have been different; but in the absence of that additional prejudice I do not think the delay is quite bad enough to weigh down on the claimant in terms of the fairness of the relief sought.

34. In the circumstances, therefore, I shall allow the appeal and disapply the limitation period as asked.