



Neutral Citation Number: [2020] EWCA Civ 1625

Case No: A1/2019/2717 & 2718

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**  
**BRISTOL DISTRICT REGISTRY**  
**(HHJ RUSSEN QC)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 04/12/2020

**Before:**

**LORD JUSTICE HENDERSON**  
**LORD JUSTICE COULSON**  
and  
**LADY JUSTICE ROSE**

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**Between:**

<b>SOLARIA ENERGY UK LIMITED</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY</b>	<b><u>Respondent</u></b>

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**Guy Adams** (instructed by Capital Law Ltd) for the **Appellant**  
**Tom Weisselberg QC and Dominic Howells** (instructed by Government Legal Department)  
for the **Respondent**

Hearing Date: 4<sup>th</sup> November 2020  
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**Approved Judgment**

“Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties’ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Friday 4<sup>th</sup> December 2020.”

## **LORD JUSTICE COULSON:**

### **1. INTRODUCTION**

1. By proceedings commenced on 21 December 2018, the claimant (“Solaria”) seeks damages against the defendant (“the Department”) as a result of an alleged wrongful interference with Solaria’s possession (namely an existing sub-contract to provide photovoltaic (“PV”) panels and related equipment) contrary to Article 1, Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled in the Human Rights Act 1998 (“A1P1”). The claim arises out of a proposal by the Department’s predecessor (the Department of Energy and Climate Change), published on 31 October 2011, to bring forward the qualifying date for the Feed-In Tariff Scheme from 31 March 2012 to 12 December 2011, and to reduce the subsidies payable thereunder.
2. That proposal, had it been implemented, would have been unlawful in *R (on the application of Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2011] EWHC 3575 (Admin), a decision affirmed on different grounds by the Court of Appeal in *R (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28. Subsequently, in *Breyer Group Plc and Others v Department of Energy and Climate Change* [2014] EWHC 2257 (QB), affirmed by the Court of Appeal at [2015] EWCA Civ 408, in an action brought against the Department by manufacturers and suppliers of solar panels, it was held that, in principle, the unlawful proposal could amount to a wrongful interference with or deprivation of the claimants’ possessions, namely existing contracts, contrary to A1P1.
3. The Department sought to strike out Solaria’s claim in these proceedings on the grounds that:
  - (a) The claims for loss and damage at paragraph 49 of the Particulars of Claim, said to represent a loss of marketable goodwill (calculated as “the capitalised value of the expected future cash flow generated” by Solaria’s sub-contract), did not amount to a possession pursuant to A1P1. The primary ground for this submission was that, unlike the assumed facts in *Breyer*, the sub-contract was not capable of assignment and therefore, by reference to the authorities, could not in law amount to a possession.
  - (b) The claim was statute-barred. The claim had not been brought within the one year period identified in section 7(5)(a) of the Human Rights Act (“HRA”), and the Department submitted that, by reference to the alternative provision at section 7(5)(b), it would not be equitable to allow the claim to be brought so long after “the act complained of” (ie the proposal of 31 October 2011).
4. In a detailed judgment dated 22 August 2019, His Honour Judge Russen QC (“the judge”) found in favour of the Department on both limbs of the application. The claim was therefore struck out. On 20 February 2020, Solaria was granted permission to appeal against the decision to strike out. It follows that Solaria need to succeed in their attack on both limbs of the judgment in order for this appeal to be allowed and the proceedings reinstated.

### **2. THE FACTUAL BACKGROUND**

5. In July 2011, Solaria entered into a sub-contract for the supply of PV panels and associated accessories to GB Building Solutions Limited (“GBBS”). GBBS were, in their turn, engaged by Northumberland County Council (“NCC”) to supply and install PV panels at residential and commercial properties in the North East.
6. The sub-contract was for the supply by Solaria to GBBS of PV panels for 130 commercial premises and 400 residential premises. The sub-contract also envisaged that additional panels might be ordered by GBBS and stipulated that the sub-contract rates would apply to any such additional materials. It is Solaria’s case that, in October 2011, it was agreed in principle that they would provide panels for another 300 residential dwellings, but it is accepted that no sub-contract instruction to that effect was ever issued by GBBS.
7. The sub-contract incorporated the JCT 2005 Design and Build sub-contract conditions, with some bespoke amendments. For present purposes, only clauses 3.1 and 3.2 are relevant:

“Assignment and Sub-letting

**Non-Assignment**

- 3.1 The Sub-Contractor shall not without the [prior] written consent of the Contractor assign this Sub-Contract or any rights thereunder.

**Consent to sub-letting**

- 3.2 The Sub-Contractor shall not without the [prior] written consent of the Contractor (which consent shall not be unreasonably delayed or withheld) sub-let:

.1 the whole or any part of the Sub-Contract Works; or

.2 the design for the Sub-Contractor’s Designed Works.

The Sub-Contractor shall remain wholly responsible for carrying out and completing the Sub-Contract Works in all respects in accordance with this Sub-Contract notwithstanding any such sub-letting and the Contractor’s consent to any such sub-letting of design shall not in any way affect the obligations of the Sub-Contractor under clause 2.13.1 or any other provision of their Sub-Contract.”

8. During the currency of the sub-contract, the Department’s predecessor published a consultation document on 31 October 2011, which contained a proposal to reduce the subsidies payable under the Feed-In Tariff Scheme in respect of electricity generated by PV installations. The tariff is the fixed price paid by electricity supply companies for the power fed into the grid from small-scale solar panel installations. The consultation document proposed a reduction in fixed rates from 12 December 2011, which was prior to the end of the proposed consultation period. The proposal, had it been implemented, would have been unlawful: see *Homesun* and *Friends of the Earth*, cited in paragraph 2 above. The date of the judgment in the Court of Appeal was 25 January 2012. Thereafter, the Department published a revised proposal which brought

forward the review date (and the reduced subsidies), this time to 2 March 2012. It has never been suggested that this revised proposal was unlawful.

9. The proposal of 31 October 2011 had a significant impact on the solar energy industry. A large number of claims were brought by contractors and suppliers in the same business as Solaria, alleging interference with their possessions and therefore breach of A1P1. Those claims were the subject of the *Breyer* judgments in 2014 and 2015, noted in paragraph 2 above, when various preliminary issues of principle were decided largely (but by no means entirely) in favour of the claiming companies. Solaria acknowledge that they were aware of the *Breyer* litigation from shortly before judgment was given in the Court of Appeal.
10. Following the decision of the Court of Appeal in 2015, what remained outstanding in the *Breyer* litigation was the resolution of the individual claims. Because the preliminary issues had been resolved by way of assumed facts, the subsequent trial would have had to deal with the myriad factual disputes that arose out of the thousands of contracts said to have been affected by the wrongful interference. There was a major issue as to causation, because each claimant needed to demonstrate that it was the proposal of 31 October 2011, and not any other matter, which had interfered with or prevented the performance or completion of each disputed contract. The trial was due to be heard in January 2018 but was settled very shortly before it was due to start.
11. Solaria was not a party to the *Breyer* litigation. They continued to supply PV panels to GBBS well into 2012. Pursuant to the sub-contract, Solaria was entitled to be paid by reference to the contractual rate of £1.35 per watt. However, they claim that, as a result of the Department's proposal, they were obliged to renegotiate the sub-contract. They invoiced GBBS at the lower rate of £1.10 per watt until July 2013, when they issued a further invoice claiming recovery at the higher rate. Solaria then waited another year, until August 2014, before they commenced proceedings against GBBS claiming the shortfall. In March 2015, GBBS went into administration and Solaria's claim was never resolved.
12. Solaria also pursued NCC who, they said, had had the benefit of at least some of the PV panels for which Solaria alleged they had not been properly paid. It appears that in May 2018 some modest recovery was made on this basis from NCC.
13. Solaria did not indicate a claim against the Department until their letter before action on 21 December 2016. In their response dated 30 January 2017, the Department took the limitation point and said that, if proceedings were commenced, it would seek to strike them out on the ground that the claim was statute-barred. Thereafter, at something of a snail's pace, the parties agreed a standstill agreement which was backdated to 21 December 2016, even though the agreement itself was not signed off until 21 November 2017. Very soon thereafter, on 30 January 2018, the Department gave notice pursuant to the standstill agreement that it would come to an end on 1 March 2018.
14. Solaria still did not issue proceedings against the Department. It was not until 20 July 2018 that they sent a letter before action (which was technically unnecessary, because they had already sent one). Although there was a suggestion that the next few months were taken up with the pre-action protocol process, it is trite law that such a process

cannot affect the operation of any relevant limitation period. That is why all relevant pre-action protocols allow for the issue of a protective writ before the process is undertaken in cases where there is or might be a limitation difficulty: see, by way of example paragraph 12.1 of the TCC Pre-Action Protocol. Despite that, Solaria did not commence these proceedings until 21 December 2018.

15. Solaria accept, as Mr Adams put it during his oral submissions, that “their claim for loss of profit crystallised at the beginning of November 2011”. The claim should therefore have been brought by the end of October 2012, within the period of one year set out in section 7(5)(a) of the HRA. Instead, even giving Solaria the benefit of the standstill agreement, approximately five years and eleven months elapsed between the unlawful proposal of 31 October 2011 and the commencement of these proceedings. That is the aggregate of the period of five years and two months between 31 October 2011 and 21 December 2016 (which was the retrospective date of the standstill agreement), and the further period of nine months between 1 March 2018 (when the agreed standstill period came to an end) and the commencement of these proceedings on 21 December 2018. That amounts to a period of delay, beyond the one-year period provided in section 7(5)(a), of 4 years and 11 months.

### **3 THE JUDGMENT**

16. The Department’s application to strike out Solaria’s claim was heard on 26 July 2019. The judge’s detailed judgment, dated 22 August 2019, is at [2019] EWHC 2188 (TCC).
17. The judge dealt in detail with the first ground for striking out, namely that Solaria’s sub-contract was not a possession as defined in A1P1. He explained the submissions and the law at [19] – [51]. His conclusion was as follows:

“52. In the light of the decision in *Murungaru*, which was followed by Coulson J in *Breyer*, I regard the key question to be whether or not the contractual rights which Solaria enjoyed under the contract had a monetary value which could be marketed for consideration. Although Solaria had negotiated with GBBS a contract which had an economic value to it at the date of the Proposal (and in that respect this business contract was clearly in a different category from Dr Murungaru’s ongoing medical treatment) the weight of authority indicates that, as with goodwill, whether or not that value is marketable is the central consideration. I have already noted that Lewison J said that transmissibility was not necessarily the touchstone but he said it is “a highly relevant factor” and went on to note the significance which the Court of Appeal in *Malik* had attached to rights which were not transferable and therefore lacked economic value. The bundle of rights could not be viewed as an “asset”. In *Breyer*, by contrast, Coulson J noted that, on the basis of the assumed facts, the contracts before him were assignable...

54. By an amendment to the JCT 2005 Design and Build Sub-Contract in the present case, it was agreed that Solaria would not assign the sub-contract or any rights under it without the prior written consent of GBBS. A similar restriction was placed upon the “sub-letting” of the whole or any part of the sub-contract, with the proviso that GBBS’s written consent

would not be unreasonably withheld or delayed. The Department contends that the absence of a right in Solaria to assign the contract without GBBS's consent means that its economic value was not a marketable one. The sub-contract also contained certain warranties given by Solaria direct to NCC and they included the warranty that Solaria would continue to perform its obligations under the sub-contract (and not assign that warranty).

55. In response, Mr Adams' skeleton argument made the points contained in paragraphs 41 and 42 of Mr Jones' witness statement which I have already quoted above. He submitted that Solaria might have realised value for the contract by dealing with it even without GBBS's consent and that the point is reinforced by the reference to the obligation upon GBBS not to unreasonably withhold or delay its consent to a subletting.

56. I am satisfied, to the standard which reflects the ultimate burden upon the Department as the applicant for summary judgment, that this is not a good response."

18. Accordingly, at [59], the judge concluded that Solaria's contractual rights under the sub-contract lacked the attributes of an asset when tested by reference to the *Murungaru* criteria. Although he noted that they had a value to Solaria, that value was not a readily realisable or marketable value because the sub-contract could not be assigned.
19. As to the limitation issue, the judge set out what he had to decide at [68] – [69]. He rejected the suggestion that the claim under the HRA was or was akin to a claim in tort [70]. He also rejected the submission that he should avoid deciding the limitation issue until the trial [72]. He was scrupulous in noting that he had to address the limitation position on the assumption that Solaria had a good claim on the merits [73].
20. He then turned to deal with the delay and the fact that the claim had not been brought within the year identified in section 7(5)(a) of the HRA and was therefore the subject of the "equitable" test in section 7(5)(b). He said at [74] – [75] that the real question was why the delay had occurred. He said:

"76. In truth, Solaria has no intelligible answer to that question. The facts show that instead of promptly bringing its A1P1 claim against the DECC, before October 2012, Solaria continued to deliver PV panels to GBBS until July 2012. It did so in return for being paid at the rate of £1.10 per watt, rather than £1.35 per watt, but on its own case upon the post-Proposal agreement reached with GBBS it did so in circumstances where (the Proposal having subsequently foundered) it should have been entitled to payment at the full rate. Indeed, in July 2013 Solaria issued an invoice to GBBS for the greater part of what it now seeks to recover from the Department under the categories (1) and (2) heads of loss; and on 26 August 2014 it issued proceedings against GBBS for recovery of the difference. As I have already noted, those proceedings were stayed following the appointment of administrators of GBBS in March 2015."

21. That is to be contrasted with his findings in respect of the prejudice suffered by the Department as a result of the delay:

“106. The failure to bring proceedings over the Proposal before the effective date of the Standstill Agreement (namely 21 December 2016 when the letter of claim was sent) clearly has prejudiced the Department. Within weeks of the Proposal being published Solaria knew of the legal challenge to its proposed implementation. If Solaria had acted promptly by looking to the DECC for the loss that had in fact resulted from it receiving from GBBS the lower rate of £1.10 per watt for PV panels (even if that should not have been the legal consequence of its agreement with GBBS) its claim could have been managed alongside the ones in Breyer.

107. As things now stand, however, the Department would be faced with the prospect of the evidential and financial implications of a claim commenced only at the conclusion of the Breyer litigation. I accept Mr Weisselberg’s submission, which is supported by the evidence from Mr Olsen of the GLD, that the evidential difficulties would not only reflect the inevitable consequences of further fading memories on the part of those behind the publication of the Proposal but also the difficulties likely to be encountered in disentangling the effect of the Proposal from a falling market in PV installations caused by the revised one which took effect, without challenge, whilst Solaria continued to supply GBBS. As to that, I have already referred to the apparent strength of the Department’s likely defence based upon GBBS’s *novus actus*. Yet the Department would be expected to attempt to adduce evidence from the officers or representatives of GBBS, to explore the reasons why Solaria were not paid the full £1.35 per watt, when that company went into administration over 4 years ago. Mr Olsen also makes the incontrovertible point (which chimes with what Rix LJ said in *M*) that bringing this very late claim is at odds with the public policy objective of encouraging the efficient use of public resources which I believe I am entitled to assume was in the Department’s mind when reaching its settlement with the Breyer claimants.”

22. In addition, in this latter part of his judgment, the judge said (amongst other things) that he rejected the suggestion that the one year period in section 7(5)(a) was not a primary limitation period; he rejected Solaria’s argument that the use of the word “equitable” brought in concepts such as the equitable doctrine of laches; and he observed that the submissions made on behalf of Solaria sought to put a gloss on the words of section 7(5)(b), in that Solaria sought to place the burden of the section on the Department by requiring it to show that it would be inequitable for the claim to continue.
23. For these reasons, the judge concluded that the claim was statute-barred. Accordingly, having found in favour of the Department on both grounds, he struck out the claim.

#### **4 ISSUE 1: THE A1P1 CLAIM**

##### **4.1 The Law**

24. The earlier European authorities concerned with the meaning of “possession” under A1P1 were primarily concerned with licences (*Batelaan and Huiges v Netherlands* (10438/83) or inclusion on a register (*Van Marle v Netherlands* (8543,8674,8675,8685/79). *R (Nicholds) v Security Industry Authority* [2007] 1 WLR

2067 was a similar case, concerned with the licensing criteria for door supervisors. The analysis of Mr Kenneth Parker QC, sitting as a deputy high court judge, as to why goodwill in a broad monetary sense was a marketable asset, and could therefore be a possession in accordance with A1P1, has been extensively cited in later cases. The reason for that analysis stemmed from the European authorities which held that, whilst goodwill could in principle be a possession under A1P1, a loss of future income could not.

25. The authorities on this aspect of A1P1 were dealt with comprehensively by the Court of Appeal in *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265. This was a claim by a medical practitioner in respect of his unlawful suspension from its performers' list by the defendant trust. The issue was whether his inclusion on the list was a possession for the purposes of A1P1. It was held that it was not: the inclusion of Dr. Malik's name on the list was in effect a licence to render services to the public and, being non-transferable and non-marketable, was not a possession for the purposes of A1P1. In his judgment at [40], Auld LJ said:

“... The licence itself is not the “possession” and...whether the economic interests that flow from it are a possession depends on the facts, one of which may be the marketable goodwill that can flow from the exercise of a licensed trade...”

Another case under A1P1 involving potentially vague and non-contractual rights was *R (Countryside Alliance and Others) v Attorney General* [2008] 1 AC 719, which concerned the right to fox hunt.

26. Authorities involving an alleged interference with existing contracts are far fewer in number, perhaps because a contract may comprise a rather more obvious ‘possession’ than a licence or a place on a register. The starting point in domestic law is *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015. The claimant's immigration status was altered without notice, which prevented him from coming to the UK for continuing medical treatment. He said that the interference with the contract between himself and his medical provider amounted to a breach of A1P1. The Court of Appeal said that “the fact that possessions can include contracts does not mean that all contracts are possessions” [30]. Lewison J, giving the principal judgment of the court, said:

“45. Some of the characteristics of the contract in the present case are not in doubt. First, the benefit of the contract is incapable of assignment. Dr Murungaru could not confer the right to medical treatment on anyone else. Second, as a contract for personal services it cannot be vicariously performed. No other doctor could perform the treatment. Third, if, for example, Dr Murungaru were to become bankrupt under English law, the contract would not vest in his trustee. If he died, his personal representatives would not be able to take advantage of the contract. Fourth, it is incapable of being enforced by injunction or specific performance. Fifth, there is no suggestion that Dr Murungaru has paid for any medical treatment in advance. If, having received medical treatment, Dr Murungaru refused to pay for it, the doctors would be entitled to recover the agreed payment by action. The debt would be a chose in action which the doctors would be entitled to assign to someone else. Likewise, if the doctors refused



to treat Dr Murungaru, he would be entitled, at least in theory, to recover damages for breach of contract, and his right to damages would itself be a chose in action capable of being assigned to someone else. But although breach of the contract may give rise to claims capable of being choses in action, I doubt whether the underlying contract itself is a chose in action. To take an analogy: a claim for damages for personal injury (say, a broken leg) is undoubtedly a chose in action. But one would hardly say that the fracture itself is property...

58. In the present case, Dr Murungaru's contractual rights have none of the indicia of possessions. They are intangible; they are not assignable; they are not even transmissible; they are not realisable and they have no present economic value. They cannot realistically be described as an "asset". That is the touchstone of whether something counts as a possession for the purposes of A1 P1. In my judgment Dr Murungaru's contractual rights do not."

27. In *Breyer*, by contrast, there were thousands of alleged contracts. The possessions issue arose principally because, whilst many of the contracts potentially affected by the unlawful proposal were completed and some had even been performed, others had not been concluded, and many could not properly be described as binding contracts at all. The argument at first instance, as is apparent from Lord Dyson's analysis at [22] – [27] of the judgment in the Court of Appeal, focussed on the certainty that could be ascribed to the alleged contracts. Thus, at one end of the scale, there were draft contracts (known as "leases") which had been sent to customers but to which they had not even responded by 31 October 2011. Such leases, which had not been converted into concluded contracts, and were simply offers, were found to fall outside the A1P1 definition of possession, because they were no more than possible future contracts which, at most, might give rise to a claim for loss of future income and would not therefore amount to a possession under A1P1. On the other hand, leases which had been signed and/or partially performed were found to be possessions within the meaning of A1P1.
28. It was because the judge at first instance had decided that some of the alleged contracts were not possessions, because they were too uncertain, that the claimants in *Breyer* appealed his conclusions on the possessions issue to the Court of Appeal. They were thereby seeking to extend the categories of contracts which could be the subject of the A1P1 claim. The Court of Appeal rejected their appeal: see [40] – [49] of the judgment of Lord Dyson MR. His conclusion was as follows:

“49. As I have said, the distinction between goodwill and loss of future income is not always easy to apply. But in my view, the judge was right to see a clear line separating (i) possible future contracts and (ii) existing enforceable contracts. Contracts which have been secured may be said to be part of the goodwill of a business because they are the product of its past work. Contracts which a business hopes to secure in the future are no more than that. For this reason, I would uphold the judge's classification.”
29. Although not directly in point, mention should also be made of *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, where it was held that a disability

premium fell within the ambit of A1P1, despite the fact that it was only of value to the person who was claiming the premium. The question of transmissibility did not arise for specific consideration by the Supreme Court.

#### **4.2 Analysis**

30. I have previously observed that the law relating to what is and is not a possession under A1P1 is, in places, counter-intuitive to a common lawyer. That is partly because future income is not a possession, but marketable goodwill is, and the dividing line between the two is murky, at best. If Lord Bingham was prepared to admit that he “did not find the jurisprudence on this subject very clear” (see [21] of his speech in *Countryside Alliance*) then it can safely be assumed to be difficult. However, that said, I venture to suggest that some of the potential problems in the present case may be more imaginary than real.
31. As noted above, most of the authorities on this aspect of A1P1 are not concerned with claims for wrongful interference with an existing contract. They are concerned with less tangible rights, like a licence or inclusion on a register. In my view, that is of no real relevance to the situation where there is an existing contract. In this way, the only authorities which are of any direct relevance to the present case are *Murungaru* and *Breyer*.
32. In *Murungaru*, the court accepted that a contract could be a possession, and the only issue was whether that particular contract was a possession within the definition in A1P1. For the reasons set out at [45] and [58] (paragraph 26 above), the court concluded that the contract with the medical provider, which was entirely personal to Dr Murungaru, was not a possession. One, but only one, of the indicia of a possession which the contract failed to meet was that of assignability. In any event, to the extent that it is material, there could never have been a claim for loss of marketable goodwill in that case, because the claimant was an individual suing in a personal capacity, not a business capacity.
33. In *Breyer*, it was accepted that a contract could be a possession, and the real issue was which of the thousands of alleged contracts could properly be categorised as possessions, and which could not. That assessment was carried out by reference to certainty. The question of assignability did not arise for consideration either way because it was assumed that the concluded contracts could be assigned (see paragraph 51 of the judgment in *Breyer* at first instance), whilst incomplete contracts were inchoate and had not yet created rights that could be assigned as a matter of law (see paragraph 59 of the judgment at first instance).
34. In the absence of clear guidance in the authorities, any analysis must start with basic principles. Whilst not all contracts are possessions within the meaning of A1P1, the starting point must be that a signed and part-performed commercial contract is, prima facie, a possession. Indeed, that was the central assumption in *Breyer*. On that basis, the sub-contract into which Solaria had entered with GBBS was a possession. It was a commercial arrangement which was of value to Solaria. It had a value in monetary terms without the need for it having first been converted into money. On the face of it, if the Department wrongly interfered with the performance of that sub-contract without justification, then that could trigger a claim for wrongful interference by reference to A1P1.

35. For completeness, however, I should say that I consider that the judge was right to find that the 300 potential future installations (paragraph 6 above) were too speculative to be a possession: they would at best give rise to a claim for future income, and they therefore fell the wrong side of the line drawn in the European authorities and *Breyer*.
36. The argument that found favour with the judge in support of the proposition that, despite being completed and partially performed, Solaria's sub-contract with GBBS was not a possession within A1P1 was that the sub-contract was not capable of being assigned. The Department submitted that, because assignability was one of the indicia of a possession noted in *Murungaru*, the inability to assign meant that the sub-contract between Solaria and GBBS could not be a possession for the purposes of A1P1. In my view, there are three flaws in that submission.
37. First, it is not correct on the facts. The sub-contract could be assigned: it was simply that the assignment required the prior consent of GBBS. That qualification might affect the value of the contract, but it did not mean that the contract was incapable of assignment in law and could not therefore mean that it was not a possession. In addition, the sub-contract was capable of being sub-let, subject only to the limited qualification that GBBS' consent to any sub-letting should not be unreasonably withheld. These provisions, certainly when taken together, seem to me to indicate that, even on a strict application of the indicia referred to *Murungaru*, the sub-contract was a possession.
38. Secondly, I consider that the judge was wrong to elevate assignability into a black and white test for whether a package of contractual rights was a possession under A1P1. *Murungaru* rightly says that it is one of many factors which must be applied to test whether a contract was a possession within the meaning of A1P1. But *Murungaru* is not authority for the proposition that, if a commercial contract is not assignable, it is somehow automatically outside A1P1. The test is much more nuanced than that.
39. Thirdly, I am not convinced that, even if the sub-contract had contained a complete bar on sub-letting or assignment, it would mean that there was no A1P1 claim in principle. I accept that such a bar might have an effect on the quantification of any claim, but that is a separate point. After all, as I have already noted, in *R (RJM)*, a disability premium was held to fall within the ambit of A1P1, and it was an accepted fact that that premium could only be of value to the person claiming it.
40. I consider that, in the present case, there has been a potentially unhappy elision of principle and quantification. In its Particulars of Claim, Solaria had sought to mimic the language of *Breyer* in defining its loss: see paragraph 3(a) above. That may have been a mistake. Each case is different. For present purposes, the issue is simply whether Solaria have a realistic prospect of demonstrating that their sub-contract with GBBS was a possession for the purposes of A1P1, not how any wrongful interference with that possession may fall to be quantified.
41. In summary, therefore, I consider that Solaria possessed a package of contractual rights which, on their case, were wrongly interfered with by the Department. Restrictions on assignability might go to their value, but on the facts of the present case, they do not go to whether or not in principle Solaria had an arguable claim by reference to A1P1. I therefore conclude that the judge was wrong to strike out the

claim simply because the sub-contract was the subject of restrictions as to assignment and sub-letting. I turn therefore to the second limb of the appeal, concerned with limitation.

## **5 ISSUE 2: LIMITATION**

### **5.1 The Law**

42. Section 7(5) of the Human Rights Act 1998 provides as follows:

**“7 Proceedings.**

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question...”

43. I consider that, of the numerous authorities cited to us, there are no more than five which are of relevance to the proper interpretation of this provision, and it is perhaps only the first two noted below which are of direct assistance. I take them in chronological order.

44. In *Dunn v Parole Board* [2008] EWCA Civ 374, the Court of Appeal was dealing with a claim against the Parole Board that was made something like four years after the relevant event. The judge struck out the claim and the appeal was dismissed. Thomas LJ gave a clear warning against adding a gloss to the words of section 7(5). He said:

“30. It was common ground in the submissions to us that a court should not add to or qualify or put any gloss upon the words "equitable having regard to all the circumstances" when considering the exercise of the discretion under s.7(5)(b) of the HRA (which I have set out at paragraph 9 above). The words of the sub-section meant exactly what they said and the court should not attempt to re-write it...”

32. In my view, it is desirable to follow a similar approach in relation to the HRA and not to list the factors or to indicate which factor may be more important than another. It is for the court to examine in the circumstances of each case all the relevant factors and then decide whether it is equitable to provide for a longer period. It may be necessary in the circumstances of a particular case to look at objective and subjective factors; proportionality will generally be taken into account. It is not in my view appropriate to say that one particular factor has as a matter of general approach a greater weight than others. The court should look at the matter broadly and attach such weight as is appropriate in each given case.

45. Thomas LJ went on to set out a number of earlier first instance decisions. The first two are of significance to the present case. He said:

“33. The three first instance cases cited to us might at first sight indicate a more prescriptive approach, but on analysis I do not consider that any of these decisions did more than highlight the factors that the judge thought of greatest weight on the facts of that case.

- i) In *Weir v Secretary of State for Transport* [2004] EWHC 2772 (Ch) ([2005] UKHRR 154), a large number of shareholders in Railtrack Group plc brought a claim against the Secretary of State in respect of the Administration Order made for the company. Lindsay J extended the period under s.7(5)(b) in circumstances where the Secretary of State had known for a long time that a HRA claim might be made and the raising of the issue by amendment had caused no surprise. The judge described his approach at paragraphs 36 and 57:

‘36. So it seems to me that the proper approach, having in mind Lord Woolf's observations [in *R v Commissioner for Local Administration ex Parte Croydon London Borough Council* [1989] 1 All ER 1033 at 1046] is that an absence of prejudice, so far as s.7(5)(b) is concerned is a highly material factor but is not of itself conclusive in favour of an extension of time being granted. I cannot say simply because the defendant suffered no prejudice ergo there should be an extension of time. Delay, as it seems to me, must always be a relevant consideration.

57. I have to consider whether here it would be proportionate to deny the Claimants the right to raise the Human Rights aspect of the case simply because a claim form or a stand-still agreement was not sought within the period.’

- ii) *Cameron v Network Rail* [2006] EWHC 1133 ([2007] 1 WLR 163) was a claim under Articles 2 and 8 arising out of the Potters Bar railway accident; Sir Michael Turner in declining to extend the period under s.7(5)(b) referred to the provisions of s.33(1) of the Limitation Act 1980 at paragraph 43:

‘43. Section 7 of the HRA prescribes a limitation period of one year from the date of the occurrence giving rise to, and the initiation of, the proceedings except that, if the court considers it equitable to extend the period, it may do so. The word 'equitable' in this statutory context has an obvious resonance with its use in the Limitation Act 1980. Section 33(1) of that Act permits the court to direct that the primary period of limitation shall not apply if it appears to the court that it would be 'equitable' to allow an action to proceed, having regard to the extent to which prejudice would be caused to the claimant or the defendant as the case might be. While it would not be right to incorporate all the circumstances to which the court is enjoined to have regard as set out in subsection (3) of section 33, which are inclusive and not exclusive of "all the

circumstances", it would not make any sense to disregard them as having no relevance to the circumstances which the court should consider in exercising its discretion whether or not to extend time under these provisions of the HRA.'

After setting out the facts and commenting that he did not consider that there were any circumstances which would make it equitable for time to be enlarged, Sir Michael continued:

'47. As a matter of the proper construction of the section, the presumption has to be that the need to prove that it would be 'equitable' not to apply the limitation provisions rests on those who seek that result. In other words, the burden must be on the claimant to prove that there are circumstances which make it 'equitable' why the defendant should not be able to take advantage of the limitation provisions. There are, in my judgment, no circumstances present in this case where it would be appropriate to rule that they should not apply. Quite clearly, a huge administrative burden would fall on the defendant if it was forced to meet the claim on its strict merits. The disadvantage to the claimant is that he has lost the claim, but that is the consequence of failing to issue his proceedings in time...'"

46. In *M (a minor by his litigation friend LT) v Ministry of Justice* [2009] EWCA Civ 419, the claimant, who was the son of a man who committed suicide in prison on 22 October 2003, issued proceedings against the Ministry of Justice in connection with that suicide in September 2007. That was nearly three years after the expiry of the one year period noted in section 7(5). There had been an inquest in July 2005 which had been attended by the claimant's mother and which was critical of the Ministry of Justice.
47. It was submitted on behalf of the claimant that in some way section 7(5) was not akin to a provision in the Limitation Act. Rix LJ rejected that submission. He said:

"20. Thus section 7(5) of the HRA itself recognises by that language that it is dealing with a time limit just like any Limitation Act time limit and recognises also that a Limitation Act time limit may be stricter than a time limit imposed by section 7(5) itself. That, it seems to me, is a critical and decisive answer to Mr Simblet's submission. But I would go on to observe, although it is not necessary to my decision, that if Mr Simblet's submission were correct, then the argument for saying that the need for a claimant to be a victim of the unlawful act referred to at the end of section 7(1) would itself be a matter going to jurisdiction. Mr Simblet himself seemed to accept that such a conclusion would be counterintuitive even though, given the language of the Act, there would be a stronger case for saying that the need

for the claimant to be a victim went to jurisdiction than to say that a time limit which is so much akin to an ordinary Limitation Act time limit went to jurisdiction. However subsections (3) and (4) of section 7 indicate that the need for the claimant to be a victim related, in effect, to what, in the context at any rate of judicial review, would be considered to be a sufficient interest in England or a title and interest to sue in Scotland. It seems to me that these considerations support the view that section 7(5) is not dealing with a jurisdictional matter. It would be very surprising if every Human Rights Act claim by an alleged victim which was opposed on the ground that the claimant was not a victim was a matter which had to be dealt with under Rule 11 of the CPR.

21. Therefore I would reject Mr Simblet's first ground of appeal to the effect that the defendants had failed to take a jurisdictional point in time. There is, in my judgment, no jurisdictional point. It also follows from what I have said about Mr Simblet's attempt to distinguish the language of section 7(5) and that of the Limitation Act, that there is nothing in the distinction between section 7(5) limitation and limitation in the Limitation Act to raise a critical interpretative difference of approach for the court.”

48. In addition, there was an argument about where the burden lay in persuading the court that a period longer than one year was equitable in all the circumstances. Rix LJ said:

“23 . It seems to me that there is that difference in language but that the burden remains, as Mr Simblet accepts, acknowledging in this respect the decision of Sir Michael Turner in *Cameron v Network Rail*, on the claimant to bring himself within section 7(5)(b), and that being the case, the burden must be the normal burden of someone who wishes to persuade the court to adopt an approach to its discretion which he is advocating. The judge, of course, has to balance all the factors which are in play in the light of all the circumstances of the case. The burden is that of the ordinary civil burden of proof where matters of fact are in issue and otherwise it is a burden of persuasion. Quite how the burden of persuasion is discharged by a claimant must ultimately depend not upon the particular form of the statute in question but upon the nature of the factors in play before the court.”

49. Turning to the more general authorities, on this question of burden of proof or onus, our attention was drawn to paragraph 167 of the judgment of Lord Kerr in *A v Essex County Council* [2010] UKSC 33 where he said:

“167. It has been held in *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB), [2007] 1 WLR 163, para 47 that the burden of establishing that it is equitable to extend time under s 7(5) is on the party seeking the extension. As Field J observed, at para 120, however, few cases of this type lend themselves to a ready resolution by the application of a burden of proof and I prefer to approach the question (as did the judge) by an open ended examination of the factors that weigh on either side of the argument that this is a case in which the discretion of the court should be exercised to extend the time under section 7 (5) (b).”

Speaking for myself, I consider that Lord Kerr was using slightly different language to make precisely the same point as Rix LJ made in *M* at paragraph 23.

50. Mr Adams also drew our attention to two passages in the speech of Baroness Hale at [114] and [116] of *A v Essex County Council*. At [114], Lady Hale said that “‘equitable’ must mean fair to each side”. I respectfully agree with that: this is a simple definition of ‘equitable’ which is applicable to section 7(5)(b) of the HRA.
51. Paragraph 116 is in the following terms:

“116. The judge placed at the forefront of his account of the relevant legal principles that “there is a significant public interest in public law claims against public bodies being brought expeditiously” (para 119). That is of course true in judicial review, when remedies are sought to quash administrative decisions which may affect large numbers of people or upon which other decisions have depended and action been taken. It is normally a prospective remedy, aiming not only to quash the past but also to put right the future. Expedition is less obviously necessary in a claim for a declaration in vindication of the claimant’s human rights, upon which nothing else depends, or of a claim for damages. These are retrospective remedies, aimed at marking or compensating what has happened in the past. Public authorities are no longer in any different position from other defendants in the general law of limitation (see Limitation Act 1980, s 37(1)). This claim is more akin to a tort claim than to judicial review.”

Again, it seems to me that those observations are uncontroversial: they are not dissimilar to the approach adopted by this court in *Secretary of State for Transport v Arriva Rail and Others* [2019] EWCA Civ 2259.

52. We were also referred to *Rabone and Another v Pennine Care NHS Trust* [2012] UKSC 2, particularly at [75] and [108]. However, it seems to me that those passages reiterate previous observations and add nothing new. Moreover, I note from [108], which was the penultimate paragraph in the judgment of Lady Hale, that the facts in *Rabone* were very strong and the delay was correspondingly short.
53. Finally, we were referred to *Betterment Properties Limited v Dorset CC* [2014] UKSC 7, a case about the Commons Registration Act 1965. In her judgment at [30] – [32], Lady Hale dealt with the question of laches. In my judgment, for reasons developed below, what she said there is of no application to the operation of section 7(5) of the HRA.

## **5.2 Analysis**

54. Perhaps conscious of the uphill battle that he faced in order to try and persuade this court that the judge had erred in the exercise of his discretion, when applying section 7(5)(b), Mr Adams instead mounted a root-and-branch attack on the judge’s approach in principle to the Department’s application to strike out on the grounds of limitation. This in turn involved a number of bold submissions as to the proper construction of the section and the correct approach to its application.

### **5.2.1 Timing and ‘All The Circumstances’**



55. Mr Adams' first submission was that the judge was wrong to embark on any sort of investigation at an interlocutory stage. He said that the reference in section 7(5)(b) to "all the circumstances" meant that the court could only consider and apply the section at trial, when all the circumstances of the claim were known. This overall submission was advanced by reference to four related propositions to the effect that section 7(5)(b): i) should be construed without reference to section 7(5)(a) because of the use of the word 'or'; ii) was not really a limitation provision at all; iii) did not contain a clear limitation period or 'long stop'; and iv) should not be utilised if it meant that a claimant with an otherwise valid claim would be deprived of their opportunity to present that claim in court only because of the delay in bringing the proceedings. For the reasons set out below, I am unable to accept any of those propositions.
56. Section 7(5)(b) is plainly a limitation provision: *M* is authority for the proposition that section 7(5)(b) is to be construed and applied in the same way as the provisions of the Limitation Act. Furthermore, section 7(5)(b) contains a clear limitation period. The two limbs of section 7(5) must be read together. The first question under (a) is whether the proceedings were brought before the end of the period of one year which begins when the act complained of took place. The alternative provision at 7(5)(b) permits a claim to be brought "before the end of... such longer period as the court or tribunal considers equitable having regard to all the circumstances." The 'longer period' is therefore a period longer than the one year referred to in section 7(5)(a). As a matter of proper statutory construction, the two sub-sections must be construed and applied together.
57. What are "all the circumstances" relevant to the enquiry envisaged by section 7(5)(b)? They are any circumstance which is or might be relevant to the question of whether it is equitable to allow the claim to be brought in the 'longer period'. Whilst there can be no limit on the circumstances which are or may be relevant to that inquiry, it is common sense to observe that what the court will primarily be looking at are those circumstances which are or may be relevant to the delay, which has resulted in a claim being brought after the expiry of the one year stipulated by section 7(5)(a).
58. Such questions will usually include: what is the overall period of delay on the part of the claimant? Why did it occur? Is there a good reason for it? What was the conduct of the defendant during that period of delay? What effect did the delay have on both parties and any future trial? Those are the sorts of questions which civil judges regularly ask themselves in all manner of interlocutory applications, most regularly in applications for relief from sanctions. They are therefore part of an analysis which civil judges are well-used to undertaking.
59. In addition, I note that these are also the questions which the judge must ask under section 33(3) of the Limitation Act 1980, which deals with the discretionary exclusion of the time limit in certain personal injury claims, and where the word 'equitable' is also used in the statute to determine the court's approach.
60. Accordingly, in my view, there is nothing in the words of section 7(5)(b) which somehow denotes a different kind of investigation to that conventionally undertaken by a court considering issues of delay. There is certainly nothing which suggests that that investigation must wait until trial.

61. Mr Adams argued that “all the circumstances” must include the merits of the underlying claim. Whilst there is perhaps no reason in principle why the merits of the underlying claim should not form part of the court’s consideration where that may be relevant, I note that the underlying merits are not one of the mandatory factors listed in section 33(3) of the Limitation Act. Moreover, there is a very good reason why the merits of the claim can make little or no difference to an investigation into ‘all the circumstances’ for the purposes of section 7(5)(b). On an application to strike out, the court should always assume that a claimant’s pleaded case is correct: a claimant cannot do better than that at trial. So the merits of the claim (perceived or actual) are unlikely to be a decisive factor in any investigation under section 7(5)(b) because they have already been assumed in the claimant’s favour. In the present case, the judge correctly dealt with the application to strike out on limitation grounds on the express assumption that Solaria had a good claim on the merits: see paragraph 19 above.
62. Finally, on this first aspect of the limitation issues, Mr Adams submitted at the hearing that a claimant under the HRA “was entitled to bring the matter before the court, no matter how late”. Again, I profoundly disagree. Amongst other things, section 7(5) of the HRA was created in order to allow the court to weed out stale claims. It is an important part of the court’s case management powers to ensure that hopeless claims (hopeless because they are plainly and obviously statute-barred) do not use up valuable court time and resources by being allowed to proceed to a trial where they are inevitably doomed to fail.
63. For all these reasons, therefore, I consider that the judge was entitled to address the application to strike out at an interlocutory stage.

### **5.2.2 Onus and Unfairness**

64. Mr Adams’ second submission was that, if the judge was right to consider the operation of section 7(5)(b) before trial, then he was wrong to consider it at this early stage of the proceedings, before pleadings had been completed and disclosure undertaken. He submitted that the court could only properly consider an application to strike out under section 7(5) once the issues had been identified and the court had been able to assess in detail what evidence was available on both sides. He said it was only in those circumstances that the court could then form a view about whether there had been prejudice, and whether the delay which had occurred prevented a fair trial.
65. There will be cases where pleadings and disclosure will be necessary before a limitation challenge can be decided: see *KR and Others v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 85 at [74(vi)]. This may be particularly important in deciding, in a tort claim, when damage occurred or whether there has been deliberate concealment. But it will always depend on the facts of the case. There is no rule that always requires the hearing of a striking out application on the grounds of limitation to wait until after lengthy and potentially expensive procedural steps have been taken.
66. There were other flaws inherent in Mr Adams’ second submission. The most fundamental was that it was predicated on the assumption that an application to strike out under section 7(5)(b) had to await disclosure and statements because it was for the defendant to demonstrate, on this material, that it would be inequitable for the matter to proceed to trial, and/or that a fair trial was not possible. In his oral submissions, Mr

Adams said that “the burden is on a defendant to say ‘I have not got X or Y’, and that can only be done by looking at what the evidence is”. He accepted that there was no authority for such a proposition.

67. In my view, this mis-states the application of section 7(5)(b) in a number of ways. First, because section 7(5)(b) presupposes that a claim is being brought outside the primary one year period, it requires the party seeking to bring the claim in the ‘longer period’, namely the claimant, to make good its entitlement under section 7(5)(b). That has long been the law: see *Cameron*, endorsed with approval by Thomas LJ in *Dunn* and Rix LJ in *M*. As noted in paragraph 47 above, I consider that this is consistent with what Lord Kerr said in *A v Essex County Council*. Of course, very few disputes of this sort fall to be decided by an application of the burden of proof: in my experience, such a case is exceptionally rare. But the fact that cases are not ultimately decided by reference to the burden of proof does not make the burden of proof irrelevant: on the contrary, for the reasons that I have explained, the fact that the onus is on the party who wishes to show that the longer period is equitable will inform the court’s approach to the investigation under section 7(5)(b).
68. The second difficulty with Mr Adams’ submission is that, for all his warnings against putting a gloss on the words in section 7(5)(b), that is precisely what it is doing. As his skeleton argument made clear at paragraph 49, Mr Adams was endeavouring to rewrite the section, placing the burden on the defendant to show why it would be inequitable for the claim to continue, and/or why a fair trial is not possible. That is not what section 7(5)(b) says. The section is clear that it is for the claimant, in this case *Solaria*, to demonstrate that, notwithstanding the delay of four years and eleven months in the commencement of the proceedings, an examination of all the circumstances demonstrates that it is equitable to allow the claim to continue.
69. Mr Adams insisted that the reference to “equitable” in section 7(5)(b) brought with it the clear inference that the section would only be triggered if the defendant had suffered prejudice as a result of the delay, and thus was unable to have a fair trial. As he summarised it in his oral submissions, it was “for a defendant to show that it would be inequitable to enforce the claim”. Again, I do not accept that as a matter of principle. Prejudice to the defendant because of the delay may well be one of the circumstances which the court will take into account when undertaking the exercise under section 7(5)(b). But it is only one such circumstance. It would be wholly wrong to elevate it into being the most important factor, let alone the only relevant factor, in the open-ended examination required by section 7(5)(b). Such an approach would not, in Lady Hale’s expression, amount to being fair to both sides.
70. The obverse of Mr Adams’ submission is that, without prejudice or unfairness at trial, section 7(5)(b) could never apply. This would mean that, whatever the delay, no matter how long it might have been, if no prejudice could be shown by the defendant, then the claim could not be struck out. I do not accept that submission either. As I have said, the length of the delay is a matter which the court is obliged to take into account under section 7(5)(b). Depending on the circumstances, I am satisfied that the length of any delay can, in the right case, be sufficient, without more, for the court to strike out a claim as having been commenced outside section 7(5)(b).
71. Finally, on this topic of the correct approach to the term “equitable”, Mr Adams submitted that the court was obliged to have regard to the equitable doctrine of laches.

This was a curious submission for a number of reasons. First, the HRA is a statute that applies in all parts of the United Kingdom; the law of equity, including the doctrine of laches, does not. If the English court had to have regard to the principles of laches in applying section 7(5)(b), but the Scottish court could not (because the law of equity does not apply in Scotland), then there would be the clear risk of inconsistent rulings. I do not believe that that was what the HRA intended to achieve.

72. Furthermore, the doctrine of laches is only relevant where there has been a delay within a statutory limitation period or where no limitation period has been prescribed by Parliament. Although Mr Adams referred to the passage in Lady Hale's judgment in *Betterment* between [30] and [32], I consider that these observations have no application to the present case. *Betterment* was not a case under the HRA; and, again contrary to the present case, it was expressly dealing with a situation in which no limitation period had been prescribed by Parliament. Lady Hale's introduction to that part of her judgment in *Betterment* makes this clear.
73. Accordingly, for all these reasons, I would reject Mr Adams' second submission. In short, he was seeking to apply a series of incorrect and inapplicable tests, so as to create hurdles for the Department which form no part of section 7(5) of the HRA.

### **5.2.3 Other Limitation Periods**

74. Mr Adams' third submission of principle was that, because this was a claim for compensation, it should be treated as a claim akin to tort, where there is of course a six-year limitation period running from when damage occurs. He said that, in a case like this, where the delay was less than six years, the claim should not have been struck out.
75. That submission faces a number of formidable hurdles. I accept that, for certain types of claim, it can sometimes be difficult to identify whether the applicable period is the judicial review limitation period of three months, or the period for claims for damages for breach of statutory duty of six years: see, by way of example in a public procurement dispute, *Arriva Rail*. But that is in circumstances where there is no specified limitation period for the claim in question, and the parties, and the court, must do their best by analogy with other types of claim. This case is different. Here there was a specified limitation period of one year with a longer period if that was equitable in all the circumstances. There is therefore no need to have regard to any other limitation periods.
76. Furthermore, the submission that these claims were akin to claims in tort and should be assessed as if they had the equivalent of a six-year limitation period would inevitably mean that both *Dunn* and *M* were wrongly decided. Those were both claims brought under the HRA which were struck out, notwithstanding the fact that the claims were for damages and were brought within six years of the relevant event. Those decisions are binding on this court. For what it is worth, I consider that they are manifestly correct, as their subsequent citation by the Supreme Court confirms.
77. For all those reasons, I reject Mr Adams' third submission as to principle. This was a case with a clearly stated limitation regime and no other periods were applicable, even by way of analogy.

#### 5.2.4 Exercise of Discretion

78. It follows from the preceding paragraphs that, in my view, there was no error of law in the judge's approach to section 7(5)(b). That leaves the exercise of the judge's discretion. Mr Adams submitted that, in exercising his discretion, the judge wrongly had regard to irrelevant matters, and failed to have regard to other matters which Mr Adams maintained were relevant.
79. I have set out at paragraphs 19-22 above the most relevant parts of the judge's judgment on limitation, although (for reasons of brevity) there is much that I have not cited. When considered as a whole, I do not accept either that the judge had regard to irrelevant matters, or that he failed to have regard to relevant matters. On the contrary, he made two critical findings which cannot be challenged on this appeal. The first was that there was a complete absence of any proper explanation by Solaria for the delay of four years and eleven months which they had allowed to occur. Secondly, the judge found that, in consequence of that delay, the Department had suffered prejudice.
80. In my view, those two findings, which were plainly open to the judge and with which this court cannot interfere, are sufficient to conclude that it was not equitable to extend the period for the bringing of this claim to 21 December 2018.
81. As to the remaining points of detail, I note that Mr Adams repeatedly criticises the judge for erroneously adopting a policy or a presumption that claims against public authorities must be brought promptly. But the policy that is identified by the judge at [107] (paragraph 21 above) was no different to the point made by Rix LJ in *M*. The judge's use of the word "presumptively" in [79] adds nothing to the underlying point there being made about the need to issue a protective writ.
82. There is a separate criticism that the judge should not have had regard to the potential evidential difficulties that would be faced by the Department, after such a long period of time, in disentangling the alleged effect of the proposal from the potential effect of subsequent actual modification to the tariff. That criticism is unrealistic. That was plainly a matter which the judge was entitled to take into account as one of the circumstances of the case and the delay that had occurred. Causation is an inevitable hurdle in a case like this: it certainly loomed very large in *Breyer*. Mr Adams also criticises the judge for taking into account other evidential difficulties faced by the Department due to the lapse of time. That too is untenable: Mr Adams cannot be heard to complain that the judge had regard to the effect of the delay on evidential matters, when it was his primary submission that, as a matter of principle, that was precisely the approach the judge should have adopted.
83. In short, the judge found, principally because there had been a long delay for which no justification had been provided and which delay had caused the Department irreparable prejudice because of the evidential difficulties to which he referred, that the claim had not been brought in accordance with section 7(5)(b) and that therefore the claim should be struck out. If my Lord and my Lady agree, I consider that that conclusion is unassailable. On that ground therefore, I would dismiss this appeal.

#### LADY JUSTICE ROSE:

84. I agree.

**LORD JUSTICE HENDERSON:**

85. I also agree.