Neutral Citation Number: [2021] EWHC 2164 (QB)

Case No: QB-2019-002129

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

**Before**:

**RICHARD HERMER QC**
**(Sitting as a Judge of the High Court)**

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**Between:**

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| **Mr Donald Wilkins** | **Claimant** |
| **- and -** | |
| **University Hospital North Midlands NHS Trust** | **Defendant** |

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**Mr Paul Stagg** (instructed by **Shoosmiths LLP**) for the **Claimant**
**Mr Vinit Khurana** (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 9 July 2021

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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RICHARD HERMER QC

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 30th July 2021.*

## Richard Hermer QC :

1. This is the trial of a preliminary issue. The issue is whether this clinical negligence claim is time-barred by virtue of the provisions of the Limitation Act 1980 (the '1980 Act'). This requires the Court to determine two discrete sequential questions, namely:

   **i)** Whether the claim was brought within 3 years of the Claimant acquiring the requisite knowledge of the cause of action, within the meaning of s.11(4) of the 1980 Act?

   **ii)** Whether, if not, the Court should nevertheless exercise its discretion, pursuant to s.33 of the 1980 Act, and permit the claim to proceed.

2. In addressing these issues this judgment is divided into the following parts.



## A: Relevant Facts

3. It is convenient to divide the description of the relevant facts into four chronological periods, (i) the treatment that forms the subject matter of the claim (ii) the Claimant's instruction of solicitors in 2012 to investigate a clinical negligence claim (iii) the Claimant's instruction of his current solicitors in 2016 leading to the issue of the claim and (iv) the procedural history of the claim.

### i) The material medical treatment

4. The Claimant was born on 17 October 1942. In February 2007 he was diagnosed with bilateral knee osteoarthritis and was referred to see Mr Shaylor, a Consultant Orthopaedic Surgeon, at the Cannock Chase Hospital ('Cannock Chase'). On 18 November 2008 he underwent a right knee replacement. The operation went well and at the end of December of 2008, about six weeks after surgery, Mr Shaylor recorded that there were no real problems as far as the right knee was concerned although the Claimant was 'a little bit sore around the medial side.'

5. Following the successful right knee replacement, Mr Shaylor performed a left knee replacement on 17 March 2009. The operation notes reveal an uneventful procedure. Antibiotics were administered pre and post operatively. Prior to discharge it was noted that there was some oozing at the site of dressing. The dressing was replaced and the Claimant was discharged on 23 March 2009 to the care of the District Nurse.

6. The Claimant was readmitted to Cannock Chase on 28 March 2009 having initially attended the Accident and Emergency Department. The cause of the admission was the Claimant's concern about his wound. There was noted to be a small open area to the wound with associated redness possibly caused by infection. He was discharged on continued antibiotics the next day with follow up arranged in Outpatients.

7. The Claimant was regularly reviewed by Mr Shaylor over the following months who was generally satisfied with progress. On review on 28 September 2009 however Mr Shaylor considered that there was some laxity to the left knee. Although the plan at that stage was to 'wait and see', a subsequent deterioration led to revision surgery being performed by Mr Shaylor on 22 June 2010. The operation and recovery were deemed contemporaneously to be satisfactory but by 6 July 2010 Mr Shaylor had been readmitted because of pain and swelling to the left knee. A diagnosis of cellulitis was made and treatment was started on intravenous antibiotics.

8. Unfortunately, the pain and swelling to the knee did not settle down and on 1 November 2010 Mr Shaylor referred the Claimant to Mr Gregson, a Consultant Orthopaedic Surgeon based at the Oswestry Hospital, for a second opinion. In light of the presenting history Mr Gregson felt that there was a possibility of continued infection and ordered appropriate testing. The results of blood tests did not reveal any infection although radiological imagery was uncertain.

9. On 19 July 2011 Mr Gregson performed an arthroscopy of the left knee and a medial menisectomy. Mr Gregson noted that there was no clinical evidence of infection or synovitis. Specimens taken at the time of the operation did show some Staphylococcus Epidermidis organisms.

10. Unfortunately, the procedure did not solve the ongoing pain and the Claimant underwent a further operation on 17 January 2012. Mr Gregson had initially planned a two-stage procedure whereby he would first deal with infection and then, at a later date, carry out a revision of the knee replacement. As it was, Mr Gregson found no sign of infection and proceeded to revise the knee replacement in a single operation.

### ii) Instructions of solicitors in 2012

11. The Claimant remained in pain post operatively and on 8 June 2012 he telephoned Harvey Ingram LLP. The attendance note records that "*... he has a complaint against*

*Cannock Chase Hospital regarding his total knee replacement. He was referred to us by one of RER's client, who has a similar case.*"

12. The Claimant had a follow up call with the solicitors on 11 June 2012. It is clear from the attendance note that the Claimant had a general concern about his treatment at Cannock Chase hospital, including the fact that his infection had not been adequately addressed. He referred to Mr Gregson having informed him that he had seen lots of patients from Cannock Chase hospital with similar complaints. The Claimant provided his solicitors with a handwritten note setting out why he felt "*so let down and disappointed*" by the care he received at Cannock Chase.

13. On 18 June 2012 a paralegal at Harvey Ingram wrote to the Claimant to "*confirm that we are able to take on your medical negligence claim*." On the same day, the Claimant and his solicitor agreed to enter a Conditional Free Agreement. A Client Care letter of the same date, from a 'Legal Director' at the firm stated:

"*I confirm that I am satisfied from the instructions that you have given that you have a claim with reasonable prospects of success.*"

14. On 27 June 2012 Harvey Ingram wrote to the Cannock Chase Hospital seeking disclosure of medical records. The letter stated amongst other things:

"*Briefly the circumstances surrounding the potential claim are that Mr Wilkins had a left knee replacement. Post operation the wound became infected and he needed further surgery. However, he caught another infection and needed a biopsy and keyhole surgery. He has now undergone a two stage [sic] revision due to the complications caused by the original knee replacement surgery.*"

15. A further letter to the Claimant from his solicitor of 21 August 2012 suggested that the main area of concern at that juncture was whether the '*screws in your knees*' were too long. In any event the writer considered that further investigation was warranted.

16. On 28 November 2012 the Claimant's then solicitors (who had by now rebranded as 'Lime Personal Injury' but who for ease of reference I will continue to refer to as Harvey Ingram) instructed Mr Radford, a Consultant Orthopaedic Surgeon, to prepare a report on liability. Mr Radford provided his report on 28 March 2013. The report extends to 44 pages. It contains a detailed overview of the relevant medical history and fully reasoned opinion on causation and negligence. It considered both the management of infection (including the likelihood that infection persisted throughout the relevant period) and standard of surgery. In broad terms, Mr Radford reached a caveated conclusion that the standard of care fell within that which would be regarded as acceptable by a reasonable body of medical opinion.

17. Mr Radford's views were conveyed to the Claimant who was naturally disappointed. It appears that he accepted the advice of his solicitor (given in writing on 24 April 2014) that Mr Radford's conclusions meant he had insufficient merits to proceed with his claim. The letter concluded thus:

> *"May I take this opportunity to remind you that you only have three years from the date when you became aware you had been the victim of negligent medical treatment, in which to issue court proceedings. Failure to issue court proceedings by this date would mean that the courts would be very unlikely to allow you to pursue the claim further, regardless of its prospects of success."*

18. A telephone attendance note of 23 July 2013 records that the Claimant accepted his solicitors advice that the claim would not succeed and instructed him to discontinue. I note that although the use of the word 'discontinue' suggests that legal proceedings had been commenced there is nothing to suggest that was the case.

### iii) Instruction of Shoosmiths LLP in 2016

19. Sadly, the Claimant's knee continued to deteriorate. He was eventually referred to the Pain Clinic at St Thomas' Hospital London and thereafter to their orthopaedic department. The precise medical history during this period is not clear because it has not been the subject of any disclosed medical report but his care at St Thomas' led to a decision to amputate his left leg because of the ongoing severe pain. An above the knee amputation of the left leg was undertaken on 22 June 2016.

20. Shortly before the amputation, on 2 June 2016 the Claimant made contact with Shoosmiths. He did so having received a recommendation from someone with whom he had been discussing his plight at his gym. The Claimant entered into a CFA with his new solicitors on 23 September 2016.

21. Thereafter matters progressed very slowly indeed. General Practitioner records were reviewed in January 2017 and revealed that the Claimant had previously instructed Harvey Ingram. The previous solicitor's files were received and were reviewed on 23 February 2017. In November 2017 it was decided by the lawyer with conduct of the case that the amputation marked the point at which time began to run for the purposes of calculating the limitation period and the expiry of the period was diarised as 22 June 2019. As I detail below, it was rightly accepted at the hearing before me that this was an erroneous assessment. A Letter Before Action was sent to the Defendant in January 2018 but it does not appear that it was until 16 August 2018 that the Claimant actually met his solicitors in person to discuss his claim.

22. Thereafter the Claimant's solicitors made several attempts to obtain reports from microbiology experts. In October 2018 instructions were sent to a microbiologist who the following month, in a preliminary report, deferred to orthopaedic opinion. It was not until 30 April 2019 that instructions were sent to a consultant orthopaedic knee surgeon. His report was received in May 2019 and it included opinion that there had been breaches of the duty of care owed to the Claimant in 2009 and that the amputation was avoidable but for the substandard care. Following a conference with counsel proceedings were issued on the 30th of June 2019. No pre action protocol letter of claim was sent to the defendant in advance of the issue of proceedings.

### iv) Procedural history

23. The Claim Form was served upon the Defendant on 4th October 2019. On the same day an application was made requesting an extension of time for service of Particulars of Claim and an order was made by consent extending the date of service until the 13 November 2019.

24. Particulars of Claim dated 8 November 2019 were duly served together with a Schedule of Loss and a 'Condition & Prognosis' report from Mr Unwin, Consultant Orthopaedic Surgeon, dated 6 August 2019.

25. The focus of the pleaded case is on the care provided at Cannock Chase under Mr Shaylor. No criticisms are made of the subsequent treatment by Mr Gregson at the Oswestry Hospital. The gist of the complaint is that Mr Shaylor and his team were negligent in not appropriately treating what is alleged to have been significant infection. The claim is premised on alleged failures in a duty of care over a number of interventions, examinations and consultations between 28 March 2009 and 22 June 2010. It is averred that the subsequent amputation was the result of the failure to appropriately treat infection.

26. The Defence is dated 30 June 2020. It admits much of the relevant history as revealed in the medical notes but sets out a robust response to the allegations of negligence. In broad terms there are two prongs to the defence. It firstly advances a positive case that there was no significant infection to the knee, certainly not one that can be traced from the time of the treatment at Cannock Chase through to the amputation at St Thomas'. Secondly, it denies that any of the clinical decisions taken fell below that considered acceptable by a reasonable body of orthopaedic surgeons.

27. The Defence also pleads that the claim is statute-barred. It avers that the Claimant had the requisite knowledge (within the meaning of the 1980 Act) on each occasion that he complained about pain post-surgery, starting from a visit to his GP in June 2009 when he stated a belief that he had a left knee infection post operatively.

28. An Amended Reply of 23 March 2021 denies that the claim is statute barred. It avers that the relevant date of knowledge did not arise until 2019 when the Claimant first received positive expert evidence. In the alternative, the pleading relies upon the exercise of discretion under s.33 of the 1980 Act.

29. The matter came before Master Cook on 18 March 2021. He ordered the trial of the preliminary issue of limitation and set directions accordingly. Pursuant to that order the Claimant served witness statements from the Claimant himself, from his partner Ms Widjaew, and from his current solicitor at Shoosmiths, Mr Bannister.

30. The statement from the Claimant, dated 27 May 2021, sets out his recollection of interaction with Mr Shaylor and his team and his deterioration leading up to the amputation of his leg and instruction of Shoosmiths. He describes, in broad terms, the profound impact that the loss of his leg has had on his life and how he feels "*that the best part of my retirement years have been taken away from me…*".

31. The statement of Ms Widjaew, dated 1 June 2021, provides her recollection of the occasions on which she accompanied the Claimant to hospital. She also describes the

deterioration in the Claimant's condition caused not only by his leg but his Parkinson's disease.

32. The statement of Mr Bannister, dated 2 June 2021, sets out a detailed description of the steps taken by Shoosmiths LLP since receipt of initial instructions from the Claimant.

33. At the commencement of the hearing the Defendant made plain that it did not wish to have any of these witnesses called to be cross-examined and is therefore deemed to have accepted their evidence. The Defendant did not adduce any evidence of its own.

34. Following the hearing before Master Cook the Claimant disclosed the entire contents of the files created by Harvey Ingram.

35. The trial before me was conducted on MS Teams over the course of one day and was limited to legal submission. I am grateful for the assistance of both counsel.

## B: Date of knowledge

### i) The Legal Framework

36. The 1980 Act provides a general framework governing the operation of limitation periods across a range of legal claims. It includes specific provisions pertaining to claims for personal injuries such as this case. These provide a general rule that for cases in which it is alleged that a negligent act or omission has caused personal injury, the claim must be brought within three years of injury. This is subject to exceptions designed to ameliorate the unfairness that might result from an inflexible application of the time limit. One such exception, relevant to this claim, is that generally time will not run until the date at which a claimant is deemed to have 'knowledge' of his/her injury. This is provided for by s. 11(3) read with s.11(4) which state:

> "(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."

37. Section 14 of the 1980 Act sets out the test for what amounts to the date of knowledge within the meaning of s.11(4)(b). The relevant parts of section 14 provide:

> (1) "Subject to subsections (1A) and (1B) below, 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."

38. In a judgment delivered in July 1997 (*Spargo v North Essex District Health Authority* [1997] PIQR 235) Lord Justice Brooke complained that the law on the application of s.14 was '*grossly overloaded'* with authority. 15 years later, in *AB v Ministry of Defence* [2013] AC 78. Lord Walker remarked that in the intervening period "*the overload has increased*". The clear authoritative emphasis is therefore to not overburden and overcomplicate the interpretation of s.14 with too ready recourse to myriad examples as to how it has been applied in the particular circumstances of other cases. Rather, section 14 should be capable of ready and sensible application by primary reference to the plain statutory language and sparing use of those cases designed to serve as general guidance.

39. For the purposes of resolving this particular dispute the most authoritative source of guidance is that provided by the House of Lords in *Haward & Other v Fawcetts* [2006] 1 WLR 682 and the Supreme Court in *AB & Others v Ministry of Defence*.

40. *Haward* concerned s.14A of the 1980 Act which is an analogous provision to that under consideration in this claim. The facts of the claim are very different to this case, they concerned financial advice rather than medical services, but the clear articulation of the relevant principles are of equal application. The Court examined the degree of knowledge required for time to run under s.14 and the degree of certainty that a party must possess. I set out below, in a little detail, some of the key analysis of their Lordships because it provides such a clear exposition of the tests to be applied in this claim.

41. As to the degree of certainty necessary to establish 'knowledge', Lord Nicholls (endorsing the approach of Lord Donaldson MR in *Halford v Brooks*) stated (at §9):

> "…. knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: "suspicion, particularly if it is vague and unsupported, when indeed not be enough, but reasonable belief will normally suffice." In other words, the claimant must know enough for it to be reasonable to begin to investigate further." [Emphasis added]

42. As to the question of the degree of detail required to have knowledge that the injury was attributable to a 'act or omission', Lord Nicholls (at §10) cited with approval the approach of trial judge in the clinical negligence claim of *Hendy v Milton Keynes Health Authority* [1992] 3 Med LR 114:

> "…. Blofeld J said a plaintiff may have sufficient knowledge if she appreciates "in general terms" that her problem was capable of being attributed to the operation, even where the particular facts of what specifically went wrong or how or where precise error was made is not known to her…. To the same effect Hoffmann LJ said [in *Broadley v Guy Clapham*] section 14(1)(b) requires "one should look at the way the plaintiff puts his case, distil what he is complaining about and asked whether he had in broad terms, knowledge of the facts on which that complaint is based play" [Emphasis added]

43. As for knowledge as to 'who' was responsible for the injury (the 'attribution' test), Lord Nicholls said (at §11) that "*time does not begin to run against a claimant until he knows there is a real possibility that his damage was caused by the act or omission in question*."

44. To similar effect at §66 Lord Walker said:

> "The Court is concerned with the identification of the facts which are 'the essence' or 'essential thrust of the case' or which 'distil what [the claimant] is complaining about" [Emphasis added]

45. Lord Scott at §49 said:

> "… the requisite knowledge is knowledge of the facts constituting the essence of the complaint of negligence." [Emphasis added]

46. Lord Brown at §90 stated:

> "What the claimant must know to set time running is the essence of the act or omission to which his damage is attributable, the substance of what ultimately comes to be pleaded as his case in negligence" [Emphasis added]

47. *Haward* was followed by three of the four judges in the majority in *AB v MoD* (Wilson, Walker, Mance JJSC) and indeed also by Lord Phillips and Lord Kerr in dissent. This was the well known case brought by former servicemen said to have sustained personal injuries as a result of exposure to radiation during nuclear testing between 1952 and 1958. The facts of the case are unique but (unsurprisingly for a case before our apex court) the principles identified are of wide application. At §81, Lord Mance referred back to the judgments in *Haward* which I have set out above and noted:

> "These passages indicate that courts, by using the words "reasonable belief" as part of the description of the requisite knowledge, as focussing not so much on whether or how far the belief is evidence-based, but more on whether it is held with a sufficient degree of confidence to justify embarking on the preliminaries to making a claim including collecting evidence."

**(ii) The Parties' Submissions**

48. Mr Stagg, consistent with his pleaded case, contended that the date of knowledge did not begin to run until May 2019 when the Claimant first received a positive advice from an orthopaedic expert. He advanced a 'secondary' position that time began to run shortly before the amputation in 2016 when told that he had osteomyelitis (para 13f of the Particulars of Claim suggests this was in around February 2016.)

49. Prior to this juncture, Mr Stagg submits, the Claimant was under the mistaken misapprehension that no one was to blame for his ongoing pain – indeed he argues – how could he when he had been previously advised by Mr Radford that no claim existed. This is all consistent, in his submission, with the advice that the Claimant was receiving through much of this period from his treating clinicians to the effect that the recovery, whilst slow and imperfect, was not a cause for concern.

50. Mr Khurana, in admirably concise written and oral submissions, advanced a case that the date of knowledge arose about ten years earlier than the date contended for by the Claimant. His case is that the Claimant was well aware of how his left knee should have recovered because of the experience of the earlier operation to the right knee. By April 2009, i.e. shortly after discharge from the hospital, he knew enough to satisfy the ss.11/14 criteria. Alternatively, Mr Khurana contends that the requisite knowledge was made out by the time the Claimant consulted solicitors in 2012.

**iii) Discussion**

51. As the citations from *Haward* and *AB v MoD* set out above make clear, in order for a claimant to have the requisite knowledge for the purposes of ss.11 and 14, it is not necessary that they appreciate all the details of the claim that they may later formulate against the Defendant, let alone that there has been an actionable breach of a legal obligation, before time begins to run. Rather, it is sufficient that they understand 'in general terms' the 'essence' of the factual case upon which a later claim might be based. In the context of a clinical negligence claim it is not necessary that the claimant appreciates the precise mechanism by which s/he has sustained an injury but rather it suffices that there is an understanding in broad terms that the medical care may be a possible cause of injury (see the reference to *Hendy v Milton Keynes AHA* above).

52. The application of these principles to the facts of this case is straightforward. By June 2012 at the latest it is clear that the Claimant was, in broad terms, ascribing his ongoing pain in the knee to the treatment he had received from the Defendant. He was sufficiently troubled by his plight that he consulted solicitors. Although he states that the purpose of contacting the solicitor was to advance a complaint rather than pursue a claim, it is clear from the records that a potential claim against the Defendant for substandard medical care was discussed in June 2012 and the Claimant was advised that he had a claim sufficient for the solicitors to agree to act under a Conditional Fee Agreement.

53. There is little doubt therefore that by this date the Claimant knew 'in broad terms' the 'essence' of the case against the Defendant. His appreciation of the nature of the potential claim in 2012 may well have been different to the basis of his pleaded case in 2019, not least the focus of critique might have been on surgical technique rather than control of infection, but he certainly knew that his ongoing difficulties were capable of being ascribed to substandard care by the Defendant. Knowledge that the Defendants medical care could be attributed to his ongoing pain is the type of 'broad knowledge' sufficient to start time running under s.11, indeed it was this knowledge that led him to take the preliminary steps of investigating a claim by the instruction of solicitors. I reject the submission that the test as applied to this case, required the Defendant to appreciate the precise mechanism of injury, i.e. that it might be a failure to manage infection that was the cause of ongoing pain, rather than surgical technique or the type of screws utilised. That degree of knowledge does not equate to the less demanding

test of knowledge of the 'broad thrust of the case'. This is not the type of case (in contrast, for example, with certain types of industrial injury) in which a Claimant needs complex medical, or other expert, investigation, to work out whether he has an injury attributable to another. By the time he approached solicitors in June 2012 the Claimant suspected with sufficient certainty (i.e. that it was reasonable to investigate) that his ongoing pain could be broadly attributed to his care at Cannock Chase under Mr Shaylor.

54. To be clear, I do not consider that the mere fact that the Claimant obtained legal advice in 2012 and/or a medico-legal report in 2013, by itself automatically establishes the requisite level of knowledge. The judgments of the majority in *AB* illustrate that whilst the date on which a Claimant first instructs a solicitor might well indicate sufficient knowledge, it is not of itself automatically determinative in every case (see, for example Lord Wilson at §13). Here though it is clear to my mind that the circumstances under which the Claimant approached his former solicitors (disgruntlement with his treatment in light of ongoing pain) that at least by 18 June 2012 after a consultation with a solicitor, confirming that they would take on the medical negligence case, that the Claimant had the requisite knowledge – indeed he was advised in clear terms that it was considered that a claim had reasonable prospects of success. It is to my mind wholly unrealistic to contend that the date of knowledge was not established until 2019 and the receipt of the positive report from a new expert – that is a submission divorced from the test propounded by the authorities in circumstances in which the Claimant had previously instructed solicitors to proceed with essentially the same claim 7 years earlier.

55. Accordingly, in my judgment, the Claimant had the requisite knowledge prior to the receipt of the report by Mr Radford. As Mr Stagg accepted the mere fact that Mr Radford's report concluded that liability could not be established cannot act to 'cancel out' pre-existing knowledge (see *Nash v Eli Lily* [1993 1 WLR 782 at 795E-F). As set out above, the Claimant had the requisite knowledge before Mr Radford had been instructed.

56. I accept that the actual date of knowledge of the Claimant might have predated the instruction of Harvey Ingram. It may well be that the Claimant understood before June 2012 that his ongoing pain was due to an act or omission of the Defendant, sufficient to merit undertaking the preliminaries to a legal claim. I do not however need to identify precisely when knowledge accrued because (i) as I have determined the date of knowledge arose in any event well outside of the primary limitation period and (ii) in the particular circumstances of the case, the precise date of knowledge would not have a material bearing on the exercise of my discretion under s.33.

57. Accordingly, I conclude that the claim was brought at least 7 years after time began to run and thus at least 4 years after it became prima facie statute barred. The sole remaining question is therefore whether the Court should exercise its discretion and disapply the limitation period.

## C: The Exercise of Discretion

### i) The Legal Framework

58. Section 33 of the 1980 Act provides a court with a discretion to extend the limitation period. The relevant parts of s33 provide:

> (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 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 11or (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.

59. Both parties agree that the most authoritative and comprehensive source of guidance to the proper exercise of the court's discretion is contained in the judgment of Sir Terrence Etherton MR in *Carroll v Chief Constable of Manchester* [2017] EWCA Civ 1992. At paragraph 42, his Lordship, set out 13 separate principles governing the application of s.33 each advanced by reference to earlier authority. As this provides such a comprehensive overview of the approach that any court should adopt, I set out in full the first 12 insights – the 13th of which concerns the approach of appellate courts and thus can be safely excised. For clarity and concision, I have also removed the references to authorities relied upon by Sir Terence. His Lordship stated:

> "Section 33(3) of the LA 1980 requires the court, when exercising its discretion under section 33(1), to have regard to all the circumstances of the case but also directs the court to have regard to the five matters specified in subsections 33(3)(a)–(f). There are numerous reported cases in which the court has

elaborated on the application of that statutory direction in the context of the particular facts of the case. In many of the cases the court has stated various principles of general application. The general principles may be summarised as follows.

1. Section 33 is not confined to a "residual class of cases". It is unfettered and requires the judge to look at the matter broadly:

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

3. The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.

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

5. Furthermore, while the ultimate burden is on a claimant to show that it would be equitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant: If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant:

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

7. Subject to considerations of proportionality (as outlined in para 11 below), the defendant only deserves to have the obligation to pay due damages removed if the passage of time

> has significantly diminished the opportunity to defend the claim on liability or amount:
>
> 8. It is the period after the expiry of the limitation period which is referred to in subsubsections 33(3)(a) and (b) and carries particular weight: The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: 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:
>
> 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: I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim.
>
> 10. Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context:
>
> 11. In the context of reasons for delay, it is relevant to consider under subsection 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period:
>
> 12. Proportionality is material to the exercise of the discretion: In that context, it may be relevant that the claim has only a thin prospect of success, that the claim is modest in financial terms so as to give rise to disproportionate legal costs, that the claimant would have a clear case against his or her solicitors and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability."

**(ii) The Submission of the Parties**

60. The focus of Mr Stagg's submissions was on the absence of any prejudice to the Defendant caused by delay. He acknowledged that his client's own recollection of his treatment would be most unlikely to be determinative of any issues as opposed to the

medical records and the clinical opinions derived from them. He relies upon the absence of any evidence of specific prejudice.

61. Notwithstanding his primary submission under s.11 of the 1980 Act, Mr Stagg accepted that there had been delay in progressing the claim. His stance was though that this was not the fault of the Claimant. The Claimant had been reasonable in accepting the advice of his previous solicitors which was in turn based on Mr Radford's opinion. Thereafter, the delays had been the fault of Shoosmiths, not the Claimant, in part based on what Mr Stagg accepted was an erroneous calculation of the limitation expiry date.

62. Mr Stagg pressed on the court the importance of the claim to the Claimant, who, if his claim is well founded, will have lost a leg as a result of clinical negligence with profound consequences for many aspects of his life.

63. Mr Khurana accepted that he had no specific evidence of prejudice caused by the passage of time. His primary argument on prejudice, albeit not one identified prior to his oral submissions, was that bringing the claim after 1 April 2013 caused prejudice to the Defendant because they could no longer recover their costs against the Claimant because of the advent of Qualified One-Way Cost Shifting.

64. A core element of Mr Khurana's submissions on s.33 focused on the merits of the underlying claim. Mr Khurana placed considerable reliance on the disclosure of Mr Radford's report. It demonstrated, he submitted, that the claim in clinical negligence was hopeless. Here was a respected clinician, in 2013 (i.e. close in time to the impugned events) giving a detailed analysis as to why there was probably no ongoing infection and why there was no actionable breach of duty. In light of the very high threshold for establishing clinical negligence, Mr Radford's report demonstrated that the Claimant had an impossible hill to climb. In those circumstances there could be no proper basis for exercising discretion and permitting the claim to proceed.

**(iii) Discussion**

65. Although most of my analysis will focus on what I consider to be the most relevant factors bearing on the exercise of discretion in this particular case, I have of course had careful regard to the five relevant specific factors set out in s.33(3) whose application was elaborated upon in the written and oral submissions of the parties. This includes the uncontested factor that the Defendant has been entirely blameless in the cause of delay. I have also had close regard, as *Carroll* directs I must, to the wider considerations of justice bearing upon the exercise of my discretion.

*Merits*

66. I begin my analysis by addressing a central element of the Defendant's argument namely that the claim is said to be without merit. As summarised above, the factual foundation of this argument is founded on Mr Radford's very detailed rejection of almost all potential allegations of negligence against the Defendant. Mr Khurana's argument is that the critique of the expert, previously instructed on behalf of the Claimant, is particularly potent in the context of a clinical negligence claim where the test to be applied is whether the standard of care fell below that which a body of similarly qualified experts would consider acceptable (per the well known test set out in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582).

67. In my judgment, save in the very clearest of cases, a Court should exercise real caution before conducting a merits assessment as part of the s.33 balancing exercise. This is for at least three reasons.

68. Firstly, although in Principle 10 of *Carroll*, Sir Terrence Etherton MR, states it might be relevant to the assessment of proportionality to take into account that the claim "*only has a thin prospect of success*", I do not read that as a general exhortation to assess merits other than in the clearest of cases. Such a (mis)reading would be inconsistent with paragraph 60 of the judgment where his Lordship said:

> "So far as concerns the legal strength of the claim, it would be entirely inappropriate at this stage to conduct a mini-trial on very limited evidence. It cannot be said that the claim is so weak or inherently implausible that it could be stuck out or dismissed on summary judgment."

69. I take this passage as making plain that generally speaking a Court should refrain from taking a view on merits save in the clearest cases, i.e. where is it obvious that a case has only thin prospects of success. In so far as this conflicts with the obiter observations of Stuart Smith LJ in *Dale v British Coal Corporation* [1992] PIQR 373 who, whilst cautioning against determining merits generally, said (at 381) that "*All that can be done and should be done is for the judge to take an overall view of the prospects of success…*" then I respectfully prefer the subsequent more cautious approach of the general guidance provided in *Carroll*.

70. Secondly this cautious approach to the assessment of merits, save in the clearest of cases, is borne out of both principled and practical concerns as to how it could be fairly and transparently integrated into the s.33 balancing exercise. If a claim is so weak that it is bound to fail, then the Court has relevant powers to dispose of it under the strike out and summary judgment provisions. The CPR, and the considerable body of case law that has built up around summary disposal powers, provide very clear legal tests that enable the court to apply a transparent and consistent approach to the assessment of merits. Where at a limitation trial is it obvious that the claim is bound to fail, then it either should be struck out, or the Court (applying the same strike out/summary standards) would be very likely refuse to disapply limitation to permit a hopeless claim to proceed. However, any additional approach that requires the assessment of the merits of a claim that is robust enough to withstand strike out/summary judgment, but is nevertheless is said to be 'weak', runs the risk of arbitrary application. That is because it is far from clear what the applicable legal standards actually are by which the merits of such a claim can be calibrated at an interlocutory stage. If the test is not that of strike out/summary judgment then what, I posit rhetorically, is it? It runs the risk of applying little more than an impressionistic view of merits at an early stage of proceedings, making it difficult, even for the most experienced judges, to apply fair, consistent and transparent standards across all cases. This concern is all the greater in cases such as this, in which it is contended by the Defendant that the 'merits' argument should be effectively determinative of the whether the claim proceeds or not.

71. Thirdly, as stated, none of this is to say that in clear and obvious cases the merits cannot be taken into account. An example of this is *AB v* MoD where counsel for the claimant accepted that his case was unsupported by expert evidence and indeed irreconcilable with binding authority. Equally, there may be cases in which the merits of the claim are so strong that they should impact on the exercise of discretion, for example because the defendant has made a relevant admission.

72. The question is therefore whether this claim can be properly classified as so weak that the Court can properly take the merits into account in the exercise of its discretion under s.33. I do not consider that it can. Mr Khurana's case is that the claim is weak but he does not go as far as submitting that it is so weak that it could satisfy the test for either strike out or summary judgment. Rather, he maintains that Mr Radford's conclusions reflect a broad weaknesses of the claim, an assertion that he argues is reinforced by a refusal of the Claimant to disclose either their 'new' liability report or to answer a Part 18 request designed to elicit the fact that they have also previously received a negative advice from a microbiologist.

73. The core forensic point advanced by Mr Khurana is not without attraction. The detailed contents of the report of Mr Radford suggests that the Claimant may face difficulties at trial in both establishing the presence of infection at the relevant times and also breach of duty, taking into account the broad ambit of a *Bolam* defence. I do not consider however that it is either possible or appropriate to draw any firm conclusions on merits at this stage of proceedings that are capable of decisively determining whether this claim proceeds or not. The evidence of Mr Bannister, which was not challenged, is that the Claimant now possesses a supportive report which has concluded that there were breaches of the duty of care in 2009 and that the amputation was avoidable but for the substandard care. In the course of argument, Mr Stagg confirmed that the claimant also possessed a supportive report from a microbiologist. I do not consider that inferences can be drawn from a failure to disclose that evidence. The Court is entitled to proceed on the basis of unchallenged assurances that the claimant possesses supportive evidence notwithstanding the previous opinion expressed by Mr Radford. If Courts were to insist of the production of liability evidence at limitation hearings, then it would become commonplace to have to hold mini-trials of precisely the nature prohibited in *Carroll*. The mere fact that Mr Radford reached a negative opinion in 2013 cannot of itself demonstrate that the more positive opinions that the Claimant's advisers have stated they possess must be wrong and that the prospects of success are obviously 'thin'.

74. During the course of argument Mr Khurana appeared to suggest that because the Claimant had obtained a report from Mr Radford in 2013, he was somehow formally bound by its conclusions – to hold otherwise, it was submitted, would be to sanction a form of 'expert shopping'. Although Mr Khurana made reference to support for his proposition stemming from Part 35 of the CPR he was unable to identify any relevant provision or authority to make good that point. With respect to Mr Khurana this is a very poor point. The conclusions of an expert obtained prior to the issue of proceedings and never relied on at any stage in the proceedings cannot in any sense formally bind the instructing party. The mere fact that the Claimant elected to disclose his previous solicitors file as part of this application, thereby revealing the existence and contents of Mr Radford's report, does not change the position one iota. The simple position is that the Claimant has never relied upon Mr Radford's report in these proceedings and cannot in any sense be bound by it.

75. The position is therefore that both parties to this dispute possess expert evidence supportive of their respective cases. Neither side has disclosed any reports and thus there is no proper basis on which I can conclude that the claim is so clearly weak, or so patently strong, that the merits/demerits should have a material impact on the exercise of my discretion.

76. Returning to the other factors bearing on the exercise of discretion, in this particular claim, I consider the most relevant dynamic is the tension between what I consider to be unjustified delay on the one hand and the absence of real prejudice caused by that delay on the other.

*Delay*

77. It is possible to identify two broad periods of delay. The first is the Claimant's delay in progressing his claim after receipt of negative advice from his previous solicitors (which included a warning that he had limited time to issue any proceedings). The second period of time extends from instruction of Shoosmiths to the issue of the Claim Form in June 2019.

78. As to the first period, at least the last year of which was outside of primary limitation, the delay can be explained by a mixture of a response to the negative advice of his previous solicitors (itself premised on a very detailed and reasoned negative opinion from Mr Radford) and also the serious deterioration in the Claimant's health. I do not consider that the Claimant can be harshly criticised for failing to progress his claim in such circumstances. He had sought professional advice and received a reasoned basis, premised on expert analysis, as to why it was believed there was no viable claim in clinical negligence. It was not in any sense unreasonable of the Claimant to reject that advice – there was no obvious reason for a layperson to conclude that it was wrong or was based on a misunderstanding. In the period following receipt of negative advice the Claimant's condition deteriorated and he was preoccupied with pain and disability, leading to the decision to amputate his leg. In these circumstances I do not consider that significant criticism can be levelled that his mind should have been directed to returning to see lawyers for a further assessment of the claim.

79. The second period is however markedly different. Having accepted instructions from the Claimant, Shoosmiths took 3 years before issuing a Claim Form. The statement of Mr Bannister reveals a lackadaisical attitude to the progression of the claim by his colleagues. The progress in obtaining records, in seeking instructions from the client, to obtaining medical evidence was glacial. The reason for this approach may well be explained by the fact, as revealed by Mr Bannister, that his predecessors at the firm had considered that the limitation period only ran from the date of the amputation not the date of the impugned treatment. As Mr Stagg realistically accepts, the decision to diarise the limitation period as expiring on 22 June 2019 was quite wrong. In fact, the solicitors should have been on notice (from at least the point at which they obtained the Harvey Ingram files) that there was at least a risk that the limitation period had expired prior to their actual instruction – a fact that would have underlined the need to expedite the claim. Even towards the end of the expiry date wrongly identified by the solicitors as applying to the case, there was no sense of urgency. Instructions were not sent to a microbiologist until October 2018 nor to an orthopaedic expert until April 2019. Proceedings were issued without any attempt to comply with the Pre-Action Protocol.

80. The evidence of Mr Bannister strongly suggests, albeit it does not state in clear terms, that the primary fault for this delay lies with Shoosmiths not the Claimant. In fairness to Mr Bannister, it merits emphasis that he did not have any involvement in the claim until the end of 2020 and appears to be personally blameless of any causing any delay. His statement makes some references to the Claimant being difficult to contact because of his health problems but Mr Stagg squarely accepted (indeed relied upon the fact) that the delay during this period was the fault of lawyers not client.

81. I consider the length of delay during this period to be unjustified. It is certainly a factor that must be taken into account when determining the exercise of my discretion. It is however relevant to note that the delay is that of the solicitors not the claimant himself. This reflects 'Principle 10' of *Carroll* which relies upon the decision of the Court of Appeal in *Corbin v Penfold Metallising Co* [2000] Lloyd's Rep Med 247 which in turn endorses the approach in *Das v Ganju* [1999] PIQR 260 to the effect that the sins of the solicitor need not necessarily be visited upon their clients in the exercise of discretion under s.33. Each case will no doubt turn on their own facts but there is nothing in the materials placed before me (nor in the submissions advanced) that the Claimant himself should have second guessed the approach of Shoosmiths during this period.

***Prejudice***

82. I turn then to consider the impact that delay has had on the fair adjudication of the substantive dispute. In many cases it is relevant to distinguish between the differing impact of delay (a) prior to the expiry of the primary limitation period with (b) that occurring once it had lapsed. Such a distinction is of far less relevance here because a hallmark of this particular case is that (save for one discrete point) the Defendant accepts that the passage of time generally has not caused it any specific prejudice and that a fair trial of the issues remains possible. The Defendant elected not to put in any evidence at trial. Thus, there was no evidence highlighting any form of specific prejudice for example that relevant medical records had been lost, or that the recollection of witnesses, said to be relevant to the resolution of the actual issues in dispute, had faded. Although there is a limited dispute as to whether or not Mr Shaylor took tissue samples to test for infection in June 2010, (the Defence posits the possibility that the absence of records might be explained by samples being lost or destroyed), it does not suggest that this issue materially impacts upon the fair defence of the claim.

83. The highest it was put by Mr Khurana is that the passage of time can always be expected to cause 'general prejudice' not least in a clinical negligence claim where experts are to be asked to recall what the level of acceptable clinical care was many years ago. As a matter of generality that may be right but absence any evidence at all of how such general prejudice transmutes into actual prejudice to the operation of a fair trial in this particular claim, the forensic value of the submission is very limited indeed. This is particularly so where, as here, the substantive dispute between the parties is unlikely to be resolved by the recollection of either patient or clinician of the material events rather than the medical records. In broad terms the resolution of the dispute will turn upon two issues – firstly, was the Claimant suffering from infection at the material times, and secondly, if so, was he appropriately treated/managed? It is accepted by both parties that the resolution of both these issues will primarily turn upon consideration of the medical notes (whether directly, or through reliance upon them by the relevant experts).

It was not suggested that this would have been any different if the claim was issued within the primary limitation period.

84. The only discrete ground of prejudice relied upon by the Defendant was that had the claim been brought before 2013 then the Claimant would not have been able to rely on the 'Qualified One Way Cost Shifting' regime introduced from 1 April 2013 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LAPSO'). This was not an argument foreshadowed in the Defendant's written submissions but only identified and developed during Mr Khurana's oral submissions. I reject the argument as having any bearing on my considerations of prejudice for the following two reasons:

    i) Firstly, I do not consider, as a matter of principle, that the introduction of a new funding regime by Parliament can properly be taken as 'prejudicing' a party to litigation that can be taken into account when considering whether a claim should be permitted to proceed or not. Parties to litigation have to take the funding regimes as they find them, accepting that from time to time Parliament might seek to change them – those are the rules of the game.

    ii) Secondly, in any event, it is far from clear that the 'new' regime necessarily prejudices the Defendant. It is of course correct that if the Defendant succeeds then (subject to the exceptions provided for in the CPR) they will not be able to enforce a cost award against the Claimant but the flip side is that if the defence fails they will not be liable to pay the successful parties uplift (of up to 100% of their costs) nor the often substantial costs of an ATE insurance policy. It is a case of swings and roundabouts.

85. It is therefore the position that little concrete prejudice has been occasioned by the substantial delays in this case. The somewhat stark fact is that despite those delays a fair trial of the dispute remains perfectly possible.

86. How then to reconcile this fact with the equally clear fact that there has been no good reason for the delay, particularly the delay since Shoosmiths' instruction in June 2016? Some helpful guidance is to be found in the judgment of Smith LJ in the case of *Cain v Francis* [2009] QC 754 and cited with approval in *Carroll*. At §73 her Ladyship said:

> "It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and

> unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones."

87. This passage reflects the trend in more recent authorities to focus more on a pragmatic assessment of whether a fair trial remains possible rather than on a punitive approach to delay per se. In my judgment notwithstanding the delays in this case it would be equitable, in other words, fair and just, to allow the action to proceed. It is not just the fact that a fair trial remains possible that bears heavily on the exercise of discretion – I accept that this cannot always be a trump card that determines any application of a s.33 application irrespective of any countervailing factors – that would be irreconcilable with the nature of a balancing exercise. It is however the fact that a fair trial remains possible, indeed pretty much unimpacted by the passage of time, taken with the seriousness of the underlying claim and its importance to the claimant (concerning as it does an allegation of mistreatment leading to amputation of his leg) and also that he himself cannot be deemed culpable for the majority of the delay. These are the primary factors that have satisfied me that it would be equitable to exercise my discretion to permit the claim to proceed.

88. For the avoidance of doubt, even if I did consider that the introduction of the new cost regime amounted to material form of prejudice, and/or that the merits of the case were so weak (albeit not sufficient to strike out the claim) that they should be taken into account, such factors would not be of sufficient weight to materially alter the exercise of my discretion in this case. I consider the fact that the fair trial of a potentially high value and significant claim remains materially unscathed by the passage of time would outweigh such countervailing points not least when the Claimant himself cannot be strongly criticised for the delay.

## D: Disposal

89. I conclude that the claim was not brought within 3 of years of the Claimant having the relevant knowledge within the meaning of s.11 of the 1980 Act but that it would be equitable in all the circumstances to disapply that time limit and permit the claim to proceed.