

[2023] EWHC 3267 (KB)

QB-2022-NCL000011

QB-2022-NCL000034

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
NEWCASTLE UPON TYNE DISTRICT REGISTRY

Barras Bridge
Newcastle upon Tyne
NE1 8QF

Before:

HIS HONOUR JUDGE FREEDMAN (sitting as a Judge of the High Court)

No. QB-2022-NCL000011

B E T W E E N :

TA Claimant
- and -
LONDON BOROUGH OF LAMBETH Defendant

AND

No. QB-2022-NCL000034

B E T W E E N :

TA Claimant
- and -
WESTMINSTER CITY COUNCIL First Defendant
- and -
LONDON BOROUGH OF LAMBETH Second Defendant

Date of hearing: 17 November 2023

THE CLAIMANT appeared **In Person**. _____

MR A SPENCER (instructed by Browne Jacobson) for the **First Defendant**.

MISS L DOBIE (instructed by Kennedys) for the **Second Defendant**. _____

J U D G M E N T

JUDGE FREEDMAN:

Introduction

1. This was a preliminary Hearing on Limitation, specifically in relation to section 33 of the Limitation Act 1980.
2. There are two separate claims which have not been consolidated but, by virtue of the commonality of the subject-matter of the claims and the fact that the London Borough of Lambeth is a defendant in both actions, the claims have been case managed together. This Hearing was, therefore, concerned with Limitation in both actions.
3. There are, however, of course distinguishing features: I shall refer to the first set of proceedings as 'Claim 0011' and the second set of proceedings as 'Claim 0034'. For ease, and in an attempt to avoid confusion, I shall refer to Westminster City Council as the 'First Defendant' and the London Borough of Lambeth as the 'Second Defendant'.

Summary of the claims

4. Both claims are brought in Common Law negligence.
5. In Claim 0034, it is alleged that between mid-August and mid-December 1972, the First Defendant negligently placed the Claimant with his mother under the terms of a Care Order whereby he was foreseeably exposed to the risk of harm, and, in fact, suffered harm. The central allegation is that there was a failure by the First Defendant to remove the Claimant from the care of his mother.

6. Similarly, it is alleged against the Second Defendant, in Claim 0034, that the Claimant should not have been placed with his mother between December 1972 and January 1973, at a time when there was a supervision order in favour of the Second Defendant. Again, it is alleged that, as a result of the Second Defendant's failure to remove the Claimant from the care of his mother, he was foreseeably exposed to the risk of harm and, in fact, suffered harm.

7. In Claim 0011, it is alleged that the Second Defendant was negligent in placing the Claimant (and his siblings) at Fairways Children's Home in Kent between 1973 and 1981. Specifically, it is alleged that the Claimant was physically and sexually abused by a Mr Tubbs who, with his wife, ran Fairways Children's Home. It is the Claimant's case that he made complaints about the abuse to the Second Defendant's Social Worker, but no action was taken to safeguard him.

8. The Claimant alleges that as a result his maltreatment at the hands of his mother and the abuse suffered by him when resident at Fairways Children's Home, he suffered both physical and psychiatric harm. In relation to the latter, reliance is placed upon a report from a psychologist, Dr Alwin, dated 4 May 2022.

Chronology

9. The key dates are:
 - Claimant's date of birth: 18.5.64
 - 18th birthday: 18 May 1992
 - Limitation expired: 18 May 1985
 - Claim 0011 issued: 1 September 2021

- Claim 0034 issued: 12 May 2022.

10. It follows from the above chronology that Claim 0011 was issued over 36 years after the date when the limitation period expired. Claim 0034 was issued one week less than 37 years after the date when the limitation period expired.

11. Claim 0034 relates to events which occurred now more than 50 years ago. Claim 0011 relates to events which occurred between 42 and 50 years ago.

Specific allegations

12. When in the care of his mother, it is alleged that both defendants failed to provide the Claimant with a place of safety in that his mother, *inter alia*:

1 Threatened him with a knife, both at home and at school.

2 Left him home alone for three/four days per week.

3 Locked him in her homemade dungeon.

4 Forced him to drink her urine.

5 Subjected him to regular death threats.

6 Subjected him to regular physical beatings.

7 Gave him inadequate food.

13. As against the First Defendant it is specifically contended that the Claimant was placed in the care of his mother, in the expectation that she would neglect him, thereby obtaining fresh evidence to prevent the Claimant's mother from revoking the existing Care Order. It is also alleged that the First Defendant ignored the Claimant's requests to be returned to a Dr Barnardo's home.
14. As against the Second Defendant, in relation to the failure to remove the Claimant from his mother, the claim is a little more nuanced. The position is that there was in place a Supervision Order rather than a Care Order. Accordingly, the Claimant would need to establish, at first instance, that the Second Defendant assumed a common law duty or responsibility for the welfare of the Claimant. That is a potentially contentious area of Law, although a decision of the Supreme Court is awaited which may provide some degree of clarification.
15. When resident at Fairways Children's Home, the Claimant says that he was repeatedly and seriously sexually assaulted by Mr Tubbs. He claims that there was also physical abuse in that Mr Tubbs encouraged other residents to assault him. The Claimant says that he reported the abuse to the Second Defendant's Social Worker, Dora Skipsey, but, allegedly, she was unable to intervene because she was based in London. He also says that the selection of Fairways Home was in breach of the guidelines in that the Claimant, and his siblings, should have been placed in smaller family units.
16. It is important to stress that none of the claims is brought on the basis of vicarious liability. Accordingly, the burden is upon the Claimant to establish that both defendants knew or ought to have known of the neglect and abuse which he suffered, both when in the care of

his mother (and as against the Second Defendant) when resident at the Fairways Home.

Thus, mere proof of the neglect and abuse will not suffice.

The Law on Limitation

17. Since the Claimant does not contend for a date of knowledge later than his 18th birthday, it is necessary to consider only section 33 of the Limitation Act 1980. The starting point is, of course, the statute itself which provides that the Court may disapply the provisions of section 11 of the Act if:

“... it would be equitable to allow an action to proceed having regard to the degree to which-

(a) the provisions of section 11... prejudice the plaintiff...

(b) any decision of the court under this sub-section would prejudice the defendant...”

18. At section 33(3) the Court is directed to *“have regard to all the circumstances of the case.”*

The section contains six specific factors to which the Court is required to have regard. In this instance, however, in my judgment, there are only three of the six factors which are of relevance, namely:

“(a) the length, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11...

...

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action.”

19. I should add, for the sake of completeness, that Sub-section (c) is concerned

with the Defendants' conduct once informed of the intended claim.

The Claimant's criticism of the Defendants' conduct in relation to disclosure seems to me to have little, or no, substance. In any event, any minor delay in disclosure due to redaction of documents or any alleged, unwarranted redactions can have no material bearing on my overall exercise of discretion.

20. The application of section 33 of the Limitation Act is replete with Judicial authority.

It is unnecessary to trawl through all the various cases which have been decided at the Appellate level since the introduction of the Act in 1980. For present purposes, I rely upon Mr Spencer's very helpful summary of the legal principle which are of direct relevance to the instant cases.

21. A useful starting point is the Court of Appeal's summary of the general principles in

Carroll v Chief Constable of Greater Manchester [2017] EWCA Civ1992; [2018]4 WLR, 32:

“(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 Gwentoy [1990] 1 WLR 472...

(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 have shown are likely to be a cause for evaluation in the exercise of the discretion and must be taken into consideration by the judge: Donovan’s case...

(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...

(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...

- (5) *Furthermore, while the ultimate burden is on a claimant to show that it would be equitable 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...*
- (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: (citing Adams v Bracknell Forest Borough Council [2005] 1 AC 76), at 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...*
- (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-section 33(3)(a) and (b) that carries particular weight... 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-48c; Cain's case, para.74. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock started to tick is also relevant, although to a lesser degree...*
- (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, and 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 advisors rather than by the claimant may be reasonable in this context...*
- (11) *In the context of reasons for delay, it is relevant to consider under sub-section 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 test or standard 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..."*

22. Assistance is also to be derived from the judgment of the Court of Appeal in *Catholic Welfare Society (Diocese of Middlesbrough) v CD* [2018] EWCA Civ 2342 (at 34-36):

“... the starting point in a decision whether or not to disapply the limitation period must be the purpose of statutes of limitation. In Robinson v St Helens Metropolitan Borough Council [2002] EWCA Civ 1099, [2003] PIQR P128 Sir Murray Stuart-Smith said at [32]:

‘The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims especially when any witnesses the defendants 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.’

It follows that the disapplication of the limitation period is an exception to the general rule. For that reason, the burden of persuasion lies on the claimant. Delay of itself may not preclude disapplication of the limitation period. What is of importance is what prejudice the defendant has suffered by the delay: see Cain v Francis (supra)... in AS v Poor Sisters of Nazareth [2018] UKHL 32, [2008] SC (HL) 146, a case about the Scottish equivalent of section 33, Lord Hope (with whom the other Law Lords agreed) said at [25]:

‘The issue on which the court must concentrate is whether the defendant can show that, in defending the action, there will be the real possibility of significant prejudice... Proof that the defendant will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour.’”

23. The issue of the defendant’s prejudice obviously feeds into the question as to whether there can be a fair trial. As Lewison LJ said in *E v E* [2015] EWCA Civ 287 at 77-78, *“If a fair trial cannot take place it is very unlikely to be ‘equitable’ to expect the defendant to have to meet the claim.”*
24. The other case of relevance which Mr Spencer cites is *Hoare* (supra) because this was a claim arising out of historic abuse. At 86 Lord Brown observed:

“Secondly, through the combined effects of Lister v Hesley Hall Limited and departing from Stubbings v Webb, a substantially greater number of allegations (not all of which will be true) are now likely to be made many years after the abuse complained of. Whether or not it will be possible for

the defendant to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect. If a complaint has been made and recorded, and more obviously still if the accused has been convicted of the abuse complained of, that will be one thing; if, however, a complaint comes out of the blue with no apparent support for it (other perhaps than that the alleged abuser has been accused or even convicted of similar abuse in the past) that would be quite another thing. By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegation----

Claimant's reasons for delay

25. Although there are subtle differences as to why the Claimant delayed in initiating claims arising out of the abuse on the part of his mother and the alleged abuse at Fairways Home, there is also a very considerable overlap such that it would be artificial to look at each matter separately.

26. The Claimant's overarching position is conveniently set out at para.7 of his witness statement dated 18 September 2023 made in the 0034 claim:

"I was not able to initiate my claims [0034/0011] within my limitation deadline which expired on my 21st birthday, 18 May 1985, as I was psychiatrically disabled due to my Chronic Complex PTSD. I had suppressed memories of my neglect and abuse, and I was unaware which of my memories and flashbacks were real, and which ones were my imagination. Until I saw my childcare records, which triggered and re-awakened my suppressed memories of my neglect and abuse."

27. In actual fact, it is clear (and I so find) that it was the publication of the report following the Independent Inquiry into Child Sexual Abuse ('the IICSA Report') that triggered the Fairways claim (0034). A brief review of the chronology makes this clear: the report was published on 27 July 2021 and, three days later, the Claimant sent a letter of claim to the

Second Defendant. He also apparently reported the abuse to the police on 31 July 2021. To complete this part of the chronology, the Claimant particularised Claim 0034 on 1 September 2021 and he was provided with disclosure of the Second Defendant's records on 7 September 2021.

28. Indeed, the Claimant would appear to concede that the publication of the IICSA Report was the catalyst for bringing proceedings, at least in relation to the Fairways claim. At para.9 of the Particulars of Claim dated 1 September 2021, the Claimant stated:

“The Independent Inquiry into Child Sexual Abuse (IICSA) recently ruled that Lambeth Council operated a culture of cover-up relating to historical child sex abuse. The IIC inquiry gave me the confidence to report my abuse to the police and start legal proceedings. Especially after my social worker covered up my allegations, by telling me 49 years earlier, that nothing could be done about my abuse, as the children’s home was based in Kent, and my social workers were based in Lambeth.”

29. It is right to observe, at this stage, that the Claimant is not there asserting that his memory of the abuse at Fairways Home was triggered by the IICSA Report but rather that it gave him *confidence* to make a formal report of the alleged abuse which he suffered and to commence legal proceedings.
30. In his oral evidence before me, the Claimant maintained that he had done his best to suppress memories of the alleged abuse at Fairways Home. At one point, he said that he was *semi aware* of the fact that he had been abused and that he had suffered flashbacks from time to time. He said that he was unclear whether the flashbacks were true or not. When, however, the IICSA Report was published, he came to realise that other people had suffered similar abuse and that therefore his flashbacks must have substance. It was then that he decided to investigate further. Until that point, he says that he was not sure whether his memories of what occurred at Fairways were real or imagined.

31. On the other hand, he appears to have a clear recollection that he reported the abuse to his Social Worker at the time, Dora Skipsey. At para.43 of his statement of case in 0011, dated 15 October 2021, he said this:

“I reported my sexual abuse on two separate occasions to my social worker, Miss Dora Skipsey, once shortly after arriving in 1973, and the other occasion in 1979 when she kept phoning me, to request that I contact my grandmother, on both occasions Miss Skipsey stated there was nothing she could do about it, as she was based in London and I was based in Kent.”

32. The Claimant also seeks to rely upon the fact that throughout his life, after leaving Fairways, he routinely used Class A drugs until in or about 2018. He says that he used the drugs to cope with his mental health issues and, by implication, to suppress memories of his childhood abuse.
33. Generally, and in relation to the claims arising out of his experiences at Fairways and when in the care of his mother, the Claimant seeks to rely upon the psychology report from Dr Alwin dated 4 May 2022. Dr Alwin noted that the Claimant had experienced many traumatic events in his childhood which had had an adverse impact upon his psychological development. Specifically, he identified post-traumatic stress disorder as well as hypervigilance to threats. He also noted that the Claimant had become emotionally withdrawn with some tendency towards delusional beliefs in relation to threats which could be posed to him.
34. What matters, however, for present purposes is the extent to which the psychological effects of the abuse caused him to suppress his memories, such as to provide a reasonable explanation for the delay in the commencement of proceedings. It is necessary to set out *in extenso* what Dr Alwin says:

- *“This emotional presentation was further complicated by his evident experience of chronic and complex post-traumatic stress disorder consequent upon his experience in childhood. I formed the opinion he was able to suppress memories of the abuse by his mother at 7/8 after moving to the children’s home in Kent and that part of his ability to suppress these memories was due to his hypervigilance to further threat and the need to maintain the approbation/commendation of Mr Tubbs in order to maintain the safety of his physical environment. Consequently, he became more focused upon the abuse by Mr Tubbs and maintaining the safety of his environment, which would have facilitated the suppression of memories of the abusive environment he experienced with his mother. It was apparent in his early adult life [TA] was primarily affected by the sexual abuse he experienced of Mr Tubbs, and this adversely impacted upon his ability to function in day-to-day life leading him to developing drug addiction problems and difficulties in interpersonal relationships. He would appear to have attempted to suppress traumatic memories of his experience with Mr Tubbs by using illicit drugs and this took him into a lifestyle in which his underlying hypervigilance to threat enabled him to survive. I have a concern that this would be likely to have reinforced his underlying hypervigilance to threat and that hypervigilance to threat from others became the norm for him throughout his drug taking years and would have been proportionate to that environment.*
- *It would appear [TA] throughout much of the time he was addicted to drugs also experienced bizarre memories of being imprisoned and being harmed that he could not fully understand or temporally place. This would be likely to have further undermined his sense of emotional stability and contributed to both his drug taking and hypervigilance to threat. In my opinion these bizarre memories would be likely to represent partial memories of the time he spent with his mother at the age of 7/8. This impression was reinforced by [TA’s] statement that following receipt of his local authority records from Westminster, and having had some tentative discussions with his siblings, he has been able to access memories of the experiences of his mother’s care at 7/8...”*

35. Accordingly, and in reliance upon what Dr Alwin says, the Claimant asserts that, effectively, he buried such flashbacks as he had of the abuse at the hands of his mother until his childcare records in the Fairways claim were given to him. In his witness statement dated 18 September 2023 in claim 0011, at para.10 he says this:

“Prior to getting my childcare records, I wasn’t too sure which of my flashbacks were real, and which ones were my imagination due to my Chronic and Complex PTSD. I wasn’t able to speak to anybody in authority about my abuse after I left care, because in addition to being embarrassed and concerned for my mental health, I had suppressed the majority of my abuse,

and I didn't know at the time which parts were real, and which parts were my imagination..."

36. At para.12:

"On the balance of probabilities, I was not able to bring my claim prior to receiving my childcare records, as I was psychiatrically disabled due to my chronic and complex PTSD which prevented me from coherently recalling my trauma. My psychologist believes that I had the ability to suppress my trauma, until seeing my childcare records re-awoken and triggered my memory."

37. The Claimant also seeks to make something of the fact that it was not until he had conversations with his siblings that he was able to confirm his memories of the abuse from his mother. Different accounts are given of conversations which he had with his siblings, and when, but what is said against him is that he could have had such discussions at a much earlier time.

38. Miss Dobie on behalf of the Second Defendant also points out that there was a period in the Claimant's life when he held down employment, working for London Underground. This was over a period of approximately nine years before he served his first term of imprisonment in or about 1993. The point is made that it is a reasonable inference to draw that he was functioning at a reasonable level during this period when he was in paid employment and, thus, would have been in a position to investigate a claim. The Claimant's retort was that he was doing his best to suppress his memories of abuse and, in any event, he was unaware of what was real and what was imagined.

Disability

39. At all events, insofar as the Claimant asserts that he was *psychiatrically disabled* from bringing proceedings until 2021/2022, it seems to me that there is no proper support for this

proposition in the medical evidence. Whilst diagnosing various mental health problems due to his dysfunctional childhood, Dr Alwin does not speak in terms of the Claimant suffering from a *disability*, far less from being precluded, as a result of any disability from bringing proceedings.

40. In these circumstances, it does not seem to me that section 33(3)(d) is of relevance, at least on present evidence. There has been no formal diagnosis of a *disability*. That is not to downplay the extent to which his mental health problems will have caused him to use avoidance strategies (whether conscious or otherwise) and to suppress memories of disturbing events.

The impact of the delay on the cogency of the evidence

41. It is for the defendants to prove that they have been prejudiced by the delay and, accordingly, it is for them to demonstrate that the delay has had a significant and detrimental effect on the evidence which would have otherwise been available. While section 33(3)(b) is, strictly speaking, concerned with the delay after the expiry of the limitation period it is plain from the authorities that once the limitation period has passed, the Court is entitled to look at the totality of the delay, from the time when the events in question occurred.
42. In relation to the Fairways claim, the Court would need to be satisfied not only that the Claimant was sexually abused but that the Second Defendant was negligent in regard to the placement and, more particularly, that it negligently failed to heed and act upon complaints made by the Claimant. In reality, unless the Claimant is able to establish that the Second Defendant knew or ought to have known about the alleged abuse at Fairways, the claim is unlikely to be established.

43. At the core of this claim, therefore, is what the Claimant allegedly reported to Dora Skipsey. It has been ascertained that Dora Skipsey's date of birth was 17 June 1914 and therefore she almost certainly died some considerable time ago. The Second Defendant argues that if these proceedings had been brought at a much earlier time, the likelihood is that Dora Skipsey would have been able to give evidence both as to the suitability or otherwise of Fairways Home and, more particularly, in relation to the allegation that the Claimant had complained about abuse whilst resident at the Home. The Second Defendant points out that there are no documents available from Fairways which have any bearing on the matters in dispute and none of the Claimant's care records make reference to any complaint being made to Dora Skipsey.
44. A witness believed to be Mrs Tubbs has been traced to a care home but she is now 95 years old. Manifestly, it would be unfair and unjust to put allegations to her that her husband sexually abused the Claimant when no such allegation was made at the time. In any event, it seems highly improbable that she would be able to give any sensible response to such allegations more than forty years after the closure of Fairways and without any documents being available.
45. Notwithstanding the above, the Claimant seeks to argue that the absence of Miss Skipsey as a witness is of very limited significance. In his skeleton argument for Claim 0011, at para.18 he says:

“Lambeth have accepted that I was rescued from my mother's flat in a state of neglect. It is highly probable that a few weeks before EPT first abused me, Miss Skipsey and her colleagues concealed that I and my siblings were rescued in a state of neglect and immediately and permanently removed my mother's care.

Lambeth have accepted and apologised for a culture of withholding, hiding and concealing information amongst social workers and staff, during the time of my abuse.

In the admission that Lambeth has made, that they concealed evidence at the time of my abuse, it is highly likely the credibility of any evidence that Miss Skipsey and her colleagues gave would have been tainted.”

Generally, therefore, he says Miss Skipsey’s credibility would have been so undermined such that her evidence would have been of no or no real value.

46. In relation to both claims concerning the Claimant’s placement with his mother, the key witness would have been the Social Worker employed by the First Defendant, Ellen Lean. She was the Claimant’s Social Worker in the context of the First Defendant’s Care Order and she would have also been involved in the discharge of the Care Order which was then replaced with a Supervision Order in favour of the Second Defendant. Despite concerted efforts to locate Ellen Lean (as outlined in the witness statement from Joanne Pruden, a partner in the firm of solicitors representing the First Defendant), it has not been possible to trace her. It appears that she was born in 1916 and therefore the overwhelming probability is that she is now dead.

47. The First Defendant has been able to disclose childcare records amounting to 420 pages. Some of those records are somewhat illegible. There is a strong suspicion that the records are incomplete but Joanne Pruden, when cross-examined by the Claimant fairly accepted that she could not say for certain that there were specific records which had gone astray. Angela Flahive who is employed by the First Defendant as Head of Safeguarding Review and Quality Assurance - Children’s Services confirmed that she could not identify any specific document which was missing but her experience told her that there should have been a much more complete set of documents. At all events, such records that have been obtained do not provide any material assistance in resolving the issues which would arise if this matter proceeded to trial.

48. In relation to documents held by the Second Defendant, I have already made reference to what is available, in the context of the Fairways claim. The witness statements from Mr James Yeulet (Senior Claims Investigator) and Yasmin Brown (a solicitor employed by the solicitors acting on behalf of the Second Defendant) depose to the extensive enquiries which have been made in order to obtain a full set of records.
49. There is compelling evidence to suggest that various important documents have gone missing. Miss Dobie identifies a number of documents which probably would have been available had the claim been brought at a much earlier time. In particular, she refers to:
- (i) The Supervision Order itself: this may have explained, in summary, the circumstances in which the Supervision Order came to be made.
 - (ii) In the context of care proceedings, a court report would have been available. There is no court file to be found.
 - (iii) There are no written risk assessments.
 - (iv) There are no police reports.
50. More generally, Miss Dobie points out that such documents as are available do not contain references to social work staff who were involved in the making of the supervision order or the supervision of the Claimant whilst in the care of his mother. Without such records, relevant witnesses cannot be traced.

51. As against the above, the Claimant points out that there are some highly relevant entries in the records, as follows:

- (i) *“A crisis occurred at the end of January when the children were found locked in a bedroom and removed by police. The Claimant’s mother had become so disturbed by that time, that Lambeth decided to take care proceedings, and a care order was made without resistance from the Claimant’s mother on 5.3.73. The children were fortunately placed together in a foster home, but I regret that this case now has to be closed and the fact that they transferred to another LA has contributed to the difficulties already existing in the family.”*
- (ii) *“After a very worrying couple of weeks the police took a place of safety order on all four children on 27.1.73.”*
- (iii) *I took the four children to the seaside and they told me a lot about their holiday in Switzerland. They were also talking more freely to each other and all in all seemed to have recovered surprisingly well from the traumatic experience of January and before.”*

52. The Claimant says that these entries are sufficient to support his contention that he was abused whilst being looked after by his mother. Indeed, quite properly, the Second Defendant has admitted that the Claimant was removed from his mother’s care by emergency services at the end of January 1973, having been held in a locked room.

53. However, the Second Defendant argues that these limited entries are insufficient to provide corroboration for the wider allegations made by the Claimant. It is said that the admission which has been made by the Second Defendant would simply not be sufficient to found a claim in favour of the Claimant.

54. The only oral evidence which could be adduced in this case as to the allegations of abuse would be from the Claimant himself and his brother. Neither the Claimant’s mother nor grandmother are alive, the latter died approximately 7-9 years before the claim was issued.

55. The Claimant asserts that his account of matters is corroborated by his brother and that the Court would be able to come to clear conclusions on the basis of that evidence. In short, he says that there is convincing and compelling evidence which he can provide to the effect that he was physically abused and neglected when in the care of his mother; and sexually and physically abused when at the Fairways Home.
56. The defendants, however, point out that (perhaps unsurprisingly) there are inconsistencies and contradictions in the Claimant's own evidence and his evidence when seen against the evidence from his brother. It is not necessary to set out in detail the various inconsistencies. Some of the inconsistencies can be summarised as follows:
- (i) The nature of the sexual abuse described in the original particulars of claim to the effect that Mr Tubbs touched the Claimant's penis and forced the Claimant to touch his penis is not the same as the description given in the summary particulars of claim dated 6 October 2023. In that document, the Claimant says that Mr Tubbs masturbated himself. On the other hand, the Claimant told Dr Alwin that Mr Tubbs made the Claimant masturbate him.
 - (ii) In the original particulars of claim, the Claimant stated that after Mr Tubbs died, he thought the abuse would stop but he says that it continued with staff abusing younger children. In the amended particulars of claim, the Claimant states that there were many rumours about such ongoing abuse but he had no knowledge of the same.
 - (iii) In the particulars of claim, the Claimant states that he told his brothers and sisters about the abuse. However, in his witness statement, he now says that his brother was an eyewitness and that his brother's evidence will be that he observed the Claimant being abused more than 100 times.

(iv) The Claimant's brother says that the abuse was reported to different social workers throughout the period after 1973 whereas the Claimant in the amended particulars of claim makes reference to two very specific disclosures. The latter is in contrast to what he said in the original particulars of claim that there were multiple occasions when he reported Mr Tubbs' abuse.

57. Perhaps of even greater significance than the inconsistencies in the Claimant's evidence is what the Claimant said to Dr Alwin about his recollection of matters. At one point, he told Dr Alwin that he had "*a limited memory of what happened*" and, at another point, he said that he had no "*...memory of what happened when he lived with his mother at the age of 8*". He added that "*He had begun to wonder whether he had made it up and was confused about what was true.*" He said that when he read the social services records, he was not sure "*whether it was real or not*".

58. None of the above is surprising given that the Claimant was only 8 when he suffered the abuse at his mother's hands. Moreover, his memory is bound to be impaired, not only by the passage of time but by his attempts to repress and suppress memories and by his use of drugs on a regular and frequent basis over many years.

Claimant's submissions

59. In discussing the impact of the delay on the evidence, and the reasons for the delay, I have already made explicit reference to what the Claimant says about matters. Nevertheless, I summarise the salient features of his case as follows:

(i) Whilst accepting that there has been very substantial delay, this can be excused by his reasonable attempts to suppress memories of the abuse, both when in the care of his mother and at Fairways.

- (ii) Moreover, the medical evidence demonstrates that he was psychiatrically disabled from bringing proceedings.
- (iii) As soon as he had access to the IICSA Report, he acted promptly to pursue claims against both defendants.
- (iv) The delay has not materially impaired the cogency of the evidence in that he and his brother can give plausible and convincing evidence about the level and extent of abuse which they suffered.
- (v) Miss Skipsey's evidence would have been of little or no value because she was clearly prejudiced and protecting herself.
- (vi) Similarly, evidence from the Tubbs would not have assisted the Court because they simply would have denied what occurred. Equally, evidence from his mother would have had no value.
- (vii) Such records as are available do demonstrate that he was abused by his mother, kept in a locked room and had to be rescued as a matter of an emergency. This provides support for what the Claimant alleges about his mother's treatment of him.
- (viii) Although the care records may appear to be incomplete, there is no basis for saying that they are less complete than they would have been if proceedings had been brought earlier. He says that his care records would have been scant in any event; and, in particular, there would not have been any record of the abuse which he received within his childcare records. He points out that the IICSA Report highlighted the fact that the Second Defendant had concealed evidence of abuse over a very substantial period of time. In short, the records would have been of no assistance to the Court even if some documents are missing.

(ix) Generally, the Court can place some reliance on the conclusions of the IICSA Report in considering his claim. The Claimant highlights the apology given on behalf of the Second Defendant during the course of which it said that the Second Defendant “*created and oversaw conditions... which were appalling and absolutely shocking and horrendous abuse was perpetrated.*”

60. In support of some of the submissions which the Claimant makes, he relies upon a number of reported cases. For the sake of completeness, I make reference to the cases which he cites in his witness statements and skeleton arguments:

(a) *London Borough of Haringey v FZO* [2020] EWCA Civ 180

This was a claim against the local authority who employed the teacher who had allegedly abused the claimant between 1980 and 1988. The Court of Appeal upheld the Judge’s conclusion that section 33 should be invoked in the claimant’s favour. However, on the facts, that case was very different from the instant one. In the first instance, the abuser had pleaded guilty to abusing the claimant. Secondly, the Judge concluded that there was no missing material evidence caused by the delay. Thirdly, the key witness, namely the abuser was available and, indeed, he had admitted much of what was alleged against him. In short, the Court of Appeal held that the Judge had exercised her discretion in an appropriate way.

(b) *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 156 QB

This was a rape case where the Claimant had reported the matter in 1991, a year after the event; and the defendant had been able to investigate. Further, the rapist was convicted. The Judge exercised his discretion under section 33 in favour of the claimant on the basis that

the cogency of the evidence had not been impacted by the delay: witnesses and relevant documents were still available.

(c) *Blackpool Football Club v DSN* [2021] EWCA Civ 1352

The claimant was abused on a footballing tour in 1987. The Judge's finding that the claim should be allowed to proceed was upheld by the Court of Appeal. The abuser was a convicted paedophile; and there was a substantial body of lay witness evidence to support what the claimant said.

(d) *FXF v Ampleforth Abbey Trustees* [2020] EWHC 791 QB

This was an abuse claim brought almost 33 years after the expiry of the limitation period. The alleged abuser had died in 1970, 17 years before the claim was brought. The Judge having found that the claim was largely dependent upon the claimant's memory of events when he was a child, concluded that the prospect of a fair trial had been seriously prejudiced. Whilst he acknowledged that the effect of the abuse itself was one reason for the delay, it was not possible for a fair trial to take place. He pointed out that there was no contemporaneous documentary evidence to support the reliability of what the claimant was able to recall.

(e) *EXE v Governors of the Royal Naval School* [2020] EWHC 596 QB

The Judge concluded that a fair trial was not possible given the delay and the absence of relevant witnesses. The delay in that case was 24 years between the expiry of limitation and the claim being brought.

61. It is perhaps trite to observe but many of the decided cases will turn on their own facts. It is understandable that the Claimant has sought to put before the Court cases which he considers might support his argument in relation to limitation. But I am bound to observe, at this stage, that since (inevitably) none of the cases to which he has referred is on 'all fours' with the Claimant's 2 cases, they are of limited value. I need to apply general principles and, in particular, the approach prescribed by the Court of Appeal in *Carroll* and *Cain*.
62. But and before leaving the Claimant's submissions, I should highlight his overarching submission which is that it would be unfair and unjust for him to be deprived of the opportunity of proving his claim in the face of horrendous abuse, both at the hands of his mother and when at Fairways Home. This is more particularly so when there is evidence that his mother ill-treated him, as documented in the records, and when there is evidence generally of widespread abuse when children were placed in the care of the Second Defendant, over an extensive period of time. The Claimant says that the Court should make proper allowance for the psychiatric damage which the sexual and physical abuse has caused him to suffer and the effect which this had had upon his ability to bring proceedings. Accordingly, he submits that it would be equitable for these claims to be allowed to proceed.

Defendant's submissions

63. I have already explained, in the body of this judgment, what the defendants say about the reasons for, and the impact of, the delay. I do not intend any disrespect in not rehearsing the arguments at this point in the Judgment.
64. Suffice it to note that both defendants contend that the delay cannot reasonably be excused. More particularly, they argue that the delay has caused irreparable damage to the cogency of the evidence, that is both the documentary evidence and any oral evidence which might have been put before the Court.

65. Additionally, both defendants submit that it is now not possible to place expert evidence before the Court as to what would have been appropriate social services practices at the material time. Witness statements have been put before the Court confirming that attempts have been made to find an independent expert who can speak as to social services' practices at the material time but without success. The Claimant challenged this evidence but I am satisfied that it would now not be possible for expert evidence to be presented to the Court such as to permit a proper evaluation of the conduct of the social workers by reference to the standards of the time.
66. The other matter upon which the defendants place reliance is the question of medical causation. This does not require an elaborate discussion. It is sufficient to observe that it is likely that the Claimant's psychological problems are multifactorial, given his long history of drug abuse and his criminal lifestyle. To put it another way, it would be very difficult indeed for a Court to identify the extent to which any sexual or physical abuse has contributed to his psychiatric problems.

Discussion

67. On any view, the length of the delay in these two claims is very substantial. The delay between the expiry of the limitation period and the issue of proceedings in both claims is in the order of 36 years. The abuse which the Claimant allegedly suffered at the hands of his mother occurred more than 50 years ago and the abuse at Fairways Children's Home occurred between 42 and 50 years ago.
68. It must also be observed that apart from the Claimant's complaints to his Social Worker whilst resident at Fairways, no complaint has been registered against either defendant until a letter of claim was sent in September 2021 to the Second Defendant, followed by a letter of claim to the First Defendant in February 2022. The significance of this is that there has

been no prior opportunity for either defendant to investigate the serious allegations made by the Claimant until approximately two years ago.

69. Nevertheless, I remind myself that the length of the delay should not be looked at in isolation. There are some situations where even if there has been very substantial delay, it will be equitable to allow the claim to proceed if there are adequate reasons for the delay and, more particularly, if the cogency of the evidence has not been adversely affected. On the other hand, it is reasonable to assume that the longer the period of delay, the more likely it is prejudice will be caused to the defendant.
70. I turn next to the reasons for the delay. Reasons for delay, good or bad, are unlikely to be determinative of the overall exercise of discretion. On the other hand, they are relevant to, and do, affect the balancing exercise. If there are excusable reasons, then it may be just that the claim should be allowed to proceed, despite some unfairness to the defendant due to the delay. Conversely, if the reasons for the delay are not good, then the prejudice caused to the defendant by the effect of the delay is likely to sway the Court in the other direction.
71. Here, I have already made it clear that I do not consider that the Claimant was unable to investigate the claims by reason of a *psychiatric disability*. I do accept, however, that according to his own account, as interpreted by Dr Alwin, he has suffered significant psychiatric problems over the course of many years; and that his mental health issues may have had a part to play in his decision not to pursue claims against the defendants. I accept too that he has, over time, endeavoured to suppress the memories of the abuse which he allegedly suffered. I also accept that, at times, he has wondered whether what he recalls was real or imaginary. Generally, I accept that he was unwilling to stir up the past because of the effect which confronting these events would or might have had on his well-being.
72. As against these matters, objectively, he has known about the abuse for 50 years or so. What happened to him has not been obliterated from his memory, albeit that he has sought to

repress such memories. He could have investigated matters at a very much earlier time, had he chosen to do so. It was his decision (conscious or otherwise) not to explore the possibility of a claim until the IICSA Report was produced.

73. Ultimately, as it seems to me, it is not a binary question as to whether the reasons for not bringing a claim before 2021/2022 are *good* or *bad*. From the Claimant's perspective, there are plausible reasons why he did not progress matters at an earlier time. But, looked at objectively, a delay of this magnitude is unreasonable in circumstances when he well knew that he had been the victim of abuse and was capable of investigating a claim or claims. Certainly, from an objective standpoint, there was no need for the Claimant to await the publication of the IICSA Report before embarking on proceedings, albeit that the report was a trigger.
74. At all events, I turn to what I consider to be the critical issue in this case which is whether a fair trial is now possible. This requires an analysis as to whether the defendants' ability to defend the claim has been prejudiced by the lapse of time. I repeat that the evidential burden of showing that the evidence to be adduced is likely to be less cogent because of the delay rests on the defendant.
75. It seems to me that this crucial question admits of only one answer, namely the defendants have been sorely prejudiced by the delay. The non-availability of key witnesses is sufficient in itself to demonstrate very significant prejudice. I have in mind, in particular, the fact that the First Defendant can no longer call upon Mrs Lean to explain the circumstances surrounding the Care Order and why it was discharged in place of a Supervision Order. Equally, the Second Defendant cannot now adduce evidence from their key witness, Mrs Dora Skipsey to whom the Claimant allegedly complained about the abuse at Fairways. Miss Dobie is right to stress that this is a case which depends not only on the fact of the abuse being established but also upon the defendant being made aware of such abuse.

76. I reject the Claimant's argument that the evidence given by the social workers would have been so tainted as to be of no value. It may well have been the case that, ultimately, the Court preferred the Claimant's evidence to that of the social workers. But the defendants have been deprived of the opportunity of advancing a case or at least seeking to meet the case put forward by the Claimant.
77. Aside from the absence of social workers, it is also the case that neither the Claimant's mother nor grandmother are alive. Similarly, Mr Tubbs has died (albeit that this was before the expiry of the limitation period). Insofar as Mrs Tubbs is still available, I accept that she is unlikely to be able to give any meaningful evidence.
78. The prejudice is not confined to the absence of witnesses. I consider that there is very real prejudice as a result of the absence of documents which is almost certainly attributable to the delay. Despite what the Claimant himself submits, I think it very likely that the childcare records are incomplete. In any event, it seems to me that the Second Defendant is entitled to complain about the absence of the court records and the Supervision Order itself. These would have been highly relevant documents for the purposes of investigating the complaints made by the Claimant.
79. Of course, the Claimant and his brother can give evidence about the abuse but I am satisfied that the cogency of their evidence has been adversely affected by the substantial passage of time. I do not need to rehearse the various inconsistencies which have emerged to date. The reality is that the cogency and reliability of the Claimant's evidence, in particular, is bound to be affected by the passage of time. He has been required to describe events which occurred when he was a young child in circumstances when, on his own account, he has only a very hazy memory of certain matters and when he has done his utmost to suppress memories of events.

80. Of course, if it be found that the Claimant's account was unreliable, at least in part, then that would be detrimental to his case. But it also renders a fair trial the more difficult. In the absence of any evidence from the defendants, the Court would be asked to reach conclusions on the basis of evidence which lacked coherence and reliability.
81. I also bear in mind that the defendants are prejudiced to the extent that they are unable to secure expert evidence to assist the Court with social work practices at the material time. The inability to call expert evidence is by no means determinative in itself, but it is relevant to the overall question of prejudice.
82. Similarly, the problems which the Court would face with causation is relevant to whether a fair trial would be possible. There are no medical notes before 2004 although it is plain that the Claimant has suffered many medical problems over time together with multiple traumatic experiences. Medical causation would be a seriously difficult issue to resolve.
83. It goes without saying that if the Court does not exercise its discretion in favour of the Claimant, the Claimant suffers very real prejudice. If the Claimant is not allowed to proceed, he will, of course, feel a burning sense of injustice in that he is entitled, as he sees it, to redress for the appalling abuse which he suffered at the hands of his mother and in the Fairways Home. A Court, however, is not permitted to allow a claim to proceed merely because a Claimant may have been the victim of awful abuse, whether sexual or physical or indeed both.
84. Overall, when carrying out the balancing exercise, I am entirely satisfied that the prejudice that would be suffered by the defendants far outweighs any prejudice that would be suffered by the Claimant. I am equally satisfied that a fair trial in these circumstances would not be possible.

85. It follows that I conclude that it would not be equitable to allow this action to proceed having regard to the 3 relevant matters set out at sub-section 33(3) of the Act and all the circumstances of the case.
86. Finally, I wish to pay tribute to the Claimant for the way in which he has conducted his case. He has done so in an exemplary fashion displaying very considerable skill in his presentation of difficult and complex legal arguments. He has shown unfailing courtesy to all concerned; and he has not allowed his emotions to take over. To the contrary, he has been controlled and measured in the presentation of his case, both on paper and during the course of the hearing.
87. I would also like to express my gratitude to both counsel. They have been of considerable assistance to the Court in the presentation of their written and oral arguments and they have conducted this difficult case with appropriate sensitivity.
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