Neutral Citation Number: [2019] EWHC 882 (QB)

Case No: QB/2018/0212 & QB/2018/0213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2019

Before :

MRS JUSTICE YIP DBE

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Between :

(1) HMG3 LTD	**Defendants/Appellants**
(2) Z D BERRY & SONS LIMITED	
- and -	
SUZANNE DUNN	**Claimant/Respondant**
(Executrix of the Estate of GEORGE DUNN, Deceased)	

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Mr Philip Turton (instructed by **Plexus Law**) for the **Appellants**
Mr Giles Mooney QC (instructed by **Fosters Solicitors Norwich**) for the **Respondent**

Hearing dates: Wednesday, 3rd April 2019

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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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MRS JUSTICE YIP DBE

Mrs Justice Yip :

1. This is an appeal brought by the two defendants in the action against the decision of Deputy Circuit Judge Holt on 22 June 2018 whereby he exercised the discretion under s.33 of the Limitation Act 1980 to permit a claim under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 to proceed out of time.

2. The claim is brought by Mrs Suzanne Dunn, who is the widow of George Dunn ("the deceased") who died on 22 March 2012 aged 79. The deceased died from bronchopneumonia, having contracted asbestosis, allegedly in the course of his employment with the defendants.

3. The claim form was issued on 15 March 2015, so within three years of the deceased's death. However, the defendants alleged that the deceased acquired the requisite knowledge, as defined by s.14 of the 1980 Act in October 2008. Therefore, the primary limitation period for his claim expired in October 2011, pursuant to s.11 and by operation of s.12 the claimant's claim could not proceed unless the court exercised its discretion under s.33.

4. Limitation was tried as a preliminary issue. Having heard evidence, the judge found as a fact that the deceased's date of knowledge was October 2008. The claimant does not challenge that finding. Therefore, the sole issue on the appeal relates to the exercise of discretion under s.33.

5. By their grounds of appeal, which run to 16 paragraphs, the defendants contend that the judge omitted material matters from his consideration and failed to properly direct himself as to the principles to be applied. They therefore invite this court to set his decision aside and to exercise the discretion afresh. The alleged errors in the judgment are summarised at paragraph 16 of Mr Turton's skeleton argument and the parties' submissions were addressed with reference to the six matters identified there.

6. Mr Mooney QC responds on behalf of the claimant, contending that the judge applied the correct principles, made findings on the evidence and reached a decision with which this court should not interfere.

7. The judge began his consideration of the discretion under s.33 by setting out the terms of s.33(3) in full. I do not need to repeat it. The sub-section makes it clear that the court shall have regard to all the circumstances of the case, before setting out six factors (a) – (f) to which particular regard should be had.

8. The judge then correctly dealt with the authorities by noting that there were many cases giving assistance on how to interpret the section and noting that they had been distilled into thirteen principles set out by the Master of the Rolls in *Carroll v Chief Constable of Manchester* [2017] EWCA 1992 at para.42. That was an entirely appropriate starting point. In *Carr v Panel Products (Kimpton) Ltd* [2018] EWCA Civ 190 the Court of Appeal said that the Master of the Rolls' summary would no doubt now form the starting point for any court's consideration of issues arising under s.33 of the Act.

9. The final point set in the Master of the Rolls' summary in *Carroll* related to the approach of appeal courts.

> "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" (para 42 13).

It is on that basis that I approach this appeal.

10. The defendants allege the following errors in the judgment:

(i) A failure to properly consider the periods of delay which arose in the case, by reference to the explanations provided;

(ii) His incorrect finding, repeated throughout the judgment, that the appellants' position had been unaffected by the period of delay and was no different to that it would have been in 2008;

(iii) A failure properly to consider the respondent's evidence of prejudice in accordance with *Carr*;

(iv) The learned judge's incorrect direction that the deceased suffered from a disability from 2008 until his death;

(v) The learned judge's failure to address delay under Section 33(3)(e) which, on the evidence, dated from 2008 when the deceased had been advised of his right to bring a claim, but included the Respondent's own further delay from June 2012 when she instructed solicitors;

(vi) The learned judge's wrong direction, in those circumstances, that legal advice had been sought promptly.

11. Mr Mooney cautions against "micro-analysing" the judgment. He points to the observations of McCombe LJ at para.44 of *Carr* (supra):

> "Allowances need to be made for judges who, having heard evidence, produce judgments on such issues, giving to the parties a clear explanation of why one has won and the other has lost, without running the danger of finding that the possible "shakiness" of one or other brick in the wall undermines the overall conclusion, unless of course, it is a foundation stone that proves to be unsound."

12. I entirely agree. There is a need to be realistic about what is to be expected of the County Court judge giving an ex tempore judgment. Sufficient reasons must be given to allow the parties and an appeal court to know how the judge has arrived at the

decision. However, the pressure of work in the County Court means that lengthy analysis of each and every point argued is simply not possible; nor is it necessary.

13. McCombe LJ's analogy of 'shaky bricks' and foundation stones proved to be a useful one for the purpose of this appeal. It seems to me that in an ideal world the judge would have set out his reasoning on the exercise of the discretion a little more fully. There were factors tipping the scales both ways, making this a fairly finely balanced decision. I note that neither party contended that there was only one possible outcome on the facts of this case. Therefore, it was important for the judge to demonstrate that he had taken all relevant factors into account and directed himself properly.

14. I consider that the defendants are entitled to say that there are some gaps in the judgment. Mr Mooney effectively invites me to fill in those gaps by reading the judgment as a whole in the context of the evidence before the judge and drawing appropriate inferences as to what the judge had in mind. The question for me is whether that is simply a case of remedying a degree of shakiness in some of the bricks or whether the foundation stones are unsound.

15. There is good reason for the court to be slow to interfere with the judge's decision. If I were to conclude the judge's exercise of discretion cannot stand, the options open to me would be to exercise the discretion afresh, without the benefit the trial judge had of hearing the evidence and reaching findings, or to remit to the County Court for a rehearing. Neither party would welcome a rehearing and I agree that this would be undesirable, given the additional cost and the potential distress to Mrs Dunn if asked to relive events surrounding her husband's death again.

16. Consideration of the judgment must begin with the unchallenged finding as to the deceased's date of knowledge. The judge found, contrary to the claimant's case, that the deceased had acquired the relevant knowledge for the purpose of s.11(4) of the Act in October 2008. Expressing his conclusion on the date of knowledge, the judge said (at para. 12), "the cause of action accrued in October 2008." Mr Turton (correctly) says that this is a misstatement of the effect of his factual finding. Breach of duty had occurred much earlier, during the deceased's employment in the 1960s, and the cause of action accrued at the point injury was suffered. However, the deceased did not know he had sustained any such injury until 2008. Limitation therefore ran from his later date of knowledge.

17. Mr Turton readily accepted that in itself this error could not found a successful appeal. However, he suggests that it is indicative of a lack of careful analysis and adds to the defendants' concern that he has not properly directed himself on the issue of delay.

18. In reaching his finding on date of knowledge, the judge set out key parts of the claimant's evidence. He noted that she had said that when asbestosis was first raised as a possible diagnosis, she and the deceased had not treated it very seriously. The deceased had other medical issues, including other chest problems. Against that background, the claimant told the judge "The asbestos problems seemed irrelevant …" An inquest into the deceased's death found that he had died of industrial disease. The claimant first went to see solicitors a month later, in May 2012.

19. Having set out this evidence, the judge said at para. 12:

> "I have sympathy for Mrs. Dunn. Her husband was getting progressively ill and it must have been very difficult for them to take it all in. However, it seems to me that the two letters from Mr. Pasteur are compelling, that the objective test is made out in favour of the defendants and the cause of action accrued in October 2008. Having dealt with the date of knowledge, the judge considered s.33. The judge went through each of the factors set out in s.33(3). It is fair to say that he dealt with each point briefly."

20. Although all six matters set out in s.33(3) are important, since Parliament has singled them out for special mention, inevitably some will be of greater significance than others in any particular case. The court must take account of all the circumstances of the case to address the test set out in s.33(1), namely whether it would be equitable to allow the action to proceed having regard to the degree to which:

    a) the claimant is prejudiced by the application of sections 11 and 12 of the Act; and

    b) the defendant would be prejudiced by exercising the discretion to allow the claim to proceed.

21. Two important findings emerge from the judgment, namely:

    i) The delay in bringing the claim was understandable in human terms and was excusable.

    ii) The defendants were in no different position than they had been in 2008.

22. I turn then to look at the specific complaints made by the defendants.

Delay and reasons

23. The defendants contend that the judge did not carry out an objective and categorical assessment of the timing of the deceased's health problems during 2008 to 2012 and that he directed himself only in relation to the period from 2008 to 2012, without also taking account of the further delay of 2 years 9 months after the deceased's death. It is said that the claimant put forward no explanation for that delay.

24. It is not right as the defendants' skeleton argument suggests that no explanation for the delay was put forward by the claimant. It is right that the deceased was advised in terms in 2008 to seek legal advice about bringing a claim. He chose not to follow that advice. However, the claimant explained that initially they did not take the diagnosis particularly seriously and later they were concentrating on his increasingly poor health rather than any claim. After the deceased's death, the claimant instructed solicitors. In her witness statement, she said that she understood that she had three years to bring a claim from the date of death. The judge found that she did her best when giving evidence to be helpful and truthful.

25. In looking at sub-section (a) the judge dealt with the position between 2008 and 2012. At paragraph 16 he said:

> "From 2008 to 2012, the deceased took no steps to further his claim. Objectively, he should have. However, subjectively, he and his wife have not taken in the diagnosis. He had other serious complaints."

Then at paragraph 17 he said:

> "Standing back, it seems to me that save in the cold, clinical world of the law, I do not consider that he and his wife should be blamed for not getting on with the claim."

26. When later considering, sub-paragraph (f), the judge said about the claimant:

> "She sought legal advice a month after the inquest and the solicitors have had conduct of the proceedings ever since. Notice of claim was served in July 2013."

27. Revisiting the reasons for the delay when looking at the principles set out in *Carroll*, the judge said:

> "I hope I have made it clear that the deceased's increasing poor health, in human terms, in my judgment, justifies the delay. He and his wife were concentrating on his health rather than pursuing any potential litigation, and it seems to me that is an excusable reason."

28. I consider that it would have been helpful for the judge to address the period from 2012 to 2015 more clearly in his judgment. However, it is apparent that his conclusion overall was that, looking at things in human terms, the delay of both the deceased and his wife was understandable. It seems to me that this encapsulates the period both before and after the deceased's death.

29. Given what he said about the solicitors having conduct since a month after the inquest and the whole tenor of the judgment that the claimant should not be blamed, it can reasonably be inferred that the judge accepted that the claimant had taken prompt action after the verdict at the inquest and that she had followed her solicitors' advice. That would suggest that the advice given was incorrect, potentially giving rise to a claim for professional negligence. However, I agree with Mr Mooney that the potential for such a claim would not weigh particularly heavily in this case. Therefore, I do not think the omission of any specific consideration of that point is of great significance.

30. It is clear that, having heard all the evidence, the judge made a finding that the delay was excusable. It is unrealistic to suggest he was limiting that finding to the period up to 2012. Further, it is a finding that was plainly open to the judge on the evidence before him. He was entitled to accept that delay in the context of understanding and coming to terms with the implications of the diagnosis, the deterioration in the deceased's health and his subsequent death was reasonable. Naturally, the period

following the death would be a difficult time for the widow, but she sought advice promptly and understood that she had three years to bring the claim. Like the judge, I would consider the delay in these circumstances to be understandable on a human basis and to be excusable.

31. The Master of the Rolls explained the relevance of delay in the balancing exercise required under section 33, at para. 42.9 in *Carroll*. If the delay has arisen for an excusable reason, it may be fair and just for the action to proceed despite some unfairness to the defendant caused by the delay. If there is no good reason for the delay or its length, there is nothing to qualify or temper any prejudice to the defendant. It follows that the finding that the delay was excusable in this case was a positive factor in the claimant's favour.

Prejudice and cogency of evidence

32. The defendants claim that the judge misdirected himself on the issue of loss of cogency in the defendant's evidence and the resulting prejudice. Further, his key finding (para 19) that the "defendants' position is unaffected by the delay" is challenged.

33. The defendants contend that the judge should have directed himself in accordance with *Price v United Engineering Steels Ltd* [1998] P.I.Q.R. P407 and *Collins v Secretary of State for Business Innovation and Skills* [2014] P.I.Q.R. P19 in relation to the significant passage of time between the breach of duty and the date of knowledge and the difficulties that created for the defendants.

34. There is no doubt that the defendants were significantly prejudiced in defending the claim by 2008. Both companies had gone into liquidation and all records had been lost. The judge's finding at para. 19 was:

> "All the defendants' documents and chances of tracking witnesses were long gone before 2008 … They are in no different position now to 2008."

35. There are observations within the defendants' grounds of appeal and skeleton argument which support this view. In the grounds, it is said:

> "The Defendant had no prospect at all of receiving a fair trial either in 2008 or now…"

At paragraph 25 of the skeleton argument, Mr Turton says:

> "The Learned Judge should have directed himself that by 2008 the Appellants were badly disadvantaged in having to meet the claim and had little prospect of investigating it or defending themselves."

36. However, the defendants also maintain that they have suffered further prejudice through the delay since 2008.

37. In *Collins*, Jackson LJ explained the relevance of prejudice caused by long delay before the date of knowledge in long tail industrial disease claims [65]:

> "The decisions in *Price, AB and Davies* establish that the court can also take account of delay before the date of actual or constructive knowledge. On the other hand**,** it would be absurd if the defendant could rely upon all the prejudice accruing from the date when the breach of duty occurred, alternatively from the date when (unknowingly) the claimant suffered injury. If all that prejudice could be fully taken into account, section 33 (3)(b) would serve no useful purpose. Loss of cogency of evidence during the limitation period must be a factor which carries more weight than (a) the disappearance of evidence before the limitation clock starts to tick or (b) the loss of cogency of evidence before the limitation clock starts to tick. Furthermore, both the claimant and the defendant may rely upon the effects of delay before the limitation clock starts to tick for different purposes"

38. He then summarised the effect of the authorities [66]:

> "Construing s.33(3) as best I can in the light of the authorities, my conclusions are:
>
> (i) The period of time which elapses between a tortfeasor's breach of duty and the commencement of the limitation period must be part of "the circumstances of the case" within the meaning of s.33(3).
>
> (ii) The primary factors to which the court must have regard are those set out in s.33(3)(a)-(f). Parliament has singled those factors out for special mention.
>
> (iii) Therefore, although the court will have regard to time elapsed before the claimant's date of knowledge, the court will accord less weight to this factor. It will treat pre-limitation period effluxion of time as merely one of the relevant factors to take into account.
>
> (iv) Both parties may rely upon that factor for different purposes. The claimant may rely upon the earlier passage of time in order to buttress his case under s.33(3)(b). The claimant may argue that recent delay has had little or no impact on the cogency of the evidence. The damage was done before the claimant started being dilatory. The defendant may rely upon the earlier passage of time, in order to show that it already faced massive difficulties in defending the action; therefore any additional problems caused by the claimant's recent delay are a serious matter. It is for the court to assess these and similar considerations, then decide on which side of the scales to place this particular factor."

39. The judge was therefore right to focus upon the impact of the delay since 2008. That was one of the statutory factors. The passage of time prior to that was relevant, but of less weight, being merely part of the circumstances of the case.

40. To the extent that any additional prejudice had been caused by the delay since 2008, that was to be treated as a serious matter. Here though the judge found that there was no additional prejudice as a result of the delay since 2008. The real question then is whether that finding is sustainable.

41. Mr Turton accepts that by 2008 any evidence that may have been available from the defendant companies had gone. He identified two material changes in the evidential picture after 2008. First, the deceased's death removed the opportunity to obtain any further information from him. Mr Turton argued this was particularly significant since he had not even provided a witness statement. Had the claim been brought before his death, he could have been questioned by the defendants whether by way of a Part 18 request and/or cross-examination or deposition.

42. The second evidential change relied upon is the destruction of the deceased's DWP records in about mid-2014. He had applied for attendance allowance and industrial injuries disablement benefit. The defendants point to the fact that the application forms for such benefits are routinely obtained in claims such as this and may provide additional information to assist the defendants' case.

43. The thrust of the defendants' submissions about the deceased's death and the destruction of the DWP records was that potential evidence allowing them to seek a contribution from another party may have been lost.

44. I fully accept that the loss of an opportunity to seek a contribution would be an important factor. However, I do not consider that this was a real rather than fanciful possibility.

45. The deceased's HMRC National Insurance records are still available and provide details of his employment history, including the names of his former employers. A letter from the chest physician who saw the deceased in 2008 records the employment history, specifically in the context of consideration being given to asbestosis. It seems to me that it is highly unlikely that the defendants would have secured any further material evidence either from the deceased or his DWP records.

46. Despite Mr Turton's attractive submissions to the effect that the defendants lost their final opportunities to investigate liability and to see whether they could pursue any claims for contribution after 2008, I am unpersuaded that anything was really lost in this period. I think that the judge ought to have dealt with the loss of the deceased and the DWP records in his judgment since those issues had been raised. However, having examined the available evidence and looked carefully at what the defendants claim to have lost, I conclude that he was right to find that the defendants' position was no worse in 2015 than in 2008. Not only was that a decision open to the judge, it was the only sensible conclusion.

47. The defendants also argue that in addressing the cogency of the evidence likely to be adduced by the claimant, the judge erred in not directing himself in accordance with *KR v Bryn Alyn Community (Holdings) Limited* [2003] 3 WLR 107 that he should

take care not to elevate the cogency of the claimant's evidence by reason of the fact that the defendant was no longer able to properly challenge it.

48. I do not accept that the judge materially misdirected himself with regard to *Bryn Alyn*. The difficulty that arose in *Bryn Alyn* was that limitation was not determined as a preliminary issue and the judge fell into the trap of relying on his substantive findings to assess the cogency of the evidence for limitation purposes, without recognising that the picture might have been very different had the defendant not faced the evidential difficulties caused by the delay.

49. Here, the judge did what he was required to. He noted that the claimant appeared to have cogent evidence to support the claim. That was relevant to the balancing exercise he was required to undertake since a claimant suffers little prejudice if deprived of a claim that is unlikely to succeed. The judge did not elevate the significance of the cogency of the claimant's evidence above that. The thread that runs through his judgment so far as sub-section (b) is concerned is that the defendants' position was no worse in 2015 than in 2008.

Evidence of prejudice

50. It is right that the burden of proving that the discretion should be exercised in her favour rested upon the claimant. The judge had that in mind, having set out the principles identified in *Carroll*.

51. The defendants contend that the judge misdirected himself in relation to what was required to discharge that burden. Their skeleton argument argued:

> "The combined effect of the decisions in Cain and in Carr is to confirm that neither the loss of the Defence (for the Defendant) nor the loss of right to pursue the claim (for the Claimant) fall to be taken into account. Rather it is for each party to adduce evidence of additional prejudice in order to justify the resolution of the balancing exercising in Section 33(1) in their favour."

That argument was based upon the interpretation of what McCombe LJ said at para. 48 of *Carr,* responding to a submission made by Mr Turton (who also appeared in that case) that the prejudice to a claimant for the purpose of s.33(1), relates exclusively or at least mainly to the prejudice caused by the loss of the claim and not to prejudice in the litigation more generally. McCombe LJ said:

> "I do not think that is correct. The wording of section 33(1)(a) is quite general with regard to prejudice to a claimant and is in precisely the same terms as section 33(1)(b) relating to prejudice to a defendant. As I have said already, potential prejudice to a claimant by the loss of his or her claim is the universal consequence of a claimant losing a limitation argument. Further, the Master of the Rolls said in paragraph 42(3) of his judgment in *Carroll* (supra) that the burden was on the claimant to show that his or her prejudice would outweigh that to the defendant. This must presume that factors of

> prejudice, beyond mere loss of the claim itself, can be advanced by a claimant in argument on the application of section 33 in any given case in order to satisfy that burden. In the same paragraph of the judgment, the Master of the Rolls said, "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.""

52. I do not consider that this paragraph can be read as requiring the claimant to adduce evidence of additional prejudice beyond the loss of the claim. Indeed, it is difficult to see what prejudice claimants can generally rely upon other than the loss of the claim. The effect of not exercising the discretion in the claimant's favour would be to wholly deprive her of her claim. As recognised by the Master of the Rolls in *Carroll* this necessarily prejudices the claimant. Further the burden on the claimant under s.33 is not necessarily a heavy one. While the ultimate burden is on a claimant to show that it would be equitable to disapply the statute, the evidential burden of showing the evidence likely to be adduced is likely to be less cogent is on the defendant (*Carroll* para 42.5).

53. Ultimately, there is a balance to be performed, recognising the prejudice to the claimant in losing her claim set against the prejudice to the defendant in being required to meet the claim out of time. It is for the claimant to show it is equitable to allow the action to proceed. The judgment demonstrates that this was the basis on which the judge approached his discretion.

Conduct and disability

54. The defendants complain that the judge directed himself that their conduct was "irrelevant". They say that it is a relevant matter as it is one of the factors that the court is expressly directed to consider. While that is right, not all factors will come into play in every case.

55. When addressing sub-section (c), the judge might have said that he had in mind that the defendants were not to be criticised in any way. However, the wording of the sub-section suggests that this is a neutral factor, or at best one of limited weight. Describing this factor as "irrelevant" on the facts of this case cannot be said to be a material error such as invalidates the judge's exercise of discretion.

56. The judge was wrong to suggest that there was any period during which the deceased or the claimant was under a disability within the meaning of sub-section (d). This sub-section is directed towards incapacity to litigate rather than more general illness or infirmity. That did not arise here. The judge said this:

> "Looking at (d), the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action, that must at this stage relate to the deceased, and he became increasingly poorly and incapacitated from 2008. If it relates to the claimant personally, she clearly was a devoted wife and much more concerned with her husband's ill-health and his decline rather than going to see lawyers."

57. Although these matters did not properly fall within sub-section (d), they were relevant considerations. In those circumstances, as in *Yates v Thakeham Tiles Limited* [1995] P.I.Q.R. P135, the judge's misconstruction of sub-paragraph (d) did not affect the outcome and does not justify setting his decision aside.

Delay once the deceased and/or claimant were aware of their right to bring a claim

58. The judge dealt with sub-section (e) by referring back to what he had said when considering sub-section (a). The defendants complain that this is a separate consideration. Sub-section (a) deals with the length of and reasons for the delay and sub-section (e) deals with the extent to which a claimant has acted reasonably and promptly once aware of the possibility of bringing a claim. Mr Turton argues the judge had not in fact dealt with sub-section (e) because he had not addressed the fact that the deceased was advised to consult solicitors in 2008 or to acknowledge that the deceased and the claimant had chosen to delay despite being advised to seek legal advice.

59. There is some force in this. However, the judge's view as to the extent to which the deceased and the claimant had acted promptly and reasonably is apparent from the judgment. In my view, the judge ought to have expressly acknowledged that the deceased had been advised to seek legal advice in 2008. However, this was clearly in his mind since he had referred to the letter in which that advice was given.

60. It has to be said that the deceased was not prompt in seeking advice. However, the judge had determined that he acted reasonably. His finding about the claimant was that she had instructed solicitors a month after the inquest and that thereafter the matter was in the hands of the solicitors. He was entitled then to find that she had acted promptly and reasonably.

61. Using McCombe LJ's analogy, if the judge's treatment of sub-section (e) represents a 'shaky brick', it is certainly not an unsound foundation stone.

The seeking of legal or medical advice

62. Similar points may be made in relation to sub-section (f). While the judge could have spelled out his analysis of this factor more clearly, it is clear when his judgment is read as a whole that, having heard the claimant's evidence, the judge accepted her explanations for not seeking legal advice at an earlier stage. In human terms, he thought their approach was understandable and reasonable and therefore should not count against them.

The exercise of discretion

63. The foundation stones on which the judge exercised his discretion were those set out at paragraph 22 above. He arrived at findings that the delay was understandable and excusable, and that the defendant's position had not materially changed since 2008. I have concluded that those findings were properly open to the judge.

64. It is true that the judge might have expressed himself more clearly in relation to other matters. However, I consider that the judgment adequately deals with the relevant considerations. Having found that the delay on the claimant's side after the date of

knowledge did not affect the strength of the defence and that it was excusable delay, it cannot realistically be argued that the judge was wrong to conclude that it was equitable to allow the action to proceed.

65. In the circumstances, I find that it would be inappropriate to interfere with the judge's exercise of the broad and unfettered discretion under s.33.

66. It follows that this appeal will be dismissed.