



Case No: B3/2015/4173

**Neutral Citation Number: [2017] EWCA Civ 2374**  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Tuesday, 12 December 2017

**Before:**

**LORD JUSTICE RUPERT JACKSON**  
**AND**  
**SENIOR PRESIDENT OF TRIBUNALS**

**Between:**

**RICHARDS**

**Applicant**

**- and -**

**MCKEOWN AND ANOTHER**

**Respondent**

(DAR Transcript of WordWave International Ltd trading as DTI  
8<sup>th</sup> Floor, 165 Fleet Street, London EC4A 2DY  
Tel No: 020 7404 1400 Fax No: 020 704 1424  
Web: [www.DTIGlobal.com](http://www.DTIGlobal.com) Email: [TTP@dtiglobal.eu](mailto:TTP@dtiglobal.eu)  
(Official Shorthand Writers to the Court)

**Mr Julian Gun Cuninghame** (instructed by Applicant in Person) appeared on behalf of the **Applicant**

**Mr Francis Bacon** (instructed by Mills Reeve LLP) appeared on behalf of the **Respondent**

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**Judgment**

**(Approved)**  
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## **LORD JUSTICE RUPERT JACKSON:**

1. This oral, ex tempore judgment is in four parts, namely:

Part 1 - Introduction

Part 2 - The facts

Part 3 - The present proceedings

Part 4 - The appeal to the Court of Appeal

### **Part 1 - Introduction**

2. This is an appeal by the claimant in a professional negligence action against an order that her action be summarily dismissed because it included a personal injuries claim, which is time barred. The issues in this appeal are first whether the lower courts acted prematurely and without regard to the possibility of relief under section 33 of the Limitation Act 1980. Secondly, whether the court should have severed the personal injury element of the claimant's claim and allowed the remainder to proceed.
3. The claimant, Ms Susan Richards was until recently a litigant-in-person. She is represented by counsel in the Court of Appeal, Mr Julian Gun Cuninghame. The first defendant is Mr Diarmuid McKeown, a solicitor. The second defendant is McKeown's Solicitors Limited, a firm of solicitors of which Mr McKeown was a director. The defendants have at all times been represented by counsel, Mr Francis Bacon. Mr Bacon tells me that the second defendant, McKeown's Solicitors Limited went into liquidation on 17 July 2015. That does not affect the present litigation. A J Smith and Company Limited is a company which will feature in the narrative. I shall refer to it as "Smith". I shall refer to the Limitation Act 1980 as "the Limitation Act". Section 11 of the Limitation Act provides:

- "(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
- (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with sub-section(4)or (5) below.

- (4) Except where subsection (5) below applies the 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."

4. Section 33 of the Limitation Act provides:

- "(1) 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 [<sup>f48</sup>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 who 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."

Section 33(3) sets out the factors to which the court should have regard when exercising its discretion under section 33(1).

5. The Court of Appeal has recently given comprehensive guidance as to the operation of those provisions in the Chief Constable of Greater Manchester Police v Robert Carroll [2017] EWCA Civ 1992, in particular at paragraph 42. After these introductory remarks, I must now turn to the facts.

## **Part 2 - The facts**

6. Smith was a company which, before entering voluntary liquidation in May 2014, provided financial advice and services to its clients. Smith provided those services through employed or self-employed independent financial advisors. The claimant started working for Smith in October 2006 under an agreement entitled, "Self-employed Advisor Agreement". It is a matter of dispute in the present litigation whether that description was apt or whether the claimant was really an employee of Smith. The agreement permitted either party to give three months notice of termination and the agreement also permitted summary termination if the claimant acted in a way which, in the company's reasonable opinion, was likely to bring it into disrepute.
7. On 14 January 2008 Smith gave the claimant notice of summary termination of the agreement. The claimant took the view that Smith had acted unlawfully. Fortunately she had legal expenses insurance. She instructed McKeowns, one of the solicitors firms on the insurers panel to act on her behalf in pursuing claims against Smith. The discussions which followed between the claimant and McKeowns are a matter of dispute. The upshot of those discussions, however, was that McKeowns issued two sets

of proceedings on the claimant's behalf. First, there was a claim in the employment tribunal for sex discrimination, harassment and victimisation. Secondly, there was a claim in the Manchester County Court for breach of contract.

8. In October 2009 McKeowns ceased to be on the insurers panel and they closed down their employment department. They advised the claimant to instruct other solicitors. They gave her substantial financial assistance in meeting the fees of those other solicitors since by then the insurance cover had been used up. The county court action proceeded to trial. The claimant had only limited success. She recovered damages and interest totalling £13,985. She also recovered 40 per cent of her costs. The employment tribunal proceedings continued but they ended in failure. The tribunal dismissed the claimant's claims for sex discrimination and victimisation. The claimant considered that her claims had been badly pleaded and conducted from the outset. In particular there should have been a claim for unfair dismissal. If her claims had been handled properly, she would have achieved a much better result in both the county court and the employment tribunal. Accordingly she commenced the present proceedings.

### **Part 3 - The present proceedings**

9. By a claim form issued in the Northampton County Court on 26 March 2014, the claimant claimed against McKeowns damages for professional negligence and breach of duty of care. Before serving the claim form she amended and re-amended it to include Mr McKeown as first defendant and to add the words, "personal injury". On 4 July 2014 the claimant served her particulars of claim. I would summarise the pleaded breaches of duty as follows:
  - (i) Failing to make a claim for unfair dismissal in the employment tribunal on the basis that the claimant was an employee rather than self-employed.
  - (ii) Failing to advance claims for detriment associated with protected disclosure, whistle blowing, failure to provide particulars of employment, disability discrimination and stigma damages.
  - (iii) Mishandling the sex discrimination claim.
  - (iv) Repeatedly changing the solicitor who was handling the case and then 20 months into the litigation, forcing the claimant to switch to a new firm of solicitors altogether.
  - (v) Using up the available insurance funds without achieving any result.

- (vi) Withdrawing financial assistance for the claimant's claims in October 2010.

The claimant alleged that she had suffered a variety of financial losses as a result of the defendant's breaches of duty. She also alleged that she had suffered personal injury as a result of stress caused by the prolonged litigation and the defendants' negligence.

10. On 10 November 2014, the defendants applied for an order that the claims against them be struck out. Alternatively that there be summary judgment for the defendants. Alternatively that the amendment to the claimant's claim joining Mr McKeown and adding the claim for personal injury be disallowed. The basis of the defendants' application as spelt out in their counsel's skeleton argument was as follows:
  - (i) On analysis of the facts and the claimant's pleaded allegations, her claim cannot succeed.
  - (ii) In any event there is no basis for joining Mr McKeown personally as a defendant. He was a director of McKeowns and was not involved in handling the claimant's litigation.
  - (iii) The claimant's claim for personal injury was launched after expiry of the limitation period, therefore that is statute barred.
11. Mills and Reeve LLP act for the defendants in the present litigation. Ms Neera Gosrani of that firm filed a witness statement in support of the defendants' application setting out the history of events in some detail. The application came on for hearing before HHJ Halbert in the Chester County Court on 5 March 2015. The claimant appeared in person. The defendants were represented by counsel, Mr Francis Bacon. At the start of the hearing Mr Bacon took preliminary point. He submitted the whole of the claimant's claim was subject to a three-year time limit because it included a claim for personal injury. He said that section 33 of the Limitation Act was inapplicable to a mixed claim such as the present. Therefore the claimant's case was doomed to fail on that ground alone.
12. HHJ Halbert accept that submission. Whilst expressing his regret at the outcome, he gave summary judgment in favour of the defendants and dismissed the action. He did not consider any of the other detailed arguments and issues which had been raised by the parties. He dealt with the matter purely on the basis of limitation. The claimant was understandably dismayed by this turn of events. She appealed to the High Court. Jay J granted permission for that appeal to proceed. He made the following observations in his written grant of permission:

"The appellant must, in my view, have an argument that the personal injury claim ought to have been severed or alternatively that section 33 should apply to it. HHJ Halbert does not appear to have engaged with these possibilities."

13. The appeal came on for hearing before Holroyde J, sitting at the Liverpool Civil Justice Centre on 19 November 2015. The judge dismissed the claimant's appeal. I would summarise his reasoning as follows:

- (i) As pleaded, the claimant's claim is barred under section 11 of the Limitation Act.
- (ii) Contrary to the view of HHJ Halbert, section 33 of the Limitation Act does apply to a mixed claim.
- (iii) Nevertheless, the judge was correct in his conclusion because the claimant had not made an application under section 33 and, indeed, that remained the position at the hearing before Holroyde J.
- (iv) There was no application by the claimant to amend her claim deleting the personal injury elements.
- (v) In any event, the personal injury elements were so closely intertwined with the other elements of the claimant's case, that a judge could not carry out a severance exercise to save the claimant's case.

The claimant was aggrieved by Holroyde J's decision. Accordingly she appealed to the Court of Appeal.

#### **Part 4 - The appeal to the Court of Appeal**

14. Mr Cuninghame, who has come into this case at a late stage has furnished the court with two skeleton arguments. These effectively replace the grounds of appeal which the claimant had drafted as a litigant-in-person. Mr Bacon, on behalf of the defendants, expresses regret that some of the claimant's arguments come late in the day. He does not object to Mr Cuninghame pursuing those points. At the hearing this morning Mr Cuninghame advanced three arguments, which I would summarise as follows:

- (i) The defendants' application dated 10 November 2014 did not seek dismissal of the whole action on limitation grounds. So far as the limitation issue was concerned, the defendants were simply seeking to disallow amendments adding in a personal injury claim.

- (ii) There did not need to be any application by the claimant to invoke section 33. The normal course is for section 33 to be pleaded in the reply if there is a limitation defence and thereafter the matter can be dealt with either as a preliminary issue or at trial. The defendants and the court in this case jumped the gun by dealing with limitation as a ground for summary dismissal of the action on 5 March 2015.
- (iii) In any event, if the personal injury claims are statute barred, the proper course is to strike out those parts of the claim form and particulars of claim allowing the remainder of the claims to proceed.

On behalf of the defendants, Mr Bacon takes issues with all three arguments. In relation to the first and second argument, he draws attention to an email which the claimant sent to Ms Gosrani at 1.36 am on the morning of 5 March 2015. In that email the claimant outlined the personal injury aspect of her claim. She submitted that the court should allow that claim to proceed in the exercise of its discretion under section 33 of the Limitation Act. In her email she referred to the relevant sub-sections of section 33 and she also referred to some of the case law on the subject. Mr Bacon sought to demonstrate by reference to the claimant's schedule of loss in conjunction with paragraph 26 of her grounds of appeal to the Court of Appeal that a large part of the claimant's claim is really about personal injury.

15. I accept that by an email sent a few hours before the hearing in the Chester County Court the claimant had specifically raised the question of section 33. That email, however, did not make it appropriate for HHJ Halbert finally to decide the section 33 issue in a strikeout or summary judgment application. Nor did that email make it appropriate to expand the scope of the defendants' application dated 10 November 2014. What HHJ Halbert ought to have done was to say to the claimant who was a litigant-in-person that the defendants could plead the Limitation Act in their defence then she could plead section 33 in her reply.
16. As to paragraph 26 of the grounds of appeal to the Court of Appeal, that document was not and could not be before HHJ Halbert. It is of no relevance to the present issue. In my view the first argument deployed by Mr Cuninghame is sound. The judge in the Chester County Court was not dealing with an application to dismiss the entire action on limitation grounds. Furthermore, the judge was in no position to deal with the section 33 issues on 5 March 2015 and he should not have done so. The judge fell into that error because he thought that section 33 did not apply to a mixed claim, which included both personal injury and financial losses. Both parties agree that HHJ Halbert was wrong in that regard. Holroyde J accepted that HHJ Halbert was wrong but Holroyde J said that in the absence of a formal application the claimant could not rely upon section 33. So HHJ Halbert's decision was correct albeit for the wrong reasons.
17. Despite Mr Bacon's valiant submissions, I am satisfied that Holroyde J was wrong on that point. The claimant did not need to make a formal application under section 33 at that stage of the litigation. All that she needed to do was to plead section 33 in her

reply if and when the defendants advanced a limitation defence. It therefore follows that Mr Cuninghame succeeds on both his first and second arguments. Let me turn now to Mr Cuninghame's third argument. Holroyde J said this at the end of paragraph 35 and the start of paragraph 36 of his judgment:

"Mr Bacon submits that on an overall view of the case and the manner in which it is pleaded and presented by Miss Richards, the claim for damages for personal injuries is so inextricably intertwined with all other aspects of her claim that there is, in reality, no scope for severance at all. However, even if he is wrong in that submission – as, with respect he may well be - it is far from a straightforward case. This is not a situation in which it would be possible for the judicial pen simply to strike out some words or paragraphs, thereby deleting all reference to a claim for damages for personal injuries and leaving a reduced but nonetheless coherent and proper claim for other heads of damages."

Mr Cuninghame submits that the judge is wrong in that passage. Mr Cuninghame took us through the pleadings and submitted that the personal injury claim could readily be severed by deleting the following passages. Delete the words "personal injury" from the re-amended claim form. Turning to the particulars of claim, delete the words "mental pain and suffering and aggravated injury" from paragraph 38.6. Delete the whole of paragraph 43. In paragraph 46, delete the following words from the heading, "excruciating mental pain and injury". Delete paragraph 46.7. From the prayer at the end of the particulars of claim delete the words "and aggravated personal injury."

18. Mr Bacon, once again, springs to the judge's defence. He submits that a large part of the schedule of loss annexed to the particulars of claim also would need to be deleted. That is the lion's share of the claim, he submits. Mr Bacon, in this submission, is referring to the following passage on page 2 of the schedule of loss:

"Disability discrimination, financial losses. The claimant has suffered financial losses from the date of her dismissal, 15 July 2013, (287 weeks). The claimant expects to suffer continuing losses from 16 July 2013 to 21 October 2018 (274 weeks)."

There then follow financial calculations showing what those financial losses work out at when multiplied by the relevant numbers of weeks. I am not sure that Mr Bacon is right about that. It seems to me that the passage on which he fastens on page 2 of the schedule of loss is part of the disability discrimination claim which the claimant contends and the defendant denies should have been brought before the employment tribunal. Therefore I do not think that this passage is actually dependent on or flowing from alleged personal injuries. But let me assume, however, that I am wrong and that Mr Bacon's more subtle reading of the pleading is correct. Ryder LJ pointed out in argument that if necessary the offending passage on page 2 of the schedule of loss could readily be deleted. Mr Bacon was constrained to admit that. It therefore



seems to me that whatever may be the precisely correct interpretation of these home made pleadings by a litigant-in-person on any view the passages relating to damages for personal injury could readily be deleted. The judge was wrong to say that there was any difficulty in disentangling or severing out those passages. In fairness to the judge I should add that the claimant was a litigant-in-person and the judge was not receiving the benefit of argument from counsel on both sides in the same way that this court has that benefit. I do not therefore intend to be in any way critical of the judge who was doing his best in a difficult situation.

19. In the result, however, Mr Cuninghame succeeds upon his third argument. Let me now draw the threads together. I am afraid that HHJ Halbert erred on 5 March 2015 in dismissing the entire action on limitation grounds. Holroyde J fell into the same error on 19 November 2015. The anticipated limitation defence to one element of the claimant's claim, did not provide a secure basis for summary dismissal of the entire action. The defendants have put forward a number of other arguments as to why, in their submission, the claimant cannot succeed on her claim, alternatively on large parts of her claim. HHJ Halbert did not consider those arguments at the hearing in Chester. Holroyde J did not consider those arguments at the hearing in Liverpool. Neither party suggests that any of those issues fall for consideration by this court today. In the result therefore, if my Lord agrees, this appeal will be allowed and the action will be remitted to the County Court.

**SENIOR PRESIDENT OF TRIBUNALS:**

I agree.

**Order:** Application granted.