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LIMITATION IN ABUSE CASES:

**WHEN IS A FAIR TRIAL NOT A FAIR TRIAL?
WHEN IT'S INEQUITABLE**

TVZ AND OTHERS V MANCHESTER CITY FOOTBALL CLUB LIMITED [2022] EWHC 7 (QB)

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Summary

Eight victims of prolific child abuser Barry Bennell have lost their compensation claims against Manchester City FC ('MCFC'). Mr Justice Johnson, sitting in the High Court in London, ruled in a 134-page judgment that the claims were out of time and that for various reasons it would be inequitable to allow them to proceed against MCFC. He also indicated that even if he had allowed the claims to proceed, they would all have failed the legal test to determine whether MCFC was vicariously liable for Bennell's actions. The key to the outcome was not whether a fair trial was possible - a frequent misquoting of the correct test in limitation cases - but whether it was equitable to allow the claimants to proceed.

Background

It is common knowledge that Barry Bennell was a prominent youth football coach with a keen eye for identifying, recruiting and referring young footballing talent in the north and north west of England in the 1970s and 1980s. It is also common knowledge that Bennell was a predatory paedophile. Between 1994 and 2020 he was convicted of 90 separate offences against young boys, including six of the eight claimants in this group. He will die in prison.

Many of his victims pursued compensation claims. Some of those victims were abused at Crewe Alexandra where Bennell was employed as a coach between 1985 and 1989. Those claims were based in vicarious liability and legally straightforward. Many of those claims have been quickly and appropriately resolved. However, this particular group of victims, who alleged that they had been abused between 1980 and 1985, faced far greater legal hurdles, principally vicarious liability and limitation.

The claimants' case

The claimants contended that MCFC was vicariously liable for Bennell's assaults because:

- Bennell was engaged by MCFC as a scout and coach
- In the course of those duties, he ran feeder teams for MCFC, providing a source for future recruitment by MCFC
- That each of the claimants played for one or more of these teams
- In the course of his duties for MCFC Bennell abused each of the claimants.

The delays in bringing these claims varied between 25 and 29 years after the expiry of the normal time limit (their 21st birthdays). But each claimant argued it was equitable to disapply the time limit because (1) there was a good reason for the delay and (2) a fair trial was still possible.

MCFC'S case

MCFC did not challenge the allegations of abuse. MCFC accepted that Bennell held himself out as an MCFC representative, using a home-made card which was sky blue but did not bear the club crest. It did not contest the claimants' accounts that this influenced their decisions to play for his teams. However, MCFC did argue that:

- Bennell was never employed by MCFC (this was agreed by the claimants)
- Any ties with Bennell were severed in 1979 when he went to work at Taxal Edge children's home in High Peak, Derbyshire.
- Any teams he ran thereafter had no connection whatsoever with MCFC.
- MCFC could not be vicariously liable for Bennell's actions after 1979.

MCFC also contended that the claims were all brought after long delays and that MCFC had suffered so much irremediable evidential prejudice that it would not be equitable to disapply the time limits.

Johnson J correctly identified that he would first need to resolve the limitation issue.



Limitation

The judge held that none of the claimants had consciously delayed proceedings. Each had a sufficiently reasoned and powerful explanation to justify their delay. It would be equitable to allow each claim to proceed UNLESS there had been a significant impact on the cogency of the evidence due to the delay.

Cogency of evidence - the arguments

The claimants contended that the correct test when assessing the impact on the cogency of the evidence was whether a fair trial was possible. It is necessary to assess the resulting evidential prejudice that is caused both to MCFC and to the claimants. Given that the burden of proof is on the claimants, any degradation of the evidence is likely, disproportionately, to prejudice the claimants rather than MCFC. The key issue on vicarious liability is the relationship between Bennell and MCFC and the best witness on that issue is Bennell, who gave detailed evidence over two days.

MCFC argued that the effect of the delay in each case was a profound impact on MCFC's ability to investigate the claims. MCFC has been left having to rely on the evidence of Bennell, who the claimants argue is discredited.

Interestingly, Johnson J warned that the claimants' formulation of the relevant test (that is, whether a fair trial was possible) had to be treated with caution. Correcting that submission, he set out clearly that the power to disapply the time limit arose *'only if it appeared to the*

court that it would be equitable to allow the claim to proceed, having regard, on the one hand, to the degree to which the application of the time limit would prejudice the claimant and, on the other hand, the degree to which the disapplication of the time limit would prejudice the defendant' (see s33(1) of the 1980 Act).

Cogency of evidence – the abuse and its consequences

Each case depended to a large extent on the oral testimony of witnesses given decades after the event. The evidence required careful assessment, even where the witness is clearly honest and doing their best to give an accurate account, because human memory is inherently unreliable (it is worth looking up the comments of Leggatt J (now Lord Leggatt JSC) in *Gestmin SGPS SA v Credit Suisse (UK) Limited and others* [2013] EWHC 3560 (Comm) [2020] 1 CLC 428 at [16]-[22]). In the present cases, problems with human memory became even more complex because of the involvement of the claimants (to varying degrees) in Bennell's criminal proceedings, related media coverage, the Mulcahy review commissioned by MCFC and the Independent Football Review of Clive Sheldon QC.

Notwithstanding those challenges, Johnson J decided that the delay had not caused any real risk of prejudice on questions of the occurrence of the abuse and its consequences, even though there was considerable scope for reattribution and confirmation bias. Where problems really arose, in his view, was in the ability of the parties and the court to conduct a properly informed, fact-sensitive examination of vicarious liability.

Cogency of evidence - vicarious liability

Vicarious liability is highly fact-sensitive, and its resolution is not entirely straightforward, as a plethora of recent cases, including *DSN* at first instance, *DSN* in the Court of Appeal and four recent Supreme Court decisions illustrate. Narrow but specific distinctions between cases can make all the difference. In order to assess those distinctions in these cases there had to be the ability to make a detailed assessment of the nature of the relationship between Bennell and MCFC. However, that was no longer an option, for several reasons:

- There was no clear contemporaneous documentary record of the relationship between MCFC and Bennell.
- Documents that still existed were fragmentary, incomplete, and of limited assistance.
- That documents had been destroyed or mislaid was not due to any irresponsibility on the part of MCFC.
- At the time the limitation period expired in each of these cases, Bennell had not worked for MCFC for around 6 years and there was nothing to indicate that MCFC might be exposed to liability as a result of his conduct. It is not possible to determine precisely when documentation was destroyed, save that it is likely to have been before 2003.
- The net result was that there was little or no documentary evidence on a wide range of matters (see para 200 for a lengthy list of issues that could not be investigated further due to the loss of documents occurring during the period of delay). Although it is not possible to tell when any individual document was destroyed, it is likely that at least some documentation



would have been available on some of these issues if proceedings had been brought by, say, 1993 (the latest date on which one of these claims could be brought in time, which was still 10 years before MCFC moved to its new stadium).

- The primary remaining evidence came from the witnesses, but most of them were observing the relationship between Bennell and MCFC from a distance, thirty years later, and in circumstances where Bennell was overstating his relationship with MCFC for his own purposes.
- Although claimants gave evidence about the different teams for which they played and the links (as they perceived them) between those teams and MCFC, at the relevant time they were young boys who were being groomed and manipulated by Bennell. Their perception of events had to be assessed in that context. They all believed Bennell was working for MCFC. They had compelling reasons for that belief which was reinforced by everything Bennell said and did. But that does NOT necessarily mean that their belief reflected reality. And there will have been points of detail which those witnesses had no reason to commit to long-term memory.
- The only remaining witness who was able to give direct first-hand evidence about the relationship was Bennell, but his evidence was worthless. He was not a credible witness.
- There were at least eight other witnesses who would also probably have been able to give evidence about that relationship. Ken Barnes, MCFC's head scout, would have been the most important witness. He would have been far better placed to give credible and reliable evidence on the relationship between Bennell and MCFC than any of the current witnesses.

Limitation – conclusions

Each claim was dismissed on the ground that it was out of time. Each claim had been brought more than 25 years after the expiry of the time limit. Each claimant had a good explanation for the delay, but the delay meant that the evidence was less cogent than if the claims had been brought in time. It was not equitable, after all these years, to reach a binding determination on MCFC's responsibility for the abuse based on the partial evidence.

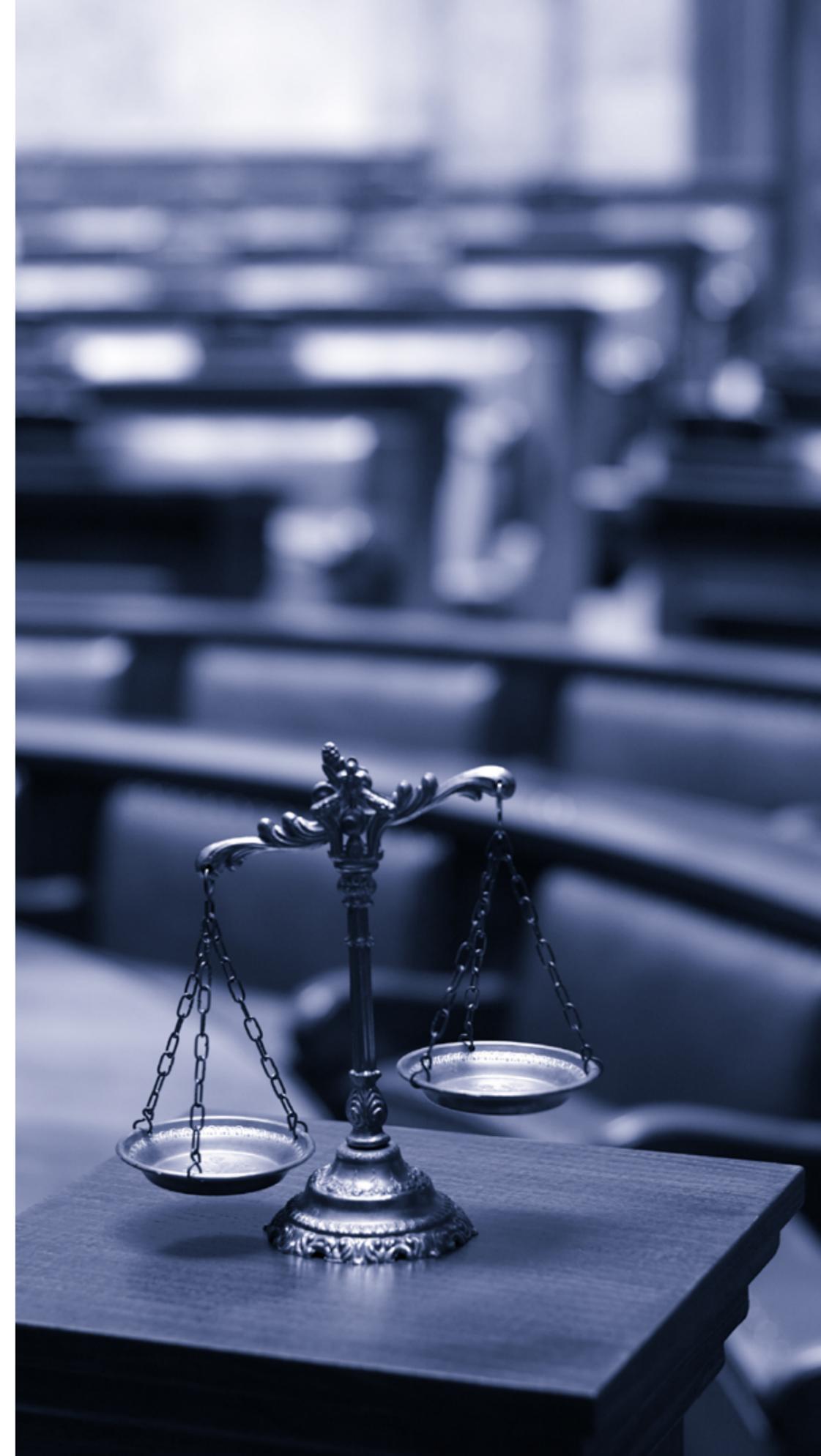
The claimants' formulation that the ultimate issue is whether a fair trial is possible *'needs to be treated with a little care'*. The s33 issue is whether it is equitable to disapply the time limit. That question needs to take account of all the circumstances. It is not simply a question, in the abstract, of deciding whether a fair trial is possible. It is whether, having regard to all the circumstances of the case, it is fair to expect the defendant to meet the claim after so many years have passed.

If the claims had been brought in time, then it is likely that there would have been a much more extensive matrix of evidence on these matters. In particular, clear confident and reliable conclusions could be reached about the relationship between Bennell and MCFC. The ability to do so had been badly compromised by the delay and the consequential impact on the available evidence. It is almost impossible to know which party was more disadvantaged by a loss of evidence. But what was clear is that a loss of evidence was relevant to the question of whether it is fair to require the defendant to face the claim

after such a long delay even if it is not known for certain whether the lost evidence would have assisted the defendant's case (para 205). Other s33 factors were of little or no relative importance.

Even though the limitation period had been disapplied in another football scout case, *Blackpool FC v DSN*, there were acute and highly relevant differences. For example:

- The delay was longer.
- In *DSN* there was evidence from the manager, chairman and company secretary who were all able to assist on the relationship between the abuser in that case and Blackpool FC. There was no such evidence in these cases.
- There was only one boys' team under consideration in *DSN*, and the way in which that single team operated was clear. These cases concerned six youth teams and the evidence relating to how they operated was limited.
- In *DSN* there was a *"narrow scope of factual dispute"* and a *"cogency and abundance of [remaining available] evidence"* such that the testimony of two witnesses who had since died would not have been capable of making a difference. Johnson J took a very different view in the impact of the deaths of no fewer than seven potentially crucial witnesses. Here, having regard to the length of the delay and the way in which the delay has affected the available evidence, he did not consider that it was fair or just to expect MCFC to meet any of the claims.



Subsidiary findings and obiter remarks

Vicarious liability

Just in case he was wrong on limitation the judge then addressed the question of whether, had he allowed the claims to proceed out of time, MCFC would have been vicariously liable. His decision was that all claimants would have failed both parts of the established two-stage test.

Stage 1

Stage 1 of the test will be satisfied if and only if the relationship is akin to employment as opposed to the scout carrying on business on his own account. On the evidence, Bennell was not in a relationship akin to employment with MCFC. There was no contract. MCFC had no control over Bennell, who had his own income sources and owed no allegiance to MCFC. He was a volunteer football coach who ran a number of junior teams (including teams with a connection to MCFC) and who, in that context, acted as a volunteer unpaid scout, recommending players to MCFC for them to consider taking on as associated schoolboys, and assisting MCFC in the conduct of trial games. That was his enterprise, undertaken at his own risk, which MCFC did not control, but was a relationship of mutual benefit to MCFC and Bennell. Applying Lord Phillips' 5 policy reasons from *Christian Brothers* produced the same result.

Stage 2

There was no need to look at Stage 2, but Johnson J did so anyway and, again, found that all of the claimants

failed this test. To pass it, the claimants needed to show that the wrongful conduct was so closely connected with what Bennell was authorised to do by MCFC that the wrongful conduct may fairly and properly be regarded as done while acting in the ordinary course of MCFC's business or Bennell's 'employment'. The focus of this test was on the relationship between Bennell and MCFC rather than that between MCFC and Bennell's teams.

The abuse generally occurred either at Bennell's homes, or at residential premises occupied by Bennell during a football tour or holiday. The claimants were staying at Bennell's home because he was their football coach and they and their parents had somehow been persuaded that it was sensible and convenient for them to stay with Bennell before or after matches, or even for periods of time during the week. There was a factual causal connection between Bennell's role as their coach and the boys staying at his home, in that his role resulted in the claimants staying with him and thus gave him the opportunity to abuse them. But the abuse had nothing to do with any of the potential roles that Bennell undertook. The work that Bennell did for MCFC did not require him to have children stay at his home overnight.

It followed that the connection between the abuse and Bennell's relationship with MCFC was insufficient to give rise to vicarious liability. The relationship gave Bennell the opportunity to commit the abuse, but MCFC had not entrusted the welfare of the claimants to Bennell. It followed that MCFC could not have been legally responsible for Bennell's acts of abuse.

Causation and quantum

Although the judge went on to assess awards between £110,000 and £600,000 for all eight claimants that he would have made had the claimants succeeded, his findings are obiter. Were they not obiter, they would attract greater attention as a number of questions would arise. For example:

- He makes separate awards for (1) the abuse itself, including its immediate consequences, and (2) the longer-term psychiatric disorder caused by the abuse. HE then adds them together with no allowance for any overlap. That approach is an unusual one that is not in line with authorities, has not been seen in similar cases and would be vulnerable to appeal.
- His conclusions on loss of chance of a football career were laden (due to the paucity of evidence) with speculation upon speculation. He assessed that two of the eight claimants would have succeeded. However, even a cursory examination of the assumptions that he made reveals significant gaps in reasoning based on limited lay testimony, pure estimates and statistical uncertainty. Again, the approach is one that (had it been material to the judgment) would be vulnerable on appeal.



Commentary

Abuse cases are difficult. They regularly invoke a range of complexities and sensitivities rarely seen in other cases. Understandably, they generate powerful moral arguments. The judge paid tribute to each of the claimants who had mustered the courage to tell their story. In light of what they had been through, and the further stress and strain that they had suffered, it was not surprising that some of them now wished they had never come forward. As the judge rightly noted in his concluding remarks:

'Each claimant has proved that Bennell abused him. All of them helped to ensure that Bennell was brought to justice. This means that others have been protected from the abuse that he may otherwise have continued to commit. The claimants have shone a light on what was going on in youth football. They have thereby helped to ensure that future generations of children are better protected, not just from Bennell, but also from others whose grooming and abuse can be prevented by better child protection measures.'

And it would be very easy, he acknowledged, to apply moral judgement in order to conclude that it is fair, just and reasonable that MCFC should be vicariously liable for the activities of Bennell.

'It is a big, well-resourced club. It could easily meet the liabilities to the claimants, at a fraction of the amount that it pays its star players. Bennell was connected to MCFC. That connection gave him the opportunity to commit grievous acts of abuse against young, innocent, and vulnerable boys. They have no real alternative remedy.

However, that is not sufficient to meet the test for vicarious liability. It is not open to a court to impose vicarious liability on the basis of an intuitive feeling for where the justice of a case lies. Rather, it is necessary to apply the tightly controlled tests set down in the authorities, including the corrective guidance in Barclays.'

It is that guidance which the judge has applied, completely in line with authority, in concluding that the claims are out of time; and even if he had allowed them to proceed, they would have failed on vicarious liability. We can take a number of points from this decision:

- Limitation continues to be an essential safeguard against prejudice arising from stale claims. These claims were brought more than 25 years out of time and over 32 years after index events. Each claimant has a good explanation for the delay, but that takes matters only so far.
- The delays have meant that the evidence is less cogent than if the claims had been brought in time. Key witnesses are dead, key documents are lost.
- It is not fair to reach conclusions based on partial evidence.
- The correct test for limitation is not whether a fair trial is still possible. It is whether it is equitable to allow the matter to proceed. It is entirely possible that an ostensibly fair trial could take place on whether abuse occurred. The claimants and Bennell were all present to give evidence. But all issues must be capable of being fairly tried. When it came to the question of vicarious liability, potentially crucial witnesses and documents were no longer available. And it doesn't

matter whether it is known if the evidence would have assisted the defendant. The critical point is that a loss of evidence is relevant to the question of whether it is fair to require the defendant to face the claim after such a long delay.

- Doing his best on the available evidence, the judge held that the claimant would have failed both stages of the vicarious liability test. But it is vital to note that he only did so, and arguably obiter, after he had already decided that due to the absence of important evidence it was inequitable to try the issue.
- His observations on stage 2 do contain useful reminders from previous cases that are all too often overlooked:
 - Mere opportunity is not sufficient
 - The close connection test operates between the abuse (and the context in which it occurred) and the nature of the relationship between abuser and defendant. In these cases, as an example, the close connection test was not focused on the relationship between MCFC and the junior team for which a claimant played. It was, rather, critical to focus on the relationship between Bennell and MCFC and what duties and responsibilities were conferred on Bennell to carry out on behalf of MCFC. It followed that if a boy was abused at Bennell's home overnight, when MCFC had never conferred any such duty (to look after a boy overnight) on Bennell then MCFC could not be vicariously liable for what had happened.

- Some observers may consider that the effect of the delay was also sufficient to render it inequitable to assess causation and quantum. There is some force in that. Both expert psychiatrists agreed that their task was made more difficult, not only through unreliability of memory and the risk of retrospective attribution but also the loss of various categories of important documentation. The conclusions of those experts were deployed in assessing significant quantum awards, but it would be reasonable to argue that those awards were based on reports that were prepared by experts who, on their own admission, had to rely on partial and potentially unreliable/uncorroborated evidence.
- As noted above, the judge's approach to quantification not only reinforced the limitation argument in the previous bullet point but would also be subject to considerable scrutiny were it to become relevant on any subsequent appeal. The judge has departed from established authority in quantifying general damages and it also likely to be contended that his approach to loss of chance is fundamentally flawed due to its excessive reliance on assumption and speculation.



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