

ENGLAND AND WALES / JUDGMENT

Cain v Francis

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(1) Case No: B3/2008/0125

(2) Case No: B3/2008/0328 IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL
(CIVIL DIVISION)

(1) ON APPEAL FROM OLDHAM COUNTY COURT HH JUDGE ARMITAGE QC 7SK03863

(2) ON APPEAL FROM NEWCASTLE UPON TYNE COUNTY COURT HH JUDGE FAULKS 7SR00566
Royal Courts of Justice Strand, London, WC2A 2LL Date: Thursday, 18 th December 2008
Before : THE CHANCELLOR OF THE HIGH COURT LADY JUSTICE SMITH and LORD
JUSTICE MAURICE KAY

- ----- Between :

(1) Stephen Cain

- and - Bernice Francis

(2) Shona McKay

- and - Stephen Hamrani -and Direct Line Insurance Plc Appellant/Claimant Respondent/
Defendant Respondent/Claimant 1 st Defendant Appellant/2 nd Defendant

- ----- (Transcript of the Handed Down Judgment of WordWave
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(1) Mrr Richard Methuen QC (instructed by Messrs Beardsell) for the Appellant/Claimant Mr
Frank Burton QC (instructed by Messrs Cogent) for the Respondent/Defendant

(2) Mr Joseph O'Brien (instructed by Messrs Browell Smith) for the Respondent/Claimant Mr
Frank Burton QC & Mr Anesh Pema (instructed by Messrs Cogent) for the 1st Defendant and
Appellant/2nd Defendant Hearing date: 18 November 2008

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Judgement

Lady Justice Smith : 1. 2. 3. Section 33 of the Limitation Act 1980 permits a judge to exercise discretion as to whether the three year primary limitation period applicable in personal injury actions should be disapplied in the particular circumstances of the case. As the judge's discretion is unfettered, the exercise of that discretion should not, as a rule, be the subject of appeal to this Court. However, in the two cases presently before the Court, the judges had reached quite different conclusions on similar facts and for that reason I thought it necessary to give permission to appeal. The facts of the two appeals are similar in important respects. Both arose from a claim for damages for personal injuries sustained in road traffic accidents. In each case, the claimant intimated a claim to the defendant's insurers very promptly. In each case, the insurer accepted liability, recognised that early settlement would not be possible because of the uncertain medical prognosis and made voluntary interim payments. In each case, although in a slightly different way, the claims became time- barred under section 11 of the Limitation Act and, when proceedings began, the claimant had to seek a direction under section 33. In the case of McKay, where the delay in commencement was just under a year, the judge exercised his discretion in favour of the claimant. The defendant/insurer appeals. In Cain, where the delay was of only one day, the judge refused to extend time and the claim was dismissed. The claimant appeals. Because of the factual similarities and the different results, the two appeals have been heard together and are now the subject of combined judgments. On the appeals, Mr Frank Burton QC appeared for both insurance companies. In the McKay appeal, Mr Anesh Pema appeared with him for the appellant, Direct Line Insurance PLC (Direct Line), and Mr Joseph O'Brien appeared for the respondent, Mrs McKay. In the Cain appeal, Mr Richard Methuen QC appeared for the appellant, Mr Cain, and Mr Burton for the respondent, instructed by his insurer. Because the appellant is the defendant in one appeal and the claimant in the other, I shall try to avoid confusion by referring to the parties as the claimant and defendant rather than appellant and respondent. The statutory provisions 4. 5. Section 11 of the Limitation Act 1980 provides a special time limit for actions in respect of personal injuries. So far as relevant to these appeals, section 11(3) and (4) provide that an action shall not be brought after the expiration of a period of three years after the date on which the cause of action accrued. The period of three years is the primary limitation period. Section 33 provides for an exception to the operation of section 11. So far as relevant and, as adapted to post CPR terminology, it provides: (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which – (a) the provisions of section 11... of this Act prejudice the claimant.... (b) any decision of the court under this subsection would prejudice the defendant.... the court may direct that those provisions shall not apply to the action... . (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 claimant;

(b) 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 than if the action had been brought within the time allowed by section 11;

- (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 claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claimant's cause of action against the defendant; (d) (e) the duration of any disability of the claimant arising after the date of the accrual of the cause of action; the extent to which the claimant 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 claimant to obtain medical legal or other expert advice and the nature of any such advice he may have received. 6. Thus section 33 gives the court a wide discretion to disapply the primary limitation period if it is equitable to do so. Factual background – McKay v Hamrani and Direct Line Insurance Co 7. 8. On 23 March 2003, Mrs McKay was driving her car with her two young children as passengers when it was in collision with a car driven by Stephen Hamrani. He had stolen that car and was uninsured. The owner of the car was insured with Direct Line. Mrs McKay had legal insurance and, when she wished to make a claim for her injuries and those of her children, she was assigned to solicitors Ewart Price and Primhak (Ewart Price). They intimated a claim to Direct Line and liability was accepted. Ewart Price obtained medical reports from time to time and these were disclosed to Direct Line. Mrs McKay needed rehabilitation treatment and Direct Line paid for this directly and also made some interim payments to Mrs McKay. As expiry of the limitation period approached, Direct Line made it plain that the claimant's solicitors should issue proceedings. On 21 March 2006, a claim form was issued; it was in time. However, Ewart Price failed to serve the proceedings within 4 months of issue and they lapsed. It appears that Ewart Price did not realise that they had lapsed until so advised by Direct Line. It was not until 30 January 2007 that Ewart Price advised Mrs McKay of the position. She then promptly instructed the firm of solicitors which now represents her. The present proceedings were issued in 9. 10. 11. the Sunderland County Court on 6 March 2007. Section 33 was put in issue and both parties pleaded their cases on prejudice. The preliminary issue of section 33 was heard on 22 January 2008 by HH Judge Faulks. In his judgment, the judge first recited the factors he was required to consider under section 33(3). The reason for the 12 month delay was the incompetence of the Mrs McKay's first solicitor and he did not think any blame could be attached to her. He also considered that there was no loss of cogency in the evidence by reason of the delay because liability had been admitted. It is now accepted on both sides that that was not quite right because there could have been loss of cogency in relation to quantum issues; however in fact there was not. He also said that the conduct of the defendant after the cause of action arose was irrelevant on the facts. It might have been more accurate (and fairer to the defendant) to say that no criticism could be made of the defendant's conduct. The judge rightly observed that section 33(3)(e) and (f) were irrelevant in this case. The judge did not think that the section 33 factors were of much assistance in making a decision. He said that his decision would turn on the balance of prejudice. He rehearsed the main arguments on prejudice raised by each side. For the claimant it was said that she would be prejudiced if no direction were made even though she could recover damages from her former solicitor.

There would be some prejudice to her in that she would have to sue her former solicitor and would also have to continue to sue the defendant on behalf of her children, whose claims were not time-barred because they were minors. She would have two actions going at once. Also, she would be at a disadvantage because her claim against her former solicitors was only for the loss of a chance. Of course, she would have a cast-iron case to recover some damages against her former solicitors but they had been privy to all the weaknesses of her case and although she was not vulnerable on liability, she could be on quantum issues. Finally, she would have to repay the interim payments she had received. However, the defendant had indicated that it would not require her to do so until put in funds by the former solicitor's insurer. The judge thought that all this amounted to 'some prejudice'. The defendant's arguments were first that it might be prejudiced by an obligation to pay more interest than would have been the case if the claim had not been delayed; the longer the delay, the greater the interest on damages. The judge was not impressed by that argument as, he said, it would be open to the defendant to ask the trial judge to curtail the interest period. Second, the defendant argued that it was prejudiced by having to maintain a substantial reserve. The judge accepted that but observed that the reserve would no doubt be earning interest; he appears to have thought that the prejudice from that was very slight, if any. Third, it was said that the claimant's rehabilitation had been stopped, because of the breakdown in relations after the failure to commence proceedings in time. The defendant would be prejudiced because the claimant might not make such a good recovery as she would have done and the damages might be greater. The judge said that this was unclear and he could not adjudicate upon it. Finally, it was claimed that the defendant might have to pay certain non-deductible benefits for a second time. However, the judge observed that this was very unclear. In fact there was no evidence about it. 12. At the end of his judgment, at paragraph 14, the judge exercised his discretion in favour of Mrs McKay, saying: "14. Looking at, therefore, the two areas of prejudice, it seems to me there is no doubt that the prejudice to the claimant far exceeds any prejudice to the defendants other than the loss of a windfall in not having to pay out a large sum of money, which I am persuaded by both counsel is not a matter that I am able to take into account in this adjudication. Accordingly, I rule that the time limits should be disapplied so that this action may proceed." The arguments on the appeal in *McKay v Direct Line*

13. Mr Burton's main submission was that the judge had erred in paragraph 14 of the judgment. He had misunderstood the submissions of counsel when he said that they had agreed that he should not take into account any prejudice suffered by the defendant as the result of losing a windfall limitation defence.
14. Mr Burton submitted that his junior, Mr Pema, who had appeared below, had not conceded that the loss of the unexpected advantage of not having to pay out a large sum of money should be left out of account. As the transcript and skeleton argument showed, Mr Pema had made no such concession. Mr O'Brien accepted that Mr Pema had not conceded the point.

15. We examined the transcript and the skeleton arguments on both sides below. Mr O'Brien's skeleton argument had submitted that the limitation defence was a 'windfall' and, by implication submitted that its loss should not weigh heavily (or perhaps at all) in the balancing exercise. The transcript shows a discussion between the judge and Mr O'Brien in which the judge suggested that it would appear to be a very real prejudice to the defendant if it lost its limitation defence because that would mean it would have to pay out a large sum of money. Mr O'Brien replied that that defence was a windfall and that its loss was not a prejudice to the defendant which arose by the proceedings not being brought in time. Further he submitted that, if a judge were to treat the fact of having to pay the damages as a prejudice, it would never be possible for a claimant to persuade the court to disapply section 11 on the balance of prejudice. The defendant would always succeed. That could not be what the section meant or what was intended by Parliament. In a case where the defendant had no defence on the merits, it would have had 'to pick up the bill in any event'. So, no prejudice was caused to the defendant by the direction. The judge made no further comment. 16. 17. Far from conceding that Mr O'Brien's submission was correct, Mr Pema had immediately submitted that it was wrong. His argument was, in effect, that the loss of a limitation defence was a real prejudice especially where liability had been admitted. If Mr O'Brien's submission were correct, he said, it would be almost impossible for a defendant ever to defeat an application for a section 33 direction in any case in which liability had already been admitted. The judge did not ask any questions. It seems to me that the judge fell into error in thinking that counsel were agreed that he should leave out of account the prejudice to the defendant in losing the limitation defence if the direction were made. Mr O'Brien accepted that this was an error, in so far as counsel had not agreed the point although he maintained that the judge had been right to give no weight to the alleged prejudice arising from the loss of the limitation defence. As the judge had made an error, Mr Burton argued that it followed that the judge's decision could not stand and the case would either have to be remitted or we would have to exercise our own discretion on the material available to us. Mr O'Brien agreed but submitted that, because the judge had been right to leave the loss of the limitation defence out of account, his assessment of the prejudice suffered by either side should stand.
18. Mr Burton's second submission was that the judge had made a fundamental error of law in leaving the loss of the limitation defence out of account. The loss of a cast-iron limitation defence was a substantial prejudice, for the reason enunciated by Judge Faulks in argument with Mr O'Brien, namely that its loss meant that the defendant would have to pay damages whereas, if the section 33 direction were refused, he would not. In a case such as this, that prejudice would sound in a large sum of money, of the order of £500,000. Once it was accepted that, if the claimant could not proceed against the original defendant she would still have a cast-iron case against her former solicitor, it was hard to imagine any prejudice to her which could come anywhere near to matching the prejudice which the defendant would suffer. Certainly the aspects of prejudice on which this claimant had relied could not do so.

19. Mr Burton referred to *Thompson v Brown* [1981]1WLR 744, where the House of Lords considered, I think for the first time, section 2D of the Limitation Act 1939, (inserted by the Limitation Act 1975) the predecessor of section 33 of the Act of
1980. The facts were similar to those of the present appeals. The claimant had a strong claim for damages against his employers. Liability was admitted before action but the damages had not been agreed when the primary limitation period expired. His solicitors failed to issue a writ in time. There was a delay of about a month. The claimant sought a direction under section 2D. Phillips J held that he had no discretion to exercise; he was bound to refuse a direction because the defendant was obviously prejudiced by the loss of its limitation defence and the claimant would not suffer any prejudice because he had cast-iron claim over against his negligent solicitors. Lord Diplock, with whom all other members of the House agreed, held that the judge did indeed have a discretion. He pointed out some of the ways in which a claimant might be prejudiced by having to take a second action. The judge's discretion was unfettered and required him to do what was equitable. The case was remitted to the judge for further decision. 20. The passage on which Mr Burton relied was at page 750B where Lord Diplock said: "Section 2D empowers the court to direct that the primary limitation period shall not apply to a particular action or cause of action. This is by way of exception, for unless the court does make a direction the primary limitation period will continue to apply. The effect of such a direction, and its only effect, is to deprive the defendant of what would otherwise be a complete defence to the action, viz. that the writ was issued too late. A direction under the section must therefore always be highly prejudicial to the defendant, for even if he has a good defence on the merits, he is put to the expenditure of time and energy and money in establishing it, while if, as in the instant case, he has no defence as to liability he has everything to lose if a direction is given under the section. On the other hand, if as in the instant case, the time elapsed after the expiration of the primary limitation period is very short, what the defendant loses in consequence of a direction might be regarded as being in the nature of a windfall. (emphasis added)" 21. 22. 23. This passage, submitted Mr Burton, was support for his contention that the prejudice to a defendant was at its highest where it stood to lose the benefit of limitation defence in a case where it had no other defence. That was the position here; the prejudice to this defendant was very great; in short it was having to pay damages of about £500,000. In argument, it was suggested to Mr Burton that, in any case where liability had already been admitted, the failure of the claimant's solicitor to issue proceedings in time might be regarded as an undeserved windfall to the defendant. Mr Burton stressed that Lord Diplock had said that the defendant had the benefit of a windfall only in cases where the time which had elapsed between the expiry of three years and the issue of the writ was very short. He had not said that the mere fact that the solicitors failed to issue in time gave rise to a windfall. I accept that that is what Lord Diplock said. However, it seems to me that there is a fortuitous bonus for any defendant who, having recognised that he has no defence to liability on the merits and admits as much, suddenly finds himself with a good defence. I would describe that as a windfall even if the delay is

longer than it was in Thompson, provided that the delay has not caused the defendant any evidential or other forensic prejudice on the outstanding issues of quantum. It is worth noting at this stage that, when the case of Thompson went back to Phillips J, he exercised his discretion in favour of the claimant: see the judgment of Leggatt LJ in *Hartley v Birmingham City Council* [1992] 1WLR 968 at page 982H. We do not know how he balanced the various factors or how he dealt with the windfall element. The delay had been short and there did not appear to have been any evidential or other forensic prejudice on the remaining quantum issues.

24. Mr Burton noted the facts of *Hartley* itself where the Court of Appeal (Parker and Leggatt LJ) overturned the judge and made a section 33 direction where the claimant had been notified promptly, liability had been admitted and the delay in issue had been of only one day. He submitted that the facts of *McKay* were very different from *Hartley*. The delay was substantial. When some weight was given to the prejudice suffered as the result of the loss of the limitation defence, it was clear that the discretion would have to be exercised in favour of the defendant. Although the claimant was not personally responsible for the delay, she should be treated as being responsible. Also, the claimant had not produced any evidence of real prejudice suffered by her. The evidence filed had dealt with the history and it was clear that Mrs McKay had been assigned to her first solicitor and had met him only twice. She could not claim to have any real objection to suing that firm. The defendant, on the other hand, had suffered real prejudice in losing its defence and also in the other respects discussed in Judge Faulks' judgment. No direction should be made.
25. Mr O'Brien for Mrs McKay urged us to hold that Judge Faulks had been right to hold that the defendant's loss of its limitation defence would be a windfall which should not count as prejudice. We should therefore respect his assessment of the weight to be given to the other factors, as set out in his judgment. He had plainly been unimpressed by the defendant's claims to prejudice; we should be likewise. 26. I will discuss the issues in due course. Factual background – *Cain v Francis* 27. 28. 29. 30. 31. 32. On 4 August 2004, Mr Stephen Cain was injured in a road traffic accident for which the defendant, Mrs Bernice Francis was wholly responsible. Within a short time, Mr Cain instructed a solicitor, Mr Mansell of Beardsell & Co. A claim was intimated to Mrs Francis's insurer who, after investigation, indicated that liability would not be in issue. The injuries were serious. Medical reports were disclosed to the insurer and substantial interim payments were made. In May 2007, as the three year time limit for proceedings approached, Mr Mansell observed to the insurers that it would not be possible to settle the claim in time and invited them to agree to an indefinite extension of time, terminable on three months' notice. The insurers did not agree to that proposal. The insurers instructed solicitors, Messrs Cogent, to accept service. Mr Mansell knew that he had to issue proceedings. By his oversight, the claim was not issued until one day after the primary limitation period had expired. He has at all times accepted that he was responsible for the delay. His professional indemnity insurers were informed. Mr Cain has not instructed other solicitors and Mr Mansell continues to act for him. The proceedings were served promptly. The particulars of claim were in common form. The defence pleaded

that the claim was statute barred. The reply claimed reliance on section 33. The preliminary issue of limitation was heard by HH Judge Armitage QC in November 2007. The judge reserved judgment and his order refusing a section 33 direction was made on 20 December 2007. After setting out the history in some detail, the judge referred to the statute and in particular to the six factors which he was required to consider under section 33(3). As to (a), he noted that the delay was of only one day and that the reason was the admitted neglect by Mr Mansell for which the claimant himself had not been responsible. As to (b) there was no suggestion on either side that the cogency of the evidence had been affected by the delay. As to (c), the judge held that there could be no criticism of the defendant's conduct. Subsection 3(d) was irrelevant and, as to (e), the claimant had acted promptly when he knew he had a claim save for failing to commence proceedings in time. The claimant had had a whole three years in which to commence his action and section 11, as an arbitrary time limit, had not prejudiced him at all. The judge then considered the substantial interim payments and observed that, if he refused to make a section 33 direction, the claimant would have to repay them. He said that he did not take account of the possibility that the defendant might allow time for repayment. No such offer had in fact been made. The judge then considered the relevant authorities including *Thompson v Brown*, *Hartley v Birmingham City Council*, *KT and others v Bryn Alyn Community (Holdings)Ltd (in liquidation)* [2003] 3 WLR 107, *Nash v Eli Lilly & Co* [1993] 1WLR and *Horton v Sadler* [2007] 1AC 307, and *Hytec Information Systems Ltd v 33. 34. Coventry City Council* [1997] 1WLR 1666. He cited the relevant passages but drew no general conclusions as to the overall effect of the authorities; nor did he say how he intended to apply them to the facts of the present case. At paragraph 28, he made some observations about the prejudice which the parties would suffer if he refused or agreed to disapply section 11. He said first that the prejudice to the claimant was entirely theoretical. Although his reasons for so saying are not entirely clear, it appears that was because Mr Mansell's insurers would have to compensate the claimant in full. Turning to the position of the defendant, he seemed to accept, somewhat reluctantly, that there was no present evidence of any prejudice in the conduct of the case. The judge then said that the defendant would be prejudiced by a direction under section 33. That was because he would have lost the accrued limitation defence. He considered that such prejudice should be inferred as a matter of law and did not require evidence. It should be noted that, when stating that the loss of the limitation defence amounted to prejudice, the judge did not remind himself of what this Court had said in *Thompson and Hartley* about such a defence being a windfall. He said that the claimant's only prejudice was that he must seek redress from his solicitor. His claim over was unanswerable and was as strong or as weak on quantum as ever it had been against the defendant. He accepted that the claimant would be discomforted by the 'hitch' of having to sue his solicitor. But, he said, the claimant had had an ample opportunity to bring his claim against the defendant. He was satisfied that the prejudice to the defendant outweighed that to the claimant. It is to be noted that the only prejudice to the defendant was the loss of limitation defence. The arguments advanced in *Cain v Francis*

35. Mr Methuen submitted that the judge had fallen into error because, although he had cited from the relevant case law, (in particular *Thompson and Hartley*) he had not applied the principles to be derived from them. Mr Methuen drew attention to Lord Diplock's description of the accrual of a limitation defence consequence of a short delay in issue as a 'windfall'. This, he submitted, was clearly a windfall case; the delay was only one day. He referred us to *Hartley* and drew attention to Parker LJ's observation at page 979G that, if a direction were not to be made in a case such as that, it was difficult to envisage circumstances in which it could ever be done. The present case was on all fours with *Hartley*. Thus the judge should have treated the accrual of a limitation defence in the present case as a complete windfall and was wrong to have counted it as prejudice to the defendant. Further, Mr Methuen cited passages from the judgments of both Parker LJ and Leggatt LJ in *Hartley* in which they explained the reasoning behind their view that, in a case where the claim had been intimated promptly after the accident and liability had been admitted, the later accrual of a limitation defence should be regarded as a windfall and its loss should not therefore be regarded as prejudice. He also pointed out that *Hartley* had been cited with approval by Lord Bingham in *Horton v Sadler* [2007] 1 AC 307 at paragraph 33.
36. Mr Methuen said that, if the judge had correctly treated the limitation defence as a windfall and had held that its loss was not a prejudice to the defendant, his conclusion must have been that the balance of prejudice favoured the making of a direction. The claimant would suffer a prejudice in having to instruct another firm of solicitors and in particular in having to sue Mr Mansell, in whom he plainly still had confidence.
37. Mr Burton for the insurer was, I think, constrained to admit that, because of the shortness of the delay and the absence of any prejudice other than the loss of the limitation defence, his position was weaker in the appeal of *Cain* than it had been in that of *McKay*. Nonetheless, he sought to uphold the judge on the ground that he had weighed up the prejudice affecting both sides and had reached a reasonable conclusion. This court should not interfere. Moreover, the judge had been entitled to reject the arguments advanced as to any prejudice suffered by the claimant; in particular, he pointed out that there was no evidence that the claimant was disadvantaged or distressed at the prospect of having to sue Mr Mansell's firm. In the absence of such evidence, the judge should not draw any inferences of prejudice to the claimant. The judge's decision should stand. Discussion of issues common to both appeals 38. 39. The above accounts show that the reason why the two judges reached opposite conclusions when exercising discretion on similar facts was because they took completely different views of the prejudicial effect on the defendant of losing his limitation defence. Judge Faulks took the view that the loss of the limitation defence should be ignored; it was a windfall and did not amount to significant prejudice. Judge Armitage, on the other hand, held that the defendant was significantly prejudiced by the loss of his limitation defence. He said nothing about the limitation defence being a windfall. The loss of the limitation defence was the only prejudice the defendant would suffer if a direction were made but it was enough to persuade the judge that he should not

make the direction. In my view, there should be consistency of approach between judges on an issue as fundamental as whether the loss of a limitation defence amounts to real prejudice in a case where the defendant has no defence to liability on the merits. It is said that judges have an unfettered discretion on applications under section 33 but, if judges as experienced as these two take diametrically opposed views on the kind of issue which has arisen here, applications under section 33 will be a lottery for litigants. It seems to me that Judge Faulks and Judge Armitage cannot both be right in their approaches.

40. Which of them was right? In my view, the answer lies in the line of authority of which Thompson and Hartley are important links. However, the line goes back further than Thompson. It begins with *Firman v Ellis* [1978] QB 886; [1978] 3WLR 1. This decision was the first occasion on which the Court of Appeal (Lord Denning MR, Ormrod and Geoffrey Lane LJ) considered the application of section 2D of the 1939 Act. There were three similar cases before the court. The writ in each claimant's first action had been issued within 3 years but had expired because it had not been served or renewed within 12 months of issue. A second writ was issued in each case and the claimants applied for directions to disapply the primary limitation period. The applications succeeded and the Court of Appeal upheld the decisions, saying that the claimants were prejudiced by section 11 in the conduct of the second proceedings. It was in those proceedings that the direction was to be given. The Court also said that the discretion afforded by section 2D was unfettered. As to the arguments on how the discretion was to be exercised in those cases, the Court made some pithy observations about the defendant's contention that it would be prejudiced by the making of a direction in the claimant's favour. Those observations illuminate the issue presently before this Court. When speaking of the exercise of the discretion, Lord Denning said, at page 905: "In each of the three cases there were negotiations for a settlement, but the plaintiff's solicitors, by the merest slip, allowed time to run out. They failed to renew the writ in time. This slip did not prejudice the defendant or his insurers in the least. Yet, as soon as the defendant's insurers discovered it, they cried 'snap' and broke off negotiations. They said to the plaintiff: 'You are statute-barred. We are not liable. You sue your own solicitors for negligence. Make their insurers pay. And not us'. All of the judges rejected this submission. Each of the judges exercised his discretion in favour of the plaintiff. I think they were quite right. As a matter of simple justice, it is the defendant's insurers who should pay the plaintiff's claim. They have received the premiums to cover the risk of these accidents. They should not be allowed to foist their liability to the plaintiff's solicitors or their insurers by calling 'snap' as if it were a game of cards (emphasis added)." 41. Also at page 909, Lord Denning M. R. said "These... cases show that the Limitation Act 1975 has made a great change in our law of limitation. It means that in personal injury cases a plaintiff is not absolutely barred by the three-year time limit. The judges have a discretion to override the time limit where it fair and just to do so." 42. At page 910, Ormrod LJ said: "Under section 2D, the court can now extend the period of limitation if it considers it 'equitable' to do so, The appellants therefore have to show that the judge below was wrong in concluding that it was equitable to give the plaintiffs leave to proceed with their actions notwithstanding the lapse of time. If they succeed, it is difficult to

imagine any set of circumstances in which it would be proper to exercise this new discretionary power in favour of a plaintiff. The appellants, as counsel frankly and inevitably conceded, have no merits at all; they are simply attempting to take advantage of formal procedural mistakes by the plaintiffs' solicitors (which has caused them no inconvenience, let alone any prejudice)(emphasis added) to transfer liability for the plaintiffs' claims from the defendants' insurers to the plaintiffs' solicitors' insurers. So, applied to the facts of these appeals the case for disapplying the three year time limit is overwhelming. ... Upon these facts, the court has to decide whether the degree of prejudice to the plaintiffs caused by refusing to disapply the normal time limit, compared to the degree of prejudice the defendants caused by extending it, is sufficient to make it equitable to disapply the limit. The answer, inevitably, is 'Yes'. The defendants, however, argued that the plaintiffs will suffer no prejudice if their actions are statute-barred because in each case they have an unanswerable claim against their solicitors for damages for negligence. The plaintiffs, relying on *Birkett v James* [1978] AC 297, contended that this was an irrelevant consideration. I do not think that Lord Diplock's observations in that case at page 324, can be applied to cases arising under section 2D, because, under that section, the court is required to have regard to all the circumstances of the case, and this is certainly one of them. I do not think, however, that it carries much weight in these cases. The court is not concerned solely with financial prejudice to the plaintiff. It is prejudicial to be forced to start another set of proceedings and against a party whom one does not particularly wish to sue and to be deprived of a good cause of action against the original tortfeasor. This may not amount to serious prejudice but it has to be balanced against no prejudice to the defendant at all. He personally has lost nothing, since no loss falls on him in either event; one or other insurance company will pay the damages and costs and his insurers have lost nothing but a fortuitous bonus arising from a harmless error by the plaintiff's solicitor." 43. The decision in *Firman* was overruled (as to the issue of legal principle) only a year later by the House of Lords in *Walkley v Precision Forgings Ltd* [1979] 1WLR 606. There it was said that, because the claimant had issued the first writ within 3 years, he had not been prejudiced by the operation of the primary limitation period. Nothing was said about the observations in *Firman* on the exercise of the discretion, which, as it seems to me, were still valid and relevant to a case in which the writ had been issued out of time.

44. When the House of Lords decided *Thompson* in 1981, *Walkley* was still regarded as good law and, apart from affirming that the discretion under section 2D was unfettered, *Firman* was not referred to. Lord Diplock did not mention the passages from *Firman* which I have just quoted when making his own observations about the prejudice suffered by a defendant as the result of losing a limitation defence: see paragraph 20 above. As I have said, he was of the view that a defendant would suffer prejudice as the result of losing a limitation defence but thought that, if the delay in issuing proceedings had been short, the loss of the defence might be regarded as a windfall. However, Lord Diplock's view on that point was not part of the ratio of the decision. The House had only to decide whether an unreported case called *Browes v Jones and Middleton* had been correctly decided. In that case, it had been held

that, where a claim had become statute-barred due to the negligence of a solicitor and the claimant had an unanswerable claim over against the solicitor, section 2D did not permit the court to make a direction to allow the late claim to proceed. The House of Lords said that that was wrong; the court still had a discretion and it was unfettered. Lord Diplock gave examples of the kinds of prejudice which the claimant might still suffer even though he had a good claim over against his solicitor. These included the inconvenience and delay in having to instruct new solicitors and to start a new action. But, in the passage which I quoted earlier, Lord Diplock considered that the financial prejudice which the defendant would suffer by the loss of its accrued limitation defence was relevant under what is now section 33(1)(b) and that the corresponding financial prejudice to the claimant, by the operation of what is now section 11, was 45. 46. 47. relevant but might be tempered by the existence of a claim against his negligent solicitors. The House did not seek to give guidance as to the general approach to the exercise of the discretion. It merely remitted the matter to the judge. In particular, Lord Diplock did not explain how he thought that the concept of windfall should be treated in the exercise of the discretion. He implied that the loss of a windfall defence would not be as prejudicial as the loss of a defence which was not a windfall. But he did not say why not. Lord Diplock's observations are, of course, persuasive but, given the narrow issue which fell to be decided, it seems unlikely that the manner of the exercise of discretion would have been fully argued. *Firman* was still regarded as being wrongly decided when the Court of Appeal came to consider *Hartley*. However, it appears that the Court recognised the relevance of the observations of Lord Denning and Ormrod LJ to a case where there had been a failure to issue a writ in time (as opposed to a failure to serve it), as they cited the passages I have quoted, and more. The facts of *Hartley* were similar to those of the two instant appeals, particularly *Cain v Francis*. The claimant had intimated a claim very promptly and the defendant had admitted liability. By error, the claimant's solicitor issued the writ one day late. On an application for a direction under section 33, the district judge and the judge on appeal refused and the claimant appealed to this Court. *Parker and Leggatt LJ* allowed the appeal on the basis that the judge had been plainly wrong. *Parker LJ* observed at page 979G that, if the discretion could not be exercised in that case, it was difficult to envisage circumstances in which it ever could be. 48. Before considering the authorities, *Parker LJ* said, at page 972F: "If the action is not allowed to proceed, the plaintiff will be deprived, through no fault of her own, of an action to which there is no defence on liability. The claim was promptly notified and the defendants' liability to defend the action on the merits is not in the slightest degree affected by the fact that the writ, instead of being issued in the afternoon 11 December, was issued in the morning of 12 December. ... Although, however, the plaintiff will be deprived of her claim against the defendants if the action is not allowed to proceed, she will have an equal, and possibly better, claim against her solicitors. As to the defendants, the fact that the writ was issued a few hours late provides them, if section 11 is not disappplied, with a wholly fortuitous cast-iron technical defence to a claim, which in justice they ought to meet, of which defence they will be deprived if section 11 of the Act of 1980 is disappplied (emphasis added). " 49. *Parker LJ* then cited extensively from *Firman* and *Thompson* including the passages which I have

quoted above. He was of the view that, in *Thompson v Brown*, the House of Lords had affirmed almost all of what the Court of Appeal had said in *Firman*. The only part of the decision that was still regarded as being wrong was the point on which Walkley was still regarded as good law. *Firman* has now been completely rehabilitated since the House of Lords overruled Walkley in *Horton v Sadler*. 50. Parker LJ then turned to *Donovan v Gwentys* [1990] 1 WLR 744. The facts of that case were very different from those in *Hartley*. The claimant was a minor at the time of the accident and time did not begin to run until about 18 months later. She issued her writ late, about five and a half months after the primary limitation period expired; that was 5 years after the accident. The accident had not been notified to the defendant until about three weeks before issue. The judge at first instance made a direction under section 33 and the Court of Appeal upheld him. The House of Lords allowed the appeal. When considering which periods of delay the court was entitled to take into account for section 33 purposes, Lord Griffiths accepted that the delay referred to in section 33(3)(a) was the delay after expiry of the primary limitation period. At page 478, he said: "It does not, however, follow that, in weighing the prejudice to the defendant, the court is not entitled to take into account the date upon which the claim is first made against the defendant. Compare the facts in *Thompson v Brown* with the facts of this case. In *Thompson v Brown* the claim had been made within a few weeks of the accident and liability and damages had been fully considered by the defendants' insurers at an early stage. At the time the limitation period expired, the defendants' insurers were in a position to settle the claim on its true merits. The fact that the plaintiffs' solicitors slipped up so that the writ was issued 37 days late was a totally unexpected windfall benefit for the defendants' insurers. The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal (emphasis added). The defendants' insurers never suffered from that disadvantage in *Thompson v Brown* and thus the degree of prejudice they suffered was slight. By contrast, in the present case, the defendants are faced with a truly stale claim first made upon them five years after the event. The degree of prejudice is incomparably greater than the degree of prejudice suffered by the defendants in *Thompson v Brown* and it would be absurd if this could not be taken into account... In weighing the degree of prejudice suffered by a defendant it must always be relevant to consider when the defendant first had notification of the claim and thus the opportunity he will have to meet the claim at the trial if he is not to be permitted to rely on his limitation defence." 51. After reviewing the authorities, Parker LJ considered the approach which the judge below had taken in that case. It was based largely on the view that the loss of its limitation defence would be a significant commercial prejudice to the defendant and the other factors (which he called equitable factors by which I think he meant non-pecuniary factors which would prejudice the plaintiff if a direction were refused) did not provide a reason to deprive the defendant of its defence, windfall though it may have been. Parker LJ said that this approach was wrong. The judge had been too restrictive. His task was not simply to balance the prejudice to the parties, it was to reach a conclusion that was 'fair and just'. Parker LJ then made some general observations about the exercise of discretion. At page 979H he said: "It appears to me to be apparent that in all,

or nearly all, cases the prejudice to the plaintiff by the operation of the relevant limitation provision and the prejudice which would result to the defendant if the relevant provision were disapplied will be equal and opposite. This might lead one to suppose that the prejudice referred to in section 33(1)(b) was not the deprivation of the fortuitous defence as such but prejudice to the defence on the merits caused by the delay. Both Lord Denning MR and Ormrod LJ in *Firman v Ellis* appear to have assumed that this was so. That this was the Parliamentary intent appears to be indicated by the fact that, as Lord Diplock pointed out in *Thompson v Brown*, [1981] 1 WLR 744, 751 only section 33(3)(a) and (b) appear to go to prejudice and both are dealing with the merits. The decisions of their Lordships preclude such a construction of the section. In my view, however, as the prejudice resulting from the loss of the limitation defence will always or almost always be balanced by the prejudice to the plaintiff from the operation of the limitation provision, the loss of the defence as such will be of little importance. What is of paramount importance is the effect of the delay on the defendant's ability to defend. The specific example given in section 33(3)(b) so indicates. (emphasis added) ” 52. Parker LJ was of the view that the fact that the defendant would lose a cast-iron defence if a direction were made was not of great significance. At page 980F he observed that, if the loss of a legal defence were a reason for refusing a direction, section 33 would be wholly inoperative. The section was specifically designed to override the legal defence. Parker LJ concluded his judgment with a citation from *Preston & Newsoms Limitation of Action*, 4th ed. (1989) page 26 paragraph 4.4.4 as follows: “A defendant will normally suffer prejudice if an order is made, but he will only have lost a windfall unless his ability to defence has been affected by the delay: *Thompson v Brown*. Consequently, if the delay (however long) does not seriously affect the evidence, the power will generally be exercised: eg *Brooks v J&P Coates Ltd* [1984] 1 All E. R. 702 and *Hutcheson v Pontinental (Holiday Services)Ltd* [1987] B. T. L. C.81.” Parker LJ approved of that passage save that he thought it would be better to omit the words ‘however long’. 53. Leggatt LJ agreed that the judge had been plainly wrong to ignore the fact that the accrual of the limitation defence in the instant case had been a windfall, by which he meant an unexpected adventitious advantage. He gave his reasons at page 982B: “In my judgment, in circumstances such as these it is not right to focus exclusively, as the defendants did in their skeleton argument, on the adverse effect of a decision to allow the action to proceed, but the consequences should also be considered of a decision not to allow it to proceed. The defendant's approach produces the bizarre, if logical, result that the prejudice to the defendants is greatest when they have no defence to the merits of the claim, because not disapplying the limitation provision affords them a defence on liability which they would not otherwise have had. But a decision not to allow the action to proceed would cause the defendants to suffer no injustice whatever in being required to meet a claim of which they had had prompt notice and which they had had every opportunity to preparing themselves to meet. Equity need not be concerned to afford adventitious protection to a tortfeasor who has not been deprived of any opportunity to defend himself (emphasis added).” 54. 55. The only other authority to which I wish to refer is *Horton v Sadler*, where the main issue was whether Walkley had been correctly decided. After concluding that it had not, Lord Bingham made some brief

observations about the exercise of the discretion and expressed his approval of the decision in *Hartley*. After noting that, in that case, the defendant had had early notice of the claim and that the delay had not affected his ability to defend the claim, he said at paragraph 33: “Thus even if the plaintiff had a cast-iron claim against her solicitors the limitation defence could fairly be regarded as a windfall or gratuitous bonus.” Lord Hoffmann also considered an argument raised by the Motor Insurers Bureau. The argument was that the Law Commission Report (Number 20, Cmnd 5630 (1974)) on which the Limitation Act 1975 had been based intended the discretion to disapply the primary limitation provision to be applied only in exceptional cases. He noted, however, that the section had been drafted in very general terms. He drew attention to the line of authority running since *Firman*, as approved in *Thompson* to the effect that the discretion was unfettered. He said that, since 1981, it had been the practice of the courts regularly to exercise the discretion in favour of the plaintiff in all cases in which the defendant could not show that he had been prejudiced by the delay. He added at paragraph 44: “no matter how negligent the claimant’s solicitors may have been in the simple skills of keeping a diary, the plea of limitation which the statute confers upon the defendant is, in the absence of forensic prejudice, described as a windfall of which he can properly be deprived.” 56. 57. 58. 59. 60. Lord Hoffmann then recited the arguments advanced on behalf of the MIB as to why this approach was wrong and should be reversed by the House. After recognising that these arguments were not without force, Lord Hoffmann said that these arguments raised policy issues which were for Parliament rather than for judicial decision. He said: “For the moment, we have years of settled jurisprudence on how the discretion should be exercised which I think it would be wrong to disturb”. It appears to me that there is now a long line of authority to support the proposition that, in a case where the defendant has had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall and the prospect of its loss, by the exercise of the section 33 discretion, should be regarded as either no prejudice at all (see *Firman*) or only a slight degree of prejudice (see *Gwentys*). It is true that, in *Thompson*, Lord Diplock said that the accrual of the defence might be regarded as a windfall only where the delay in issuing proceedings was short. However, with great respect, it does not seem to me that the length of the delay can be, of itself, a deciding factor. It is whether the defendant has suffered any evidential or other forensic prejudice which should make the difference. If the House of Lords were not prepared to disturb this long-established jurisprudence which runs from *Firman v Ellis* in 1978 to *Horton v Sadler* in 2007, it does not seem to me that Mr Burton has or should have much prospect of persuading this Court that the practice has been wrong and should now be changed. I regard the matter as settled. Moreover, although the discretion given by the statute is unfettered, it must be exercised consistently with the broad guidance given by the higher courts, otherwise, as I have said earlier, applications for a direction will be a lottery. Having said that, it does appear that, although the authorities all lead to the same result, they do not speak with one voice as to the underlying rationale. In the citations above, I have italicised the passages in which the judges have explained their reasoning. The reasons differ. In *Firman*, Lord Denning MR thought that it was a matter of simple justice that it was the tortfeasor’s insurers who should pay the damages and not the

insurers of the solicitor who had made a minor slip, which had not caused any prejudice. Ormrod LJ said that, in those cases, the procedural mistake had not caused any inconvenience let alone prejudice. So, it seems that they thought that the direct financial prejudice flowing from the loss of the limitation defence was not relevant to the balancing exercise. It was only the forensic prejudice which mattered and, in those cases, there was none. In *Thompson*, Lord Diplock thought that the prejudice to the defendant in the making of a direction clearly included the loss of the accrued limitation defence which would mean that the defendant would have to pay damages which he would otherwise avoid. That prejudice would be at its highest where the defendant had no defence on the merits. But, he said, to my mind rather cryptically, that where the delay was short, the loss of an accrued limitation defence might be regarded as a windfall. As I have noted, he did not say why that meant that it should either not count as prejudice at all or not count as heavily as the loss of a defence which was not a windfall. One possible and rational explanation was that, if the delay was short, there could not be any (or much) forensic prejudice to the defendant. But did that mean that the judge should 61. 62. 63. 64. ignore the direct financial prejudice which would result from the loss of the defence? It is not clear. In *Donovan v Gwentys*, Lord Griffiths thought that prejudice arose where a defendant did not have notice of a claim until it had become stale and there was only slight prejudice where a defendant had been notified promptly and had had every opportunity to investigate the claim. He was of the view that what mattered was the prejudice to the defendant in the conduct of the action, which of course included investigating the circumstances of the accident. He did not consider whether the loss of the limitation defence was, per se, prejudice which was to be taken into account. Finally, in *Hartley*, Parker LJ grappled, as it seems to me somewhat uneasily, with the conflict between Lord Diplock and Lord Denning MR. He said that the prejudice to the claimant from the operation of section 11 and the prejudice to the defendant from the loss of its accrued limitation defence are equal and opposite; they cancel each other out. He must have meant the direct financial prejudice. But that balancing exercise ignores the effect of the claimant's claim against his solicitor, which appears to be at least one of the circumstances of the case. However, the balancing exercise as envisaged by Parker LJ led him to suppose that the prejudice referred to in section 33(1)(b) was not that kind of financial prejudice but the prejudice to the merits of the defendant's case as the result of the delay. It seems that Parker LJ was saying that the section was not concerned with direct financial prejudice at all, only forensic prejudice caused by the delay. As I have said, the authorities all arrive at the same result but by different reasoning. I believe that it would be helpful to judges if some rational explanation for the authorities could be advanced. I have searched for some coherent explanation of Parliament's intention within the words of the section itself but did not for myself find one. However, having now read the Chancellor's judgment, I agree with his analysis of section 33(1)(b). I do not think one can infer much from the six factors in section 33(3) which, as Lord Diplock said, are 'a curious hotchpotch'. I agree with the Chancellor that the phrase 'it would be equitable to allow the action to proceed' is at the heart of the section. Equitable here means 'fair and just'. With that in mind, I think that the rationale underlying the provision must be found in a consideration of

the background to limitation law as a whole. It is fundamental precept of the common law that a tortfeasor should compensate the victim of the tort. At common law, the victim, now the claimant, could sue the tortfeasor at any time, without limitation. It is also a fundamental precept that any person who is sued in respect of a tort should have a fair opportunity to defend himself. In 1623, a uniform limitation period of six years was introduced for all actions. The rationale behind the limit was to protect defendants from stale claims. It was not fair and just to impose liability on a defendant who had not had a proper opportunity to investigate the allegations against him and to assemble the evidence necessary to defend himself. There may have been other policy reasons for the provision, such as the desirability of finality but, as between the parties, the reason was to protect the defendant from a stale claim. 65. The effect of the limitation provision was not to extinguish the claimant's right of action, only to bar his remedy. The Act did not provide a defence on the merits; the defendant was *ex hypothesi* still a tortfeasor; but he could not be sued. The six year 66. 67. 68. 69. period must have been Parliament's best estimate of when it would be unfair or unjust to the defendant to allow the claimant to enforce his right of action. So far as personal injury actions were concerned, the limit remained at six years until the Limitation Act 1954, when it was reduced to three. I infer that Parliament must have thought that, in the context of that kind of action, unfairness to the defendant was likely to arise at an earlier date than in other actions. Any limitation bar is arbitrary. It cannot always be fair and just to permit a claimant to proceed with his action if he commences it two years and 364 days after the relevant injury. Significant prejudice and unfairness might already have arisen, even long before the expiry of three years, for example by the death of an important witness. But the rule is that the claimant can proceed, notwithstanding any unfairness to the defendant. On the other hand, the expiry of the three year term does not automatically create unfairness. Yet what was deemed fair on Tuesday is deemed unfair on Wednesday. There might be no unfairness to the defendant even if he is required to answer the claim, say, five years after the accident. The three year limit is Parliament's best guess as to when prejudice can be expected to have arisen such that it is unfair to expose the defendant to the claim. The imposition of an arbitrary limit could only ever hope to do rough justice. In 1975, in response to recommendations in the Law Commission's paper, mentioned above, Parliament introduced further provisions, designed principally to improve on those introduced in the Limitation Act 1963 and to assist a claimant who was suffering from a disease which had developed slowly over many years to pursue a cause of action which, under the old law, had become time-barred before he even knew of its existence. Those 'knowledge' provisions were contained in sections 2A to 2C of the Act of 1975 and are now to be found in sections 11 to 14 of the Act of

1980. But in addition, Parliament introduced section 2D, now section 33 of the 1980 Act, which was not related to the knowledge provisions and which applied to all personal injury actions, even where knowledge was not a problem. The only rationale which could have underlain the introduction of this provision was a desire to refine the rough justice of the old arbitrary provision. Instead of a limitation rule of thumb, the courts would be required

to consider what was fair and just in all the circumstances of the individual case. In my view, the words of section 33 must be construed against that background. The context is that the claimant had the right to pursue his cause of action which he has lost by the operation of section 11. The defendant, on the other hand, had an obligation to pay the damages due; his right was the right to a fair opportunity to defend himself against the claim. The operation of section 11 has given him a complete procedural defence which removes his obligation to pay. In fairness and justice, he only deserves to have that obligation removed if the passage of time has significantly diminished his opportunity to defend himself (on liability and/or quantum). So the making of a direction, which would restore the defendant's obligation to pay damages, is only prejudicial to him if his right to a fair opportunity to defend himself has been compromised. 70. Thus, although on a literal construction of section 33(1), it appears to be relevant to the exercise of the discretion that the defendant would suffer the financial prejudice of having to pay damages if the arbitrary time limit were to be disappplied, Parliament 71. 72. 73. 74. cannot have intended that that financial prejudice, as such, should be taken into account. That is because, in fairness and justice, the defendant ought to pay the damages if, having had a fair opportunity to defend himself, he is found liable. If having to pay the damages is not a relevant prejudice under section 33(1), it cannot be relevant either as one of the circumstances of the case. I accept that some judges appear to have thought that this financial prejudice, as such, was relevant to the exercise of the discretion. In particular, Lord Diplock appears to have thought so and the rest of the House agreed with him. I must say, with hesitation and great respect, that I think he was wrong. I comfort myself with the knowledge that his remarks were not essential to the ratio of the decision in Thompson. Apart from Lord Diplock's, all the other judicial utterances are broadly consistent with the reasoning I have advanced. A claimant's position is different. He has a substantive right, his cause of action, but he cannot proceed with it because of the operation of section 11. He has therefore been prejudiced by the loss of the right to enforce his cause of action. That prejudice is greatly reduced if he has a good claim over against his solicitor. In a case where the defendant has suffered some forensic or procedural prejudice, which will diminish his ability to defend himself, it will be relevant to consider that the claimant has another remedy. But the fact that the claimant has a claim over will not necessarily mean that the direction should be refused. It might still be fair and just that the defendant remains in the frame. It is the defendant who has, *ex hypothesi*, committed the tort and, as Lord Denning M. R. pointed out, it is his insurer who has received the premiums in respect of the relevant risk. So the fact that the claimant will not suffer financially in the end is relevant but not determinative. 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. Although the delay referred to in section 33(3) is the delay after the expiry of the primary limitation period, it will always be relevant to consider when the defendant knew that a claim was to be made against him and also the opportunities he has had to investigate the claim and collect evidence: see *Gwentys*. If, as here, a defendant has had early notification of a claim and every possible opportunity to investigate and to collect evidence, some delay after the expiry of three years will have had no prejudicial effect. Application to the two appeals 75. 76. 77. The facts in *Cain v Francis* are very similar to the facts in *Hartley*. It seems to me that the judge fell into error first because, although he was referred to *Hartley*, he did not apply it when making his decision. He considered that the loss of the accrued limitation defence would amount to real prejudice to the defendant. As I have explained, the loss of that defence was not a consideration relevant to the exercise of the discretion. So there was an error of law which entitles this court to substitute its own decision. The defendant below did not even attempt to argue that she had suffered any other prejudice besides the loss of the limitation defence. The claim was promptly notified and an admission of liability was soon made. The defendant had every chance to investigate the remaining quantum matters. The delay in issue was of one day. That did not cause any prejudice at all; it did not even cause inconvenience. In such a case, it barely becomes necessary to consider whether the claimant has been prejudiced by the operation of section 11. However, he has. Even though he will not suffer a financial loss, if no direction is made, Mr Cain would have to sue Mr Mansell his solicitor, with whom he has been since shortly after the accident and who he has continued to instruct, notwithstanding his error. Further, he would have to repay the substantial interim payments received. However, before this Court, Mr Burton has said that it would allow time for repayment until Mr Cain was put in funds by Mr Mansell's insurers. That greatly reduces that aspect of the prejudice. Even taking account of the benefit of the claim over and even without the problem of repayment, it seems to me that Mr Cain would suffer some real prejudice. One could say in this case, as in *Hartley*, that, if a direction is not to be made here, it is hard to envisage any case in which it could be. In my view, it is fair and just that a direction should be made under section 33 so that the claimant's action may proceed. I would allow the appeal in *Cain v Francis*. The appeal in *McKay v Hamrani* is different in that the delay was longer and the defendant claimed to have suffered other prejudice besides the loss of the limitation defence. Although Judge Faulks made an error in thinking that counsel had agreed that he should leave the loss of a windfall defence out of account, he did not, in my view, make an error of law in acting on that mistaken belief. He was quite entitled to conclude that the loss of the limitation defence should be disregarded. He was right to examine the effect of the delay on the future conduct of the action and/or the damages which would have to be paid and was entitled to conclude that the delay, even though it was as long as a year, had not significantly prejudiced the

defendant. He was also entitled to conclude that, if he refused to make a direction, the claimant would suffer some prejudice, even though she would have a claim over to replace her original cause of action. He decided that it would be equitable to allow the action to proceed. This conclusion was not vitiated by any error of law and I do not think that it should be disturbed. I would dismiss the appeal in McKay v Hamrani. Lord Justice Maurice Kay: I agree with both judgments. The Chancellor 78. In cases to which s.11 Limitation Act 1980 applies an action may not be brought after the expiration of the periods prescribed by subsections (3) and (4). In any such case there will be no trial on the merits. The purpose of s.33 is to enable the court to review the position in the light of the facts of individual cases. The object of the exercise is to consider the circumstances of individual cases in order to determine whether the action should proceed to trial. That this is the purpose is confirmed by the material words in subsection (1) which pose the indirect question whether “...it would be equitable to allow the action to proceed...”. The action can only proceed in cases to which s.11 applies if the provisions of that section are disapplied by a direction to that effect made by the court under s.33. By subsection (1)(b) the court is required to have “regard to the degree to which – [such a decision]...would prejudice the defendant...”. Thus the prejudice is to be ascertained on the assumption that the provisions of s.11 have been disapplied by an order made under s.33. The subsection does not direct the court to have regard to the prejudice the defendant would suffer from the very act of disapplication. The consequence of the disapplication of s.11 will be that there may be a trial of the claimant’s claim on its merits notwithstanding the delay in commencing the proceedings. Has that delay caused prejudice to the defendant in its defence? If so, does it outweigh the prejudice to the claimant of being denied a trial at all? In addition the court will need to consider all the circumstances of the case and in particular to the other aspects of the case enumerated in subsection (3). In that context it does not appear to me that the loss of a limitation defence is regarded as a head of prejudice to the defendant at all; it is merely the obverse of the disapplication of s.11 which is assumed. It is this consideration which, in my view, accounts for and justifies the marked reluctance of the courts, as demonstrated by the judgments to which Smith LJ has referred in detail, to have regard to the loss of a limitation defence. I am grateful to Smith LJ for setting out the facts of the two appeals and the relevant details of the previous decisions on this matter. I have nothing to add in either respect. I agree with her conclusion in paragraph 73 and the application of the rationale to which she refers to the facts of the two appeals. I have added these few words of my own by way of exegesis from the wording of s.33 in its wider context. 79. 80. 81. 82.

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