Neutral Citation Number: [2023] EWHC 896 (KB)

Case No: QB-2019-001967

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/04/2023

Before :

THE HONOURABLE MR JUSTICE MARTIN SPENCER

- -

Between :

JUANITA TYERS **(widow and executrix of the estate of GEORGE TYERS deceased)**	**Claimant**
- and -	
(1) AEGIS DEFENCE SERVICES (BVI) LIMITED **(2) CAMERON INTERNATIONAL** **(3) GCC SERVICES**	**Defendants**

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Miss Sarah Crowther KC appeared for the Claimant
Mr Patrick Blakesley KC appeared for the Defendant

Hearing dates: 20th February-21st February

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21st April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE MARTIN SPENCER

Mr Justice Martin Spencer :

Introduction

1. On 29th May 2012, George Tyers (hereafter, "the deceased"), a South African national engaged to carry out security work for the Defendant at the Cameron International Life Support Camp in the North Ramallah Oil Field, Basra, Iraq, went for an early morning jog around the perimeter of the camp, which was still in the course of construction. His movements were observed by a security guard in a guard tower, Ahmed Shati. Next to Tower One was a double steel sliding gate. The deceased entered the inner perimeter of the camp through the gate, and pushed the gate closed after him. However, the gate, weighing some 3 tons, was not secured to its stanchion with stoppers or flanges, and it toppled over onto the deceased, crushing him and causing injuries which were fatal. By this action, his widow, Juanita Tyers (hereafter "Mrs Tyers" or "the Claimant"), seeks damages on behalf of the Estate pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 and on behalf of herself and their daughter, Georgina Tyers (born on 5 May 2009 and therefore aged 3 at the date of her father's death), as dependants pursuant to the Fatal Accidents Act 1976.

2. Proceedings were issued on 29th May 2019, 7 years after the accident and 4 years after the expiry of the limitation period, if time is taken to have started to run from the date of the accident. The proceedings were served on the Defendant on 10th August 2020. It is the Claimant's case that her "date of knowledge" was not in fact until 1st November 2013, so that the primary limitation period expired on 1st November 2016 and the claim was 2 years, 8 months out of time. On either view, it is agreed that, in order for Mrs Tyers' claim to succeed, she requires the court to exercise its discretion pursuant to section 33 of the Limitation Act 1980 and disapply the primary limitation period. It is further agreed that, Georgina being a minor, the limitation period is statutorily suspended until she reaches her majority, so that the action may proceed in respect of her claim irrespective of the court's determination on the section 33 issue. There is an issue between the parties as to whether the fact that Georgina's claim will continue in any event is a relevant consideration for the court to take into account in its section 33 determination. It is also relevant for the court to know, in deciding the section 33 issue, how long out of time the proceedings were issued and therefore it remains necessary for the court to decide the "date of knowledge" issue.

3. By her Order dated 26th May 2022, Master McCloud ordered that limitation be tried as a preliminary issue. This was agreed, although it seems that the Claimant also wanted liability to be tried at the same time. It is not clear that, in objecting to that course, the Defendant's advisers appreciated at the time that the trial would be proceeding in respect of Georgina's claim in any event: from reading the Defendant's outline submissions for the hearing before Master McCloud, I would surmise not, given the arguments made about costs savings. In the event, the hearing before me proceeded on the issue of limitation alone.

4. The issues that arise for determination are:

(i) When the primary period of limitation expired, and therefore how long out of time the proceedings were issued;

(ii) Whether the court should exercise its discretion under section 33 of the Limitation Act 1980 to disapply the limitation period and allow Mrs Tyers' claim to proceed; incorporating

(iii) Whether, for the purposes of section 33, the court can take into account the fact that the action will proceed in any event in respect of Georgina's claim.

The Detailed History

5. Mrs Tyers was born on 23rd January 1971, the deceased was born on 20th February 1975, and they were married on 16th March 2002. Their only child, Georgina, was born on 5th May 2005. In the Defence, it is pleaded that the deceased was engaged from time to time since April 2005 to provide security services under a series of contracts for services. At the time of the accident, the governing contract provided for him to perform security services as a security team member in Iraq for a 6 month period from 1st February 2012 to 31st July 2012. Paragraph 8 of the contract provided:

> "This Contract shall be governed by the laws of England. The parties agree to submit to the exclusive jurisdiction of the courts of England to settle any claim or matter arising under or in connection with this Contract …"

The deceased was promoted to team leader on 28th May 2012, the day before his accident.

6. The Defendant (also referred to hereafter as "Aegis") is a private security services company incorporated in the British Virgin Islands and was contracted by an American company, Cameron International (hereafter "Cameron"), to provide security services in Iraq, a project which was known as "Project Arcadia". Cameron was engaged in the provision of support services to the oil and gas industry in Iraq and in particular the construction and operation of a Life Support Camp ("LSC") on the North Rumala Oilfield, near Basra. The LSC remained under construction by GCC Services (hereafter "GCC"), a company incorporated in the United Arab Emirates.

7. The events in the period leading up to the accident are described in an email dated 20th October 2020 from Mr Robin Furphy who was a Team Leader and who, like the deceased, was similarly contracted to the Defendant and engaged on Project Arcadia. He stated:

> "Build up to Occupation:
>
> In or around June/July 2011, Cameron leased land for their planned facility in North Rumaila. Aegis operated out of what was the CMO Villa in Basra providing mobile security for Cameron.
>
> "Work began on the site in the form of UXO Clearance followed by land grading /compacting."
>
> Aegis conducted client movement/site visits on a daily basis over several months to allow Cameron in-country manager and visiting personalities oversight as construction began.
>
> Prior to the planned occupation, the build-up phase saw the construction of Project SOPs in line with the SOW. Security & safety briefs were held discussing HSE practices. These briefs would have involved all Aegis staff assigned to the Cameron Project.
>
> In late Dec 2011/early 2012 Cameron moved up the timeline in regards to occupation of the site. The original plan was the site would not be occupied until complete.

Aegis Iraqi Guard Force and two Mobile Security Teams including 2-3 Cameron clients moved into a "fly camp" on the construction site.

On occupation of site Aegis HSE SOPs were adhered to in relation to all real estate occupied by our staff.

Occupation / Construction:

Cameron contracted GCC to construct the camp who in turn would have subcontracted to various Basra & Baghdad contractors.

KBR were contracted by Cameron to provide 2xQSHE Managers to live on site. This was short lived with their services terminated by Cameron. I believe that this was due to the QSHE Managers raising flags and causing delays to various aspects of construction.

The above meant that there was no QSHE Manager based on site.

I do not believe GCC had a construction manager on site at any time.

All Aegis & Cameron staff were accommodated in a "fly camp" located in the South Western area of the camp, well away from the ongoing construction areas.

Project Routine:

HSE briefs were conducted with all visitors to site and the construction areas would have been out of bounds to persons not involved in construction.

Aegis daily routine would have seen our staff conduct an evening brief, this covered all security related matters, project business and anything relating to site HSE.

The only designated area for fitness training (running) was on the compacted track in the area between T Walls & chain link fence. All staff were aware of this."

8. The important points that emerge from this email are that:

(i) it was originally planned that the site would not be occupied until construction had finished;

(ii) in early 2012, Cameron decided to occupy the site, although still under construction, and engaged KBR to provide two Health and Safety Managers;

(iii) The services of the Health and Safety Managers were dispensed with after a short time because they had "raised flags" thereby causing delay to various aspects of the construction, leaving no Health and Safety Manager on site;

(iv) The Defendant's staff conducted daily health and safety briefs covering all security-related matters, project business and anything related to the site.

9. The accident to the deceased occurred at about 05:30 hours on 29th May 2012. The Defendant immediately launched an investigation, in the course of which witness statements were taken. Ahmed Shati, also contracted to the Defendant, stated:

> "About 05:30 hours on 29th May 2012 I was manning Guard Tower One. I saw George Tyers running on the track around the area between the T Walls and fence. He approached from the area of Tower Four. When he arrived at the Double Steel Gate beside Tower One, he entered through the gates. He then started to close the gate to my left (from Tower One). The gate came off its rollers and fell on top of George. I released my airhorn and blew my whistle."

10. Similarly, Mr Abdul Bashir stated:

> "About 05:30 hrs on 29th May 2012 I was manning the main gate to the Cameron Facility. I observed George Tyers running around the track between the T Walls and the Chain Link Fence. After running one lap I saw George going towards the two large gates. He went inside and started closing the gate on the right. As he walked towards the left gate, the right gate fell off the rollers onto George. Immediately I shouted for my Supervisor who was inside the guard room."

11. Other witnesses describe the first aid given to the deceased and the efforts made to resuscitate him and save his life. Further details of the background and circumstances

of the accident are contained in an email from Baker McKenzie (Cameron's solicitors) to Mrs Tyers sent on 4th November 2013 (see paragraph 21 below).

12. In a statement dated 23rd June 2012, ie within a month of the accident, Mr Furphy wrote:

> "Throughout the whole incident all members of Project Arcadia, G6, and RSMI fought extremely hard to resuscitate George but unfortunately his injuries were fatal.
>
> "In the 6 months I have been based at the Cameron Facility I never received any form of HSE Brief from the GCC HSE Officer. I am not even sure that GCC had one. At no time did GCC brief myself or any other Aegis personnel that there were any areas Out Of Bounds due to hazards. The gate that fell on George Tyers had no means of retention/stoppers/warning signs. And once again we had not been instructed by GCC that these gates were to be avoided. In fact, these gates were used for heavy vehicles and pedestrian movement. Only after the incident was the area taped off and placed Out of Bounds. Nearly a month after, GCC has fitted stoppers/chains/retainers to the gates. These do not appear to be of good quality. I firmly believe that if GCC had implemented a HSE Plan our colleague would still be alive today. Currently over 75% of the facility remains out of bounds due to potential hazards and debris, and this was implemented by Aegis personnel not GCC HSE."

13. After the accident, the matter was seised by a local Iraqi court. At a court hearing on the 31st May 2012, when the Judge of the Az Zubayr court was presented with a request from the Defendant for the body of the deceased to be released from legal proceedings in order to allow for his body to be repatriated to his family in South Africa, the Judge demanded that GCC, which had installed the gate at the Cameron LSC, issue a statement to the court to the effect that they had constructed the gate. A second court hearing was concluded on 3rd June 2012 when the Judge was satisfied that he was in possession of all the necessary legal paperwork for subsequent culpability and liability hearings to be conducted and he signed the release paperwork for the deceased's body to be repatriated.

14. In her statement, Mrs Tyers states that, in June 2012, she received a payment via Aegis in the sum of $200,000 (USD) as an insurance pay-out on a policy taken out by Aegis.

15. The Defendant's report into the accident was completed on 27th June 2012. This was a very full report, with witness statements and photographs attached. The conclusion was as follows:

> "The Construction Company GCC has, post incident, implemented a HSE representative at the Cameron International LSC. Despite his efforts there continues to be daily breaches of normal Health & Safety Protocol. Deputy Country Manager Dominic Collins is in liaison with the Cameron International Security advisor Stan Webster to increase basic safety awareness at the site. Aegis employees remain vigilant and brief their clients at the site accordingly in order to mitigate risk.
>
> "There is no evidence to show that any member of the Aegis project staff were at fault. The lack of Health & Safety measures of any sort is the reason that this tragic incident was not avoided."

This report was released to Mrs Tyers on 3rd September 2013.

16. Mrs Tyers' link to Aegis and what was happening in Iraq with the investigation and the Iraqi court proceedings was through the Defendant's Welfare and Information Support Officer, Jo Anthoine (who was based in London). Dealing with the tragedy of her husband's death was complicated by the death, 20 days later, of Mrs Tyers' father-in-law, the father of the deceased. Mrs Tyers was appointed as executor of the deceased's estate, and she engaged Mr Brenton Ellis to assist with gathering the estate's assets, including the contractual insurance policy taken out by the Defendant in respect of the deceased as employee (see paragraph 14 above).

17. The Defendant's General Counsel at this time was Sylvia White and she was in contact with Jennifer Ferratt, Cameron's Chief Counsel in October 2012, asking for a copy of Cameron's report into the deceased's death. On 5th October 2012, Ms Ferratt wrote to Ms White:

> "I am writing to you concerning the request recently made by your company (copy attached) for Cameron's investigative report relating to Mr Tyers's death. We will aim to provide you with a written report today or Monday summarizing Cameron's findings. In accordance with our internal policies, this

> document is generally created subject to attorney client privilege and prepared at my direction. We will be making an exception to share the document with Aegis, since Mr Tyers was your employee and we do not want his family's benefits withheld any longer. That being said, would you be willing to confirm that Aegis seeks to use Cameron's report for internal "need-to-know" purposes only and will otherwise keep it confidential?"

Ms White replied:

> "Thank you for your email. I have left a voice mail. We can confirm that we only require the report for internal purposes. I would like to ensure you retain privilege, if this is possible, so that any ultimate decision to release is entirely at Cameron's behest – perhaps we should discuss how we can best achieve this."

On 22nd October 2012, another of the Defendant's Legal Counsel, Dan Grundy, asked Ms Ferratt to send the Cameron report to Mr Ross Denton of Baker & McKenzie. There was then a call between Mr Grundy and Ms Anna Hensel, Cameron's Director of Oil & Gas, followed by an email from Ms Hensel as follows:

> "Shortly after our phone call, I was notified that his estate intends to pursue a claim against Cameron. In view of that, I am double checking with our counsel as well. I apologize for the delay but believe we will be able to reach out to Ross this week with something."

18. In her witness statement, at paragraph 37, Mrs Tyers states:

> "I believe that, during his time as the appointed agent on behalf of the estate,
>
> "Mr Ellis made contact with both Aegis and Cameron International between November 2012 and April 2013 in an attempt to secure from them a payment(s) for the lost income to George's estate to be paid for the estate's benefit. I do not recall having had any direct involvement in the preparation or approval of these letters. I assume they were prepared based on the information provided to Mr Ellis in the administration of the estate and were sent to Aegis and Cameron International in the best interest of the estate for the benefit of myself and our

> daughter. I do not recall, at any point, that I was given any advice that would constitute legal advice as to the merits of bringing a civil claim for damages as a result of what happened to George."

Subject to a slight inaccuracy in relation to the dates, I assume that it is this to which Ms Hensel was referring in her email of 22nd October 2012 to Mr Grundy.

19. On 7th March 2013, Cameron sent to Aegis a document titled "Notice of Claim for Indemnification" which stated:

> "Cameron has been contacted by legal counsel representing the family of the deceased. We anticipate that a claim will be filed against Cameron seeking monetary compensation for the death of Mr Tyers.
>
> "This is to advise you that, in the event of a claim against Cameron in relation to the Incident, Cameron will take all action necessary to seek indemnification from Aegis pursuant to the indemnification provisions of the Agreement."
>
> "Kindly provide us with the contact details of your insurance company providing the Commercial General Liability Insurance and other insurance coverage required under Article 12 and Schedule 5 of the Agreement. We also request that you provide us with the name and contact details of any other individual at Aegis with whom we should correspond in relation to this matter in the future.""

20. On 26th July 2013, Brenton Ellis chased Jo Anthoine for a copy of the police report into the deceased's accident, and she replied on 22nd August 2013:

> "Our Country Management Office in Iraq spoke to the local judge in Basra regarding the release of a police report and they confirmed that they are waiting for a number of documents before a report can be released. They have asked for three statements from our Iraqi contractors who were present at the time of the incident. We did take statements following the event but the judge has asked for further statements to be taken in front of a lawyer and our Deputy Country Manager and then

> stamped and sent to him for review. This request is currently being processed."

Ms Anthoine states in her witness statement that, in order to assist Mrs Tyers and the Estate with the life assurance claim, she agreed to liaise with the Legal and Ops teams regarding the release of the Aegis Inquiry Process report ("AIP") dated 27th June 2012 (see paragraph 14 above) and this was sent to Mrs Tyers on 3rd September 2013. The Claimant contends that her date of knowledge for the purposes of the Limitation Act 1980 was three weeks after receipt of this report, that is 1st November 2013, whereby the primary limitation period expired on 1st November 2016.

21. On 4th November 2013, Mr Tom Thraya of Baker Mackenzie, Cameron's solicitors, sent an email to Mrs Tyers setting out Cameron's understanding of the background and circumstances of accident. This stated as follows:

> "As the Cameron facility construction progressed and adequate site security measures had been adopted, a decision was made to build a temporary camp (fly camp) in the right-hand corner of our site footprint, the rationale being that this move to the field would greatly reduce our exposure to both militancy and road traffic collisions. The temporary camp consisted of sleeping cabins, office, dining trailer and a small kitchen. A final security review of the temporary camp was completed resulting in all Cameron staff and Aegis security personnel relocating to the camp; this was fully completed by 31st January 2012.
>
> On the 27th May 2012, staff vacated the temporary camp to occupy two of the permanent accommodation units of the new facility. On 31st May, the remaining security personnel completed their move to permanent accommodation units. This move placed all personnel closer to construction activity. All staff were made aware of construction site safety and that they were not to enter construction areas without an approved need to actually do so. Hard hats, high visibility vests and closed footwear (individually owned) were available for wear and were expressly required.
>
> Facility security is based on a layered approach, known as the "onion skin' principle, meaning, if one layer of defence is breached, you are immediately faced by another. One element

of facility security consists of erecting steel gates at the main entrance. The gates are constructed from steel; the exact weight has yet to be determined. The gates are to prevent hostile vehicle intrusion therefore size and weight is critical. The gates run on rollers to assist in their operation and to enable single man operation and are not mechanically operated. To support the gates' weight a concrete foundation was created under direction of GCC supervisors, which was poured in two stages and completed overnight on 24/25th May 2012. Irfan (GCC supervisor, a Pakistan national) supervised and participated with the security gate installation on the 27th May 2012, and later that day Irfan reported the gates installed. The only caveat mentioned was that the entrance could not be used for vehicular traffic as the concrete foundation would need a further 14 days to set and cure correctly. In addition, one of the rollers at the base of the gate needed adjusting for correct alignment when the gates were in the fully closed position. Irfan left the project for Pakistan (prior to the incident).

Incident Circumstances:

At 05:30 hours, on the morning of Tuesday, May 29th 2012, George Tyers (Security Team Leader, Aegis Private Security Company) went on his morning jog around the perimeter of the facility. George was wearing ear-phones and carrying an iPod.

About 05:32 hours, George's run took him past the main entrance which was still under construction. The security gates were in the open position. For reasons only known to George, it appears he decided to close the gates. It is believed he first went to the right-side gate, positioned both hands on the outer gate edge and pushed hard. The gate moved towards the closed position, probably in part under its own momentum. George then walked across the concrete roadway towards the open left-hand gate and it is our understanding that it was as he crossed, the right gate rolled out of the right upright support and then fell inwards towards George. It appears George had turned towards the falling gate, reaching upwards as if to try and support or stop the falling gate. The approximately two ton gate fell onto George.

Ultimately, George would have been unable to support the sheer weight of the gate. The gate came to rest against George's

> chest. His shoulders and head were free from the weight and extended from the gate."

22. At about this time, the deceased's mother and brother, Philip, contacted a South African lawyer called Jeremy Sarkin who had been recommended to Philip by a family friend. Philip Tyers recalls a meeting with Mr Sarkin in October 2013 when Mr Sarkin emphasised the need to gather as much information as possible, whether from the deceased's co-workers, Aegis, the Iraqi court and the other two companies involved, including Cameron. No advice was given about possible limitation periods, and soon after this, Mr Sarkin moved to England. This coincided with Mrs Tyers now feeling ready to deal with her own legal investigations: however, she states that she came to understand that little further progress could be made with any legal action until the Iraqi court had given its ruling on the case, thereby allowing the Iraqi police to release their report, but there was a long delay caused by, among other things, the judge with conduct of the case being changed three times. Enquiries were made with a US firm of Attorneys, Barnett, Lerner & Karsten, about a potential claim under the US Defence Base Act, but these came to nothing. Mrs Tyers clearly appreciated that there was a potential claim in negligence because she wrote on 12th April 2014 to an Iraqi lawyer, Mr Saleh Majid:

> "No-one is prepared to accept liability for my husband's death. I have seen the Aegis Incident Report and according to the witness statements and photographs, negligence is definitely at play.
>
> The case is currently (almost 2 years) before a Judge in Basra. Aegis keeps me informed from time to time. I wish to have some more insight on whom I can contact regarding the court documents which I believe is for public domain. The judge requested an Incident Report from Aegis, Cameron as well as the contracts between Aegis/Cameron and Cameron/GCC translated in Arabic.
>
> My husband was the sole provider for our family. I have recently started working again. Our daughter is 4 years old. My husband was 37 years old at the time of his death.
>
> Mr Majid, would it be possible for you to advise me on this matter."

It appears that the one thing which neither Mrs Tyers, nor any other members of her family, thought to do was to contact an English lawyer about a possible claim against Aegis, despite them regarding Aegis as having been the deceased's employer and despite the contract for the deceased's services specifying the applicability of English law.

23. The ruling from the judge in Iraq eventually came in early 2016 and Ms Anthoine provided a translated copy to Mrs Tyers by email on 6th April 2016. On 7th April 2016, Mrs Tyers replied asking Ms Anthoine what would happen next and she replied stating that she was not expecting any further action to be taken by the Iraqi authorities. Mrs Tyers says that she now "decided to seek more formal legal assistance myself" and she made enquiries with an English firm of solicitors who told her they were unable to assist but did tell her about the 3 year limitation period. She then contacted Leigh Day in September 2016 who confirmed that the primary limitation period was 3 years from the deceased's death and agreed to act.

24. Mr Joseph Dawson of Leigh Day states that, after a period of investigation and consideration of the merits of this matter, the Claimant instructed that firm to send a Letter of Claim to the Defendants (outside of the jurisdiction) in January 2017, proposing an agreement to a suspension of any arguments as to limitation until such a time after the Defendant had the opportunity to complete a Protocol investigation. He further states that, unfortunately, no response was received from the Defendants and chasing correspondence was sent, culminating in a warning being provided to the Defendants in March 2019 that unless a response was received in the jurisdiction of England and Wales, Part 7 proceedings were to be issued. Proceedings were issued on 29th March 2019 and, following a hearing before Master McCloud on 23rd December 2019, permission was granted to serve the proceedings out of the jurisdiction.

25. From the Defendant's perspective, I have been provided with two statements from Ms Jo Anthoine and also statements from Timothy Ignatiev and Ms Shairin Mohamed. Ms Anthoine refers to enquiries made by Mr Jay Vaghani, Legal Counsel to the Defendant's insurers Gardaworld, into the receipt of the Letter of Claim. Mr Vaghani emailed Aegis's BVI agent on 9th October 2020, querying whether the BVI office received the Letter of Claim or indeed any correspondence. However, Mr Vaghani was advised that there is no record of when the Letter of Claim was received by

Aegis's local BVI agent or whether it was even served. Following receipt of Mr Dawson's witness statement, Mr Vaghani sought further clarification from the local BVI agent for completeness. It was again confirmed that there is no record of the agent receiving the Letter of Claim or the letters dated 6th March 2019 and 1st July 2019, there being no service stamps on any of the letters. The letters dated 6th March 2019 and 1st July 2019 were copied to Aegis Defence Services Ltd, London office at 84 Eccleston Square, Pimlico, London, SWIV 1LP. Unfortunately, Aegis Defence Services Ltd had moved their registered office from 84 Eccleston Square to 1 London Bridge, London SE1 9BG, on 24th February 2015.

The Witness Evidence

26. For the purposes of the trial of the limitation issue, I heard evidence on behalf of the Claimant from Mrs Tyers, the Claimant and widow of the deceased, the Rev Jo Tyers (the deceased's mother) and Mr Philip Tyers (the deceased's brother) as well as Mr Dawson. For the Defendant, I heard from Ms Jo Anthoine, Mr Ignatiev, Gardaworld's Manager of Insurance and Welfare and Ms Shairin Mohamed of Kennedys, the Defendant's solicitors.

27. In her evidence, Mrs Tyers accepted that she knew Aegis was an English company, with George going to London for his interview. Mr Blakesley KC suggested that, in the circumstances, a good place to start would been an English lawyer and Mrs Tyers answered that they asked Mr Sarkin for advice who said it was complicated. Although she regarded Aegis as George's employer, Mr Sarkin had not mentioned the duty owed by an employer. Mr Blakesley referred Mrs Tyers to the email from Brenton Ellis to Jo Anthoine of 22nd May 2013 where he said: "We are in the process of lodging claims against various parties as a result of Mr Tyers' death." Mrs Tyers accepted that Mr Ellis was looking at various claims, but not against Aegis. She said if there was to be legal action, Mr Ellis was not a lawyer and she did appreciate there would need to be legal investigations. By February 2014, Mrs Tyers accepted that she was investigating the matter herself by reference to her email to Ms Anthoine of 7th February 2014 and it was clear to her something had gone wrong which had led to her husband's death and someone was at fault. She said that on Mr Sarkin's advice, she

made a real effort to get more information but it did not cross her mind to instruct another lawyer. She said she hoped Mr Sarkin would tell them what to do including putting her in touch with a lawyer as necessary. The only lawyer she found was Mr Majid whom she wanted to give her some insight as she was waiting for the Iraqi judge to give a ruling. She said it never crossed her mind to approach a South African lawyer because the accident had taken place in Iraq. She thought that she couldn't do anything until the Iraqi court had ruled. In August 2016, she contacted the first English solicitors of her own accord having found them on the Internet. She agreed she had not seen anything in the judicial report that implicated Aegis or anything to make Aegis a potential target. She said that there was nothing in the period 2012 to 2016 to alert her to Aegis being a potential defendant. During that period Aegis (through Ms Anthoine) was in fact her only point of contact: she had identified GCC and Cameron as potential defendants. She said:

> "I thought the judicial report would identify who was responsible so that I could then proceed. I was waiting and hoping for what was happening in Iraq, so that justice would prevail. The accident had no connection with South Africa save that my husband was a South African national."

28. Mrs Tyers' mother-in-law, Rev Jo Tyers and her brother-in-law, Philip Tyers, gave evidence about the support offered to Juanita and Georgina following George Tyers' death. Jo Tyers confirmed that it was her daughter-in-law's understanding from her dealings with Ms Anthoine that legal proceedings would have to wait until the Iraqi investigations were complete. Philip Tyers gave evidence about the contact with Mr Sarkin which he had originally facilitated through a friend. He confirmed that Mr Sarkin didn't say anything about the limitation period: Mr Tyers said that if Mr Sarkin had said this, they would have reacted quicker.

29. For the defendant, Ms Anthoine gave evidence of her role in the matter including liaising with Mrs Tyers on behalf of Aegis. She said she had provided Mrs Tyers with as much information as she could and had repeatedly asked for the release of the AIP report. She said that the AIP report gave Mrs Tyers more information. She agreed that she had put Mrs Tyers in contact with Cameron but knew that Cameron had not responded. She couldn't remember being told that Cameron had intimated a claim against Aegis. She confirmed that Cameron had been uncooperative, refusing to

release their report into the accident and refusing to engage except through lawyers. She agreed that throughout the period, Mrs Tyers had kept in regular contact. She said that once the Iraqi report was released, she was taken aback when Mrs Tyers asked what do next as she too didn't know what would happen next. So far as Iraq was concerned, she confirmed to Mrs Tyers that there would be no further action. Ms Anthoine stated that she was initially given a fairly clear description of what had happened in the accident and this had enabled her to give a fairly accurate account to Mrs Tyers, which she had done over the telephone. She didn't know about the mechanics of the gate but knew that George tried to shut the gate and because there was nothing to secure it, it had fallen on him and she had passed on those details to Mrs Tyers.

30. Mr Ignatiev stated that, on 12th October 2020, he attended a "Teams" meeting with Robin Furphy who explained that a lot of project documentation was stored in a container. He thought that the container was lost to flood damage due to heavy rains in mid 2015. Mr Ignatiev also contacted the Regional Operations Manager for Southern Iraq, Mr Gary Standbridge on 13th October 2020, requesting any documentation saved either electronically or in paper format. Mr Stanbridge conducted a "deep dive" of the Egnyte database and was able to locate Arcadia Weekly Reports for the period 1/5/12 - 11/6/12, as well as various site plans prepared by Cameron, in relation to the camp. Mr Stanbridge and his team conducted a further deep dive of Egnyte in February 2021, in order to locate further documentation relating to the occupation of the camp whilst under construction. However, he was unable to find any further information. Mr Ignatiev also referred to his investigations into the availability of witnesses. Some, he said, left the company almost a decade ago and were not contactable – the implication is that they would probably not have been traceable if proceedings had been issued in time. In relation to other witnesses, Mr Ignatiev stated that they

> "provided witness statements detailing their recall of events immediately post-incident and for the purpose of Aegis's investigation in 2012. However, I understand that their recollection of events 10 years after the incident is now very limited."

31. In his oral evidence, Mr Ignatiev stated that he believed that Robin Furphy and Darren Lane mentioned Health & Safety briefings, which would have been by Aegis and would have been by those on the project who would have been able to carry out a basic risk assessment. Health & Safety briefings from Aegis would have been documented, but the documents have not come to light. Briefings were given by team leaders to Aegis staff: he was not sure of their training but it would be from what they observed. In answer to my questions, he said:

> "I don't believe there is much doubt as to how the accident happened – this is clear from the witness statements and the documents. I agree that witness statements taken soon after the accident are likely to be more reliable than those taken years later."

32. Ms Mohamed addressed in her witness statement the question of prejudice to the defendant's case arising from delay. She stated that as it is now some ten years post-accident, many records which were probably relevant to the action are no longer available. From her discussion with Mr Furphy, she understood that the vast majority of project documentation was lost due to flood damage in mid-2015 although Garda [the insurers] had not been able to provide definitive confirmation in that regard. Aegis's operations in relation to Project Arcadia concluded in 2017 and the relevant potential witnesses had been difficult to trace or were entirely uncontactable. She asserted that, of those witnesses that had been contacted, "there is significant evidential prejudice due to the fading recollections of the witnesses. In those circumstances, the cogency of the factual evidence is adversely affected." Ms Mohamed also refers to Aegis being adversely affected by the delay in relation to its ability to consider potential causes of action against the other parties involved in the operation and the construction of the camp, namely Cameron International, Pressure Peak and GCC.

33. In her oral evidence, Ms Mohamed stated that the relevant documents which she had not seen but which would be relevant to the case included documents as to how the decision was made to occupy the camp before the completion of construction documents relating to the construction of the gate in question. She agreed that Aegis would be able to join Cameron to these proceedings: she confirmed that there had

been no letter to Cameron from Aegis indicating a contribution claim. She had sought early disclosure from Weightmans, Cameron's solicitors, but that had not been forthcoming.

The Legislation

34. For the purposes of this preliminary issue, the relevant legislation is the Limitation Act 1980 and the relevant provisions are as follows:

11.— Special time limit for actions in respect of personal injuries.
(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
…
(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.
(4) Except where subsection (5) below applies, the period applicable is three years from—
(a) the date on which the cause of action accrued; or
(b) the date of knowledge (if later) of the person injured.
(5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from—
(a) the date of death; or
(b) the date of the personal representative's knowledge;
whichever is the later.
(6) For the purposes of this section "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.
(7) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.
12.— Special time limit for actions under Fatal Accidents legislation.
(1) An action under the Fatal Accidents Act 1976 shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Act or in any other Act, or for any other reason). Where any such action by the injured person would have been barred by the time limit in section
11 [, 11A or 11B] 1 of this Act, no account shall be taken of the possibility of that time limit being overridden under section 33 of this Act.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action under the Fatal Accidents Act 1976, but no such action shall be brought after the expiration of three years from—
(a) the date of death; or
(b) the date of knowledge of the person for whose benefit the action is brought;
whichever is the later.
(3) An action under the Fatal Accidents Act 1976 shall be one to which [sections 28, 33, 33B and 35] 2 of this Act apply, and the application to any such action of the time limit under subsection (2) above shall be subject to section 39; but otherwise Parts II and III of this Act shall not apply to any such action.

13.— Operation of time limit under section 12 in relation to different dependants.

(1) Where there is more than one person for whose benefit an action under the Fatal Accidents Act 1976 is brought, section 12(2)(b) of this Act shall be applied separately to each of them.
(2) Subject to subsection (3) below, if by virtue of subsection (1) above the action would be outside the time limit given by section 12(2) as regards one or more, but not all, of the persons for whose benefit it is brought, the court shall direct that any person as regards whom the action would be outside that limit shall be excluded from those for whom the action is brought.
(3) The court shall not give such a direction if it is shown that if the action were brought exclusively for the benefit of the person in question it would not be defeated by a defence of limitation (whether in consequence of section 28 of this Act or an agreement between the parties not to raise the defence, or otherwise).

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

(1) [Subject to [subsections (1A) and (1B)] 3 below, 2 in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—
(a) that the injury in question was significant; and
(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
(c) the identity of the defendant; and
(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.
…
(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.

28.— Extension of limitation period in case of disability.

(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or

died (whichever first occurred) notwithstanding that the period of limitation has expired.

…

(6) If the action is one to which [section 11, 11B or 12(2)] 2 of this Act applies, subsection (1) above shall have effect as if for the words "six years" there were substituted the words "three years".

…

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

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 11 or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 [by section 11A] [by section 11B] or (as the case may be) by section 12;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or

inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

The Defendant's Submissions

35. For the defendant, Mr Blakesley KC conceded that, by reference to sections 13(2), 13(3) and 28 of the Limitation Act 1980, Georgina's claim can be pursued because, as a minor, she has been under a disability at all times. However, he submitted, as is agreed, that Mrs Tyers' claim can only be rescued by the exercise of the court's discretion under section 33. In considering Mrs Tyers' claim, he submitted that the words in section 13(3) "if it is shown that if the action were brought exclusively for

the benefit of the person in question" has the effect of excluding consideration of the fact that Georgina's claim remains in when looking at the section 33 considerations in respect of Mrs Tyers. He further submitted that there is good reason for this: otherwise, where there is a child dependant, an adult claimant could hide behind the child's claim to a very large extent.

Estoppel by Convention

36. In relation to Juanita's date of knowledge, Mr Blakesley first submitted that the claimant is estopped by the doctrine of "estoppel by convention" from asserting a date of knowledge later than the date of the accident. He referred first to the Letter of Claim of 17th January 2017 which, although never received, was appended to Mr Dawson's third statement of November 2021 and where it was stated:

> "Limitation
>
> Subject to the above, we take the view that English law will apply to the issues of
>
> limitation in this matter and that the applicable limitation date is that of three years
>
> form [sic] the date of Mr Tyers' death, namely 29th May 2012."

He further referred to Juanita's first witness statement of 21st October 2022 where at paragraph 6 she stated:

> "I'm advised that the court has deemed that it would be appropriate to determine if this claim should proceed outside the applicable limitation period which I am advised is 3 years from the date of the incident."

Again, in her second witness statement, she referred to knowing, by the end of September 2016, that "although the time limit for the claim was 3 years, the court had a discretion to allow claims to be brought more than 3 years after the accident." Thus it was submitted that for 2½ years, everyone was proceeding on the basis that the claim became time-barred as at May 2015.

37. Mr Blakesley relied on *Tinkler v HMRC* [2022] AC where, in a case arising from a very different context, Lord Burrows at paragraph 45 upheld the statement of principles set out by Briggs J as follows:

> "In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings . . . are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

Referring to these conditions, Mr Blakesley submitted that;

(i) The common assumption as to the expiry of the primary limitation period was expressly shared because it was attached to Mr Dawson's witness statement, and it was the express basis upon which the parties discussed the issue of the preliminary issue in March 2022, and it was expressly conceded in the Claimant's witness statements;

(ii) This is clearly satisfied;

(iii) There was reliance as any later expiry of the primary limitation period would have affected the evaluation of the risk for the Defendant's insurer; and

(iv) If there was no benefit to the Claimant in having a later date of knowledge, it would not have been raised.

Date of Knowledge

38. Apart from his argument on estoppel by convention, Mr Blakesley KC argued that, on the facts and on the law, the primary limitation period should in any event be regarded as having started to run from the date of the deceased's accident.

39. Firstly, Mr Blakesley submitted that the burden is on a claimant to plead, and prove, that the date of knowledge is later than the date on which the cause of action accrued. He relied on *Nash v Eli Lilly & Co* [1993] 1 WLR 782 at 796H per Purchas LJ and *AB v Ministry of Defence* [2013] 1 AC 78, where Lord Walker, at paragraph 48, approved an earlier Judgment of Mance J in *Crocker v British Coal Corp* [1996] 29 BMLR 159 in which he held that the onus under s.14 to prove the date of knowledge and the accrual of the cause of action rests throughout on the claimant.

40. Secondly, he submitted that it is exceptionally rare for a date of knowledge argument to be raised in the case of a fatal accident, and then only in unusual cases. This, he submitted, is unsurprising given the wording of s.14.

41. Thirdly, he submitted that, by reference to such authorities as *Broadly v Guy Clapham* [1994] 4 All ER 439 and *Dobbie v Medway Health Authority* [1994] 1 WLR 1234, the date of knowledge is to be interpreted as the date of the accident. Thus, in *Broadly*, Hoffmann LJ (as he then was) said at 449G:-

> "How does one determine "the essence" of the act or omission? The purpose of s.14(1) … is to determine the moment at which the plaintiff knows enough to make it reasonable for him to begin to investigate whether or not he has a case against the defendant…"

In *Dobbie,* Sir Thomas Bingham MR said at 1240G:-

> "Time starts to run against a claimant when he knows that the personal injury on which he founds his claim is capable of being attributed to something done or not done by the defendant …. This condition is not satisfied where a man knows that he has a disabling cough or shortness of breath but does not know that his injured condition has anything to do with his working conditions. It is satisfied when he knows his injured condition is capable of being attributed to his working

> conditions, even though he has no inkling that his employer may have been at fault". (emphasis added).

In the same case at 1248B Lord Steyn robustly dismissed an argument that a claimant must know that he has a possible or worthwhile cause of action to satisfy the s14(1) test.

Section 33

42. Mr Blakesley KC then addressed the factors to be considered by the court in deciding whether to exercise its discretion to disapply the limitation period pursuant to Section 33. He characterised Mrs Tyers' position to be that she did not act because, firstly, she was distressed in the months/years following her husband's death and secondly she was pinning her hopes on the Iraqi investigation. He made the following submissions:

- Mrs Tyers had received $200,000 within a month of her husband's death, and so was in a financial position to take advice from a lawyer in South Africa: there is no good explanation for her failure to do so;
- Mrs Tyers did in fact get help from other people: Mr Ellis, Mr Sarkin, Mr Barnet and Mr Majid;
- When Mrs Tyers wrote to the English lawyers in August 2016, her state of knowledge was no greater than it had been in 2012 vis a vis Aegis;
- There is no excuse for the delay once Mrs Tyers had consulted Leigh Day in October 2016: protective proceedings could have been issued long before 2019.

43. Mr Blakesley then addressed the individual parts of section 33(3):

a) (the degree to which the provisions of section 12 of this Act prejudice the Claimant or any person whom she represents): Mr Blakesley referred to the decision of the CA in *Sayers v Chelwood* at paragraph 61 where Jackson LJ referred to the default of the solicitors in that case who delayed for a period of three years before commencing proceedings and offered no explanation at the trial. Here, I do have evidence from Mr Dawson explaining the delay in the present case. Mr Blakesley criticised the Letter

of Claim as having been incompetently drafted and he criticised the fact that proceedings were not issued until 2 years and 4 months after the Letter of Claim. The only excuse the Claimant could offer is her own lack of experience, but he submitted that was hollow when she had been able to press those whom she thought could assist in the period 2012-2016.

b) (The degree to which any decision of the court under this subsection would prejudice the defendant) This paragraph was, of course, at the heart of Mr Blakesley's submissions. He submitted that the Defendant is prejudiced by reference to the reduced cogency of the evidence resulting from the fact that witnesses are missing, documents are missing and memories have faded. In this regard, he relied on the evidence of Ms Mohamed and Mr Ignatiev. He referred to the email from Darren Lane to Ms Mohamed of 12th November 2020 where he stated:

"As I mentioned I recalled a meeting between Cameron/Pressure Peak and BP ROO the week before the accident with George. ...
The two KBR engineers were Richard Phillips and I think Alex Smith, they deployed with us to the facility in early January, Alex left the project some time before the accident, Richard left shortly after the accident. I can't recall their official capacity, only that they oversaw construction activities and reported directly to Cameron, they pre-dated me on the project.
Myself and Robin Furphy were the Team Leaders of APA 1 and APA 2 (Aegis Project Arcadia) respectively, I think Rob Edwards and Matthew Wardlaw were a 'surge' team (perhaps to support the above meeting). I don't recall how long they were on-site before the accident.
I believe we were not intended to deploy to the site until construction was completed, but I can't recall how, why or who changed that, that decision would have been made at RMO/CMO/Cameron level.

I'm afraid that the passage of time doesn't help recollection too much, but I hope this is helpful…."

Mr Blakesley submitted that this highlights the Defendant's difficulties in addressing such questions as whether the missing retainer was a design flaw or would have been fixed, whether it was a latent fault, whether a risk assessment would have identified the fault and who introduced the fault. To these questions must be added factors of operational necessity and the balance of security in terms of the threats to life from hostile forces operating in the area. Thus, there may have been features whereby Aegis had no choice but to place their personnel close to the construction works. He further submitted that Aegis' ability to deal with the systemic case is compromised, with difficulty in witnesses remembering the sequence of events, the details of meetings and who briefed whom. He pointed to the way that Kennedys had tried to ensure that there was a proper process, illustrating this by reference to Ms Mohamed's email of 1st February 2021 where she wrote to Darren Lane and Bobby Ignatiev:

"To an extent, I am working blind here given the passage of time and the fact that a great deal of the information appears to have been destroyed. I would like to ensure that Aegis/Gard have done everything possible to locate the information in relation to the project. Bobby, are you able to identify the Aegis senior management who conducted the SIR?

Both, Is there any way of checking Aegis's systems for the TRiM and/or whether we can identify any further documents in relation to the project?"

Mr Blakesley further submitted that, as well as there being missing evidence, there is contradictory evidence. For example, in an email dated 25th November 2021, Darren Lane commented:

"I recall a 'All hands' HSE brief from GCC shortly after we occupied the 'Fly camp', I don't recall the specific content. (NB: George was out of country). At some stage we were provided with Hi-Vis vests and construction helmets for PPO's and clients (Cameron/KBR), for when we accompanied them into

the construction area. I don't recall whether Aegis provided these or GCC. Daily briefings would be an int update, confirmation of next day's tasks and any admin/logistics issues."

This appears to contradict Robin Furphy's assertion that there were no GCC briefings. There is other contradictory evidence and, as a result of the delay, it is now impossible to say who is right. Mr Blakesley referred to the dictum of Lord Oliver in *Donovan v Gwentoys* [1990] 1 WLR 472 at 479 where he said:

"The argument in favour of the proposition that dilatoriness on the part of the plaintiff in issuing his writ is irrelevant until the period of limitation has expired rests upon the proposition that, since a defendant has no legal ground for complaint if the plaintiff issues his writ one day before the expiry of the period, it follows that he suffers no prejudice if the writ is not issued until two days later, save to the extent that, if the section is disapplied, he is deprived of his vested right to defeat the plaintiff's claim on that ground alone. In my opinion, this is a false point. A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant"

c) (The conduct of the defendant after the cause of action arose) Mr Blakesley submitted that nothing can properly be held against Aegis and,

in so far as the Claimant seeks to rely on *Hammond v West Lancashire Health Authority* (1998) WL 1042417, this is very different to the present case.

44. Finally, Mr Blakesley addressed the balancing exercise to be carried out by the court under section 33. He referred to *Carr v Panel Products (Kimpton) Limited* [2018] EWCA Civ 190 where McCombe LJ disagreed with the proposition that prejudice to a claimant, for the purposes of section 33(1), relates exclusively or at least mainly to the prejudice caused by loss of his or her claim and not to prejudice in the litigation more generally. He said (at paragraph 48):

> *"I do not think that that is correct. The wording of section 33(1)(a) is quite general with regard to prejudice to a claimant and is in precisely the same terms as section 33(1)(b) relating to prejudice to a defendant. As I have said already, potential prejudice to a claimant by the loss of his or her claim is the universal consequence of a claimant losing a limitation argument. Further, the Master of the Rolls said in paragraph 42(3) of his Judgment in Carroll (supra) that the burden was on the claimant to show that his or her prejudice would outweigh that to the defendant. This must presume that factors of prejudice, beyond mere loss of the claim itself, can be advanced by a claimant in argument on the application of section 33 in any given case in order to satisfy that burden."*

45. Mr Blakesley further referred to *RE v GE* [2015] EWCA Civ 287 where McCombe LJ said:

> *"58. ... The question for the court under section 33 is whether it "would be equitable to allow the action to proceed", notwithstanding the expiry of the primary limitation period. That question is to be answered by having regard to all the circumstances of the case, including in particular the factors identified in section 33(3).*
>
> *59. Whether it is "equitable" to allow an action to proceed is no different a question, in my judgment, from asking whether it is fair in all the*

> *circumstances for the trial to take place - the same question as the judge asked in the first part of the criticised paragraph 29 of the Judgment. That question can only be answered by reference (as the section says expressly) to "all the circumstances", including the particular factors picked out in the Act. No factor, as it seems to me, can be given a priori importance; all are potentially important. However, the importance of each of those statutory factors and the importance of other factors (specific to the case) outside the ones spelled out in section 33(3) will vary in intensity from case to case. One of the factors will usually be the one identified by the judge in paragraph 29, by reference to the*
>
> *Judgment of Bingham MR in Dobbie v Medway HA [1994] 1 WLR 1234, 1238D-E, namely that statutory limitation rules are "…no doubt designed in part to encourage potential claimants to prosecute their claims with reasonable expedition…but they are also based on the belief that a time comes when, for better or worse, a defendant should be effectively relieved from the risk of having to resist stale claims". Nor must it be forgotten that one relevant factor is surely the very existence of the limitation period which Parliament has decided is usually appropriate.*
>
> *60. In paragraph 29 of the Judgment, the judge identified correctly the relevant question of whether it was fair (sc. "equitable") for a trial to take place. He also directed himself immediately, at the end of that same paragraph, to the question of whether a fair trial could be conducted, the criterion which Ms Gumbel put at the forefront of her argument. Thus, the judge addressed both questions and both were relevant."*

Relying on this passage, Mr Blakesley submitted that the fundamental question for the court is whether it would be equitable ("fair in all the circumstance") for the trial to take place. He submitted that it would not.

The Claimant's Submissions

46. For the Claimant, Ms Crowther KC referred to the good and comprehensive investigation carried out at the time by Mr Dominic Collins on behalf of the Defendant (the AIP report). This investigation covered the immediate and systemic

causes of Mr Tyers' accident and referred to the lack of warning signs and the lack of Health & Safety briefings in which the state of the construction works on the site could have been discussed. By reference to the witness statement of Ahmed Shati (and indeed Mr Ignatiev's answer to the court's questions – see paragraph 31 above), there is in fact little or no dispute as to how the accident happened, and the Defendant was aware of all the relevant information within about 3 weeks of the accident. She submitted that the evidence points to significant shortcomings in relation to Health & Safety on site with no line of communications and no basic safety measures in place. She submitted that the Defendant's problem is not so much delay as the fact that it has never had a defence to this claim, and its tactic has been to "throw up dust".

47. In relation to "date of knowledge", Ms Crowther submitted that the Claimant only had vague and general knowledge of the accident circumstances until the AIP report was released to her in September 2013. She did not know enough of the facts to establish a complaint against Aegis before the AIP was released. However, she accepted that, with the benefit of hindsight and subsequent advice, there was sufficient in the AIP, in the light of the general and objective test as set out in *AB v Ministry of Defence* [2013] 1 AC 78, to give Mrs Tyers enough information to go a lawyer (if she could find one) with her complaint to act for her in relation to seeking compensation arising out of the accident, even though she did not have actual knowledge that Aegis was responsible. Ms Crowther submitted that a period of reflection and consideration would have been necessary after the receipt of the report and that her date of knowledge should be considered to be a few weeks after its receipt. The time period by which a claim form should have been issued in her part of the FAA claim and the 1934 Act claim is 1st November 2016, namely 3 years from 1st November 2013.

48. Acknowledging that, even with the primary limitation period expiring on 1st November 2016, she needs to rely on section 33 of the Limitation Act in order for the claim on behalf of Mrs Tyers to be able to succeed, Ms Crowther referred to the principles by which the discretion is to be exercised, as authoritatively set out in *Carroll v Chief Constable of Greater Manchester* [2017] EWCA Civ 1992; [2018] 4 WLR 32 (see further paragraph 66 below). She submitted that the discretion under s.33 is unfettered and proportionality is a relevant consideration: as the court will be enquiring into liability in any event in relation to Georgina's claim, the addition of Mrs Tyers' claim under s.33 is not a significant additional cost to the court's

investigation into liability and the exercise of the s.33 discretion is proportionate given that the claim is a valuable one.

49. Ms Crowther challenged the Defendant's interpretation of section 13(3). She submitted that the exercise of the court's discretion under section 33 is unfettered, and there is no provision for excluding consideration of the fact that the claim will continue in any event so far as Georgina's claim is concerned. She submitted that this is plainly a relevant consideration. She submitted that the scheme of sections 12 and 13 is simply to require the court to consider the claim of each dependant separately, but the court is not required to cast a blind eye to the fact that there is to be a trial in any event.

50. Turning to section 33, Ms Crowther first addressed the Defendant's point that there is simply no reason, or excuse, for the delay from the time that Leigh Day were instructed in October 2016 to the issue of the proceedings in May 2019. In so far as the Defendant is purporting to visit upon the Claimant the default of the solicitors in this regard, she relied upon the decision of the Court of Appeal in *Corbin v Penfold Metallising Group Ltd* [2000] Lloyd's Rep Med 247: I consider this submission and the case of *Corbin* in more detail in paragraph 67(vii) below.

51. So far as the earlier period is concerned, Ms Crowther submitted that Mrs Tyers reasonably believed that there was a legal process going on in Iraq which would resolve the issues. At the same time, there were various life events preoccupying her mind: the death of her father-in-law, the insolvency of the estate, her lack of income and the fact she was now the breadwinner with primary responsibility for her young daughter. She submitted that the suggestion that part of the $200,000 insurance payment should have been gambled on getting legal advice with a view to securing a larger award was distasteful: that money was precious and understandably ring-fenced by Mrs Tyers.

52. Ms Crowther submitted that the court should consider what Mrs Tyers did and whether it was reasonable: she consulted Mr Sarkin who gave practical advice about getting evidence from Iraq – he did not advise on foreign law. It is clear, she submitted, that Mrs Tyers was under the false impression that if she followed Aegis'

involvement in the Iraqi proceedings, that would be her route to getting compensation. Far from delaying matters, she was trying to get the matter moved along.

53. Addressing Mr Blakesley's argument concerning the added factors of operational necessity and the balance of security in terms of the threats to life from hostile forces operating in the area, Ms Crowther submitted that this was a "red herring". To avoid the accident, all that was needed was proper and adequate communication between those carrying out the construction on site and those living on site. As Darren Lane said, if there had been a warning, he would have remembered that. The reference to Mr Lane's faded memory relates only to peripheral matters.

54. Addressing the loss or destruction of documents, Ms Crowther submitted that the situation here is similar to that in *Carroll v Chief Constable of Greater Manchester Police* [2017] EWCA Civ 1992 where, at paragraph 48, the court said:

> "I do not accept that, in carrying out the balancing exercise for the purposes of section 33, the matters mentioned in those paragraphs of Mr Finch's witness statement amount to real prejudice to the defendant as a result of the claimant's culpable delay. In the first place, there is no evidence as to when the documents ceased to be available, whether before, during or after the limitation period commenced. It cannot be said, therefore, that the documents were lost, disappeared or were destroyed during any period of delay, let alone any undue delay, by the claimant in commencing the proceedings."

On her case as to the primary limitation period, the project documentation was destroyed by the flood (see paragraph 32 above) within the limitation period. There were plenty of reasons for the documentation to have been retained, not least the incident itself leading to the detailed investigation. Another reason was the Notice of Claim for Indemnification from Cameron dated 7th March 2013: see paragraph 19 above. She submitted that it is entirely speculative that relevant documents have been lost: there is no actual evidence that the documents did exist but have now disappeared.

55. Addressing the issue of the fading/faded memories of witnesses referred to by Ms Mohamed, Ms Crowther submitted that this is counter-balanced by the AIP report: it is speculative that relevant witnesses have forgotten something relevant when their recollections are caught timeously within the AIP report.

56. In relation to prejudice to the Defendant in prosecuting a claim for contributory negligence, Ms Crowther submitted that the issue of contributory negligence stands or falls with the main allegation: it would only have been negligent for George Tyers to have moved the gate if he had been told not to touch it.

57. Ms Crowther referred to the dictum of Latham LJ in *T v Boys and Girls Welfare Service* [2004] EWCA Civ 1747 where he said (at paragraph 13):

> "It is no answer, in my view, to say that the prejudice has only been marginally
>
> increased by the fact that the claim was made two years after the limitation period has expired. The Act, with its generous provisions for claimants in personal injury actions for an extension of the primary limitation period so that it starts from the date of knowledge, has, as this court has said in Bryn Alyn , provided the limit of permissible prejudice save in special cases. In other words Parliament has determined in Sections 11 and 14 where the balance of prejudice should normally be struck. It follows that Section 33 should only be available for special cases. And it is for the claimant in any particular case to establish that his claim is one of those special cases."

Ms Crowther submitted that the suggestion that a case needs to be "special" to enjoy the exercise of section 33 discretion has not withstood the test of time: see *Carroll* at paragraph 42 where the court said:

> "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: *Donovan v Gwentoys Ltd* [1990] 1 WLR 472, 477E; *Horton v Sadler* [2007] 1 AC 307, para 9 (approving the Court of Appeal judgments in *Firman v Ellis* [1978] QB 886); *A v Hoare* [2008] AC 844, paras 45, 49, 68 and 84; *Sayers v Hunters* [2013] 1 WLR 1695, para 55."

58. Finally, addressing proportionality, Ms Crowther referred to two factors:

(i) This is a valuable claim for Mrs Tyers, even if Georgina's claim is excluded; and

(ii) The claim involves the loss of a husband and father.

When all is put into the balance, any prejudice to the Defendant is more than outweighed by the prejudice to the Claimant.

Discussion

Date of Knowledge

59. The starting point for the Claimant's date of knowledge is section 14 of the Limitation Act 1980 (see paragraph 34 above). The court needs to consider when the Claimant first had knowledge that:
(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;
taking into consideration that knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

60. As Mr Blakesley submitted, it would be an unusual case where, in the case of a fatal accident, the date of knowledge is later than the date of death. Clearly, Mrs Tyers knew that the injury was significant immediately. Furthermore, she knew that this was an accident which had occurred at work, arising from her husband's working conditions, and in particular the fact that a gate fell and crushed the deceased: so much was imparted to her by Jo Anthoine soon after the accident when Mrs Tyers was informed what had happened. The identity of the Defendant has never been hidden: Mrs Tyers has known at all material time that Aegis were her husband's employers (or the people to whim her husband was contracted).

61. The only factor which could conceivably prevent the limitation period from running from the date of death would be if it could be said that Mrs Tyers did not know that the injury to her husband "was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty." However, the authorities show that the bar for satisfying this test is set low. As Mr Blakesley submitted, the issue is effectively decided by the decision of the CA in *Dobbie v*

Medway Health Authority [1994] 1 WLR 1234 where Sir Thomas Bingham MR said at 1240G:-

> "Time starts to run against a claimant when he knows that the personal injury on which he founds his claim is capable of being attributed to something done or not done by the defendant …. This condition is not satisfied where a man knows that he has a disabling cough or shortness of breath but does not know that his injured condition has anything to do with his working conditions. It is satisfied when he knows his injured condition is capable of being attributed to his working conditions, even though he has no inkling that his employer may have been at fault".

62. In my judgment, on the above basis, the primary limitation period in this case started to run from the date of death and expired on 29 May 2015. So far as Ms Crowther's argument that Mr Tyers "only had vague and general knowledge of the accident circumstances until the AIP report was released to her in September 2013, she did not know enough of the facts to establish a complaint against Aegis before the AIP was released", this does not, with respect to her, encapsulate the test to be applied by the court. The purpose of the three year limitation period is to give a potential Claimant the time to carry out the necessary investigations and to establish the details of the accident circumstances in order to draft a protocol Letter of Claim or, if necessary, Particulars of Claim: the detailed knowledge which was provided by the AIP report in this case was not the knowledge required for the purposes of sections 12 and 14 of the Limitation Act, but the knowledge required for the drafting of proceedings. In a sense, the 3 year limitation period achieved the very purpose for which it is provided: it gave the Claimant the time to investigate the matter, obtain the AIP report and then consider that report with her lawyers and decide whether to issue proceedings. The fact that the Claimant did not in fact instruct and consult the appropriate lawyers does not detract from the basic proposition that she had the necessary knowledge for the purposes of sections 12 and 14.

63. Given my decision above, it is unnecessary for me to decide on whether the Claimant is estopped from relying on a later date of knowledge by reference to the doctrine of "estoppel by convention" but I can indicate that I was persuaded by Mr Blakesley's arguments (see paragraphs 36 and 37 above) in this regard too.

Section 33: the relevance of Georgina's Claim

64. In her submissions, Ms Crowther was careful to limit her argument as to the relevance of the fact that there will be a trial of Georgina's claim in any event by reference to the principle of proportionality. In this regard, cost is a relevant consideration and the addition of Mrs Tyers' claim will not result in a significant inflation of the costs of the action. However, in my judgment, this is of limited effect on the exercise of discretion under section 33 in this case. If Mrs Tyers' claim is to proceed, the main effect will be on the quantum of damages and this will be substantial should the claim succeed.

65. What is clear, however, is that the fact that Georgina's claim is to proceed in any event cannot, by itself, make it fair that there should be a trial in the case of Mrs Tyers' claim. In *Cain v Francis* [2009] QB 754, Smith LJ expressed the basic question to be asked, in considering whether to exercise the discretion to disapply the limitation period, as "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 effect of section 28 of the Limitation Act 1980 is to extend the limitation period in the case of claimants under a disability whether or not delay in commencement has made it unfair or unjust to expect the defendant to meet the claim on the merits: a form of "statutory fairness" is thus imposed on the proceedings so far as the person under a disability is concerned irrespective of the actual fairness. However, the claimant who is not under a disability does not enjoy that statutory fairness and it is difficult to see how, if it would not be fair and just in all the circumstances to expect the defendant to meet Mrs Tyers' claim on the merits because of the delay, her claim can be transformed into one which it is fair and just to expect the defendant to meet, not when it is fair and just for the defendant to meet Georgina's claim in fact, but simply because the statute says so. As Mr Blakesley submitted (see paragraph 35 above), the effect of section 13(3) is to exclude consideration of the fact that Georgina's claim remains in when looking at the section 33 considerations in respect of Mrs Tyers. He further submitted in writing the following with which I agree and which I adopt:

> "That affords justice between the parties. The purpose of the section and of LA80 s.28 (extension of time for those under a

> disability) is met as the infant dependant, for example, remains (in principle) permitted to bring a claim against the defendant, while the defendant is relieved of the obligation to satisfy a claim brought by an adult who is guilty of significant and/or unexplained delay, but who is rescued by virtue of the fact that she has a dependant whereas an identical but childless claimant would be time-barred."

Section 33: Exercise of Discretion

66. In my judgment, the starting point in considering whether to exercise my discretion to disapply the limitation period should be, as Ms Crowther submitted, the principles as espoused by the Court of Appeal in *Carroll v Chief Constable of Greater Manchester* [2017] EWCA Civ 1992 [2018] 4 WLR 32 at paragraph 42, which encapsulates all the relevant authorities including those relied on by Mr Blakesley:

> "42 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:
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> 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: *Donovan v Gwentoys Ltd* [1990] 1 WLR 472, 477E; *Horton v Sadler* [2007] 1 AC 307, para 9 (approving the Court of Appeal judgments in *Firman v Ellis* [1978] QB 886); *A v Hoare* [2008] AC 844, paras 45, 49, 68 and 84; *Sayers v Hunters* [2013] 1 WLR 1695, para 55.
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> 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: *Donovan's case,* pp 477H–478A.

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: *Donovan's case*, p 477E; *Adams v Bracknell Forest Borough Council* [2005] 1 AC 76, para 55, approving observations in *Robinson v St Helens Metropolitan Borough Council* [2003] PIQR P128, paras 32 and 33; *McGhie v British Telecommunications plc* [2005] EWCA Civ 48 at [45]. 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: *Sayers's case*, para 55.

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: *Burgin v Sheffield City Council* [2005] EWCA Civ 482 at [23]. 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: *Hammond v West Lancashire Health Authority* [1998] Lloyd's Rep Med 146.

6. The prospects of a fair trial are important: *A v Hoare*, para 60. 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: *Donovan's case*, p 479A; *Robinson's case*, para 32; and *Adams's case*, para 55. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: *Robinson's case*, para 33; *Adams's case*, para 55; and *A v Hoare*, para 50.

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: *Cain v Francis* [2009] QB 754, para 69.

8. It is the period after the expiry of the limitation period which is referred to in sub-subsections 33(3)(a) and (b) and carries particular weight: *Donovan's case*, p 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: *Donovan's case*, pp 478H and 479H–480C; *Cain's case*, para 74. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: *Collins v Secretary of State for Business Innovation and Skills* [2014] PIQR P19, para 65.

9. The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: *Cain's case*, para 73. 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: *Corbin v Penfold Metallising Co Ltd* [2000] Lloyd's Rep Med 247.

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: *A v Hoare*, paras 44–45 and 70.

> 12. Proportionality is material to the exercise of the discretion: *Robinson's case*, paras 32 and 33; *Adams's case*, paras 54–55. In that context, it may be relevant that the claim has only a thin prospect of success (*McGhie's case*, para 48), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (*Robinson's case*, para 33; *Adams's case*, para 55); *McGhie's case*, para 48), that the claimant would have a clear case against his or her solicitors (*Donovan's case*, p 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (*Robinson's case*, para 33; *Adams's case*, para 55).
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> 13. An appeal court will only interfere with the exercise of the judge's discretion under section 33, as in other cases of judicial discretion, where the judge has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has made a decision which is wrong, that is to say the judge has exceeded the generous ambit within which a reasonable disagreement is possible: *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441, para 69; *Burgin's case*, para 16."

67. Applying these principles, and focusing on whether the delay in this case has seriously compromised the ability of the defendant to defend the claim, I take into account, and make findings, as follows:

(i) As Ms Crowther submitted, and as Mr Ignatiev conceded, there is little or no dispute in this case as to the circumstances of the accident to George Tyers and how he came to meet his death.

(ii) Immediately after the accident, the defendant carried out a probing investigation which included the taking of relevant witness statements and thus the preservation of the evidence which a court might require.

(iii) Although it is true that witnesses have disappeared or become unavailable, and in respect of those witnesses who remain available, their memories will have faded, I consider that this is not a consequence of the delay in this case to any great extent: had proceedings been brought within the three year limitation period, it is unlikely that a trial would have taken place less than about five years after the accident by which time many of the witnesses, particularly those in Iraq, would probably have

disappeared or become unavailable in any event, and those witnesses who remain available would have been largely dependent upon the contemporaneous statements they made at the time, as will still be the case.

(iv) Although documents were destroyed in flood damage caused to the container in which they were stored, the relevance of those documents is speculative. In any event, given the defendant's knowledge of the claim and the possibility of contributory proceedings between the defendant and Cameron, the defendant should have taken better care to protect and preserve relevant documents, and I refer to principle 5 in Carroll's case above and the reference to *Hammond's case*.

(v) On my assessment of the evidence, the claim on behalf of Mrs Tyers (and Georgina) appears to be a strong one: it is important, of course, for me not to pre-judge the claim which remains to be tried on its merits, but insofar as the merits of the claim are a relevant consideration - which must be the case when the court must assess the effect of the delay on the ability of the defendant to defend the claim - the prejudice to the defendant diminishes as the claim gets stronger. Whilst I do not necessarily subscribe to Ms Crowther's submission that what the defendant has tried to do in this case is "throw up dust" and I recognise the validity of some of the arguments raised, in the end I do consider that the effect of loss of evidence has been over-stated by the Defendant.

(vi) I turn to the reasons for the delay, which are an important consideration. Given Mrs Tyers' recognition at an early stage that there was fault or negligence involved in the death of her husband, and given her enlistment of professional help including from Mr Sarkin, Mr Bennett and Mr Majid, it is difficult to understand why she did not consider consulting an English solicitor earlier than she did, particularly given that she knew that the defendant was her husband's effective employer, the contract was governed by English law and her husband had travelled to London to be interviewed for the job. I consider the explanation lies in her reliance on Ms Anthoine, with whom she clearly had a close and trusting relationship, and her misplaced assumption that all would fall into place with the conclusion of the Iraqi investigation. It is likely that Mrs Tyers was genuinely shocked when led to understand by Ms Anthoine in 2016, when the Iraqi investigation was complete, that they had reached the end of the road, and it

is no coincidence that it was shortly after this that she first sought assistance from English lawyers. I also take into account the effect of the difficulties on Mrs Tyers which she faced: not only the death of her husband but also the death of her father-in-law and her prioritisation of the needs of Georgina for whom she was now the principal breadwinner. Mrs Tyers, in the circumstances, placed her trust on those around her including her family and those professionals with whom she was in contact, and I find that none of them advised her to consult an English lawyer. As she and her mother-in-law said, it was as if the scales had fallen from their eyes in 2016. In the circumstances, I do not find the delay before the instruction of Leigh Day in October 2016 to be so egregious as to count heavily against the claimant.

(vii) As for the delay thereafter, there were, in my judgment, undoubtedly errors on the part of the solicitors and in particular their failure to ensure that the Letter of Claim/Introduction of 17th January 2017 had been received by the defendant: the fact that the address of their registered office in London had changed should have been ascertained. However, I do not consider it right or appropriate to visit upon Mrs Tyers the errors of her solicitors and I refer to principle 10 in *Carroll's case* above and the reference to *Corbin's case*. It is worth setting out the relevant part of the judgment of Buxton LJ in *Corbin's case*:

"22. The main difficulty about that approach is the emphasis that is placed upon the failings on the part of the defendant's solicitors, because in his analysis of whether the Claimant had acted diligently, the Judge undoubtedly attributes − and entirely attributes − the actions of the solicitors to the Claimant himself. Unless the Claimant is, as a matter of law, bound by and bears the responsibility for that which is done by his solicitors, that attribution is plainly not right because, on the evidence, Mr Corbin did what a man in his position might be expected to do, which is to go to his solicitors, who are apparently efficient and responsible in this area of work, and left them to get on with it. Unless, as a matter of law, he is bound by the solicitors, that analysis of the Judge, as a matter of fact, is not right.

23. This Court has recently considered the impact in this particular area of limitation of fault on the part of those advising the Claimant. It did that in the case of Das−v− Ganju [1999] LLR Medical, at page 198. I do not run over the facts of

that case, save to say that the delay there was to a large part attributable to mistaken advice that had been received by the Claimant. In assessing the effect of that, Sir Christopher Staughton −who gave the leading judgement, quoted a passage in an earlier case of Whitfield −v−North Durham Health Authority [1995] 6 Med LR, and then said this:

> "If that passage means that as a matter of law anything done by the lawyers must be visited on the client, it cannot in my view be reconciled with other authority. It appears to have been a concession which the court accepted. The other authority is Thompson −v− Brown [1981] 1 WLR 744 and the speech of Lord Diplock at pages 750 and 752, which I do not set out for fear of lengthening this judgment even further. I would also return to Halford −v− Brookes, where again it is said that it is no reproach to the plaintiff that he has received the wrong legal advice."'

68. Balancing the above factors, whilst I consider that it was highly unfortunate that the defendant did not receive notification of the claim until service of the proceedings on 10th August 2020, more than 8 years after the accident, the claimant has persuaded me that this is a case where it remains possible for there to be a fair trial and in which I should exercise my discretion to disapply the limitation period, and, accordingly, in my judgment, the claim of Mrs Tyers should be permitted to proceed.