



PARK
SQUARE

BARRISTERS

THE ELASTIC LIMITATION PERIOD

Section 33 Limitation Act 1980



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Tuesday 9th January 2018



LEARNING OUTCOMES

1. Carroll v CCGMP [2017] EWCA Civ 1992.
2. Better understand when to accept or reject a potentially late claim. Determine which claims to defend to trial.
3. Improve your pleadings.
4. Understand when best to seek a split trial.
5. Appreciate what makes a good ‘prejudice statement’.



CARROLL
- V -
**CHIEF CONSTABLE GREATER
MANCHESTER POLICE**

[2017] EWCA Civ 1992

The Master of the Rolls
1st December 2017

See appendix for ss.11, 14 & 33 LA 1980



THE 13 PROPOSITIONS

Paragraph 42

1. Unfettered discretion
2. All the circumstances + s.33(3)
3. Balance of prejudice is the essence
4. Burden on C – but not onerous
5. Evidential burden on D
6. Prospects of a fair trial



THE 13 PROPOSITIONS

7. D not entitled to a windfall, unless...
 1. Disproportionate
 2. Significantly diminished ability to defend
8. Post expiry is the most relevant period
9. Good reasons for delay?
10. Delay by advisors possibly excusable
11. Reasonably suppressed knowledge
12. Proportionality v's ability to defend
13. Should be incapable of appeal!



FACTUAL BACKGROUND

- C was a police officer with GMP involved in covert drug operations. Alias ‘Lee Taylor’.
- He claimed for a psychiatric injury arising from his addiction to heroin. Subsequent depression.
- He was a test purchaser who was exposed to the drug in a familiarisation exercise.
- Placed in situations at risk of danger. Had to ‘kite’.
- COSHH / common law claims / risk assess
- Safe place / system of work.
- Once his addiction became known he was prosecuted and dismissed.



SOME KEY DATES

| | |
|-------------------------------|---|
| February 09 | C ‘kites’ in Wythenshaw. |
| 6 th May 09 | C exposed to H at Sedgley Park. Addicted that day. |
| 22 nd June 09 | Did not tell GP about his drug use. No diagnosis. |
| 25 th September 09 | Visited Lifeline re addiction. Actual knowledge. |
| November 09 | Returned to normal duties as an addict. No debrief. |
| 16 th February 12 | Diagnosed with anxiety and depression. |
| July 12 | C suspended pending investigation. |
| 11 th November 12 | PG to theft and misconduct in a public office. 14m |
| 30 th September 13 | Dr Monteiro reported. |
| 4 th November 13 | Claim issued. |
| 15 th July 15 | Limitation hearing. C succeeds on s.14 issue. |
| 22 nd November 17 | Appeal hearing. |



CLAIMANTS

Would you have taken his claim on a CFA?



VETTING CLAIMANTS

- How soon did they act once injury significant?
- Why did they not investigate their claim(s) sooner? Has C suppressed knowledge?
- What is the potential value? Merits? Time?
- Do they have witnesses and/or documents?
- Can they identify D's key witnesses?
- Other successful claimants?
- Does D continue to trade / exist?
- What did protocol disclosure yield? PAD app?
- Fair trial possible? Balance of prejudice?



DEFENDANTS

Would you have sought a split trial?



VETTING DEFENDANTS

- Does D continue to trade / exist? Do the premises / machines / materials / people exist?
- Who were C's managers? Who knows / knew of C?
- Adequate time to investigate / early notification?
- Have there been other successful claims paid out by the insurer?
- Have documents been *reasonably* disposed of?
- Effect of the delay?
- Fair trial possible? Balance of prejudice?
- High costs to damages ratio?
- Merits? Time costs?



SO WHAT WAS THE OUTCOME?



S.14 WAS CONCEDED

D said May/June 09 when the addiction arose.

C said 25th September 09 C Visited Lifeline re addiction.
Must have had actual knowledge.

Paras 43 to 44 - The Master of the Rolls did not regard it as necessary to determine the s.14 issue.

The claim was 12 to 18 months late.

The court had to consider the s.33 issue afresh on the evidence presented at trial.

Was it late? Broadly, how much by?



THE DECISION

No real prejudice to D as a result of C's delay.

No evidence of when the docs ceased to be available.

Duty to retain some documents.

Speculated whether many documents ever existed.

No evidence of witness enquiries.

No evidence as to present practice.

C had a good excuse.

It was a waste of time and money to seek a split trial.

Greater prejudice was caused by the delay associated with the appeal, which was twice C's delay.



PLEADINGS



THE DEFENCE

- S.14 is only relevant to two issues – is the s.33 exercise necessary, and how late is the claim?
- Focus on the s.33 exercise.
- Prejudice caused by the delay.
- Fair trial not possible.
- Proportionality.
- Rubric for your prejudice statement.



THE REPLY

- What was the reason behind the delay?
Often incorrectly put in the s.14 column.
- Don't undervalue the claim.
- Can C point to why D is not prejudiced i.e.
what enquiries have *not* been made?
- What documents should have been
retained, but were not?
- Why is a fair trial still possible?



PROCEDURE



A SPLIT TRIAL?

Jackson LJ Review of Civil Litigation Costs - July 2017
para 5.14 ‘...I strongly discourage the ordering of preliminary issue trials in the fast track.’

- (i) Overlap of evidence between limitation and liability.
- (ii) Delay / prejudice if limitation decision appealed.
- (iii) Two trials of a fast track claim is disproportionate.
- (iv) If C wins, then loses, 1st trial has been a waste.
- (v) It hands D a tactical advantage – no need to hedge its bets and prep as if going to trial.
- (vi) Encourages investigative complacency.



A SPLIT TRIAL?

- Does C have a respectable prospect of success on limitation? Will C likely lose at trial in any event?
- Will it genuinely reduce the length of the final hearing, or increase court time?
- Is the evidence on limitation discrete, or is there a significant overlap?
- Do you have a genuine knock out point?
- What if the judge (DDJ) fluffs it? Think QOCS.
- Will it reduce or increase costs?
- Save it for the moderate value lengthy claims.



PREJUDICE STATEMENTS

- Pleadings are a rubric / template.
- Apply the language of s.33.
- Good enough reason?
- Solicitor involvement – notification, conduct etc.
- What was the exact effect of the delay?
- Particularise the prejudice **caused by the delay**.
- Exhibit investigation correspondence.
- Highlight why a fair trial is / isn't possible (on the live issues)?
- Analyse the proportionality arguments.
- Conclude with a balance sheet approach.



CONCLUSION

Merely asserting that a claim is out of time is to miss the point of the exercise entirely.



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- Improve your pleadings.
- Understand when best to seek a split trial.
- Appreciate what makes a strong ‘prejudice statement’.
- Gauge the ‘elasticity’ of the limitation period. Has it snapped?



