Neutral Citation Number: [2023] EWHC 2155 (KB)

Case No: QB-2022-002581

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/08/2023

Before :

MASTER COOK

- -

Between :

KAREN SHAW **(Widow and executrix of the estate of LAURENCE SHAW deceased)**	**Claimant**
- and -	
BRIGID MAGUIRE	**Defendant**

- -
- -

Shahram Sharghy (instructed by **Clarkson Wright & Jakes Ltd**) for the **Claimant**
Jack Ferro (instructed by **Medical Protection Society**) for the **Defendant**

Hearing date: 25 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER COOK

MASTER COOK:

1. This is the hearing of preliminary issues ordered by me on 18th November 2022. The preliminary issues identified for determination were;

   i) Whether or not the claim was brought in accordance with the provisions of the Limitation Act 1980 ; and if not

   ii) Whether it would be equitable to disapply the time limit under s. 33 of the Limitation Act 1980.

The background to the claim and this application

2. Mr Shaw was born on 7th September 952 and was a Consultant Gynaecologist by profession. He died on 9th January 2014 of metastatic melanoma at the age of 61. The Claimant is his widow, executor of his estate and sole dependant pursuant to the Fatal Accidents Act 1976.

3. The Defendant was at the relevant time a Consultant Pathologist who reviewed cell samples taken from Mr Shaw's back in October 2007. She reported the samples as being "*benign*". Based upon this report, Mr Shaw was discharged without any follow up treatment.

4. Unfortunately the lesion on Mr Shaw's back returned in 2009. Further samples were taken and sent for histological examination. The subsequent report dated November 2009 confirmed the presence of malignant melanoma. The 2007 samples which had been examined by the Defendant were also sent for further review and a report at the end of November 2009 confirmed that the malignancy was present in the 2007 samples.

5. The lesion was excised with a 2cm margin. At this time it was hoped that the melanoma had not metastasised and Mr Shaw would have an uneventful recovery with no impact on recurrence/life expectancy.

6. In April 2013, Mr Shaw developed a dry cough and following an ultrasound scan in June 2013 he was referred for a CT scan and bronchoscopy. Mr Shaw was diagnosed with stage IV metastatic melanoma that caused his death.

7. The Claimant then instructed solicitors (Whitehead Monckton) in November 2014. A Claim Form was issued on 17th January 2017 naming the deceased's dermatologist and BMI Healthcare as defendants. It would appear that no claim had been intimated against the Defendant at that point.

8. The Defendant was first notified of a potential claim against her by letter of claim dated 8th March 2017, and the Claim Form was amended on 18th May 2017 to substitute the Defendant as a defendant in the claim in place of the dermatologist. However the claim form was never served on any party, and no Particulars of Claim were ever served. On 27th June 2017, the Defendant's representatives spoke to the Claimant's solicitors in order to follow up on the letter of claim dated 8th March 2017, and were informed that the Claimant's solicitors were no longer instructed and had closed their file.

9. Some three years later, in June 2020, the Claimant instructed new solicitors (Clarkson Wright and Jakes Ltd) to pursue a professional negligence claim against Whitehead

Monckton for failing to pursue the claim against the Defendant in 2017. A letter of claim was sent to Whitehead Monckton in December 2020. By a letter of response dated 25th March 2021, Whitehead Monckton denied liability.

10. On 2nd November 2021 BLM acting on behalf of Whitehead Monckton made a proposal that their client would indemnify the Claimant against the costs of pursuing a claim against the Defendant out of time. The Claimant apparently agreed to this proposal. A letter of claim was sent to the Defendant on 12th April 2022, and proceedings issued against the Defendant on 10th August 2022. This was the first indication the Defendant or her representatives had had that a claim against her was being pursued since June 2017, over 5 years earlier, when she had been positively told that the case against her was not being pursued.

11. The Defendant filed a Defence denying liability and raising the issue of limitation on 22nd September 2022.

The positions of the parties

12. The Defendant's primary case is that the claim is statute barred on the basis that the '*date of knowledge*' pursuant to the s.14 of the Limitation Act 1980 began no later than 13th November 2009 when histological samples analysed by the Defendant in 2007 were reported as malignant on 13th November 2009. As such, proceedings should have been issued by 13th November 2012 at the latest.

13. The Claimant, as Executrix of the deceased's estate, is not entitled to bring an action for the benefit of the deceased's estate when the deceased himself had no entitlement to bring an action at the time of his death. S. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 provides for a deceased person's estate to take over causes of action which had been vested in the deceased, but only where the deceased had a cause of action vested in him upon his death. The Defendant relies upon s. 11(5) of the Limitation Act 1980, which states that the survival of a cause of action for the benefit of the estate of a deceased person only arises if the deceased died while the primary limitation period was still extant.

14. Similarly, by virtue of s.12(1) of the Limitation Act 1980, no claim under the Fatal Accidents Act 1976 may be brought in respect of the deceased's death in circumstances where the deceased died at a time when he could no longer maintain an action in his own right. It is expressly stated in s.12(1) of the Limitation Act 1980 that where an action by an injured person has become time barred upon expiration of the primary limitation period, no account shall be taken of the possibility which may have arisen during the deceased's lifetime of the deceased applying for the primary limitation period to be overridden under s.33 of the Limitation Act 1980.

15. These proceedings were issued on 10th August 2022, some 13 years after the deceased's date of knowledge, and 10 years after the expiry of the primary limitation period in respect of any claim the deceased may have wished to make against the Defendant. In the circumstances the claim was statute barred before the deceased's death and cannot as a matter of law be resurrected by the Claimant making an application under s.33 of the Limitation Act 1980 to disapply the primary limitation period.

16. Alternatively the Defendant asserts there is a minimum of 5 ½ years delay and that it would not be equitable to extend he limitation period under s.33 of the Limitation Act 1980.

17. The Claimant's position is that the limitation period began at the earliest on 9th January 2014 when Mr Shaw died meaning that proceedings should have been issued by 9th January 2017 and served by 9th May 2017. The Claimant also argues that her '*date of knowledge*' pursuant to s.14 of the Limitation Act 1980 was later than Mr Shaw's death meaning that the limitation period expired post-2017. As these proceedings were issued on 10th August 2022 the delay, for the purposes of s.33 of the Limitation Act 1980 is therefore just over 5 years at most or circa 3 years.

18. The Claimant submits that on a correct reading of the Limitation Act 1980 there is no bar to the use of s.33 in the circumstances of this case even if the deceased died more than three years prior to the expiry of the limitation period and further that it would be equitable to extend the limitation period as it would still be possible to have a fair trial.

The evidence

19. The Court heard from the Claimant who gave evidence in accordance with her witness statement dated 16 November 2022. She was cross examined by Mr Ferro. She was taken to a letter dated 31 October 2007 addressed to Dr Kittle from Dr M Hudson-Peacock.

> "I reviewed Lawrence in the clinic today with lesions on the forehead, low back and right abdomen. These all were clinically benign and what I have done is to remove all of them by shave excision and cautery and will confirm results in due course. The only one that gave me some cause for possible concern was the mole on the right low back which is papular but with a dark streak of pigment within it that may be new although it is not clear. I'll confirm histology when available, if further treatment is required we can plan as appropriate. The other two lesions on the abdomen are probably an haemangioma and on the forehead an irritated squamous papular one. To be confirmed."

20. She explained that her husband had had informal contact with Dr Hudson-Peacock who was a colleague of his at the Chaucer Hospital and that the letter had been written to Dr Kittle who was their GP. She said that Dr Hudson-Peacock and her husband would have informal chats at work but that she was present at the consultation when the histology results were discussed. She was shown Dr Hudson-Peacock's clinical notes but could not explain why there was no record of this consultation. She and her husband were relieved to be told the histology report reported the samples as benign.

21. Mr Ferro then took the Claimant back to Dr Hudson-Peacock's clinical note. She recalled the review on 28 October 2009 and the excision carried out on 30 October 2009 but could not explain why the notes stopped after the entry on 18 November 2009.

22. Mr Ferro took the Claimant to another letter from Dr Hudson-Peacock to Dr Kittle dated 27 November 2009

> "I wanted to just clarify the histology of Laurence's recent mole excision on the low back. This has turned out to be a recurrent melanoma! Completely excised 1.3mm Breslow thickness and somewhat unexpected. As you'll know about two years ago I removed three lesions a small haemangioma on the abdomen, a squamous cell papilloma on the forehead and what was described as a benign compound naevus on the back, which certainly didn't look anything very exciting at the time. With hindsight this histology has been retrieved and re-examined and it was a melanoma then! This is obviously a bit of a disaster in terms of histology because if it had been recognised then, it would have been treated appropriately at that point. It has slowly reoccurred over the last couple of years but fortunately seems very tight and has been completely excised albeit narrowly at this time. I'm sure you will not be averse to me referring Laurence back to the NHS as I've got an NHS list on Monday. The plan is to excise this on Monday with a 2cm margin which would be appropriate for a lesion that is a millimetre or more in thickness. I'm hoping that the prognosis has not been adversely affected by the delay in complete excision. Only time will tell but fortunately being just over a millimetre thick the risks of it having spread are still hopefully less likely than likely. I have informed Laurence of the situation and obviously he is not best pleased, and nor would I be, but in the context of now having got a definite diagnosis we have a treatment plan ready and that will be for fulfilled early next week. Laurence has my number to ring me at any time should he have any concerns. … "

23. The Claimant said she remembered getting a telephone call at about 9 pm on 25 November 2009. She was told it was not good news and she then handed the phone to her husband.

24. The Claimant couldn't recall if she was present at the clinic on 18 December 2009 but was fairly certain she was. She could not explain why there were no clinical notes relating to this appointment. She recalled a discussion about prognosis. She could not recall if they were told what stage the cancer had reached but presumed they would have been. She told me that as both she and her husband were doctors there was a tendency to assume they knew more than lay people. She was referred to the case on causation set out at paragraph 13 of the Particulars of Claim, which was, that at the time of the recurrence, the malignant melanoma had progressed to stage III with a survival rate of 10 years of 42%. She did not believe that the figure of 42% was mentioned at the time.

25. Following the surgery the Claimant said her husband remained well and under review. She and her husband had no cause to think of legal action. As far as they were concerned her husband would placed under surveillance and would be reviewed every three months. As far as she was concerned her husband was fit and well and there was no reason to think he would die.

26. The Claimant was referred to a claim her husband made on a critical illness policy with Scottish Equitable in January 2010. The claim contained the following diagnosis:

> "Malignant melanoma of nevoid type Breslow thickness on the shave excision diagnosed retrospectively as 1.2mm at least with a Clark level lV - please see the histology report.
>
> Subsequent histology of the initial excision confirmed the nevoid melanoma recurrence Breslow thickness 1.3mm Clark level lll. This was confirmed by Dr Colonje from St Thomas' Hospital when the depth of invasion was revised to 1.23mm. A 2cm margin of clearance was appropriate and this was undertaken ;12th December 2009. The subsequent histology' confirmed complete excision with no residual melanoma, just evidence of scar tissue."

27. The Claimant confirmed the policy paid out a lump sum on the basis that her husband had developed a qualifying condition.

28. The Claimant confirmed she first instructed solicitors in November 2014. Mr Ferro took the Claimant through the steps they had taken to obtain expert evidence. The Claimant said that she did not know what the solicitors were doing, why they didn't chase the expert or apply for an extension of time. She said that she was unaware of a conversation between her solicitor and the MPS claims assistant Ms Wilkinson in June 2017.

29. The Claimant confirmed that she believed in June 2017 that Mr Sadler of Whitehead Monkton was progressing the claim. 16 months later she was told the claim was not progressing. She said she was not happy, very frustrated and felt powerless to do anything. It was in these circumstances that she contacted the Legal Ombudsman who upheld her complain of poor service by Whitehead Monkton.

30. The Claimant said it was the response from the Legal Ombudsman which prompted her to seek advice from new solicitors in June 2020. She said she had been let down by 2 professionals and accepted advice to pursue her previous solicitors.

31. The Claimant confirmed her understanding that the pathology slide from 2007 was still available. Mr Ferro then suggested that the slide could have deteriorated and was somewhat surprised to learn that the Claimant had undergone a spell as a pathology registrar in her training. The Claimant's understanding was that slide would not deteriorate.

32. Finally the Claimant said that if the situation had been different in 2009 she would have commenced an action then. However her husband was fit and well and they both hoped he would have a long life span.

33. The Court took the witness statement of the Defendant's solicitor Mr MaCaughley dated 15 December 2022 as read.

Findings of Fact

34. I found the Claimant to be a truthful witness who was doing her best to assist the Court. She readily accepted that her memory of distant events could be at fault and acknowledge the accuracy of contemporaneous documents. I formed the view that she

had a very close relationship with her husband, that they discussed all issues concerning his health and treatment in detail. I also accept that she attended the majority of her husband's medical appointments with him and that they made all major decisions concerning his treatment together.

35. It follows that there is a very close correlation between the Claimant's state of knowledge and that of her husband.

36. I find that the Claimant and her husband knew that he had suffered an injury which was attributable in whole or in part to alleged negligence on the part of the Defendant in November 2009 that much is clear from the letter from Dr Hudson-Peacock to Dr Kittle dated 27 November 2009.

37. I find that neither the Claimant or her husband believed the injury to be significant. I accept the Claimant's evidence that they had no reason to believe at that time the malignant melanoma which had been present since 2007 had metastasised.

38. The melanoma was excised with a 2cm margin by a consultant dermatologist in November 2009. Thereafter, other than she had the odd slight nagging worry, I accept the Claimant's evidence that life carried on as normal and that she and her husband were generally optimistic for the future.

39. I accept that this state of affairs came to an end in June 2013 when Mr Shaw became ill. I also accept that at this point the Claimant decided with her husband that any claim would be brought after he had died.

40. I am satisfied that the Claimant first instructed solicitors in November 2014 and was always informed by them that her claim for damages had good prospects of success. Those solicitors commenced proceedings in January 2017 which were later amended to include the Defendant. Through no fault of the Claimant the proceedings were not served on the Defendant.

41. I accept the Claimant received no advice from her former solicitors and was left in the dark about how to proceed. She sought advice from her current solicitors following her complaint to the Legal Ombudsman in June 2020 and in response to criticisms of her former solicitors by the Legal Ombudsman.

42. I am satisfied that the histopathology sample from 2007 has been preserved and I find it is unlikely to have deteriorated.

The relevant provisions of the Limitation Act 1980

43. The Limitation Act 1980 contains the following provisions which are relevant to the issues the Court must decide;

> "**11.— Special time limit for actions in respect of personal injuries.**
>
> (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.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (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.

(5) if the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (MiscellaneousProvisions) Act 1934 shall be three years from—

(a) the date of death; or

(b) the date of the personal representative's knowledge;

whichever is the later."

"**12.— Special time limit for actions under Fatal Accidents legislation.**

(1) An action under the Fatal Accidents Act 1976 shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Act or in any other Act, or for any other reason). Where any such action by the injured person would have been barred by the time limit in section 11[, 11A or 11B] of this Act, no account shall be taken of the possibility of that time limit being overridden under section 33 of this Act.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action under the Fatal Accidents Act 1976, but no such action shall be brought after the expiration of three years from—

(a) the date of death; or

(b) the date of knowledge of the person for whose benefit the action is brought;

whichever is the later.

(3) An action under the Fatal Accidents Act 1976 shall be one to which [sections 28, 33, 33B and 35] 2 of this Act apply, and the application to any such action of the time limit under subsection (2) above shall be subject to section 39; but otherwise Parts II and III of this Act shall not apply to any such action."

"**14.— Definition of date of knowledge for purposes of [sections 11 to 12]**

(1) [Subject to [subsections (1A) and (1B)] 3 below,] 2 in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on 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, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(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.

(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

"33.— Discretionary exclusion of time limit for actions in respect of personal injuries or death.

(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[11A, 11B] 1 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] [, by section 11B] 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) the extent to which the plaintiff acted promptly and reasonably once he 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.
>
> (4) In a case where the person injured died when, because of section 11 [11A(4) or 11B(2) or (4)], he could no longer maintain an action and recover damages in respect of the injury, the court shall have regard in particular to the length of, and the reasons for, the delay on the part of the deceased.
>
> (5) In a case under subsection (4) above, or any other case where the time limit, or one of the time limits, depends on the date of knowledge of a person other than the plaintiff, subsection (3) above shall have effect with appropriate modifications, and shall have effect in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit."

The appropriate application of the Limitation Act 1980 in claims under the Fatal Accidents Act 1976

44. Mr Ferro referred to the commentary in **Kemp & Kemp** at 3-010;

> "If the deceased failed to sue within his own limitation period then no Fatal Accidents Act claim may be pursued, and there is no power to make a retrospective s.33 application to disapply the limitation period once the victim has died: s.12(1).
>
> Pursuant to s.12(2) of the Limitation Act 1980 the limitation period for fatal accident claims by dependants is three years from the date of death or the date of knowledge of the "person" for whose benefit the claim is brought, i.e. the dependant. If there is more than one dependant the limitation period is applied separately for each."

45. Mr Ferro submitted the proceedings herein were issued on 10th August 2022, some 13 years after the deceased's date of knowledge, and 10 years after the expiry of the primary limitation period in respect of any claim the deceased may have wished to make against the Defendant. The claim was therefore statute barred before the deceased's death and cannot as a matter of law be resurrected by the Claimant making an application under s.33 of the Limitation Act 1980 to disapply the primary limitation period. In the circumstances the Defendant's primary case is that the claim is subject to an absolute bar, and the Court has no power to resurrect a right of action which had already expired by the time of the deceased's death by exercising its discretion under s.33 of the Limitation Act 1980.

46. Mr Sharghy did not accept that s.12(1) if the Limitation Act 980 had the effect contended for by Mr Farro. He referred me to the commentary in **Clerk & Lindsell on Torts** 23 Ed at 31-70:

> "An action under the Fatal Accidents Act 1976 can in principle be statute-barred in one of two ways:
>
> (1) At the time of his death, the deceased must have been in a position to sue the defendant had he survived injured by the wrongful act instead of dying because of it. Therefore if the limitation period expired between the deceased's injury and his death from his wounds, no Fatal Accidents Act claim can come into existence. Thus if the deceased died of his wounds four years after being injured by the defendant, no Fatal Accidents Act claim would normally arise; though it could arise if it was not yet three years since the deceased acquired the relevant knowledge under s.14(1), e.g. the identity of the person who injured him. In deciding whether the deceased's hypothetical personal injuries action—and hence the dependant's actual Fatal Accidents Act claim—is thus statute-barred, the possibility that the deceased could have applied to the court to override the limitation period under s.33 is disregarded.
>
> Although the possibility that the deceased could have invoked the court's s.33 discretion is disregarded when determining whether his cause of action was statute-barred, the claimants in a Fatal Accidents Act claim may ask the court to exercise its discretion under s.33 of the Limitation Act 1980 and override the limitation period which would have barred the deceased's claim, and hence bars theirs. This is provided for by s.33. The power of the court in this respect is qualified, however, by s.33(2). It can only "disapply" for these purposes the normal time-limit in personal injury cases. If the deceased's claim was statute-barred by, say, the time-limit in the Carriage by Air Act 1961, there is no power to override. When the court exercises its discretion in such a case, the criteria it has to take into account are modified in the same way as when it is dealing with a Law Reform Act claim in which it is asked to override a limitation period which ran out in the lifetime of the deceased.
>
> (2)Where a cause of action under the Fatal Accidents Act does arise, it must be brought within three years from *either* the date of the death, *or* "knowledge" of the person for whose benefit it is brought, whichever is the later. Where there are several potential Fatal Accidents Act claimants, then the limitation period runs separately against each of them: if one had the required knowledge more than three years before the action, the action is statute-barred against him but not against the others. The court has power to direct that such a claimant shall be excluded. If the dependant's Fatal Accidents Act claim becomes statute-barred because it is not brought within three

> years, the dependant can ask the court to exercise its discretion to disapply the primary limitation period to allow the claim to proceed."

47. I expressed some surprise that this issue had not been judicially considered and was informed by counsel that they had been unable to find any case on the issue.

48. It seems to me the answer is provided by a careful reading of s12 (1) and s. 33 (2) of the Limitation Act 1980. The effect of s 12 (1) taken together with 33 (2) is that where an injured person with capacity dies three years of more after the accident or date of knowledge without commencing proceedings, the only avenue open to the personal representative on behalf of the dependants is to commence proceedings and apply to the court to exercise its discretion under s 33 to disapply the limitation period. On the basis that s.33(2) of the Limitation Act 1980 provides the court may disapply s.12(1) where the reason the person inured could not maintain an action was because of the time limit provided by s.11(4). This seems to me to be consistent.

49. This also seems to be consistent with the approach taken in the case of ***MMG3 v Dunn*** [2019] EWHC 882 (QB). In this case the deceased suffered a long and lingering injury before his death with the result that the deceased had not commenced proceedings in the period in excess of three years between diagnosis (and date of knowledge) and his death. Therefore, the primary limitation period for the deceased's claim expired in October 2011, pursuant to s.11 and by operation of s.12 of the Limitation Act 1980 the claimant's claim could not proceed unless the Court exercised its discretion under s.33 of the Limitation Act 1980. The deputy circuit judge found as a fact that the deceased's date of knowledge was October 2008 and went on to exercise his discretion under s.33 Limitation Act 1980 in favour of the Claimant. The decision of the deputy judge was upheld on appeal by Mrs Justice Yipp.

50. Having brought this case to the attention of counsel and received their comments on it I agree with them that the point was not directly addressed but it appears the claim seems to have proceeded on the basis that it was accepted that s.33(4)-(6) of the Limitation Act 1980 permitted an extension to be sought by the personal representative of the estate in these circumstances. I also not that my view is consistent with that of the editors of **Butterworths Personal Injury Service** at [129].

51. In the circumstances the commentary in **Kemp & Kemp** at 3-010 appears to be misleading. I cannot accept the submission that there is an absolute bar to the application of s.33 of the Limitation Act 1980.

Date of Knowledge

52. Having regard to my factual findings I am not persuaded that either the deceased or the Claimant possessed sufficient knowledge that the injury in question was significant to satisfy s14 (2) of the Limitation Act 1980 in 2009 on the basis that neither the claimant or her husband had knowledge that his injury was significant. Given that I have accepted they believed Mr Shaw would be placed under review and were optimistic for the future on the basis they did not then know the malignant melanoma, present since 2007, had metastasised. I accept that at this time it would not have been reasonable for them to have instituted proceedings for damages against the Defendant.

53. I conclude that the Claimant and her husband's date of knowledge for the purpose of s.14 of the Limitation Act 1980 was June 2013 when they both became aware that his condition was serious and terminal. In the circumstances Mr Shaw would have had until June 2016 to bring proceedings. In these circumstances the cause of action remained vested in him at the time of his death on 9 January 2014. In these circumstances it is common ground the primary limitation period expired on 9 January 2017. The current proceedings were issued on 10 August 2022 just over 5 ½ years later.

Extension of the limitation period under s 33 Limitation Act 1980

54. I derive the relevant principles from the case of ***Carroll v Chief Constable of Greater Manchester*** [2017] EWCA Civ 199 [2018] 4 WLR 32 at paragraph 42:

> "i. s.33(3) of the LA requires the Court to have regard to all the circumstances of the case but also directs the Court to have regard to the five matters specified in subsections 33(3)(a)–(f)."
>
> ii. s.33 of the LA is not confined to a "residual class of cases". It is unfettered and requires the judge to look at the matter broadly: ***Donovan v Gwentoys Ltd* [1990] 1 WLR 472, 477E; *Horton v Sadler*** [2007] 1 AC 307, para 9 (approving the Court of Appeal judgments in ***Firman v Ellis*** [1978] QB 886); ***A v Hoare*** [2008] AC 844, paras 45, 49, 68 and 84; ***Sayers v Hunters*** [2013] 1 WLR 1695, para 55.
>
> iii. The matters specified in s.33(3) of the LA are not intended to place a fetter on the discretion given by s.33(1) of the LA, as is made plain by the opening words "*the court shall have regard to all the circumstances of the case*", but to focus the attention of the Court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: *Donovan's case,* pp 477H–478A.
>
> iv. The essence of the proper exercise of the judicial discretion under s.33 of the LA is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: *Donovan's case*, p 477E; ***Adams v Bracknell Forest Borough Council*** [2005] 1 AC 76, para 55, approving observations in ***Robinson v St Helens Metropolitan Borough Council*** [2003] PIQR P128, paras 32 and 33; ***McGhie v British Telecommunications plc*** [2005] EWCA Civ 48 at [45].
>
> v. The burden on the claimant under s.33 of the LA is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: *Sayers's case*, para 55.
>
> vi. Notwithstanding the above, there is an evidential burden on the defendant to show that the evidence adduced or likely to be

adduced by the defendant is or is likely to be less cogent because of the delay: ***Burgin v Sheffield City Council*** [2005] EWCA Civ 482 at [23].

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

viii. Subject to considerations of proportionality, 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.

ix. It is the period after the expiry of the limitation period which is referred to in s. 33(3)(a) and (b) and carries particular weight: *Donovan's case*, p 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: *Donovan's case*, pp 478H and 479H–480C; *Cain's case*, para 74. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: ***Collins v Secretary of State for Business Innovation and Skills*** [2014] PIQR P19, para 65.9. The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: *Cain's case*, para 73. The latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant′s ability to defend the claim.

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

xi .Proportionality is material to the exercise of the discretion: *Robinson's case*, paras 32 and 33; *Adams's case*, paras 54–55.

> In this context, it may be relevant that the claim has only a thin prospect of success (*McGhie's case*, para 48), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (*Robinson's case*, para 33; *Adams's case*, para 55; *McGhie's case*, para 48)."

55. I start by considering the s 33 (3) criteria.

The length of, and the reasons for, the delay.

56. I have already concluded that the length of delay in this case is just over 5 ½ years. I accept that the Claimant took reasonable steps to instruct what she believed were competent solicitors who specialised in clinical negligence claims in November 2014.

57. It seems clear that the solicitors proceeded to obtain disclosure of documents and evidence and their investigations of breach of duty, causation and the correct defendant. I have not been provided with the complete solicitors file but it is clear from the chronology set out in a letter from BLM acting for Whitehead Monkton dated 25 March 2021 that there were initial difficulties in obtaining the relevant medical records. By December 2016 the solicitors had begun to focus on obtaining the relevant histology slides. These had not been obtained by January 2017 and so protective proceedings were issued against Dr Hudson-Peacock and the Chaucer Hospital. It would then seem in February 2017 Whitehead Monkton closed their personal injury department and transferred the file to another firm of solicitors, Marsons.

58. The only progress made whilst Marsons had conduct of the case was that Dr Maguire was identified as the only possible defendant on the basis she had examined and reported on the original histology slides in 2007. In circumstances which remain unclear, the file was then transferred back to Whitehead Monkton.

59. Whitehead Monkton continued to seek production of the 2007 histology slides which they received in July 2017 and forwarded to the expert instructed on behalf of the Claimant, Professor Nicholas Wright. Whitehead Monkton did obtain an extension of time for service of the Claim Form to 19 August 2017. However it would seem that Professor Wright returned the histology slides to the Chaucer hospital because he believed his report was no longer required following the transfer of the case to Marsons. In these circumstances Whitehead Monkton informed the Claimant they could not continue with her claim.

60. As I have found none of this was in any way the responsibility of the Claimant who was left high and dry to eventually attempt some form of recourse with the Legal Ombudsman. Thereafter the Claimant has reasonably followed the course suggested by her new solicitors.

The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the claimant or the defendant is or is likely to be less cogent.

61. On behalf of the Defendant it was asserted by Mr McCaughley in his witness statement that the Defendant has no recollection of the relevant events which occurred over 15 years ago and in circumstances where she had been told no claim would be pursued.

62. The allegation of negligence against the Defendant is set out at paragraph 11 of the Particulars of Claim:

> "a) Failed to fully and properly examine and/or analyse the samples provided to her in 2007 so as to correctly identify the malignancy in the same, whether as alleged or at all;
>
> b) Caused, permitted or suffered the sample taken from the Deceased's lower back to be incorrectly identified and records as being benign, when in fact it was malignant, whether as alleged or at all;
>
> c) The Defendant's report on the 2007 samples were a category 1 failure as provided by the Royal College of Pathologists, namely a diagnostic error which was likely to have a definite influence on clinical management and possible outcome, as well as a category 81 failure, namely a diagnosis which is surprising to see from any pathologist i.e. an obvious cancer being reported as benign;
>
> d) Failed in all the circumstances of the case to exercise reasonable skill, care and diligence that was expected from a reasonably competent pathologist, whether as alleged or at all;
>
> e) The Claimant avers that the facts of and surrounding the actions and/or omissions of the Defendant speak for themselves in establishing breach of duty. "

63. In the circumstances as both the histology sample and the Defendant's report are available the issue will be one that will be the subject of independent expert evidence. Given that the issue relates to the interpretation of the sample it is difficult to understand how the Defendant's recollection of the events of 15 years ago would be relevant. This state of affairs is common in many clinical negligence cases where it is usual for clinicians to have regard to their usual practice and the contemporaneous medical notes.

64. The issue of causation will also be a matter for independent expert evidence from an oncologist. The Claimant's evidence is only likely to go to issues of quantum which will be largely based on documentary evidence as is common with many Fatal Accident cases.

Conduct of the Defendant

65. There are no relevant conduct issues.

Disability of the Claimant

66. This is not a relevant issue.

The extent to which the Claimant acted promptly and reasonably once she 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

67. I have addressed this issue both in my findings of fact and at paragraphs 56 to 60 above. It will be apparent that I take the view the Claimant cannot be criticised for acting as she did after June 2013 when she acquired the necessary knowledge.

The steps, if any, taken by the Claimant to obtain medical, legal or other expert advice and the nature of any such advice she may have received.

68. I have addressed this issue in my findings of fact and at paragraphs 56 to 60 above.

The balancing exercise

69. It is clear from the guidance given in the case of **Caroll** that the Court is exercising an unfettered discretion and that the s. 33 (3) factors place no fetter on exercise of the discretion. The essence of the test to be applied by the Court is a balance of prejudice and the burden is upon the Claimant to show that her prejudice would outweigh that to the Defendant.

70. Mr Ferro placed much reliance on the fact that this was a second action case in circumstances where the Defendant had been told that the first case would not be pursued and where the Claimant had an arguable case of professional negligence against her solicitors. These are not insubstantial points.

71. In the case of **Corbin v Penfold Metallising Co Limited** Buxton LJ said at [26]:

> "Those observations of Sir Christopher Staughton were adopted unanimously by this Court. Mr Tonna said, when asked about it, that each case turns on its own facts, and that we should reconsider this point in the present context: whether the Judge, in truth, was right to attribute the solicitor's failings to Mr Corbin. I am not, for my part, persuaded that that is so. It seems to me that the Court in Das−v− Ganju was speaking more generally, and certainly saying − as Sir Christopher Staughton said in terms − there was certainly no rule of law to visit the faults of the lawyers upon the claimant, when one is looking at this particular area of the limitation jurisdiction. But even if that is not right, and even if we would be correct in adopting Mr Tonna's invitation, it seems to me that there is no reason at all in this case, and no justification, for attributing what the solicitors did to Mr Corbin, as a matter of his fault. He did not contribute to the delay in any way. He was a passive observer of what was going on. The fact that the solicitors may or may not have acted properly and the fact that the consultants − not any of those that I have mentioned by name – may or may not have acted properly when consulted, could not possibly be said, in any realistic way, to be Mr Corbin's fault."

72. In the case of ***Rayner v. Wolferstans*** *(A Firm)* [2015] EWHC 2957 (QB) Wilkie J , pointed out in the context of a s.33 application that an action against a claimant's former solicitor was one for loss of a chance and that of necessity that would result in a claimant recovering less than 100% of what they would recover in the personal injury action. At [131] and [132] the judge said:

> "13. Furthermore, her ability to succeed against Wolferstans, even to the extent of recovering for the loss of her chance, depends upon her establishing that Wolferstans was negligent. Whilst the claimant contends that she has a good claim in negligence against Wolferstans, that claim too is by no means bound to succeed. I have not, of course, considered in any depth the contentions, respectively, of the claimant and Wolferstans concerning their alleged negligence, but even a cursory examination of the chronology demonstrates to me that the claimant would be by no means bound to succeed in establishing a claim of negligence against Wolferstans.
>
> 132. Accordingly, I am satisfied that the operation of section 11 would prejudice the claimant because the alternative remedy against Wolferstans is by no means bound to succeed and would, in any event, result in an award of damages less than that she would receive were she to proceed against Medway and win."

73. In circumstances where I have found that the Claimant has not contributed to the delay caused by her former solicitors I can see no reason to visit any of the faults of her lawyers on the Claimant. Nor can I be satisfied that the Claimant's claim against her former solicitor would succeed. It is clear from the evidence before me that the claim was being resisted and there was much about the circumstances surrounding the instruction of Professor Nicholas Wright and the return of the histology samples which was unclear. I am also clear that the Claimant's alternative remedy, if she were to win, would result in an award of less damages that if she were successful against the Defendant.

74. As for the period between Mr Shaw's diagnosis in June 2013 and the Claimant instructing solicitors in November 2014 I find it entirely reasonable for her to have concentrated on her husband's condition and treatment in what they both knew were the last months of his life.

75. There is in my judgment clear evidence of prejudice to the Claimant. Firstly the refusal to exercise the court's discretion under s, 33 of the Limitation Act1980 in favour of the Claimant who is bringing this claim outside the limitation period will cause her prejudice which any alternative remedy would not cure. Secondly I bear in mind the Claimant's current clinical negligence claim is supported by expert evidence and on the basis of the contemporaneous histology could be described as strong and accordingly the prejudice to the Defendant can be said to diminish. As Martin Spencer J said in **Tyres v Ageis Defence Services (BVI) Ltd** EWHC 896 (KB) at [67]:

> *""…On my assessment of the evidence, the claim on behalf of Mrs Tyers (and Georgina) appears to be a strong one: it is important, of course, for me not to pre-judge the claim which remains to be tried on its merits, but insofar as the*

> *merits of the claim are a relevant consideration – which must be the case when the court must assess the effect of the delay on the ability of the defendant to defend the claim – the prejudice to the defendant diminishes as the claim gets stronger".*

76. I do not underestimate the impact upon the Defendant, a professional person, of being told that this claim would not proceed, however this is just one factor in the overall balance albeit a strong one in her favour.

77. I am not satisfied that the Defendant has provided any evidence to the effect that she is prejudiced in her ability to defend the claim. Firstly, she is able to give direct evidence regarding her usual practice when it comes to reviewing cell samples. This knowledge will not have been lost through time, in fact it is more likely to have been enhanced by many more years of experience and refinement of her practice. Secondly, the 2007 samples are still available and can be viewed by her and her instructed independent expert. Thirdly, to the extent that they are relevant, which is debateable given the likely issues in this case the 2007 samples are still available and can be viewed by her and her instructed independent expert. Lastly, even if a claim had been brought within the relevant limitation period, it is doubtful that the Defendant would have in fact had a clear recollection of this cell sample review over that or the many hundreds, if not thousands that she had carried out in the intervening years. It is more likely she would have to resort to relying on the contemporaneous medical records which she is equally able to do now.

78. Accordingly when all is put into the balance and taking account of all the circumstances I conclude that any prejudice to the Defendant is more than outweighed by the prejudice to the Claimant and that a fair trial can still take place with substantially the same evidence as would have been available had proceedings been served within the limitation period. Accordingly, it would be equitable to allow this action to proceed by directing that ss. 11 and 12 of the Limitation Act 1980 shall not apply to this claim.