Neutral Citation Number: [2019] EWHC 1608 (QB)

Case No: HQ15A05254

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

St Albans Crown Court
The Court Buildings, St Albans, AL1 3JW

Date: 26/06/2019

Before :

THE HON. MR JUSTICE TURNER

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Between :

The Personal Representatives of the Estate of Maurice Hutson, Deceased	**Claimants**
- and -	
TATA Steel UK Limited (formally Corus UK Limited, Successors in the Title and Holders of the Liabilities of British Steel Corporation and Predecessor Companies)	**Defendant**

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- -

Mr Robert Weir QC and **Mr Ivan Bowley**
(instructed by **Hugh James** and **Irwin Mitchell**) for the **Claimant**
Mr David Platt QC and **Mr Peter Houghton** (instructed by **BLM**) for the **Defendant**

Hearing dates: 10 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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THE HON. MR JUSTICE TURNER

THE HON MR JUSTICE TURNER :

INTRODUCTION

1. Fifty years ago, about a third of a million people were employed in the steel industry in the United Kingdom. Nationalised in 1949, the industry was re-privatised in 1988 trading thereafter as British Steel plc and, from 1999, the Corus Group. The defendant is the successor in title to and holder of the liabilities of all of these previous manifestations of the business.

2. The UK steel industry is now but a shadow of its former self. Over time, very many sites have been closed and the workforce today is about a tenth of the size it was in the 1970s.

3. In this group action, it is alleged that some of those employed by the defendant's predecessors over the years were exposed to dust and fumes at work and, as a result, went on to develop occupational diseases involving mainly, but not exclusively, respiratory conditions. Unsurprisingly, bearing in mind the historic nature of the alleged exposure, a high proportion of these workers have since died. Many of those who remain are of relatively advanced age. The claimants comprise a combination of surviving former employees and the representatives of the estates of those who have died.

4. The passage of time since the injuries are alleged to have been sustained has prompted the defendant to raise the argument in its Generic Defence that at least some of these claims are statute barred. There are some 229 claimants and the defendant has predicted that a limitation defence will be pursued in about half of their cases. Against this background, it now applies to have limitation tried as a preliminary issue.

5. This initiative is opposed by the claimants.

LIMITATION

6. By the operation of section 11 of the Limitation Act 1980, the time limit within which a claim in respect of personal injuries must be brought is three years from the date of injury or the date of knowledge as defined in section 14. However, the court may, in appropriate cases, disapply the primary limitation period in the exercise of its discretion under section 33.

7. The parties are agreed that, in any given case in which a limitation point has been taken, the matters with which the Court is likely to be concerned will relate to: "date of injury", "date of knowledge" and "discretion to disapply".

8. The leading case on the general principles to be applied in the exercise of the discretion to disapply is ***Carroll v Chief Constable of Greater Manchester Police*** [2018] 4 WLR 32. The Court observed at paragraph 42:

"42. Section 33(3) of the LA 1980 requires the court, when exercising its discretion under section 33(1), to have regard to all the circumstances of the case but also directs the court to have regard to the five matters specified in subsections 33(3)(a)–(f). There are numerous reported cases in which the court has elaborated on the application of that statutory direction in the context of the particular facts of the case. In many of the cases the court has stated various principles of general application. The general principles may be summarised as follows.

1. Section 33 is not confined to a "residual class of cases". It is unfettered and requires the judge to look at the matter broadly: Donovan v Gwentoys Ltd [1990] 1 WLR 472, 477E; Horton v Sadler [2007] 1 AC 307, para 9 (approving the Court of Appeal judgments in Finch v Francis (unreported) 21 July 1977); A v Hoare [2008] AC 844, paras 45, 49, 68 and 84; Sayers v Lord Chelwood [2013] 1 WLR 1695, para 55.

2. The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1) , as is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: Donovan's case, pp 477H–478A.

3. The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: Donovan's case, p 477E; Adams v Bracknell Forest Borough Council [2005] 1 AC 76 , para 55, approving observations in Robinson v St Helens Metropolitan Borough Council [2003] PIQR P9, paras 32 and 33; McGhie v British Telecommunications plc [2005] EWCA Civ 48 at [45]. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.

4. The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: Sayers's case, para 55.

5. Furthermore, while the ultimate burden is on a claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be,

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

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

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

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

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

effect of the delay on the defendant's ability to defend the claim.

10. Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: Corbin v Penfold Metallising Co Ltd [2000] Lloyd's Rep Med 247.

11. In the context of reasons for delay, it is relevant to consider under subsection 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: A v Hoare, paras 44–45 and 70.

12. Proportionality is material to the exercise of the discretion: Robinson's case, paras 32 and 33; Adams's case, paras 54–55. In that context, it may be relevant that the claim has only a thin prospect of success (McGhie's case, para 48), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (Robinson's case, para 33; Adams's case, para 55); McGhie's case, para 48), that the claimant would have a clear case against his or her solicitors (Donovan's case, p 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (Robinson's case, para 33; Adams's case, para 55).

13. An appeal court will only interfere with the exercise of the judge's discretion under section 33 , as in other cases of judicial discretion, where the judge has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has made a decision which is wrong, that is to say the judge has exceeded the generous ambit within which a reasonable disagreement is possible: KR v Bryn Alyn Community (Holdings) Ltd [2003] QB 1441, para 69; Burgin's case, para 16."

PRELIMINARY ISSUES

9. The power of the court to direct that a preliminary issue should be heard is to be found in CPR 3.1(2)(i) and (j):

"*The court's general powers of management*

3.1(2) Except where these Rules provide otherwise, the court may –

(i) direct a separate trial of any issue;

(j) decide the order in which issues are to be tried;…"

10. These powers must, of course, be exercised in order best to achieve the overriding objective.

CASE LAW

11. I have been provided with a generously-filled bundle of authorities which cover a wide variety of cases in which the courts have considered the relative advantages and disadvantages of the hearing of preliminary issues. Paradoxically, if one overarching conclusion can be drawn from them, it is that no overarching conclusion can be drawn from them.

12. Put shortly, there are so many possible permutations of fact which lie behind the cases in which the suitability of ordering the hearing of a preliminary issue falls to be determined that there are particular dangers in seeking to elevate judicial observations in the context of any particular factual matrix to a status akin to one bearing statutory force. One must not lose sight of the fact that these are, in essence, all case management decisions which are, necessarily, very fact-sensitive.

13. The temptation to extract, and rely upon, broadly stated judicial pronouncements from earlier decisions has, in this case, predictably resulted in a superfluity of reference to authority. One only has, for example, to compare and contrast the observations of the Court of Appeal in two of the cases cited before me to appreciate the wealth of scripture from which the Devil may freely quote:

> "Wherever the judge considers it feasible to do so, he should decide the limitation point by a preliminary hearing by reference to the pleadings and written witness statements and, importantly, the extent and content of discovery."

KR v Bryn Alyn Community (Holdings) Ltd [2003] 3 W.L.R. 107

> "While they have their value, it is notorious that preliminary issues often turn out to be misconceived, in that, while they are intended to short-circuit the proceedings, they actually increase the time and cost of resolving the underlying dispute."

Bond v Dunster Properties Limited [2011] EWCA Civ 455

14. This does not, of course, mean that no assistance is to be derived from consideration of the decided cases. They are particularly helpful in identifying and articulating the *types* of factors which *may* fall to be considered in any given case. It does, however, mean that I reject the

defendant's contention to the effect that any party opposing an application for the hearing of a preliminary issue in a case such as the present bears a burden of persuasion. The balancing act is one which should be approached from the outset with an open mind.

15. It is against this background that I propose to deal in turn with each of the central contentions raised by the parties.

THE STRENGTH AND SCOPE OF THE LIMITATION DEFENCE

16. The defendant contends that the application of the principles identified in ***Carroll*** provides them with a strong case on the limitation issue in respect of a significant proportion of the claims. By way of example, it points to the following categories of potential evidential prejudice upon which it would be entitled to rely:

    (i) Many of the various sites at which the relevant employees worked have long since closed down;

    (ii) Many of these employees are dead and, in some cases, there are no surviving relevant employees from premises which have since closed;

    (iii) In a number of cases involving posthumous claims, the medical and work records are depleted or missing.

17. I readily accept that the points raised by the defendant on the issue of evidential prejudice mean that it has a prospect, which, at the very least, is more than fanciful, of succeeding on the issue of limitation in some cases. On the other hand, the defendant's prospects of demonstrating that any given case is statute barred are not such as to be likely to be sufficiently strong, at least in most if not all cases, as to equip it to strike out the claim under CPR 3.4 or obtain summary judgment under CPR 24. It would be inappropriate for me attempt to assess the strength of the limitation defence with any greater level of precision between these two broad parameters at this stage.

18. The fact that there is a prospect that the defendant might well be successful in some undefined proportion of lead cases in which a preliminary issue of limitation is intended to be raised is not, however, determinative of the merits of the application before me. Other salient considerations fall to be taken in to account.

COSTS

19. The defendant contends that the hearing of a limitation preliminary issue in selected lead cases would bring about a costs saving because the judgment of the Court in such cases would potentially lead to the early disposal of a significant number of other cases which would otherwise be expensive to prepare for and litigate in full.

20. I readily accept that questions of costs are, potentially, of considerable importance in the context of the determination of the merits of embarking on the hearing of a preliminary issue in any given case. Care must be taken, however, to identify whether the hoped-for savings may be more apparent than real.

21. A central consideration is the extent to which the determination of the limitation issue in selected lead cases would be likely to catalyse the early resolution of a high proportion of other claims. In this regard, the claimants make the following points:

    (i) About half of the claims are not intended to be the subject of a limitation challenge. It must follow that the determination of lead cases confined solely to the limitation issue would provide no useful guidance whatsoever as to the proper resolution of such unaffected cases.

    (ii) Only those lead cases, if any, in respect of which the limitation issue is decided in favour of the defendants would be concluded once and for all. Any that survive could well continue to be resisted on the remaining substantive grounds of defence including, for example, matters relating to diagnosis and causation.

    (iii) Any adjudication on the limitation issue in the lead cases will not, in any event, be legally determinative of the result in any of the other cases which the defendant claims to be statute barred. The issues adjudicated upon are unlikely to involve the resolution of any disputed questions of law or documentary construction. Indeed, the proper approach to be taken to applications to disapply the three year limitation period is set out in recent detail in Carroll, from which I have already quoted at length, and is unlikely to be significantly revised by any further useful elaboration in the context of the present claims.

    (iv) There is also a limit to the assistance which the exercise of the discretion in lead cases would provide in informing the parties as to the strength of the limitation issues arising in other cases. These claims involve over 20 different coke works with varying levels of consistency and availability of documentary records and a very considerable number of claimants the personal circumstances of whom are likely to vary significantly each from the other.

22. In my view, there is force in these points.

23. Moreover, the costs of hearing preliminary limitation issues are likely to be out of proportion to the perceived benefits. Even on the defendant's estimate, the determination of such issues will take many days and I accept

the claimants' contention that it would probably be necessary to hear live evidence in any given case from: claimants, family members, union officials and/or, potentially, from legal or medical advisers. I am also persuaded that there is likely to be a significant overlap between the evidence which would have to be explored on the limitation issues and that which would have to be considered in the context of substantive liability.

DELAY

24. A further adverse consequence of ordering the hearing of preliminary issues in this case is the likelihood of delay. The progress towards a determination of the remaining issues will inevitably be significantly interrupted. The defendant concedes that a delay of at least six months is likely. That may well be an unduly optimistic prediction.

25. The length of any hearing of preliminary limitation issues would, in itself, be measured in weeks and the parties are in predictable dispute over any more precise estimation than this. Again, I consider that the defendant's estimate (of two weeks) is optimistic.

26. I must also bear in mind that many of the surviving former employees are elderly. So, too, are the claimant relatives of those employees who have died. Delay thus gives rise to a significant risk that many of those most likely to benefit the most directly from compensation, in the event that they were to have been successful, will have died waiting.

FAIRNESS TO THE DEFENDANT

27. A further objection taken by the defendant is that it is automatically prejudiced by the hearing of the limitation point and the substantive issues simultaneously. In other words, it faces two conflicting tactical objectives:

    (i) To maximise the extent of the evidential prejudice it has suffered in order to win on the limitation issue; or

    (ii) To minimise the extent of the evidential prejudice it has suffered in order to win on the substantive defence.

28. The contrary argument is that a court adjudicating upon the issue of limitation will be in the best position to strike the requisite balance between the respective positions of the parties if it has available to it all the evidence which would otherwise be necessary upon which to make a substantive determination. So long as the court rigorously follows the proper sequence of analysis, the result will be fair to both sides. Of course, cases may well arise in which the cost of hearing the evidence on substantive liability will be disproportionate but where, as here, there is no countervailing costs advantage I am not persuaded that the position is automatically detrimental to the position of a defendant. In ***B v Nugent Care Society*** [2010]1 W.L.R.

516, Lord Clarke MR, who gave the judgment of the court, observed at paragraphs 21-22 that the judge who has to determine the issue as to whether the primary limitation period should be disapplied:

> "…may well conclude that it is desirable that such oral evidence as is available should be heard because the strength of the claimant's evidence seems to us to be relevant to the way in which the discretion should be exercised. We entirely agree with the point made at vii) that, where a judge determines the section 33 application along with the substantive issues in the case he or she should take care not to determine the substantive issues, including liability, causation and quantum before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. To do otherwise would, as the court said, be to put the cart before the horse.
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> 22. That is however simply to emphasise the order in which the judge should determine the issues. When he or she is considering the cogency of the claimant's case, the oral evidence may be extremely valuable because it may throw light both on the prejudice suffered by the defendant and on the extent to which the claimant was reasonably inhibited in commencing proceedings…"

PROPORTIONALITY

29. The defendant urges me to have regard to the fact that the individual claims are likely to be of relatively low value and thus the value of hearing limitation as a preliminary issue is greater. However, as I observed in ***Pearce v The Secretary of State for Business, Energy and Industrial Strategy*** [2018] EWHC 2009 at para 69:

> "The defendant raises the additional argument that the potential value of Mrs Nicholls' claim is disproportionately low when compared to the costs involved in litigating it. I am not impressed by this contention. As the claimants rightly point out, the Court, when deciding whether to make a GLO, had to consider the issue of proportionality. A key purpose of a GLO, as recognised by the Final Access to Justice Report (July 1996), quoted in the White Book at 19.10.0 (p.657) is to "provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable."'

DISCLOSURE

30. The defendant seeks to mitigate the demands which would be made upon the parties' time and resources in resolving preliminary limitation points by

proffering and commending the option of narrowing the scale of disclosure which would be required. I am of the view, however, that this course, even it if were otherwise unproblematic, does not sufficiently diminish the disadvantages which I have identified to make the preliminary issue application an attractive one.

CONCLUSION

31. In all the circumstances, despite the skill and care with which the defendant's arguments have been deployed before me, I am satisfied that the overriding objective in this GLO would not be best served by determining limitation defences by way of the hearing of any preliminary issue or issues and, thus, refuse this application. The parties are invited to agree a form of order which reflects my conclusion and deals with any remaining ancillary matters including costs. In the event of disagreement, I would be prepared to resolve any outstanding issues on paper.