

THE QUICK AND THE DEAD

LIMITATION CONSIDERATIONS WHERE THE TORTFEASOR IS DEAD – FXF V AMPLEFORTH ABBEY TRUSTEES [2020] EWHC 791 (QB)

A Guidance Note from the 2TG Personal Injury Team

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October of this year will mark the 9-year anniversary of the death of disgraced television presenter Jimmy Saville. Saville's death sparked a revolution that saw victims of sexual abuse, who for years had suffered in silence, step forward to speak out about the horrible crimes that had been committed against them. In October 2012, the police launched Operation Yewtree in response to the growing number of complaints received in this new era of openness. Unfortunately, in many cases the criminally underfunded CPS was ill-equipped to bring the perpetrators of these crimes to justice, and often it simply could not due to the death of the accused. In recent times, a large number of the victims of child sex abuse that were ill-served by the Criminal Justice System have turned to the Civil Courts for justice. When they do, the first hurdle they inevitably have to clear is that of limitation.

The most recent example of such a case is *FXF v Ampleforth Abbey Trustees* [2020] EWHC 791 (QB). The Claimant, now aged 56, was 4 or 5 years old when she was sexually abused by Father Webb, a local priest and member of the Defendants' Benedictine community. The abuse took place between 1968 and 1969. The primary limitation period expired in January 1985, and Father Webb died 5 years thereafter. As with so many cases in this area, the Claimant had tried to speak to her parents at the time, but no one had believed that a man of the cloth was capable of such acts. Unusually in this case, however, it was alleged that the Claimant's mother and grandmother had actually witnessed the final act of abuse and that, following this, Father Webb was banned from the family home.



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The Claimant first contacted solicitors about the abuse in March 2013 but did not pursue the litigation at that time as she was worried about the potential costs of doing so. The Claimant, via the National Catholic Safeguarding Commission, first alerted the Defendants to her complaint in July 2014. A Letter of Claim was sent on 1st July 2016, and proceedings were issued in September 2017; some 32 years and 9 months after the expiry of the primary limitation period.

The Claimant's claim was pleaded to allege both primary negligence on the part of the Defendants and vicarious liability for the acts of Father Webb. The Defendants admitted that they would be vicariously liable in respect of any tortious acts by Father Webb, but put the Claimant to proof as to the occurrence of those acts as, in view of the death of Father Webb, the Defendant could not advance a positive case in relation to the same.

Unsurprisingly, the Defendants raised a limitation Defence. Although the applicable statutory provisions in this case were found in the Limitation Act 1939 (as amended by the Limitation Act 1975), both Parties addressed the limitation issue by reference to the Limitation Act 1980 and the authorities decided in connection with the same. In closing submissions, the Claimant abandoned her case on date of knowledge, so that the sole issue arising for consideration in relation to the limitation

defence was whether the Court should exercise its discretion under s33 Limitation Act 1933 to set aside the primary limitation period.²

Lambert J began by noting the statutory structure of s33. She remarked that she had been referred to a large number of authorities commenting on the operation of that section, but ultimately considered that the principles to be applied by the Court were well settled and set them out as follows:³

- 1) *"The section 33 discretion is not fettered and requires the judge to look at the issue broadly, taking into account each of the circumstances specified in section 33(3) to the extent that they are relevant. No one factor or circumstance will predominate. The topics specified in s 33(3) are not intended to place a fetter on the discretion but to focus the attention of the court on matters which experience has shown are likely to call for an evaluation in the exercise of the discretion and must be taken into account by the judge...Having considered the relevant circumstances, including those set out in section 33(3) the court should conduct a balancing exercise of all relevant circumstances and with regard to all of the issues.*

² There were other issues before the Court including whether the abuse occurred and, if so, whether this had caused the losses claimed by the Claimant, but given the

decision on limitation no judgment was given on those issues.

³ *FXF v Ampleforth Abbey Trustees* [2020] EWHC 791 (QB) at [16]

- 2) *The essence of the proper exercise of the judicial discretion under section 33 is that the test is the balance of prejudice as between the claimant and defendant. The burden of establishing that the balance tips in his or her favour is upon the claimant, but the burden is not necessarily a heavy one; how heavy or easy it is for the claimant to discharge the burden will depend upon the facts of the particular case...However, whilst the ultimate burden is on the claimant to show that it would be inequitable not to extend the relevant time-limit, the evidential burden of showing that the evidence adduced or likely to be adduced by the defendant is less cogent, is on the defendant.*
- 3) *When conducting the balancing exercise, the basic question to be addressed is whether it is fair and just in all the circumstances for the defendant to meet the claim on its merits, notwithstanding the delay."*

The Judge went on to explain that, when conducting the balancing exercise, the Court will consider:

- a) The length of any delay: It was emphasised that this is relevant due to the effect that it might have on the cogency of the evidence available, both on

liability and quantum. Moreover, the Judge explained that the although a defendant cannot complain of the permitted delay between the accrual of the cause of action and the expiry of the limitation period, once the limitation period has expired, the Court can look at the whole period that has elapsed since the accrual of the cause of action.

- b) The reason for the delay: The Court must investigate the subjective reason for any delay and then decide whether that is a good or bad reason, or whether it is such that the claimant is not culpable for any delay.
- c) Whether a fair trial can still take place: In this regard, if a fair trial cannot take place it is "very unlikely to be equitable to expect the defendant to have to meet the claim".⁴ However, the mere fact that there is a possibility of a fair trial does not mean the matter should proceed. In other words, the ability to have a fair trial is "a necessary but not sufficient condition for the disapplication of the limitation period".⁵

⁴ FXF at [16]

⁵ RE v GE [2015] EWCA Civ 287 at [78]

- d) Whether the Defendant is prejudiced: The question here is whether the passage of time has "*significantly diminished the opportunity to defend the claim on liability or amount*".⁶
- e) When considering limitation at the same time as the substantive issue of liability, the Court must decide the limitation point first. This is because it is important that the Judge does not rely on any findings in relation to the substantive issues in the claim when determining issues regarding the cogency of the evidence. When deciding whether to exercise the s33 discretion, it is necessary for the Court to take into account the evidence that is not before it that might have been called if the defendant had been made aware of the claim at an earlier time. Lambert J did give one caveat to the foregoing as she states that if, even on the basis of impoverished evidence deployed by the defendant, the court is not satisfied that the abuse took place, then the Court can take this into account when determining issues on limitation.

Turning to the case before her, Lambert J found that in relation to liability, the death of Father Webb in the period since the expiry of the limitation period had caused "*real and substantial evidential prejudice*" to the Defendants. In terms of causation, she accepted that whilst the experts instructed would need to disentangle various events when considering what had caused the mental health problems suffered by the Claimant, the delay had not significantly diminished the cogency of the evidence relevant to that issue. The Judge noted that the delay was substantial. In terms of the reasons for the delay, whilst the Judge accepted that this was in part brought about due to the Claimant's shame and embarrassment over the abuse, made worse by the response of the latter's family, she accepted that these feelings had not been "*psychiatrically disabling*" and had not prevented the Claimant functioning in everyday life, or led to her being unable to confront what had happened to her. It was noted that when the Claimant initially contacted solicitors in 2013, she decided not to pursue a claim at that point due to fears regarding the financial repercussions of doing so. As a result, the Judge found that from 2013 onwards, there was no good reason why the Claimant did not bring a claim. Whilst it was accepted that, prior to 2013, there were other reasons why a claim had not been pursued, the Court found that those reasons did not temper the prejudicial effect of the delay on the Defendants' ability to

⁶ *Chief Constable of Greater Manchester Police v Carroll* [2017] EWCA Civ 1992 at [42]

defend the claim. Accordingly, it was found that although the Claimant may well have been sexually assaulted as alleged, as a fair trial was no longer possible, it would not be equitable to disapply the limitation period. As a result, the Claim was dismissed.

Undoubtedly, many will interpret this decision to mean that in cases brought after the expiry of the limitation period where the tortfeasor has died, the Court will not exercise its discretion to disapply that limitation period under s33 Limitation Act 1980. However, I would argue that, whilst inevitably this decision will render it more difficult to make a successful s33 application in such cases, it does not shut the door on the same. In particular, one feature of the case that seems to have weighed heavily against disapplying the limitation period in *FXF* were concerns about the cogency of evidential basis for the Claimant's case. In a stronger claim, one could well see limitation disappplied, even long after the tortfeasor's body has gone cold.

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