



Neutral Citation Number: [2008] EWCA Civ 1416

Case No: B3/2008/0107

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE HON. MR JUSTICE EADY
[2007] EWHC 2968 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2008

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE HUGHES
and
MR JUSTICE HEDLEY

Between :

Jake Pierce

Claimant/
Respondent

- and -

Doncaster Metropolitan Borough Council

Defendant/
Appellant

Miss Elizabeth –Anne Gumbel QC and Mr H Witcomb (instructed by Bolt Burdon Kemp)
for the **Respondent**

Mr Michael Kent QC and Miss Catherine Foster (instructed by Halliwells Llp)
for the **Appellant**

Hearing dates : 22nd and 23rd October 2008

Approved Judgment

Lord Justice Hughes:

1. This is the Judgment of the Court.
2. The claimant, when in his late twenties, sued the defendant Local Authority in common law negligence upon the allegation that it had failed to take him into care as an infant and in consequence exposed him to abuse and grave neglect by his parents. He complained of a continuing failure to take him into care from the age of approximately 18 months until he was 15, but as the case developed it was refined to focus on events in (i) November 1977 (aged 18 months), (ii) May 1979 (aged 3) and (iii) 1990-91 (aged 14-15). The Judge found for him on (i) but against him on (ii) and (iii). The Local Authority appeals against the decision upon (i). It does not challenge the existence of a duty of care. The issues raised are (a) whether there was a basis for a finding of breach in November 1977, (b) if so, whether there was a basis for a finding that that breach caused the claimant to remain in his family for years when otherwise he would not, (c) whether, if so, damages for injury by violence as distinct from by neglect were recoverable and (d) whether the Judge misdirected himself upon section 14(3) Limitation Act 1980. The Local Authority also appeals upon the quantum of damages.
3. On any view, and whatever the cause, the claimant has the misfortune to be a very damaged young man. A jointly prepared psychiatric report concluded that he is a “very disturbed man who has had serious mental health problems throughout his life.” The principal diagnosis in adulthood is of emotionally unstable personality disorder, attended by agoraphobia and anxiety; further he is HIV positive and requires constant medication. The personality disorder was foreshadowed by severe behavioural problems necessitating special schooling throughout his childhood. At the age of fourteen, in 1990-91, he left home and lived either rough as a rent boy, in a commune, or with two men who were themselves in a homosexual relationship. His own conviction is that his misfortunes are the result of physical abuse and neglect by his parents, and would have been avoided if he had been removed from them in infancy.
4. The claimant and his twin sister were born on 1 March 1976. His mother and father were not married to one another, but were living together, if in a relationship characterised by periodic brief separations. His mother had two older girls, A (four and a half years older than the twins) and K (about 18 months older than them). K had significant mental disability, or learning disabilities. Later it was to transpire that the twin sister was also similarly handicapped. At the time of the birth of the twins, the family lived in a rented house of their own. They were short of money and the rent was not being paid properly, in part because Father was irresponsible and often spent the money elsewhere. Mother was struggling to cope. Standards of housekeeping were very poor.
5. On 7 July 1976 both twins were placed temporarily by the Local Authority with foster parents, clearly by arrangement with Mother, because she was going into hospital for termination of a further pregnancy. The claimant returned to Mother on 28 July, after about three weeks, his stay away having been prolonged because of instability in the parents’ relationship, culminating in Father leaving Mother. It seems that the twin sister stayed with the foster parents. The Social Worker, Mrs Callaghan noted at that early stage that since the claimant had been fostered voluntarily under section 1

Children Act 1948, the Authority could not prevent his being returned home, but that a careful eye should be kept on his progress and on Mother's ability to cope.

6. Only about four weeks later, on 19 August 1976, having been alerted by the Health Visitor, Mrs Callaghan had to take the claimant to hospital. He was grubby, had the 'frozen awareness' stare of a neglected baby and had lost weight when he should have gained it; he was some 800 grammes under par. Mother was ill. The paediatrician was anxious that he should not simply be returned home to the same conditions on discharge.
7. Mrs Callaghan and her Group Leader decided that efforts should be made to persuade Mother and Father that the claimant, as well as his twin sister, were better off being looked after other than at home and that they should agree to their being in voluntary care under section 1 of the 1948 Act. The attitude of both parents was reluctant. At times Father was demanding of return and when the proposition was first put to her Mother was angry and distressed. However, within a day or so, agreement was given. The claimant went from hospital to the foster parents, joining his twin already there. That was on or about 8 September 1976; he was six months old. As things turned out, he remained there until 8 November 1977, when he was returned to his parents in supervised housing in a Rehabilitation Unit. It was this return in November 1977 which the Judge found to have been negligent.
8. Throughout the intervening fourteen months there was regular contact between the social worker and the parents' household, as well as between the social worker and the foster parents. Circumstances in the parents' home fluctuated but were clearly a long way short of satisfactory. Father was out of work for most of the time. He often squandered the rent and eviction was threatened. In November 1976 Mother left him for a while and, after living with the elder girls at the home of Father's sister, became homeless and had to be found temporary lodgings. In the end, she returned to Father in the family home. There was a period of a week or so when Mother failed to answer the door to the social worker; that turned out to be because Father was wanted by the police and in the end he gave himself up and was then in prison for a period in early 1977. Other than that, Mother was generally co-operative but often not coping well. The house was often dirty, though at times Mother and/or Father tried to clean up and made some efforts to re-decorate. The two older girls were sometimes properly cared for, clean and tidy, and sometimes not. The eldest was often not taken to school. At times, Father was living partly with Mother and partly elsewhere. Significantly, Father did not visit the twins in their foster home at all; Mother's efforts at visiting were occasional and disorganised.
9. Early in January 1977, at a point when Father was in prison and the parents were speaking of marrying on his release, Mrs Callaghan and her supervisor decided that if the family was to have an opportunity of successfully being reunited, the best prospect lay in their being accommodated in the Bentley Rehabilitation Unit. It consisted of eight separate houses around a square, to be occupied by the families being helped. A three-bedroomed home was proposed for this family. There were wardens living on site, who could keep an eye on them and no doubt offer advice, and there may have been some group activities organised. It did not, of course, offer the kind of intensive testing and training nowadays provided by Family Assessment Units. In this case it seems to have had the potential to solve the housing difficulties and to provide some level of supervision and support, particularly for Mother. The parents were seen by

the Unit in March 1977 and approved as prospective residents at the end of April. The approval of the Housing Department had to be obtained, which came in May. The place for them was not available until June. Mother, Father and the two older girls moved in on 27 June 1977. Whereas up until now, the claimant had not visited the parents at home, and had seen not very much of Mother, arrangements were now made for him to be taken to the new house. His response to those visits was very mixed. The early ones were not successful and Mother was ill at ease handling him. On some occasions he appeared to settle, but there were clear signs of distress not mirrored when owing to a brief illness of the foster-mother he had to move to another foster home for about ten days.

10. This critical period coincided with a hiatus in the allocation of social worker. Mrs Callaghan moved to a different posting on about 20 September 1977. There is then a gap of just under a month in any record of contact by any social worker, save for a report from the warden at Bentley that there had been a row between the parents and that Mother, who had initially refused to allow the warden in, was saying that the relationship was over. Then, from the latter part of October, a different social worker managed some six or seven contacts between Mother and the claimant. They also were of mixed success.
11. On 8 November 1977, the claimant was moved to live with the parents at Bentley. In the end his twin sister did not accompany him. Her significant disabilities and special needs had been discovered in the meantime, and a few days before the move Mother told the social worker that she had reluctantly come to the conclusion that she would not be able to cope with her. Accordingly, she remained with the foster parents, and never, in the end, went back to the parents.
12. Although the defendant's file contains the notes of the October/November visits between Mother and son, it contains no indication of any occasion when anyone reviewed the current position and reached a reasoned decision whether the planned reuniting of them should or should not proceed, and if so when. At the trial there was a substantial dispute whether this was because no such review of the claimant's welfare had taken place, or was because the document recording it had been lost. Both the key witnesses called for the defendants, Mr Percival, a sometime senior manager of theirs with social work experience in the 1970s, and Mr Lane, their expert in social work, assumed the latter must be true. On examination of the evidence, the Judge concluded that there never had been such a review of welfare. There is and can be no challenge to that finding of fact. So what had happened was that the move of the claimant to live with the parents at Bentley had been the assumed objective ever since January and in October/November it simply proceeded without fresh application of minds to whether it was the right thing to do, or whether now was the right time.
13. Thereafter the family consisted of the parents, who remained together with interruptions and who later married, the two elder girls, and three more children born in 1980, 1984 and 1987. The claimant remained in this family until the latter part of 1990 when, at the age of 14, he left home and fended for himself. The records of the local authority in the claimant's file are unsatisfactory after about 1978 and do not suggest regular contact by social workers.
14. There was a worrying incident in May 1979 when Mother took the claimant to her sister, saying that she could not cope with him, and he was found by his aunt to have a

large scald on his buttock and right leg. At hospital a possible old burn on his back, as well as small areas of bruising, were also found. It was impossible to say whether the cause of the scald was or was not non-accidental, but no medical attention had been sought by Mother whichever it was. After an inter-disciplinary case conference, the outcome was that the claimant went home from hospital but was placed on the 'at risk' register of the local authority and remained on it for two years until 1981. The Judge found that it was impossible to hold that no reasonable local authority would have dealt with this incident in this way or that an application for a care order would have got off the ground at this stage. There is no appeal by the claimant against that finding.

15. Thereafter there is no sign that Social Services were actively involved in the claimant's life until 1991. It is plain that by 1989-90 the claimant's behaviour was very worrying. He was stealing and there was an episode of arson. He went missing for about six weeks in August 1990 and in the next school term truanted for more than half the time. He eventually left home again around Christmas of that year, later saying that there had been a violent altercation with his father and that he had been thrown out. He was found by the police on the streets in March 1991; thereafter he was accommodated, not without difficulty, by the local authority. The Judge was critical of the school for not reporting his absences to social services, but also of the defendants for not keeping abreast, prior to March 1991, of what was going on. However, he concluded, plainly realistically, that such was the extent of the claimant's personality disorder and sexualised behaviour by that time, it was impossible to conclude that any significant damage flowed from any delay or failings on the part of the local authority at that stage. Once again, there is no appeal from that finding.
16. The Judge found that some of the claimant's evidence was unreliable and distorted by his perception of himself as a victim. It was certainly true that the claimant's behaviour at school was very worrying, including sexualised behaviour, and it is no doubt to be inferred that much the same applied at home. But the Judge, who heard the witnesses, substantially accepted the claimant's evidence that over the years from 1979 or 1981 with his parents he suffered "indifference, neglect and periodic violence". The evidence showed that Father was, at any rate at some stage, alcoholic, and that in about 1983 he had attempted to set fire to the house. Mother, the Judge appears to have found, was often feckless and he recorded that she had said in the past that she had had to hit the claimant, send him to his room, or ignore him, because of his behaviour. She would also appear to bear responsibility for failing to see that he received medical attention when scalded in 1979, and for failure to protect him against violence from Father. It is now accepted that there can be no realistic challenge to these findings of fact by the Judge. They do not carry the necessary implication that the local authority was or ought to have been aware of what transpired at home in the years 1981-90, but they form the basis for the assessment of damages for injury suffered if the Judge's finding of a breach of duty in November 1977 is to stand.

Negligence in November 1977 ?

17. The Judge's conclusion that it was negligent to return the claimant home in November 1977 was founded upon his preference for the evidence of the expert called by the

claimant, Mr Ayre, over that of the defendant's expert, Mr Lane, and of Mr Percival. For the defendants, Mr Kent QC now submits that:

- i) on proper analysis Mr Ayre was saying no more than that the return was not based upon a proper review of the case, rather than that if such review had been carried out no reasonable local authority could have decided to attempt rehabilitation to Mother; and
- ii) since Messrs Lane and Percival were of the view that it was reasonable to attempt rehabilitation, there was no proper basis, applying the principle in Bolam v Friern HMC [1957] 1 WLR 582, for concluding that no reasonable local authority could have decided to do so.

18. Mr Kent rightly draws attention, in support of both propositions, to the statutory framework within which the local authority had to work. At that time, long before the Children Act 1989, the effect of the relevant statutes was in summary this:

- i) a local authority could receive a child into its (voluntary) care with the consent of the parent under section 1 Children Act 1948;
- ii) that section gave no power to retain the child against the wishes of the parent; subsection 1(3) expressly so provided; the proposition which crept into the case at one or two points, that subsection 1(2) created either a duty or a power to override the parent's wish in the interests of the child's welfare, is wrong;
- iii) if social workers wished to exercise compulsory powers to retain a child already in voluntary care they had to persuade the relevant committee of their authority to pass a resolution under section 2 of the 1948 Act taking parental rights over the child; such a resolution involved showing (in a case such as this) that the parent had so consistently failed without reasonable cause to discharge the obligations of a parent as to be unfit to have the care of the child or was of such habits or mode of life to be similarly unfit (s 2(1)(b)(iv) and (v)); if such a resolution were contested by the parent, the local authority had to justify it in the juvenile court and the justices could uphold it if, but only if, it were shown that the statutory ground was made out and in addition that it was in the best interests of the child for the resolution to stand;
- iv) alternatively, and particularly if the child were not currently accommodated voluntarily, the local authority could seek a care order from the juvenile court; that involved establishing the grounds set out in section 1 of the Children and Young Persons Act 1969; in the context of a case such as this that meant proving that the child's proper development was being avoidably prevented, or his health avoidably impaired or neglected, and that he was in need of care and control which he was unlikely to receive in the absence of such an order;
- v) thus although the tests in s 2 of the 1948 Act and s 1 of the 1969 Act were not identical, both involved, in the event of dispute by the parent, proof before the juvenile court of significant parental failings and also that the welfare of the child required the exercise of compulsory powers.

19. It follows that if the only complaint being made by Mr Ayre was as to the procedure (or absence of it) leading to the return of the claimant to his mother, the Judge would have had to go on to consider whether return would not have occurred anyway on the grounds that it would have been obligatory once Mother sought it. At the stage when leave to appeal was granted it appeared arguable that this was Mr Ayre's only complaint. On careful analysis of the whole of his evidence, however, it has become clear that this was not the limit of his complaint. It is true that he gave evidence that as at October 1976 an application for compulsory powers (conveniently but loosely described as an application for a care order) would have been very unusual; thus it could not have been negligent not to make it *then*. And he did make passing mention of the possibility that in November 1977 a local authority might, whilst retaining the child, reasonably have decided to continue contact visits; exactly what he meant would have ensued is unclear, and does not appear to have been pursued by either party. What is clear is that he did assert that no reasonable local authority, properly assessing the case, could have reached a decision to permit return when in fact such return was made, *and* that the only proper course would have been to seek compulsory powers if necessary, that is if Mother did not agree, however reluctantly, to the child remaining with the foster parents. That is plain, *inter alia*, from the fact that it was on the basis that this is what Mr Ayre had said that the case was presented on behalf of the defendants in closing submissions. It is also clear that the case being presented by the claimant was that compulsory powers had to be sought if necessary; that was the case put in some detail to Mr Percival in cross-examination. Thus there was the evidential basis for the Judge's finding which it at first appeared might be absent.
20. The Judge recognised the necessity to apply the Bolam test. He quoted and endorsed the assertion of Mr Ayre that it was unlikely that any similarly qualified expert would disagree. He regarded the evidence of Messrs Lane and Percival as depending substantially on their assumption that a full review of the claimant's welfare had preceded the decision to return. Even if some other Judges might not have taken the same view of the evidence, it is not possible in this court to say that there was no proper basis for the conclusion which the Judge reached.
21. Nor, upon examination, is the Judge's conclusion, or Mr Ayre's evidence, inconsistent with the proposition that at the time of the scald incident in May 1979 it was not possible to say that care proceedings would have succeeded. Whilst the ground to be established for taking compulsory powers would, under whichever statute, have involved similar proof of the failings of the parent(s) both in November 1977 and May 1979, the court would have had to go on to decide whether the welfare of the child called for the exercise of compulsory powers. At that stage of the court's decision, there would have been a real difference between, on the one hand, a decision in November 1977 that the status quo ought not to be disturbed by moving the child from foster parents to parents and, on the other hand, a decision in May 1979 that the status quo should be altered and moreover after the local authority had decided to rehabilitate the child home and the rehabilitation had been carried out. The Judge expressly recognised this. He said at paragraph 65 that an attempt to obtain a care order in 1979

“...would have been a more uncertain exercise and involved a major change in the *status quo* – unlike such a decision if taken in October or November 1977.”

22. This case thus falls to be resolved in this court upon the narrow basis that there was evidential support for the conclusion which the Judge reached. In other cases the evidence might be different. Such a case might be affected by, for example, expert evidence directed to what would have been the likely response of a juvenile court, in a case of neglect rather than of violence or abuse, to an application for compulsory powers by an authority previously planning to rehabilitate, and when rehabilitation had not been tried. Likewise, expert evidence might in other cases follow up the possibility mentioned by Mr Ayre of continuing contact, and explore what in that event was likely to happen.
23. Mr Kent took a supplemental point that the Judge relied upon the existence of a duty under the Boarding Out of Children Regulations 1955 to carry out a review of the claimant’s case which would have been due in October 1977. His contention is that those regulations existed to monitor conditions in the foster home rather than the relationship between the child and his parent(s) or to assess future plans for rehabilitation. This aspect of the evidence went only to the complaint of lack of proper procedural basis for the decision to return, rather than to the reasonableness of that decision in principle. However, whatever is the purpose of the regulations, the experts on both sides were agreed that no return could properly have been made without a thorough review of the claimant’s welfare, so the existence of any additional duty under the regulations made no difference.

A possible subsequent return ?

24. The Judge held that if the claimant had not been returned home in November 1977 it is likely that he would have remained accommodated by the local authority indefinitely. Once again, that conclusion would not necessarily follow but it depends on the evidence in each case. In the present case, it is clear that everyone proceeded upon the basis that if the local authority ought not to have returned the child when it did, there was no realistic scope for later return. Strikingly, there was no evidence from the defendants that even if return in November 1977 had been wrong, it was likely that not long afterwards, perhaps after conditions had been imposed on the parent(s) or severe warning given, rehabilitation would have had to be tried, or at least that it would have been reasonable to try it. It follows that the Judge was entitled to find as he did; indeed such finding was, in this case, treated as following from a breach of duty in 1977.

The type of damage

25. The failings of the parent(s) as at 1977 were sins of omission rather than commission. This was a case of neglect rather than of violence or abuse. The defendants contend that it follows that what was foreseeable if the child was returned home in breach of a duty of care was injury by neglect, not violence or abuse, and that the recoverable loss is therefore limited to the former. That defines the foreseeable damage, and the scope of the duty, too narrowly. What was foreseeable if a negligent return were made was injury through bad parenting and this is what, on the Judge’s findings, occurred.

Quantum of damages

26. The Judge awarded £25,000. The defendants contend that this must have involved compensation for long term psychological damage, whereas on the Judge's findings, the severe personality disorder was congenital and would have occurred in any event. But the Judge was very conscious of the necessity to distinguish between what was properly the result of the negligence which he found and what would have occurred in any event. It was because he made that distinction that he rejected the claim for substantial continuing loss and damages for abuse sustained after leaving home in 1990. His award was for the neglect and abuse during the time at home; it thus continued for about thirteen years. It is right that damages are not to be given for simple unhappiness without more; they are however to be given for the consequences of physical injury and neglect of physical needs which may properly include the effect upon the claimant of those things. The assessment of damages for such a long period of abuse, effectively throughout most of the claimant's childhood, must largely be a matter of impression. It is impossible to say that the Judge's award lay outside the bracket properly available to him.

Limitation

27. The action was treated by agreement as having been commenced on 24 August 2004. Thus the claimant had to establish that his cause of action arose after 24 August 2001, or that he ought to receive discretionary extension. Three questions potentially arose on the limitation issue:
- i) what in this case was the "act or omission which is alleged to constitute negligence" for the purposes of section 14(1)(b) Limitation Act 1980, actual knowledge of which starts the limitation period running ?
 - ii) if there were no actual knowledge of that act, was there constructive knowledge within section 14(3) ? and
 - iii) if there were either actual or constructive knowledge, should a discretionary extension of time nevertheless be granted pursuant to section 33 ?
28. The relevant provisions of the section 14 of the Limitation Act 1980 are:
- “(1) ...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
 - (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence....
 - (c) the identity of the defendant
- ...

(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.”

29. This claimant undoubtedly complained from the early 1990s onwards that the defendants had failed him by not taking him into care and thus caused him substantial injury. Mr Kent, however, disclaimed any contention that that meant that he had actual knowledge for the purposes of section 14(1)(b), that is to say that the relevant act was failure to put or keep him in care. He accepted that the relevant act for the purpose of the breach of duty found by the Judge was the return of November 1977, and that the claimant, who was then but eighteen months old, could not have knowledge of that without sight of his records as maintained by the defendants. It is accordingly not necessary to say more about section 14(1)(b) save to note that the point has not arisen for argument. Mr Kent relies on constructive knowledge under section 14(3).
30. The claimant's case was that he could not reasonably get access to his records before he actually did so in 2004. They were then provided to his solicitors in response to their request. The evidence of his erstwhile foster father was that he had asked the defendants for his file sometime in or soon after 1992. It is no doubt true that his reason for wanting the file was not only to inform his complaint but also to know more about his early childhood; he had for example not known of the existence of his twin sister until 1989 or thereabouts. His complaint was, however, clearly a substantial reason for seeking the file. Agreed correspondence showed that he had written to the defendants asking for it in July 1995 and, when sent a form to complete in October 1995, had returned it with a similar request in May 1996. In September 1996 he instructed solicitors who made a similar request in writing. The correspondence suggests that the defendants continued to deal directly with the claimant, but it is clear that after other letters, they offered him several appointments in January and March 1997 to visit to view the file, and indeed offered to pay for his train journey from London for the purpose. Three appointments were not taken up, and the correspondence ends with an open offer by the defendants to arrange another if asked. The claimant's case in the court below was that having been warned that the contents of the file might be distressing, he wanted to take someone else with him, and did not take the matter further because the defendants were not willing to pay for a companion's travel as well as for his own.
31. The parties' submissions on limitation at the end of the evidence were understandably compressed given the breadth of other issues to be covered. They variously, and perhaps at times compendiously, addressed both the issue of knowledge for the

purposes of section 14 and the issue of discretionary extension under section 33. It is, however, clear that the defendants did raise the issue of constructive knowledge within section 14(3). Perhaps because the submissions were brief and took the form they did, the Judge did not address that question separately. As to limitation he said simply this, at paragraph 88:

“In order to plead a case against the Defendant, the Claimant and his advisers needed to know the state of the Defendant’s knowledge, at the various material times, such as would give rise to the obligation to address his plight and take steps for his protection. I accept that the only means open to him to acquire this knowledge was through consideration of the records, which were obtained in July 2004. Accordingly, there is no need to go on to consider whether there should be an extension under s 33.”

32. By the reference to the state of the Defendant’s knowledge, the Judge was not confusing its knowledge with that of the claimant for the purposes of section 14(1), and Mr Kent realistically did not support the suggestion that he was. But equally it is clear that in referring to what was needed to plead a case the Judge was addressing what (on the claimant’s submission) was the knowledge required by him (viz s 14(1)), but not the question whether he might reasonably have been expected to acquire that knowledge (viz s 14(3)).
33. The question under s 14(3) is, in this case, whether the claimant might reasonably have been expected to acquire the necessary knowledge from facts ascertainable either by himself or with the help of expert advice which it was reasonable for him to seek. It is true that it will be relevant to that question to consider any disability or difficulty which the claimant had in pressing his request or in seeking expert advice. This claimant was a damaged personality and it may be that he was somewhat inhibited by the suggestion that the contents of the file might be distressing. But even assuming that were so, on the agreed facts set out there can only be one answer to this question. He knew where the file was. He wanted it. He was offered access to it. He could clearly have gone to Doncaster to obtain it. The correspondence does not bear out his assertion that the defendants refused to pay for the travel of a companion, nor indeed that he asked them to do so. He may have been referring to a different stage of communication, or perhaps was just inaccurate. But, making the assumption in his favour that the defendants had refused to do this, the Claimant had earlier professed himself ready to send a cheque for copying charges, and could reasonably have been expected, if he had wished to take a companion, to find the rail fare. If on the other hand he did not wish to go there alone then, faced with an open offer of inspection, he could reasonably have been expected to ask someone else, expert or otherwise, to obtain it for him. Had the Judge addressed the issue of constructive knowledge, he would have been bound to find that the claimant had such knowledge.
34. The Judge would then have had to go on to determine the application for discretionary extension under section 33. Different considerations would apply to that issue, as the House of Lords has recently made clear in A v Hoare [2008] UKHL 6; [2008] 1 AC 844. The parties are, rightly, agreed that this question must be remitted to the trial Judge, if the issue remains live. It will be for him to decide, no doubt after seeing or

hearing submissions, whether any additional evidence or oral argument is needed in order to resolve the question.

Conclusion

35. In the result the defendants' appeal must be allowed on the issue of constructive knowledge under s 14(3) Limitation Act 1980, but otherwise must, given the particular evidence in this case, be dismissed. The claimant's application for discretionary extension of time pursuant to s 33 Limitation Act 1980 must, if not capable of agreement, be remitted to the court below, for hearing by the trial Judge if possible, and for management there.