Neutral Citation Number: [2017] EWCA Civ 1711

Case No: B3/2016/2244

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LIVERPOOL COUNTY COURT
MR GARSIDE QC
A07LV01

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2017

Before :

SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE LINDBLOM
and
LADY JUSTICE THIRLWALL

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Between :

THE PENNINE ACUTE HOSPITALS NHS TRUST **Appellant**

and

MR SIMON DE MEZA **Respondent**

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Ms Anna Hughes (instructed by **Weightmans LLP**) for the **Appellant**
The Respondent was unrepresented and appeared as a litigant in person

Hearing date: 26th July 2017

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JUDGMENT

LADY JUSTICE THIRLWALL :

1. This appeal arises in the context of a personal injury claim by the claimant brought in 2015 in respect of alleged clinical negligence in the early 1980s. The first defendant is the successor body to the treating hospitals. The second defendant was a consultant endocrinologist who was employed at one of the hospitals but also saw the claimant privately. Proceedings were issued in October 2014. Both defendants raised defences of limitation. Their applications to strike out the claims as statute barred were heard by Mr Garside QC, sitting as a recorder, on 11th May 2016. He gave judgment the following day. He concluded that the claimant had knowledge of his claim, within the meaning of section 14 of the Limitation Act 1980 (LA 1980) in June 1983. The limitation period expired therefore in June 1986. Prima facie the claims were statute barred. The recorder then considered the claimant's application under section 33 LA 1980 to disapply the limitation period. He rejected the application in

respect of the second defendant. He granted the application in respect of the first defendant. Accordingly the claim was to proceed against the first defendant only. The first defendant appeals. There is no cross appeal and the second defendant played no part in the hearing before us. I refer to the respondent as the claimant, and the appellant as the first defendant.

Preliminary issue

2. The claimant was not represented before us. The solicitors and counsel who had successfully argued his case in May 2016 came off the record in mid June 2016 and were not replaced. The claimant told us that he was not satisfied with their conduct.

3. At an early stage of the hearing before us the claimant raised what he described as the professional misconduct of the recorder. He alleged that the recorder had said at the limitation hearing that he knew two of the people involved in the case but had not said who they were. He also said that he had discovered after the hearing that the recorder and the second defendant shared premises in Manchester and that they were friends. This information was not foreshadowed in any of the correspondence before the hearing. We directed that he put his assertions in writing and endorse them with a statement of truth. We received his three page document during the vacation. Only one of the three pages submitted deals with the allegations about the recorder's conduct. The rest were directed to the merits of the appeal which we had already heard. The relevant section of the document records that at the beginning of the hearing the recorder made the parties "fully aware that he was familiar and knew of some of the parties involved". Who they were became clear, the claimant says, "during the latter part of the hearing [when] counsel for the second defendant Dr BA Enoch, made it clear that his client was unable to stand trial because of his medical condition and age, at no time did Recorder Charles Garside request any medical documented proof of the reasons why Dr Enoch was unable to stand trial." He complains that when he had made a statement without any document in support of it, the evidence was ignored. At (iii) of his document he writes "It therefore became clear that there was a close relationship between the recorder and the second defendant and Recorder Garside should have stepped down from hearing the case." At (iv) he writes "I wish to therefore accuse Recorder Charles Garside, for professional negligence on the grounds as stated above in that he was unfit to sit before his limitation hearing as he could not have an unbiased view." He then asserts that some two weeks "therefore the hearing" by which I think he means after the hearing he was "formally advised that one of the people to whom the was referring as known to him was Dr Enoch and that Dr Enoch's private consulting rooms were next door to the recorder's chambers in Manchester." The claimant goes on to say "I have been formally advised that Recorder Charles Garside not [sic] socialised with BA Enoch but attended both his professional and private retirement parties at his private rooms and home." The claimant does not give the source of his information but for the purposes of this part of the judgment I have taken it at face value.

4. The issue is not one of professional negligence but whether or not there is or might be actual or perceived bias. It is plain from the claimant's own account that the recorder raised the question of his knowledge of two of the people involved in the case before the hearing had even begun. In doing so the recorder was alerting the parties to the possibility of perceived bias, given his knowledge of the doctor. By raising it he gave

the parties the opportunity to explore the issue and thereafter to make an application for the recorder to recuse himself if appropriate.

5. The claimant was represented by very experienced personal injury solicitors and by counsel. Once the recorder had raised the matter it was for them to decide what to do about it. All would have been aware that St John's Street in Manchester is the professional base for a number of barristers' chambers and that a number of medical practitioners have their private consulting rooms there. It is not apparent to what extent the issue was explored but it seems there was no application to the recorder to recuse himself. That was a matter for the professional judgment of counsel. The particular matters upon which the claimant relies as evidence of actual bias do not take his case any further; the fact that the doctor was 77 years old was a matter of record. His state of health does not seem to have been in dispute and it is not apparent that counsel challenged it.

6. At the hearing before us counsel for the defendant made the point that if this complaint had any merit it could and should have been raised before the recorder and, in any event, straight after the hearing if new information had come to light. In his recent document the claimant says
"As per the appellant's latter statement why did I not instruct my legal representatives of my findings after the limitation hearing of the association between Dr BA Enoch and Recorder Charles Garside soon thereafter the hearing date. This is quite simple, by the time the case was heard I had made it quite clear with my legal team I was not happy the many in which they handled the case and the manner in which I was treated, in that my lawyer each time I had requested for the witness statement to presented in my case dossier for the courts, I had been told that if was unhappy with the manner in which they were handlng my case to find someone else."
The solicitors came off the record in mid June 2016, a month after the hearing, and two weeks after the claimant says he made the discoveries to which I have referred. There is no explanation for not having raised the issue while the solicitors were still on the record, still less for failing to raise it in the year that elapsed before the hearing of the appeal. Given that the recorder raised his knowledge of Dr Enoch at the hearing and no objection was taken then or after the judgment the overwhelming likelihood is that experienced lawyers considered there was no reason to object. We find that unsurprising. Had the recorder been a close personal friend of Dr Enoch he would have disclosed it. There is no evidence that this was the case. What the claimant's researches reveal is, at its highest, a professional social relationship which was the reason for the disclosure by the recorder in the first place. I am quite satisfied that there is nothing in this point.

The claim

7. The claimant had been diagnosed with hypogonadism in 1977 when he was 16. At that time he was and had been for some time very overweight. Various treatments were tried for the hypogonadism and in 1979 he was referred to Professor Wynn who prescribed Gonadotropin (which stimulates the production of sperm cells). The records show that in 1981, aged 19, the claimant was asking for testosterone (judgment paragraph 3). The recorder found that as at 1981 the claimant was well aware that testosterone would have a potentially beneficial effect upon his condition. In June 1981 Dr Shalet at the Christie hospital prescribed Sustanon (testosterone). It was effective. The claimant was concerned that the drug was causing weight gain.

As at 16 November 1981 the doctor wrote "I have asked him to remain on Sustanon 250, every three weeks as I am quite sure this is not responsible for his weight problems". The claimant stopped taking the drug. At that time he was 20 years old.

8. In April 1983 the claimant was referred to Dr Enoch. He saw him privately. Dr Enoch wrote to the claimant's GP who was, as the recorder found, proactive in his care of the claimant. He set out the history of the claimant's various conditions and arranged tests. On 22nd July he wrote to the GP again with details of more of the history and of the current position. He set out the investigations carried out by Dr Shalet. It was the claimant's case that Dr Enoch was negligent in failing to follow up his case, the hospital was vicariously liable for his negligence and further negligent in failing to devise, institute or enforce any or any adequate system of patient follow-up whereby the claimant would have been recalled to an endocrine clinic with the second defendant at the Northern hospital. Had that been done, it is said, the claimant would have received appropriate testosterone therapy for his hypogonadism by 1984.

9. In 2011 the claimant was referred to Dr Syed who prescribed testosterone replacement therapy. The effects were dramatic. The claimant said in evidence that he was very surprised that testosterone replacement could be used to treat his hypogonadism since no one had offered him such treatment since 1981 or 1982. He said that Professor Wynn had told him that his problems stemmed from an abnormality of the pituitary gland and advised him that no treatment was available, and therefore that he would be impotent and infertile for the rest of his life. The recorder disbelieved his evidence about this. He found that the claimant had known what his condition was and that treatment was available for it because he had received treatment, including from Professor Wynn. "I do not accept that Professor Wynn would ever have said to the claimant that there was no cure or way of ameliorating his hypogonadism. Professor Wynn and his team discussed it at length with the claimant and it is quite clear that although weight was the primary problem, as far as Professor Wynn was concerned hypogonadism was also on his list…In any event, after that episode Dr Shalet prescribed Sustanon, which…produced good results. Therefore the claimant knew that he had a condition that could be treated…There is no note or record of why it was stopped." The recorder went on to conclude, entirely reasonably on the evidence, that the decision to stop the Sustanon was that of the claimant. There was no evidence that he had ever asked the doctors who dealt with him subsequently to reinstate it. There was no reason for them to do so if the claimant did not want to take it. As the recorder found "I accept for the sake of this finding that the duty of those who were treating them was to do what they could to treat his hypogonadism. However, they could not do anything unless he was prepared to cooperate. They certainly could not force him to have treatment that he did not want." These were important findings for reasons I shall come to later in the judgment.

10. Section 11 Limitation Act 1980 provides, so far as relevant to this claim, as follows:
"(3) An action to which this section applies shall not be brought after the expiry of the period applicable in accordance with sub-section (4)….
(4) … [T]he period applicable is three years from –
(a) the date on which the cause of action accrued; or
(b) the date of knowledge (if later) of the person injured."

11. Section 14 provides, again so far as relevant to this claim:
(1) … [I]n section 11… references to a person's date of knowledge are references to

the date in which he first had knowledge of the following facts –
(a) that the injury in question was significant; and
(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence… or breach of duty; and
(c) the identity of the defendant; …
(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

The claimant's case on limitation

12. It was the claimant's case that his date of knowledge as defined by section 14 LA 1980 was 2011, when Dr Syed prescribed testosterone. The defendants argued that the he had the requisite knowledge at the time of the alleged negligence, at some point in the early 1980s and that the limitation period had expired. Both submitted that the recorder should not disapply the limitation period under section 33.

Section 14

13. There is no complaint about this aspect of the recorder's decision and I am satisfied that his ultimate conclusion was correct but the route he took was flawed. Given my views about his approach to section 33 it is helpful, briefly, to touch on this.

14. When dealing with paragraph (a) of subsection (1) the recorder found that the injury was the adverse consequences of the alleged failure to treat the hypogonadism as it should have been treated namely "increasing pain and suffering through lack of treatment of his hypogonadism." He found "that [the claimant] knew and had known since he was relatively young that that condition untreated was going to cause him pain and suffering. The sorts of symptoms of that condition would obviously be very significant, particularly to a relatively young man." He then asked, "was it significant"? and answered that question "It undoubtedly was." He came to that conclusion by reference to the symptoms as the claimant knew them to be at the time of the alleged negligence and in the light of effective treatment after 2011. The reference to the latter period is unhelpful. What the recorder meant was that the injury was significant throughout the period from the early 1980s until 2011. The question to be addressed under section 14 was when did the claimant **first** know that the injury was significant? It is clear from the recorder's earlier findings that the claimant knew that the injury was 'significant' as a matter of ordinary English in the 1980s. The next question to be asked was that posed under section 14(2) which for convenience I repeat:
"*For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment*." The recorder did not refer to this in terms but it is plain from his findings as to the seriousness of the injury that a person in that position would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment. The threshold for sufficiently

serious is not high; it is more than minimal. This was passed by some margin. Accordingly, the recorder's finding that the injury was significant was correct.

15. As to paragraphs (b) and (c) the recorder found that the claimant knew that he had a condition that could be treated and which, post 1981 he knew was not being treated. He knew that Dr Enoch had not followed up on hypogonadism by, at latest, June 1983. The recorder concluded that the date of knowledge was June 1983. There was no complaint about that by either party. It followed therefore that the primary limitation period expired in June 1986, some 28 years before the claim was intimated.

The application under Section 33 LA 1980

16. Section 33 (1) reads
If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
(a) the provisions of section 11 [or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and
(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
..
(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to –
(a) the length of, 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 [by section 11A] or (as the case may be) by section 12;
(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action

(e) knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

17. Having set out the terms of subsection (1) the recorder dealt with each of the relevant factors set out at subparagraphs (a) to (f) of subsection 3.

18. As to (a) the recorder found, inevitably, that the delay was extremely long and that there was no reason for it, he having rejected the claimant's evidence about Professor Wynn. Even after the claimant approached solicitors in 2011 proceedings were delayed until 2014. There was, as the recorder found, no explanation for that further delay.

19. When considering (b) the recorder reviewed the likely evidence to be given by the claimant who was prepared to accept that notes written by doctors were likely to be accurate but did not have any real recollection of what had happened. The recorder concluded that the claimant's evidence as to events in the 1980s was not cogent and that, taken with the deficiencies in the documents, rendered "his evidence and the evidence of anybody else much less cogent." He then considered the evidence of Dr Enoch. Dr Enoch is, "I am told, 77 years old and in poor health. He is retired. All his own notes and documents have been destroyed; as have the North Manchester General Hospital records and so nothing has been recovered apart from the letters to the general practitioner which are in the general practitioner files." He went on to conclude that Dr Enoch had nothing to rely on apart from his memory "which is likely to be non existent at this stage in time, even if he was a fit 77 year old. Any evidence he may give is likely to be lacking in cogency." The position of the first defendant was even worse "They have nothing to rely on. They do not even know if there was an appointment and if there was, what happened. They cannot resurrect any institutional memory of these events at all, and in practical terms if this case proceeds I recognise that it will have to be dealt with by the first defendant by way of cross examination only. It seems very unlikely unless some miraculous document appears that they will be able to call any evidence of their own at all." These were very powerful findings on the effect of delay on the cogency of the evidence.

20. The recorder went on to find, correctly, that there was no criticism to be made of either defendant (sub paragraph c).

21. As to subparagraph (e) the recorder concluded that notwithstanding the lack of evidence on this issue "I am prepared to assume in his favour that he only had that knowledge in 2011 and that he acted promptly and reasonably thereafter." As to (f) he had obtained medical treatment and consulted solicitors and his claim was pleaded nearly three years later in October 2014.

22. The recorder considered (paragraph 22) that the circumstances of the case included Dr Enoch's age and infirmity "and the fact that he is an individual human being, rather than a body and that the natural reaction to ...proceedings being brought suggesting he was negligent is bound to be one of distress and upset." These were all irrelevant considerations in this case, as was the recorder's view that "it was a question of reputation and a life spent giving conscientious care to patients." Age and infirmity may be, and were here, relevant to an assessment of the quality of the evidence a party may give but they are not of themselves factors to weigh in the balance against a claim being heard.

23. The recorder acknowledged that the claimant had spent years struggling with the effects of the condition "and it would be a very serious decision to deprive him of any action he may have." He went on to say that he was "not making any judgment about the merits of any case there may be, but I am bound to assume that on the surface there is a case which may have merit and which but for the limitation point the claimant would be entitled to put before the court." This was an error. In considering "all the circumstances of the case" the recorder was entitled to and should have looked at the merits, particularly given his earlier findings that as at November 1981, when he was 20, the claimant had stopped taking the medication, knowing that it was effective in the treatment of hypogonadism. He was 22 when he saw Dr Enoch in 1983 but he did not seek a follow up appointment nor did he ask any medical

professional for a renewed prescription. This is all of a piece with the recorder's finding that the claimant may have been concerned that the medication was causing weight gain, notwithstanding the clearly expressed view of Dr Shalet to the contrary. It is difficult to see how, even if there had been a breach of duty (as to which there must be real doubt,) the claimant could have proved causation. The recorder was entitled to and should have taken into account that this was a weak claim.

24. The recorder went on to opine that this was a very finely balanced case and concluded that it would be appropriate to disallow the limitation provisions in respect of the first defendant "but not for the reasons I have already given in respect of the second defendant." He acknowledged that it would be open to the first defendant to bring a claim against the doctor but expressed the hope that this would not happen. He then reverted to the second defendant and said, "I think to bring to this court a 77 year old doctor, who has long retired without the benefit of any records, at a time when he has been asked to deal with things that happened 40 [this should be 30] or more years ago would not be equitable. Therefore… I propose to give a direction that the claim against the second defendant should be dismissed." This was followed by a direction that the claim against the first defendant should proceed. The recorder gave no reasons for this latter decision. Ms Hughes submits that it appears that the recorder placed reliance on the fact that the first defendant was an institution and not an individual, given his observations in respect of the second defendant with which I have dealt at paragraph 22 above. If that is right, and there is force in the submission, then the reliance was misplaced. The fact that a defendant is an institution or, as the case may be, an individual is not, of itself, a matter which can affect the exercise of discretion under section 33.

25. Section 33 LA 1980 gives the judge a wide discretion when considering an application to disapply the limitation period and it is not for this court lightly to interfere with the exercise of that discretion. However as is plain from paragraphs 23 and 24 above, the recorder's conclusion in respect of the first defendant is unreasoned and unexplained. To the extent that the reasoning may be inferred it is erroneous. In my judgment, the conclusion cannot be upheld. The recorder did not exercise his discretion in accordance with Section 33.

26. This court has all the evidence necessary to consider the application under section 33. I would carry out the section 33 exercise afresh, taking account of the recorder's findings of fact contained in paragraphs 18-23 above. The delay from the expiry of the limitation period is 28 years. Delay of itself is not a reason to refuse to extend time; it is the effect of delay on the ability of the defendant to defend the claim that matters. The prejudice to the defendants resulting from the very long delay, which was not of their making, was stark. It is inescapable that had proceedings been brought by 1986 the first (and indeed the second) defendant would still have retained their records which would have revealed whether appointments were sent to the claimant, whether he attended and what was done. As the recorder made clear there were no records, save the letters held by the GP. Neither the claimant nor the second defendant had any reliable memory.

27. In his oral submissions, the claimant observed that there were sufficient documents for his solicitors to formulate the case. This is true but his case was that there had been no follow up as a result of which he had suffered injury. Those issues could not

fairly be tried given the combination of the absence of any relevant documents and the inability of those involved reliably to remember anything.

28. I acknowledge that, in theory, the claimant had a potential claim but for the reasons I have already developed, it faced very real difficulties. Taking account of all the circumstances to which I have already referred at some length I am not satisfied that it would be equitable for the first defendant to be required to defend such a claim. On the contrary, it would be inequitable.

29. I have referred to the flawed reasoning in respect of the recorder's decision to disapply the limitation period in respect of the claim against the second defendant but I am satisfied that the conclusion was ultimately correct. Much of the reasoning in respect of the first defendant applies here also. There was no appeal against this conclusion and it is not necessary to say any more about it.

30. I would allow the first defendant's appeal and strike out the claim against the first defendant as statute barred.

Lord Justice Lindblom: I agree

Lord Justice Ryder: I also agree