



Limitation in abuse claims: Court of Appeal guidance and the real possibility of significant prejudice

CD v The Catholic Child Welfare Society & Others [2018] EWCA Civ 2342

The Court of Appeal (CoA) has today handed down its ruling in the case of *CD v The Catholic Child Welfare Society & Others [2018] EWCA Civ 2342*. The judgment gives further guidance on the way the court should approach limitation and exercise its discretion under s33 of the Limitation Act 1980.

Kari Hansen, Partner at Keoghs, who acted on behalf of the defendants in the case, considers the decision and its potential impact on other similar claims.

Background

The claimant is one of a number of litigants who allege that they were physically and/or sexually abused at a school run and managed by the defendants.

There was an issue between the defendants as to who should be held vicariously liable for any assaults found to be proved. This point was tried by way of preliminary issue which went to the Supreme Court, hence the delay in the substantive cases coming to trial.

The claimant was born in 1978. He initially alleged that he was the victim of physical abuse at the school between 1989 and 1991. Proceedings were issued in January 2006, alleging that the defendants were vicariously liable for the physical assaults.

In 1993, the police began an investigation into physical and sexual abuse allegations against the former headmaster of the school. The claimant was interviewed by the police whilst still resident at the school, and he denied suffering any form of abuse. He was interviewed by the police again in 2003 in the context of a fresh investigation where he gave a signed statement, once more denying having suffered any form of abuse. The claimant was examined by an expert in July 2006 and denied that he had been sexually abused, but said he had been physically abused. He provided a signed witness statement in May 2007 with no mention of any allegations of sexual abuse. It was not until the claimant's addendum statement in February 2014 that he first made any sexual abuse allegation.

The claimant's claim was one of five test claims which proceeded to trial in November 2016. Following the trial, the trial judge dismissed four of the test claims but exercised his discretion on limitation in favour of the claimant and awarded him damages in the sum of £14,000.

In doing so the judge found that:

- The claimant was physically assaulted on several occasions
- The claimant was sexually assaulted on one occasion
- The lack of witnesses to attest to the contemporaneous documents did not prevent the court from conducting a fair trial

Grounds of Appeal

The defendants were granted permission to appeal by the CoA on the issue of the exercise of the court's discretion.

CoA Judgment

In the lead judgment, Lewison LJ (with whom Rafferty LJ agreed) allowed the defendants' appeal and dismissed the claimant's claim. In particular, whilst the CoA affirmed that the decision to disapply the limitation period is discretionary, they concluded that the trial judge was wrong to have disapplied the limitation period.

In the CoA's view, the trial judge failed to take into account the overall delay between the date the alleged sexual assault happened and when the defendants were first informed of the claimant's claim. The CoA found that the overall effective delay was nearly 24 years and considered that by the time the allegation was revealed, it was a stale complaint. In particular the defendant had lost the opportunity to investigate the claimant's allegation of sexual assault and locate potentially highly relevant witnesses. The CoA noted that the trial judge had found that contemporaneous records, made not only by employees of the school but also by independent officers of local authorities, were not consistent with the claimant's case and highlighted the importance to the defendants of those witnesses being available to give evidence.

The CoA found that this was particularly important given the claimant's account was otherwise uncorroborated and that he had given several accounts denying he had been sexually abused. The court also relied on the judge's own findings of inconsistencies in the claimant's evidence in that the cogency of his evidence had been affected by the passage of time.

The CoA placed particular reliance on the speech of Lord Hope in the case of *AS v Poor Sisters of Nazareth [2008] UKHL 32* when he said, '*...proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour*'.

In summary Lewison LJ concluded that, '*...the defendants were exposed to the real possibility of significant prejudice in their ability to defend this claim, so long after the event, and without the ability to call relevant witnesses*'.

Conclusion

This judgment is another example of the court's recognition and acceptance of the difficulties defendants face in investigating historic allegations. It reiterates that it is not the delay from the expiration of the primary limitation period to the issue of proceedings that is crucial when considering whether to disapply the limitation period, but the entire period of delay from the date the cause of action accrued to the date on which the defendants were first informed of the allegation.

It also gives further guidance on the way in which courts should approach limitation, highlighting the importance that witness evidence could have where contemporaneous documentation is inconsistent with a claimant's pleaded case and thus, how that itself could prevent a fair trial in circumstances where such evidence could sway the ultimate finding either way.

The CoA made it clear that it is a practical point as to when a claimant notifies a defendant of his/her real claim, not a technical one.

This judgment emphasises that if a defendant can show there is a **real possibility of significant prejudice** this should be sufficient to succeed on limitation and defeat the claim.

For further information please contact:

Kari Hansen, Partner or Hayley Riach, Legal Director

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