Case No: H18YJ431

IN THE CENTRAL LONDON COUNTY COURT

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 17/03/2023

Before :

HIS HON JUDGE DIGHT CBE

- -

Between :

LYNN STEWART TAYLOR & 275 OTHERS	**Claimants**
- and -	
THE CABINET OFFICE	**Defendant**

- -
- -

Theo Huckle KC and Catherine Casserley (instructed by **Scott-Moncrieff & Associates Ltd**) for the **Claimants**
Zoe Leventhal KC and Nathan Roberts (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 23 September and 7 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 17 March 2023 by handing down in court and circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HON JUDGE DIGHT CBE

His Hon Judge Dight CBE :

Introduction

1. By section 114 of the Equality Act 2010 ("the Act") the county court is given jurisdiction to determine claims relating to, among other things, a contravention of the duty to make reasonable adjustments to avoid a disabled person from being put at a substantial disadvantage in relation to certain services and public functions when compared to others who do not have the same disability. By section 118(1) of the Act, which is headed "Time limits",

> "(1) Subject to section 140AA proceedings on a claim within section 114 may not be brought after the end of -
>
> (a) the period of 6 months starting with the date of the act to which the claim relates; or
>
> (b) such other period as the county court…thinks just and equitable.
>
> …
>
> (6) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period;"

The principal question before me is whether the claim in this case was brought within the period of 6 months starting with the date of the acts (or omissions in this case) which the claimants complain of. Whatever conclusion I come to in respect of that principal question other questions or issues then arise which I will set out in detail below in the section headed "The application".

2. My role at this stage is not to resolve the merits of the claim, which, for the purposes of the application, I will assume in favour of the claimants rather than the defendants. The potential dispute about substantive issues in the case was not before me. I have to resolve what are essentially procedural issues which arise in the factual context which I will now describe.

3. Around what is considered to be the very beginning of the coronavirus pandemic, on dates between 3 March 2020 and 19 March 2020, the BBC broadcast live briefings on BBC One television by the then Prime Minister containing important information about the pandemic, including HM Government's plans for dealing with it, the initial limitations on movement of individuals and steps which should be taken by institutions and individuals to protect the public and the NHS ("the Briefings").

4. The main claimant, Ms Stewart Taylor, has been profoundly deaf since birth and falls within the definition of a disabled person within section 6 of the Act. She uses British Sign Language ("BSL") as her first language and says that she was unable to follow any of the Briefings because of the failure of the defendant to provide simultaneous BSL interpretation or take any reasonable steps to allow her to access the Briefings. By the claim ("the Claim") the 275 claimants seek not more than £10,000 each and

declaratory relief for unlawful discrimination contrary to sections 20, 21 and 29(2)(c) of the Act. Having regard to the dates of the omissions complained of the primary limitation periods expired on dates between 2 September and 18 September 2020.

5. It is common ground that:

   i) the claim form was first lodged by the claimants' solicitors on 2 September 2020, but was returned by the court to the claimants' solicitors four times before it was finally retained by the court for issue when it was received on 26 March 2021 (as appears from a date stamp on a letter dated 24 March 2021);

   ii) the time limit for the last omission in time under s.118(1)(a) of the Act had expired on 18 September 2020;

   iii) the issue fee of £10,000 was tendered by cheque on 24 March 2021 following which the cheque was presented and cleared;

   iv) the Claim was issued by the county court on 8 April 2021;

   v) the claim form was served on the defendant on 5 August 2021.

The application ("the Application")

6. The defendant made an initial application dated 2 September 2021 to strike out the Claim, which was subsequently refined by a further application notice dated 31 October 2022. The defendant asks me to strike out the Claim on one of the following bases:

   i) first, that the Claim has been brought out of time, having only been brought for the purposes of the limitation period under section 118 of the Act when it was issued on 8 April 2021. If I come to the conclusion that the Claim was brought out of time I am asked to consider the claimants' application for what is referred to for the sake of convenience as an extension of time under section 118(1)(b) of the Act;

   ii) secondly, the Claim should be dismissed because of the claimants' failure to serve the claim form within 14 days of being required to do so by a notice served by the defendant under CPR 7.7;

   iii) thirdly, the Claim should be struck out because of the claimants' failure in the claim form and in the Particulars of Claim to provide basic information about themselves and their claims in breach of the CPR which amounts, in the circumstances, to an abuse of the process.

7. At a short hearing which took place on 23 September 2022, at which it had initially been anticipated that I would be able to determine the defendant's then application to dismiss the Claim, it became apparent that there were documents on the court file which were relevant to the issues before me and which might assist in filling what seemed to be gaps in the evidence relating to the lodging of the claim form, payment of the issue fee and issue of the Claim, but which the parties had not seen (or in the case of documents which had been on the claimants' solicitors' file, they no longer had copies of). I provided both sides with copies of the documents as a result of

which the hearing was adjourned and the parties agreed an order giving directions for the resolution of the defendant's application. The directions provided for any further application made by the defendant to be resolved at the adjourned hearing and gave a timetable for the filing and exchange of evidence in respect of all applications which were to be determined at that later hearing. In light of the documents which the court provided the parties with they agreed the following direction:

> "1. By no later than 4pm on 12 October 2022, the Claimants' solicitor shall serve a statement detailing in full chronological order any information relevant to the bringing, issuing and service of the claim (including evidence about the payment of the court fee), exhibiting disclosure of any further documents relevant to the same including: (a) all records of any oral communications with the Court in relation to the claims (such as attendance notes); and (b) all other documents relevant to the questions of when and how the claims were lodged, issued and served (including from the Claimants themselves). Such order does not require the Claimants to disclose documents that are subject to legal professional privilege."

8. The claimants seek judgment in default of defence in accordance with their application notice dated 20 October 2021.

A preliminary issue?

9. The claimants submit that the question of limitation is a fact sensitive matter in respect of which there should be a trial of a preliminary issue and that it would be inappropriate for the court to determine the issue without giving directions for such a trial, and therefore it is not suitable for summary determination under CPR 24 or strike out under CPR 3.4. In support of that submission reliance was placed on the decision of the House of Lords in Anyanwu v South Bank Students Union [2001] UKHL 1 in which Lord Steyn said, in paragraph [24], that in the field of discrimination claims perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. However, as the defendant submits, correctly in my view, that decision is not authority for the proposition for which the claimants cite it. Anyanwu does not concern a claim which is alleged to have been brought out of time: the issue was whether the employment tribunal had been right to hold that the claim was frivolous or vexatious and should be struck out on the grounds of res judicata. The tribunals and courts which considered the issues in that case at the various appellate stages between the employment tribunal and the House of Lords had to grapple with the underlying facts in the case and the relevant statutory scheme. That is not the same here. The merits of the underlying dispute are not a matter for determination by me and there is no reason why for the purposes of this application that I should not assume that it is properly arguable.

10. As the defendant correctly submits, the issue for determination by me is a procedural issue, principally whether the claim is barred on grounds of limitation, which it is usual to determine in the course of an application to strike out made under CPR 3.4 on

the basis of evidence contained in witness statements which will be read by the court. Appropriate directions have been given for evidence to be filed in this case. A significant quantity of evidence has been filed, including 6 witness statements by the claimants' solicitors, as well as by the defendant. Although submissions have been made about the alleged internal inconsistencies in and the accuracy of the claimants' evidence there have been no express challenges to the truthfulness of it. Nor have the claimants identified any specific fact or information which they would hope to establish by way of live evidence if the question of limitation were to be tried.

11. At the hearing Mr Huckle KC, for the claimants, submitted that the court cannot deal with the application (and in particular the issue of whether it would be just and equitable in all the circumstances to extend time) without live oral evidence and cross-examination of the maker of the witness statements filed on behalf of the defendant. The claimants also submitted that because at present their solicitors' original file is not available neither the parties nor the court have access to any attendance notes which may have been made recording relevant telephone conversations which took place between the solicitors and the court from time to time.

12. In my judgment it is appropriate, and the usual practice, to determine this sort of application without a trial as the directions which I made on the last occasion recognise. The parties have provided the court with a considerable quantity of material and have a continuing duty of disclosure. In light of the contemporaneous correspondence in the hearing bundle there is no need to resolve at a trial any uncertainties and inconsistencies that the evidence of the witnesses may throw up. There are, in my judgment, no conflicts which need to be resolved by oral testimony. The claimants have not identified any specific facts, of relevance to the issues which I have to decide, which need clarification by oral evidence. Further, the fact that there may be further documents of relevance to those issues is not a logical justification for directing that the question of limitation be determined at a trial. I will therefore deal with the application on the basis of the material which has been put before me to date.

The background facts

13. There are essentially five sources of information as to the material facts, namely the documents produced by the parties, the documents produced by the court (mentioned above), the court's electronic case record keeping system, called Caseman, the five witness statements of Mr Fry, formerly of Fry Law Limited ("Fry Law"), the claimants' solicitor throughout this litigation, and the statement of his former assistant, Ms.Clewes. I have reviewed them all but I will refer in detail only to those which help me resolve the issues which arise on the Application.

14. The relevant chronology, after the Briefings, starts when Mr Fry sent a pre-action protocol letter to the defendant dated 22 June 2020. The Government Legal Department ("the GLD") replied on behalf of the defendant on 20 July 2020 denying liability and setting out the defendant's response to the claimants' allegations. In his response dated 29 July 2020 Mr Fry specifically stated that if the defendant continued to defend the cases "proceedings will need to be commenced in September in order to comply with the time limits at s.123 of the Equality Act." He concluded by seeking "a limitation amnesty, or a standstill agreement", to which the GLD replied that they did not have instructions to agree to such a request. Time for commencement of the Claim was therefore in issue well within the timeframe contemplated by the Act.

15. On the court file, but unseen by the GLD until I provided them with copies at the hearing which took place on 23 September 2022, was a number of documents which in my view are self-explanatory and shed light on what had in fact occurred between the lodging of the claim form in September 2020 and issue of the Claim in April 2021. Much of the evidence in the Application now before me was filed in ignorance of the contents of those documents which had been in the possession of Fry Law at one point in time but which Mr Fry no longer had access to. I will refer to them in chronological order before returning to the evidence filed by the parties.

16. A letter on the court file from Fry Law dated (Wednesday) 2 September 2020, being the last day of the limitation period for the breach of duty alleged on 3 March 2020, appears to have been hand-delivered to the county court at Sheffield enclosing three copies of the claim form and a letter addressed to the County Court Money Claim Centre ("CCMCC"). The letter to the county court at Sheffield said "We should be grateful if you would please date stamp the documents at the Sheffield County Court and forward the pack of documents to the CCMC (sic) for issue". The request for a date stamp indicates that Mr Fry was well aware of a potential limitation issue. There is no reference in that letter to payment of the issue fee. The letter to the county court at Sheffield is date stamped as received by CCMCC on (Monday) 7 September 2020. I infer that the Sheffield county court simply acted as a post box and forwarded the documents to CCMCC where, I infer, a paper file of some sort was created.

17. The enclosed letter to CCMCC was also dated 2 September 2020 and read:

> "We…enclose for the Court's attention a Claim Form which has been date stamped as received for Limitation purposes at the Sheffield County Court on 02/09/20.
>
> We would kindly ask that the Court issue proceedings at the earliest opportunity and **return to us** so that we may serve the sealed documents in due course.
>
> We enclose copies for the court and all parties involved.
>
> Please debit our Court Fees Account 0089198.
>
> We look forward to receipt of the sealed copies in due course."

There is no evidence that the documents had been date stamped by the county court at Sheffield "as received for Limitation purposes" and there can have been no guarantee that the county court would do so. As appears below, the proferred method of payment of the issue fee could not be used.

18. By their letter of 24 September 2020 CCMCC notified Fry Law that they had not been able to take the fee or issue the Claim and were returning the documents, saying:

> "Please find enclosed your documents received on 02 September 2020. These have been returned for the following reason(s):-

> There are insufficient funds in your PBA account. Please make the necessary arrangements for your account to be updated and resubmit your claim for processing."

The only inference to be drawn from that letter is that the court had tried but had been unable to take the issue fee from the PBA account of Fry Law and therefore they did not issue the Claim and did not keep the documents which had been lodged, including the claim forms. It was a non-event, if I can call it that. There is no suggestion in the letter that the Claim was being treated by the court as having been lodged for limitation purposes on 2 September. This was the first time that the claim form was returned to Fry Law.

19. On Friday 9 October 2020, some 2 weeks later, Fry Law wrote to CCMCC in the following terms:

> "We refer to the above parties and enclose for the Court's attention a Claim Form which has been date stamped as received for Limitation purposes at the Sheffield County Court as 02/09/2020.
>
> We would kindly ask that the Court issue proceedings at the earliest opportunity and **return to us** so that we may serve the sealed documents in due course.
>
> We enclose copies for the court and all parties involved.
>
> We understand that an attempt was made to take payment from our PBA Account and that this was rejected. We believe that this was due to a cap on our PBA Account and apologise that this didn't go through.
>
> We would be grateful if you could call us on receipt of these papers to facilitate a card payment for the issue fee of £10,000.00. We can be contacted on 0114 3610015…"

Notwithstanding the repeated assertion that the documents had been date stamped for limitation purposes that is not what the claim form or the court correspondence showed at that stage. In any event I do not understand, given the evident importance of the limitation date, why what were said to be the issues with the PBA account were not resolved by Fry Law nor why a cheque was not sent with the claim form when it was returned under cover of this letter to CCMCC for issue.

20. On 5 November CCMCC sent the claim form back to Fry Law for a second time under cover of a letter which said that the court fee was incorrect, although it is agreed by the parties that £10,000 was the appropriate fee. The letter invited Fry Law to resubmit the claim form and fee. I do not understand the reason for the court's letter of 5 November.

21. On 18 November Fry Law responded in a letter which again started by stating, erroneously, that the claim form had been date stamped as received for limitation purposes as 2 September by the county court at Sheffield. That is simply not what the

documents from the county court said at that stage and the repeated assertion by the claimants' solicitors of their view did not alter the true position. The letter from Fry Law continued:

> "We attach a copy of all previous correspondence. You will note that this matter was referred back initially as the Court couldn't take the issue fee of £10,000.00 as we believe there is a cap or limit on our PBA Account.
>
> I called the Court to check this and was advised to re-sent (sic) the paperwork with a request to pay the fee over the phone, I was advised to state our number so that Court staff could call and take the payment over the phone by card. Papers were therefore re-submitted with a cover letter to this effect on 9 October.
>
> We have now received the papers back for a second time noting an incorrect court fee but stating that the correct fee is £XXX. For clarify (sic), this matter is for 276 clients with a total value in excess of £200,000.00. We therefore believe the correct fee is £10,000.00 as stated on the claim form.
>
> We would kindly ask that the Court issue proceedings at the earliest opportunity and **return to us** so that we may serve the sealed documents in due course. We enclose copies for the court and all parties involved.
>
> We would be grateful if you would call us on receipt of these papers to facilitate a card payment for the issue fee of £10,000.00…
>
> We look forward to hearing from you and receiving the sealed copies reflecting the original received date in due course."

It is to be noted from the last sentence of that letter that the importance of the limitation issue was apparent to the claimants' solicitors who were keen to ensure that the court treated the proceedings as having been received in September 2020. However, notwithstanding that apparent and very real concern and, on the assumption that the solicitors had sufficient funds to meet a card transaction, I do not understand why a cheque was not tendered rather than suggesting a process which inevitably risked further delay, as events proved. The CCMCC neither issued nor kept a copy of the copy claim forms which had been submitted twice by Fry Law.

22. On 26 November CCMCC wrote to Fry Law, returning their documents for the third time:

> "Please find enclosed your documents received on 19 November 2020. These have been returned for the following reason(s):-

> The Court has attempted to contact you on three occasions to take payment by telephone. As we have been unable to contact you we are unable to process your request any further. Therefore we are returning your documents for you to arrange an alternative method of payment. Alternative methods of payment are cheque or postal order made payable to HMCTS…"

23. Nothing then happened for some time.

24. It is plain to me that the GLD had not been made aware of the toing and froing which had been taking place between the claimants' solicitors and CCMCC. The first time that the GLD became aware of the progress of the Claim was when they were alerted to it in paragraph 20 of a witness statement dated 14 December 2020 made by Mr Fry in judicial review proceedings brought on behalf of Katherine Rowley against the Cabinet Office ("the Judicial Review proceedings") in which Mr Fry said:

> "On 6 May 2020, we sent 260 Letters of Clam to No.10 Downing Street. According to the Government Legal Department, they have only received 15 from No.10. Those cases remain contested through the County Court where proceedings have been issued but not served."

The inference to be drawn from that paragraph is that the Claim in this case had been issued by the date of that witness statement. However, it had not been issued and the claim form was not then served on the defendant. The claim form in the instant case was not served for another 8 months.

25. After an unexplained gap of a further three months Fry Law wrote again to CCMCC on 23 February 2021, again making the erroneous assertion that somehow the county court at Sheffield had treated the claim form as received for limitation purposes on 2 September 2020. After repeating some of the correspondence between the firm of solicitors and CCMCC the letter continued:

> "We returned the papers and later received a voicemail from the court confirming they were calling to take a card payment but left no return number to call. We later received the papers back into the office.
>
> We attach a further copy and would kindly ask that the Court issue proceedings at the earliest opportunity and **return to us** so that we may serve the sealed documents in due course. We enclose copies for the court and all parties involved.
>
> We would be grateful if you could call us on receipt of these papers to facilitate a card payment for the issue fee of £10,000.00. We can be contacted on 0114 3610015.
>
> We look forward to hearing from you and receiving the sealed copies reflecting the original received date in due course."

Notwithstanding the repeated emphasis on the question of limitation the solicitors again failed to send a cheque or a postal order as they had been advised to do by CCMCC in their letter in November and again chose the inherently riskier route of payment by card over the telephone, inherently riskier in that experience had shown that the solicitors and the court had not managed to communicate by telephone at all up to that point in time.

26. On 10 March 2021 CCMCC returned the papers to the claimants' solicitors for the fourth time, saying:

> "The Court has attempted to contact you on three occasions to take payment by telephone. You've advised the court your (sic) unable to make payment at this time and we've agreed we should return your claim so when your (sic) are able to organise payment you will return the claim for processing, with you (sic) chosen method of payment.
>
> You have been advised to include in your covering letter the initial date the court received your claim, which was 2 September 2020, as this date is important for limitation purposes."

There is no further explanation of what was meant by the statement that the solicitors had been unable to make payment at that time, which I infer was the subject of a telephone conversation between the solicitors and CCMCC as to which there is no evidence. It is also to be noted that for the first time the court itself appears to say that the date when the claim form was originally received was important for limitation purposes, which I infer is what the court was told by the solicitors rather than a view which HMCTS formed itself. Either way it is of no relevance to the limitation issue for the reasons I give below.

27. At the hearing before me the claimant produced an email which sheds some light on the conversation. The email is dated 9 March 2021 and was sent by Mr Fry to his client, Ms Stewart Taylor:

> "Dear Lynn,"
>
> The County Court Office has contacted us requesting that we pay the fee of £10,000.00 to issue the 260 private law claims against the Cabinet Office, in respect of which you are the lead Claimant.
>
> The Court will take the payment by card, or alternatively we can pay it from our Client Account. Would you please ask Just Giving to arrange to transfer that sum to the following account? The Court requires payment by 3pm tomorrow…"

I do not know where the reference to "3pm tomorrow" came from, but this is the only evidence before the court of a request by Fry Law that they be put in funds for payment of the issue fee. The email gives the appearance that this was the first

request made by the solicitors for the claimants to put them in funds; there is no evidence before me of any earlier requests or ability to pay the £10,000 issue fee.

28. On 24 March 2021 Fry Law sent a cheque to CCMCC for £10,000 and the Claim was issued on 8 April.

29. However, on 28 April 2021 the GLD, who were still in the dark about whether any proceedings had been commenced, served a notice on Fry Law pursuant to CPR 7.7 requiring the claimants to serve on them any claim form which had been issued in respect of the Briefings within 14 days bearing in mind that if the Claim had been issued in December 2020 (as appeared in Mr Fry's witness statement in the Judicial Review proceedings) the time for service would have expired in April 2021. CPR 7.7 reads:

> "(1) Where a claim form has been issued against a defendant, but has not yet been served on him, the defendant may serve a notice on the claimant requiring him to serve the claim form or discontinue the claim within a period specified in the notice.
>
> (2) The period specified in a notice served under paragraph (1) must be at least 14 days after service of the notice.
>
> (3) If the claimant fails to comply with the notice, the court may, on the application of the defendant –
>
> (a) dismiss the claim; or
>
> (b) make any other order it thinks just."

Fry Law did not then serve the claim form but in an email dated 11 May 2021 asked for time for service to be extended to 31 May 2021, without explaining why further time was needed. The request was rejected by the GLD on 18 May 2021. The claim form was not then served by 31 May (the extension requested by Mr Fry) and on 9 June the GLD wrote again inviting Mr Fry to discontinue the Claim. There was no response.

30. On 5 August 2021, without further warning, the claim form and Particulars of Claim were served by email on the GLD.

31. The claim form identified the preferred court as the county court at Central London. The brief details of the claim on the front of the claim form allege unlawful discrimination for which the claimants sought damages and a declaration. The claim form is verified by Mr Fry. The front of the claim form has a box in the top right corner which has a sticker placed over much of the information but at the foot of that box is a legible entry which reads "Issue date - 2 SEP 2020". The sticker, which has a bar code and gives the number allocated to the Claim, namely H18YJ431 (a 2021 claim number indicated by the prefix "H"), also bears the detail "CCMCC 08/04/2021" beneath the bar code. The claim form is sealed and has what appears to be a "received" stamp which reads "County Court Money Claims Centre 16 April 2021". The claim form is also stamped "Solicitor Service".

32. Attached to the claim form is a schedule of claimants from which it is readily apparent that the names and addresses of a significant number of them are incomplete.

33. The court electronic record keeping system known as Caseman produced a one page document headed "Notice of Issue (Duplicate)" which appears also to have been served on the GLD on 5 August. That document contains information about the Claim in a box in the top right corner of it, including a line which says: "**Claim Received** 2 September 2020". Beneath that box is a line of typescript which reads "Your claim was issued on 8 April 2021. The court sent it to the defendant by first class post on _/_/___ and it will be deemed served on _/_/___. The defendant has until _/_/___ to reply."

34. At the hearing before me the claimants, through leading counsel, accepted that the Claim had not been issued on 2 September 2020. It is plain, and insofar as it is in doubt I hold, that the claim form was first received by the court on 2 September 2020 but, after having been returned to the claimant's solicitors and relodged four times, the Claim was not issued until 8 April 2021 after the issue fee had been paid.

35. On 28 July 2021 judgment was handed down by Fordham J in R (on the application of Rowley) v Minister for the Cabinet Office [2021] EWHC 2108 (Admin) being the Judicial Review proceedings in which Mr Fry had made the witness statement of December 2020 referred to above. In the Judicial Review proceedings Fordham J found that the defendant had discriminated in respect of two specific scientific briefings in September and October 2020, which he described as "Data Briefings". He described the nature of the two Data Briefings in paragraph [6] of his judgment. They were not briefings by the Prime Minister, of the type which the Briefings challenged in this Claim were. Fordham J said of the two Data Briefings he was considering that :

> "6…. "two particular Briefings" on 21 September 2020 and 12 October 2020 – the first two "Data Briefings" – were "of a different nature from most other Briefings in that they were not led by a minister, but rather were led by a medical or scientific adviser", being "more focussed on some of the underlying data relating to the pandemic, rather than on (for example) announcements of policy or changes in the law or guidance". On the gov.uk web page, where the various "slides and datasets" and "transcripts" are found, the Briefings (including Data Briefings) are called "coronavirus press conferences". They were called "Government coronavirus briefings" in the Defendant's pre-action correspondence. They have also been called "the Government's press briefings", "Government-hosted national briefings" and "national live broadcasts". The basic pattern, as regards the Briefings, was as follows. The first Briefing was conducted by the Prime Minister, together with the Government's Chief Scientific Adviser (Sir Patrick Vallance) and Chief Medical Officer (Professor Chris Whitty), on 3 March 2020. The next Briefings were held on 6 March 2020, 9 March 2020 and 12 March 2020. Then there was a Briefing on 15 March 2020, at which the Prime Minister

> announced that Briefings would now take place daily, as they did until 5 June 2020 by which time there had been some 79 Briefings. Slides and datasets were first used at the Briefing on 30 March 2020 and were frequently used from then onwards: by 5 June 2020 slides and datasets had been used and published in conjunction with some 67 of the 79 Briefings which by then had taken place. From 8 June 2020 to 23 June 2020 the Briefings took place on all weekdays, after which the pattern was less regular. On 21 September 2020 and 12 October 2020 there were the first Data Briefings. The Data Briefing at 11am on 21 September 2020 was hosted by Sir Patrick Vallance and Professor Whitty. The Data Briefing at 11am on 12 October 2020 was hosted by the Deputy Chief Medical Officer (Professor Jonathan Van-Tam), accompanied by Professor Stephen Powis (NHS England's Medical Director) and Dr Jane Eddleston (Greater Manchester Medical Lead).

36. The Briefings which are the focus of the challenge in the Claim before me were not the subject of challenge in the Administrative Court before Fordham J.

37. Fordham J held in the Judicial Review proceedings that the defendant had failed to make the reasonable adjustment in respect of the two Data Briefings of providing a BSL interpreter [para 59] as a result of which he granted a declaration and transferred the claim to the local county court for assessment of damages. The claimants say that the findings of Fordham J in the Judicial Review proceedings have been made on "facts which are not sensibly distinguishable, so as to establish "primary liability" in the instant case, albeit that the extent of disadvantage to each claimant, whilst of the same generic type, is individual to each claimant and is to be separately assessed and compensated for based upon the evidence adduced in each case.

38. Paragraph 1 of the Particulars of Claim, which are dated 5 August 2021 and verified by Mr Fry, says that they set out the particulars of the claim brought by Ms Lynn Stewart-Taylor but continues in paragraph 2 as follows: "These particulars of claim are also generalised pleadings in respect of the claims of the Claimants set out in the Schedule appended to these particulars ("the scheduled Claimants"). Further particulars will be provided pursuant to court directions as to the conduct of the proceedings."

39. By an email dated 9 August 2021 the GLD wrote to Mr Fry serving their Acknowledgment of Service and seeking a detailed response to questions which they posed about the discrepancy between the two "issue" dates which appeared on the face of the claim form, namely 2 September 2020 and 8 April 2021. Mr Fry's response, in a letter dated 2 September 2021, was that the proceedings had been lodged with the court on 2 September 2020 which meant that the proceedings were brought in time. Given that the notice of issue was 8 April 2021 he argued that service on the GLD on 5 August 2021 was within the time for service under the CPR. In paragraph 25 of his witness statement dated 29 November 2021, in opposition to the application to strike out the Claim, Mr Fry said:

> "In this case the Claim was brought when it was received on 2nd September 2020. It was not issued until 8th April 2021 and on

> that basis, it had to be served by no later than midnight on 8th August 2021. The Defendant accepts that it was served on 5th August 2021."

That initial witness statement did not explain what had happened between 2 September 2020 and 8 April 2021.

40. In his later witness statement dated 20 September 2022 Mr Fry explained that his firm, Fry Law, had been forced to close on 19 September 2021 and was now in Administration. He said that he had then moved to work for the solicitors currently representing the claimants, Scott-Moncrieff & Associates Ltd, who served notice of change on 21 September 2021. The administration of his old firm and the move of the case to the current firm meant that he no longer had access to his original files in this case which had been passed to a third-party firm of solicitors in Sheffield. He also gave evidence about a cyber-attack on the case management system of Fry Law which further hampered his access to the original information and documentation which had been on his file.

41. However, Mr Fry went on to say, in paragraph 17 of his second witness statement of 20 September 2022, as follows:

> "17. Although I don't think it relevant to the strike out application or the Part 18 application subsequently made [by the GLD], I do recognise that the Court will be curious as to the reasons for delay between sending papers for issue and service. The answer to that is that the Claimants raised money to pay to come to Court through a Crowd Funding site. They could not pay the Court Fee directly because the Court only had a telephone line for payment which was not appropriate for my clients who are deaf. The crowd funding web site was not able to pay the Court directly. The Claimant had to close her funding account before she could withdraw her funds and it therefore took some time for the lead Claimant to close her fund-raising account and then to arrange the transfer of the £10,000 Court fee by cheque. This was not a fault of the Claimants and did not affect the Claimants from bringing their claims."

That paragraph, from which I infer that there was a problem with releasing funds at the time that the claim form was lodged in September 2020, has to be considered alongside the later evidence (some of which I have set out above) which shows (1) that Mr Fry intended to pay the Court fee via his firm's PBA account in September 2020, but (2) when he could not do so he did not ask his client for funds to pay the issue fee until 9 March 2021, some 6 months later following which the Claim was issued relatively promptly by CCMCC.

42. In his third witness statement, dated 22 September 2022, Mr Fry explained the difficulty in paying the issue fee in the following way:

> "14. Fry Law used a "PBA Account" – Payment by Account- which was connected to our Office Account. PBA is a free

service, enabling legal firms and organisations to pay for HMCTS online court fees by direct debit. The service is managed bv a third-party provider, Liberata UK. It essentially works as a short term credit facility and payments would be taken from the relevant law firm or organisation by direct debit either fortnightly or monthly. This is standard practice. It means that the fees are often not paid as a matter of practice until some time after the Claim Form is received.

15. In addition, the Court also often seals and returns Claim Forms with "Help with Fees" references, where the issue fee is either waived in full or discounted. These applications can often be decided some time after the Court has received the Claim Form.

16. The original Claim Form which I now have, shows that the Fry Law PBA Account details were on the Claim Form in the top right hand box, although it is covered by a sticker applied by the Court. I will bring the original form to Court, because the PBA Account reference cannot be seen through a copy, or scanned, but the reference was 0089198. The details [are] inputted there indicating that there was a clear intention to pay the Court Fee.

17. Ms Clewes's recollection was that there was a difficulty with processing the Court Fee from the PBA Account because the Court Fee was £10,000 and as a small firm our credit limit set by the Court was not high enough to be able to enable that. In other words, that we couldn't pay that way because of the size of the fee and not because the funds were not available at the that time.

18. The Court left messages asking us to pay the fee by card. Carrie [Clewes] recalled difficulties with finding time to speak to someone at the Court to arrange payment. Calls would be received whilst she was on the phone and without notice. The call back waiting times were very lengthy at that time. Again, the file would have recorded these letters, notes and messages, as would the Court file.

19. This was a case in which the Court fee was unusually high for the Court as well as for us as Firm. As the business paid through Office Account and our cashflow was becoming problematic, and as this situation continued, the business financial position was unpredictable and deteriorating. By this stage I had appointed an insolvency adviser and I was concerned that the payment should be made through Client Account rather than through the Office Account to which the PBA Account was connected; any payment could not be done, as indicated in my second statement by the Client by

> telephoning directly. This created more difficulties in making the payment.
>
> 20. As Exhibit CJF3 I attach a message dated 09/03/21 which the Claimant has found confirming that payment was sent to the Fry Law Client Account for that purpose. As I stated at paragraph 17 of my Second Witness Statement, my recollection was that we paid the Court Fee by cheque."

These paragraphs give more than one explanation for the delay in payment of the court fee and it can be seen that there is an apparent conflict between what is said in paragraph 17 and what is said in paragraph 19 about the reason(s) why there was a difficulty in making payment.

43. In any event these explanations for the delay in payment of the issue fee are difficult to reconcile with the explanation given by Mr Fry in his second statement that the delay was due to the difficulty faced by his client is raising or releasing the funds to pay the fee.

44. I also find it difficult to accept that a small firm would not know whether it had a credit limit on its PBA account and, if so, what that limit was. If there was such a limit I do not understand why the firm would not have taken steps to adjust the limit or pay the fee by cheque or by some other means in the first place rather than rely on its PBA account.

45. In his fourth witness statement, dated 27 September 2022, which had been filed in response to the order which I made on 23 September 2022 requiring an explanation of the events evidenced by the correspondence which had been found on the court file and disclosed to the parties on 23 September, Mr Fry said that the reason for the delay in replying to letters from the court between November 2020 and February 2021 was because of a problem with the redirection of his firm's post. He went on to provide another explanation for the delay in paying the issue fee. He said:

> "21. Ms Stewart Taylor has sent me a copy of her bank statement from 2021…This shows that payment was made to Fry Law on 23/03/21. I invite the court to accept that the cheque for payment was sent on 24 March 2021.
>
> 22. The original payment was sent by the PBA Account when the Claim was lodged with the Court, which for reasons outside of Fry Law's control was not processed as explained in my earlier statements.
>
> 23. From this, it can be seen that payment was sent to the Court promptly taking into account all the circumstances.
>
> 24. There was never any intention to delay payment of the court fee, and the court throughout acknowledged that 'for limitation purposes' the claim was properly received for issue on 2 September 2021 just before Fry Law entered administration. At all times Ms Stewart Taylor was able to put us in funds to

> issue the claim, because of her Crowdfunding backing. As soon as delay in payment came to our attention in a way in which we could deal with it, the cheque was obtained from Ms Stewart Taylor and the payment made to the court."

46. The assertion in paragraph 22 that the original payment was sent by the PBA Account when the claim form was first lodged with the court is not accurate. It is Mr Fry's position elsewhere that payment could not be made from that account. Although the PBA account was offered as a source of payment of the fee it was not in reality, in the circumstances, and for the reasons explained earlier by Mr Fry, a potential source of payment. It was in my view the equivalent of tendering a cheque which could not and would not be honoured. On the other hand a real cheque could have been tendered at the time that the claim form was first lodged, subject to the availability of funds to meet it, as to which there is no documentary evidence. In the circumstances the payment was obviously not made promptly contrary to what it said in paragraph 23.

47. Nor, I am afraid, do I understand the sentence in paragraph 24 which reads:

> "As soon as delay in payment came to our attention in a way in which we could deal with it, the cheque was obtained from Ms Stewart Taylor and the payment made to the court."

The delay in payment was made known to Fry Law by the court's numerous letters between September 2020 and March 2021, underscored by the fact that on each occasion the court returned the unissued claim form to the solicitors. The phrase "in a way which we could deal with it" begs more questions than it purports to answer.

48. As I read paragraphs 9 and 10 of his fifth witness statement, dated 14 November 2022, Mr Fry says that when the claim form was lodged in September 2020 there were sufficient funds available to Fry Law to pay the issue fee. I struggle to understand why the firm did not then pay it (by PBA, bank transfer, postal order, cheque or other means) and instead waited until March 2021 to send a cheque.

<u>Limitation</u>

When was the Claim brought?

49. It is common ground that the principal limitation period under section 118(1)(a) of the Act requires the Claim to be brought within 6 months from the acts to which the Claim relates.

50. The claimants submit that a claim is brought for limitation purposes on the day that the court receives the claim form, not on the day that it is issued by the Court. They argue that the claim is brought on the date stamped on the front of the claim form, in this case on 2 September 2020 when the county court at Sheffield received the claim form and either they or CCMCC stamped it with the date. The claimants also argued that whether Mr Fry could and should have done better in paying the issue fee at an earlier stage is irrelevant.

51. Mr Huckle KC alternatively submitted that the original certification of receipt of the claim form was conclusive. He says that the last letter from the court, dated 10 March

2021, which included the sentence "You have been advised to include in your covering letter the initial date the court received your claim, which was 2 September 2020, as this date is important for limitation purposes", amounted to "the officially court-certified date of receipt and thus – expressly – the relevant date on which the limitation 'clock' had stopped." .

52. The defendant contends that a claim is brought when a claim form and appropriate court fee are delivered to the court office and that in this case although the claim form was lodged on several occasions from September 2020 the court fee was not paid until a cheque for £10,000 was sent to the court on 24 March 2021 at which point the Claim was "brought" for limitation purposes.

53. CPR 7.2(1) provides that proceedings are started when the court issues a claim form at the request of the claimant and by sub-rule (2) a claim form is issued on the date entered on the form by the court. Practice Direction 7APD.5, headed "Start of Proceedings", says:

> "5.1 Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is "brought" for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date.
>
> 5.2 The date on which the claim form was received by the court will be recorded by a date stamp either on the claim form held on the court file or on the letter that accompanied the claim form when it was received by the court."

The claimant argue that "the rules only require receipt of the (presumably subsequently issued) claim form in the court office for the purposes of r. 7.2 and PD7A para 5.1". I agree that receipt and issue are causally connected on a proper construction of the rules. However, it seems to me that the rule and the Practice Direction contemplate a claim form being received by the court and retained by the court, even though the court might not process the claim by issuing it on the date that it was received. It seems to me that where the court has not retained the claim form and, indeed, has returned it on four occasions declining to issue it that the proceedings are neither "started" nor "brought" within the meaning of the CPR unless and until the claim form is retained for issue.

54. Neither the rule nor the Practice Direction says anything about the payment of the issue fee.

55. In <u>Hayes v Butters</u> [2021] EWCA Civ 252 the Court of Appeal considered the role played by the payment of the relevant court fee for limitation purposes, in that case s.35(1) of the Limitation Act 1980, which speaks of a new claim being "made" as opposed to "brought". The ratio in that case appears from paragraph 1 of the judgment of Peter Jackson LJ:

> "1. Does the non-payment of a court fee mean that time continues to run for limitation purposes in respect of a new

> claim within existing proceedings? In my view it does not. If a new claim which is not otherwise abusive is made by amendment within the limitation period, it will not later become time-barred because a requisite court fee had not been paid."

In reaching that conclusion about a new claim made in existing proceedings Peter Jackson LJ reviewed the existing case law which considered when new proceedings were "brought". First he looked at two decisions of the Court of Appeal and said of them:

> "14. *Barnes* and *Page* were concerned with when an action was 'brought' under Part I of the Act. They were not concerned with the making of a new claim under s. 35 of the Act. They establish that for limitation purposes, time will cease to run upon the delivery of the claim form to the court office. That interpretation was justified by the obvious unfairness of a claim becoming time-barred because of a delay in issuing on the part of the court where the litigant had done "all in [his/her] power to set the wheels of justice in motion". The decisions assume that this will include payment of the appropriate court fee, but they did not expressly consider a situation where a claim form is lodged in time but with an incorrect fee, whether inadvertently or abusively. Nor did they concern the position where a claim is issued by the court within the limitation period, despite a non-payment of the correct fee."
>
> 15. The reference in *Barnes* and *Page* to the payment of an appropriate fee in the context of limitation has been taken up in six first instance decisions which cannot all be reconciled with each other."

He then turned to the first instance decisions before summarising them and identifying the different conflicting strands, which he did not resolve. One of the decisions which he looked at was that of Hildyard J in what is known as "Page No.2" following the appeal to the Court of Appeal in the first Page case. He summarised that first instance decision in paragraph 16 of his judgment:

> "16. *Page v Hewetts Solicitors* [2013] EWHC 2845 (Ch) ('*Page No. 2*') was the decision of Hildyard J following the appeal. He was called upon to consider two claims. Having heard evidence about the first claim, he did not accept the assertion that it had been delivered to the court within the limitation period. As to the second claim, which had been delivered in time, he noted that the Fees Order was not easy to construe but he held that the fee proffered (£990) had been insufficient by £400. He said that:

> "It is, in a way, concerning that the fate of a claim should depend upon the miscalculation by such a relatively small amount of a court fee. I have considered whether it is so *de minimis* that the Court should not take it into account, or make some exception or allowance."

However, applying what he took to be the rationale of this court's decision, he concluded that the claimants had not done all that was required of them. Accordingly, even though the underpayment arose from a miscalculation and that there was no question of abusive procedural conduct, the claim was time-barred."

56. After summarising some of the other conflicting first instance decisions Peter Jackson LJ said in Hayes v Butters:

"23. I reach the following conclusions:

(1) The cases, with the possible exception of *Glenluce*, are concerned with the bringing of actions under Part I of the Act. They do not directly concern a new claim made by amendment within existing proceedings.

(2) Accordingly, none of the decisions suggests that the non-payment of a fee prevents a new claim from being 'made' for the purposes of s. 35 of the Act.

(3) As a matter of construction of Part I of the Act, an action will be brought within the limitation period if it is issued by the court within that period. The statement in *Bhatti* that an action will be statute-barred if issued in time but without the appropriate fee is not correct.

(4) The decisions of this court in *Barnes* and *Page* establish that an action will be brought within the limitation period if it is delivered in due time to the court office, accompanied by a request to issue and the appropriate fee. They do not decide that an action will be brought in time *if and only if* it is accompanied by the appropriate fee."

24. There is a division of opinion at first instance as whether an action delivered but not issued in due time is brought at the date of delivery if the correct fee has not been proffered. There are perhaps three approaches. In *Page No. 2* and *Dixon* it was held that an action would not be brought by reason of the non-payment alone. In *Lewis*, it was held that the action had not been brought because the non-payment was abusive. In *Liddle* it was held that the action had been brought because

> the non-payment had not been materially abusive, in the sense that it did not impact on the timing of the issuing of the claim. Each approach involves a trade-off between the advantages of certainty and an appreciation of the justice of the individual case. Tempting though it is to seek to resolve the question, it is unnecessary for us to do so for the purposes of the present appeal. That said, my provisional view is that there is force in the concerns expressed in a number of the cases about the disallowing of a claim on limitation grounds merely because of an inadvertent miscalculation of a court fee. I also agree with the observations of Stuart-Smith J in *Dixon* about the range of other responses that are available to the court to control any abuse of its processes:
>
> > "56. … If identified before issue, the court may simply refuse to issue the proceedings until the proper fee is paid. If proceedings are issued, the court could direct the payment of the missing fee either at the time of issue or later. Non-compliance with that order could result in the proceedings being stayed or in a succession of peremptory orders of increasing severity that could, at least in theory, lead to a claim being struck out for non-compliance. The existence and potency of these procedural responses demonstrates that the nuclear option (i.e. holding that all proceedings that are issued without the correct fee being paid are ineffective to stop time running) is unnecessary as well as being unwarranted."
>
> However, even if good faith miscalculations were not ineffective to stop time running, there is a further difficult question about where the line should be drawn in relation to calculated underpayments, as can be seen from the different approaches taken in *Lewis* and *Liddle*. As the present case is not one in which such abuse was found, resolving that question is beyond the scope of this appeal and the matter must be left for decision in a case in which the issue directly arises."

57. None of those cases support the claimants' proposition that a claim is "brought" for limitation purposes when the court receives the claim form and stamps a received date on it.

58. The question for me is whether the Claim falls within the ratio of any of the decisions which bind me. The instant case is neither a Barnes nor a Page case, as it was in the Court of Appeal (paragraph [23(4)] of Hayes), where the payment of the court fee at the time that the claim form was lodged was not in issue before the Court of Appeal. In the instany case the claim form was ultimately not delivered to the court with the appropriate fee until 24 March 2021.

59. In my judgment the defendants are correct in their submission that this is a Page No.2 case, which is binding on me being a decision of the High Court to which any appeal

from my decision would lie. As the reference to that case above demonstrates, Hildyard J was dealing with a (second) claim in which the claim form had been delivered to the court in time but the correct fee had not. He concluded that he was bound by the decision of the Court of Appeal in Page at paragraph 38 of which Lewison LJ had concluded that inclusion of the appropriate fee was an essential requirement for determining when a claim was brought. Applying the ratio of that decision to the case before him Hildyard J said:

> "57. However, as I read Lewison LJ's judgment in the Court of Appeal, the rationale of treating the receipt by the court of the required documents as sufficient and as transferring to the court the risk of loss or delay thereafter (see paragraph 31 of Lewison LJ's judgment) is that it is unfair to visit such risk on a claimant after he has done all that he reasonably could do to bring the matter before the court for its process to follow. Lewison LJ expressly described what had to be established by the Claimants: that the claim form was (a) delivered in due time to the court office, accompanied by (b) a request to issue and (c) the appropriate fee. In my judgment, the failure to offer the appropriate fee meant that the Claimants had not done all that was required of them; and they had left it too late to correct the error, which was a risk they unilaterally undertook."

He therefore concluded that the claim in the case before him had not been "brought" within the time permitted by the Limitation Act 1980.

60. The facts of the instant case fall squarely within the factual matrix of Page No.2. If the test is that the claim is brought when the documents and the appropriate fee is paid the answer is that the claim was brought in March 2021, not in September 2020. If the test is wider, namely, when did the claimants do all that they reasonably could "to bring the matter before the court for its process to follow" the answer is the same. In my judgment the claimants, via their solicitors, failed to do all that they reasonably could in the steps which they took between September 2020 and March 2021 to pay the issue fee. The factual analysis which I set out at length above plainly demonstrates that failure.

61. The instant case is also much closer to the type of case considered by Stuart-Smith J, as he then was, in Dixon, where the absence of the fee was identified before issue and the court refused to issue the Claim and, indeed, returned the claim form to the claimants' solicitors on a number of occasions. The effect of that refusal to issue was, as I read the case, that the claim had not been brought at the time that the claim form was returned to the claimant.

62. On the basis of my view of the law I do not have to decide whether there was abuse of the process here. However, if on the other hand the Lewis and Liddle approaches are the correct basis on which I should direct myself the question is whether the non-payment of the issue fee is (materially) abusive. The claimants submit that there is no evidence of any abusive behaviour by the claimants. In my judgment if the reality is that the claimants through their solicitors sought to maintain that the Claim was live from 2 September 2020, at a time when they failed to pay the issue fee, did not engage with the court to enable the fee to be paid, and delayed in doing so until put in

funds while hoping to argue that the claim was on foot then in all the circumstances it seems me in the present case that the non-payment of the issue fee at the time that the claim form was lodged and successively relodged was (materially) abusive.

63. In the alternative the claimants submit that the court itself concluded that the Claim had been brought in time when it wrote to the claimants' solicitors the letter dated 10 March 2021, which included the sentence "You have been advised to include in your covering letter the initial date the court received your claim, which was 2 September 2020, as this date is important for limited purposes", amounted to "the officially court-certified date of receipt and thus – expressly – the relevant date on which the limitation 'clock' had stopped." That argument cannot succeed. Whether the claim was brought at a certain point in time is a matter of law to be determined in the light of the relevant authorities. Secondly, the court only included the statement relied on by the claimants at the very end of the chronology after the claim form had been rejected on a number of earlier occasions. Thirdly, insofar as it may be said that the reliance by the claimants on the statement is of some legal effect the evidence demonstrates that (a) it was far too late to have the effect which the claimants contend for and (b) no detrimental reliance has been, or in my view could be, identified.

An extension of time

64. There is power, under section 118(1)(b) to extend the time for bringing the Claim for "such period as the county court…thinks just and equitable".

65. The claimants submit that if I reach the conclusion that the claim was not brought until the issue fee was paid then I cannot go on to consider an extension of time at this point because "the test for strike out/summary judgment is not met given that the claimants contend that it would be just and equitable for the court to hear the claims and the court will – if a form of limitation defence is pleaded against any of the claimants – be required to give directions for and determine that issue upon the evidence adduced in each relevant case."

66. In my judgment that formulation of the approach which the court should take does not reflect the statutory scheme. The issue of what is "just and equitable" is first, the criterion for determining an alternative time limit for bringing a claim, hence the use of the word "or" at the end of sub-paragraph 118(1)(a) of the Act. Thus the court only reaches the stage of applying the test (or considering the issue of an extension) if it has concluded that the claim was not brought within the 6 month period provided by sub-paragraph 118(1)(a). Secondly, the issue of what is "just and equitable" is the yardstick against which the time within which the claim was actually brought is measured. It is not the yardstick for deciding whether to hold a trial of a preliminary issue as to when in fact the claim was (or should be permitted to be) brought.

67. The claimants describe the court's power to determine an alternative period under sub-paragraph 118(1)(b) as a discretion, which the analogous case of Hutchison v Westward Television Ltd [1997] IRLR 69 regarded it as. Be that as it may it seems to me that the task for the court is to undertake an evaluative judgment in the light of all the relevant factors.

68. The parties have been unable to find any authority on section 118 of the Act. However, the defendant submits section 118 should be construed consistently with

section 123 of the Act which provides that complaints in the Employment Tribunal must be brought within 3 months or, insofar as relevant, in the same words as section 118(1)(b), namely "such other period as the employment tribunal thinks just and equitable". They refer to Robertson v Bexley Community Centre [2003] EWCA Civ 576 in which the Court of Appeal, considered the predecessor of section 123 of the Act, namely section 68 of the Race Relations Act 1976 which was in materially the same terms. The tribunal in that case had held the complaint to have been brought out of time and held that it would not be just and equitable to hear the complaint out of time. The Employment Appeal Tribunal overturned that decision and the Court of Appeal, in turn, allowed the appeal against the decision of the EAT. Auld LJ, with whom the other two members of the Court of Appeal agreed, held as follows:

> "23. I turn now to the second issue. The decision by the Employment Tribunal not to exercise its discretion to consider the claim on just and equitable grounds. There are a number of basic propositions of law to which Miss Outhwaite has referred us which govern the way in which this exercise has to be undertaken. If the claim is out of time, there is no jurisdiction to consider it unless the Tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the Tribunal to determine, as it did here, having reconvened for the purpose of hearing argument on it.
>
> 24. The Tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in Daniel and Homerton Hospital Trust (unreported, 9th July 1999, CA) in the judgment of Gibson LJ at page 3, where he said:
>
> > "The discretion of the tribunal under section 68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong."
>
> 25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a Tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can

> identify an error of law or principle, making the decision of the Tribunal below plainly wrong in this respect."

He continued at paragraph [33]:

> "As I have said, the Employment Tribunal had a very wide discretion in determining whether or not it was just and equitable effectively to extend time. It was entitled in the words of section 68(6) to consider all the circumstances, anything that it considered to be relevant."

69. I was also taken to a much more recent decision of the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 which considered the application of the power to extend time under section 123 of the Act where a race discrimination claim had been brought 3 days out of time and the Employment Judge had refused to extend time. The Court of Appeal held that the judge had not misdirected herself despite the short period of delay in bringing the claim and despite the absence of prejudice on the part of the respondent to the claim. In analysing the decision of the first instance tribunal, which they upheld, the Court of Appeal commented

> "24. At para. 35 she says that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals. The former point is unexceptionable. The latter reflects a statement made by Auld LJ at para. 25 of his judgment in *Robertson*. That statement was the subject of some discussion in the later decision of this Court in *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327 (*per* Wall LJ at paras. 24-25 and Sedley LJ at para. 31), but it is not a ground of appeal that the Judge's reference to that statement constituted a misdirection, and in any event I do not think that it did.
>
> 25. In short, the substance of the Judge's reasoning was as follows. The proper starting-point is that other things being equal time limits ought to be enforced: para. 35. In this case there was no good reason for the Appellant missing the applicable deadline, for the reasons given in para. 32. If an extension were granted, the key events which the tribunal would be being required to examine would have occurred almost a year before the start of the claim (in a context where the primary time limit is three months from the date of the act complained of): para. 33."

70. Having decided that the appeal should be dismissed Underhill LJ, with whom the other two Lords Justices agreed, went on to give more general guidance at [37], which included the following:

> "…rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate *Keeble*-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in [*British Coal Corporation v Keeble [1997] UK EAT 496/98*] , well and good; but I would not recommend taking it as the framework for its thinking."

71. It seems to me that the following principles may be derived from the above decisions of the Court of Appeal:

    i) There is a public interest in the enforcement of time limits;

    ii) An extension of time is the exception, rather than the rule;

    iii) It is for an applicant to demonstrate that it is just and equitable to extend time;

    iv) The court has a "very broad general discretion" in respect of such applications;

    v) While there is no checklist the court should take into account all the factors in the case which it considers relevant to whether it is just and equitable to extend time,

    vi) Those factors include "in particular…the length of, and the reasons for, the delay".

72. Bearing in mind that the burden of proof is on the claimants to show why the limitation period should be extended it is important to look at the reasons why the claimants say that it is just and equitable to do so in all the circumstances. The only evidence which the claimants rely on in support of their application for an extension of time under section 118(1)(b) is to be found in paragraphs 22 and 23 of Mr Fry's fifth witness statement of 14 November 2022:

> "22. Should the Court determine that the Claim Form was, for technical reasons issued out of time, I would urge the Court to recognise that this was not a failing which ought to prejudice the Claimants either in relation to their substantive claims or at all. The Claimants have valid claims which have not been met by any Defence. Their claims have been delayed for reasons outside of my control, or theirs. There has been a case which I brought on similar issues where Mr Justice Fordham made a declaration that the Cabinet Office discriminated against deaf people who use BSL as their first language. I would ask the Court to recognise that the focus on technical issues here is

> designed to avoid dealing with the substantive issues which are of significant importance to over 80,000 deaf people in the UK.
>
> 23. The Claimants are not seeking an exclusively financial remedy and this is not a matter which can be said to be one which would be offset against Fry Law (in Administration) in any event. It would therefore be just and equitable to allow this case to proceed, even if the Court found technical failures on the part of Fry Law, in respect of which I would in any event apologise for.

73. The claimants argue that the decision whether to extend time has to be made in respect of each individual claimant on the evidence relating to their own personal circumstances. However, in their evidence the claimants have chosen not to provide such information but only to rely on the matters in paragraphs 22 and 23 of Mr Fry's fifth witness statement set out above.

74. In opposition to this application for an extension of time Ms Wilkinson-Hargate of the GLD made a witness statement dated 28 November 2022 in which she identifies what she says are two forms of prejudice which the defendant would suffer were the court to grant an extension, first, the prejudice of having to meet a claim which would otherwise be defeated by a limitation period and, second, what is described as the forensic prejudice of having to defend a delayed claim bearing in mind that it may be more difficult to find the relevant documents and identify and proof the relevant witnesses (whose memories may fade in any event). The defendant says that if there is forensic prejudice that is "crucially relevant" and may be decisive. In support of that submission the defendant relies on the decision of Elisabeth Laing J, as she then was, in Miller v MoJ [2016] UKEAT 0003 concerning the approach of the Employment Tribunal to an application for extension of time for bringing claims holding, at [13], that forensic prejudice to a respondent "may well be decisive". In their skeleton argument the defendant's counsel submits that there are 8 relevant factors which point against the court extending time.

75. The claimants submit that the judgment in the Judicial Review proceedings demonstrates that there is no forensic prejudice because in order to meet the claim in that case the GLD had been making enquiries about the events which are the factual basis of the claimants' Claim in the present case.

76. I have considered carefully the factors on both sides and I have come to the conclusion that it would not be just and equitable in all the circumstances to extend time for bringing the Claim until the issue fee was paid in March 2021 for the following reasons:

    i) Time limits are to be observed and an extension is exceptional;

    ii) It is for the applicant to demonstrate why it is just and equitable to extend time and I need therefore to evaluate the reasons given by the claimants in their evidence;

    iii) The claimants describe the possibility of the Claim having been brought out of time as a technical issue. It is not. It may be a procedural issue but that does

not make it technical, in the intended sense, which would trivialise the importance of time limits;

iv) The delay between September 2020 and March 2021 was lengthy, equal to the length of the principal limitation period and allowing an extension would, in effect, mean doubling the limitation period;

v) The reasons given for non-payment of the issue fee between September 2020 and March 2021 are, on a generous interpretation of the evidence, not entirely clear but appear to show, at the very least, a failure to engage with the requirement to pay the fee in any substantive way until nearly 6 months after expiry of the principal limitation period. The claimants did not do what the court repeatedly asked for in correspondence and no satisfactory explanation has been given for that failure. Nor do I accept, on the evidence before me, that the delay in bringing the Claim was outside the control of Mr Fry and his clients as he suggests in paragraph 22 of his fifth witness statement;

vi) I cannot assume that but for the "technical" issue relating to the limitation period that the claimants would necessarily succeed in this litigation. The merits of the substantive claims are still a matter for determination. I do not accept the submission that the decision of Fordham J in the Judicial Review proceedings in respect of the two Data Briefings is on all fours with or dispositive of the Claim in respect of the Briefings in issue in this case;

vii) In their skeleton argument the claimants place reliance on authorities which suggest that failings by a solicitor in presenting a claim should not be laid at the door of the claimants. Before me the claimants submitted that it was not that litigants should never be fixed with the failings of their solicitors but, they asked rhetorically, why should the claimants be condemned in this case. Neither the evidence nor the submissions before me specifically suggested that it was the solicitors' fault (save in a technical sense) that the fee had not been paid at an earlier date, the position remaining somewhat obscure. Leading counsel suggested that Mr Fry might be cross-examined in due course about his ability to pay the issue at an earlier date. However, it seems to me that in the very many opportunities which had been open to them to do so during the course of the preparations for the hearing of this application the claimants could, and should, have set out in their evidence unequivocally what their position was. Whether the claimants' solicitors had the funds to pay the issue fee at 2 September 2020 should not be a difficult question to answer;

viii) There is prejudice in having to meet a claim which would otherwise be defeated by a limitation defence and there may well be forensic prejudice but that is difficult properly to evaluate on the material before me and which I need not determine in light of my other conclusions above.

On balance I have come to the conclusion that it would not be just and equitable in all the circumstances to extend the time for bringing the Claim to the date at which the issue fee was finally paid by the claimants.

Dismissal for failure to comply with CPR 7.7 request

77. The Claim was issued on 8 April 2021, unbeknown to the defendant or the GLD, which served its notice under CPR 7.7 (text set out above) on 28 April requiring the claimants to serve the claim form within 14 days or discontinue the Claim. The claim form was not then served on the defendant until 5 August 2021, just under 4 months after issue (i.e. the usual period for service permitted by the CPR).

78. In paragraph 25 of his fourth witness statement dated 12 October 2022 Mr Fry said that he had no intention to delay service of the claim form and that on issue he had diarised the claim form for service "within the 4 months allowed".

79. In paragraph 42 of the claimants' skeleton argument it was said on their behalf:

> "As a matter of generality, to the extent that there is a complaint made by the defendant about delay, CPR 1.1 is germane. At its outset the case concerned novel points (at least they were novel until determined by the High Court on 28 July 2021 in [the Judicial Review proceedings]. In all the circumstances of the case it was both proportionate and in accordance with concern for the proper administration of justice not to serve the claims on points that were shortly to be decided. Had [the Judicial Review proceedings] been unsuccessful on the same issues, and/or lesser points only been determined in favour of those claimant, it would have been necessary for careful consideration to be given to the costs and merits of the current claims, as well as to their correct formulation in Particulars. Once the formal date of issue was known, given the proximity of a merits based decision being made in the senior court the claimants cannot be said to have abused any process by awaiting the outcome of the Judicial Review proceedings before serving these claims on the defendant."

My concern about that paragraph is that it is not reflected in the evidence which was filed in respect of the Application.

80. Where a claimant fails to serve a claim form within 14 days after service of a notice to do so the court is given the power by CPR 7.7(3) to dismiss the claim or make any other order it thinks fit. The claimants submitted that the court's power to intervene under CPR 7.7 had lapsed once the claim form had been served. However, in my judgment the rule does not suggest that the powers in sub-rule (3) may only be exercised in a situation where after expiry of the notice the claim form still has not been served. Prima facie, therefore, it seems to me that the powers are exercisable in principle in the present case where the claim form has been served albeit outside the period required by any notice served by the defendant.

81. To assist me in my approach to this issue the parties referred me to the decision of Andrew Baker J in Brightside Group (formerly Brightside Group plc) v RSM UK Audit LLP [2017] EWHC 6 (Comm), a case in which there had been a technical failure to comply with a notice served under CPR 7.7 by about two business days,

albeit the claim form was received by the defendant's solicitors within time. That was a case where the application to strike was made by the defendant after the relevant claim form had been served. The judge refused to dismiss the claim and gave directions about the filing of pleadings. He expressed the following view about the purpose of CPR 7.7

> "34….
>
> The function of CPR 7.7, as it seems to me, is to enable defendants to flush out early whether a claim that has been issued against them is going to be pursued and to get early sight of it, if it is. That does not involve or require putting the temporal validity of the claim form, that is to say the length of time within which the claimants' invocation of the court's jurisdiction will be valid, into defendants' hands (through service of a CPR 7.7 notice). I do not read the express reference to dismissal of the claim in CPR 7.7(3) as indicating a presumption as to the result of non-compliance with a CPR 7.7 notice. In my judgment, it is there merely to make clear that non-compliance is to carry with it a power to dismiss in an appropriate case (and not only lesser, procedural, sanctions). An example would be where the defendant, on his application under CPR 7.7(3), persuades the court by evidence that the claimant has no real intention of pursuing the claim. The court could then, and would expect to, put the claim out of its misery by an order for dismissal even though *ex hypothesi* the claimant had not done so himself by discontinuing."

82. The defendant asks me to dismiss the Claim because of the following:

i) the claimants' failure to respond to the notice under CPR 7.7 except to request an extension which was rejected by the GLD's letter of 18 May 2021, after which the claimants' solicitors did not respond to the notice despite the defendant's solicitors' letter of 9 June asking the claimants to discontinue, which was not responded to either,

ii) the failure to serve the claim form in compliance with the notice,

iii) noncompliance with the CPR 7.7 notice has not been explained,

iv) the noncompliance was substantial (nearly 3 months),

v) the claimants' own suggested service date of 31 May 2021 was not complied with;

vi) the time from when the claimants say that the Claim was brought until service, more than 11 months, is much greater that the ordinary period for service and

vii) the claimants have not advanced a good reason for the delay.

83. The claimants ask me to consider the usefulness and proportionality of this aspect of the defendant's application, alleging that the defendant itself is guilty of abusing the process of the court because there was no legitimate purpose in serving a notice under CPR 7.7 or in making this application once the defendant had served an Acknowledgement of Service.

84. Technically this issue is academic, but I have heard detailed submission on it and so I should address it.

85. Had the matter come before me in May 2021 I would probably have made an unless order for service of the claim form within a short limited period of time. On the basis that the application comes before me some considerable time after service of the claim form, and, but for my decision under section 118 would have been brought in time, and, on the basis, as I have said, the Claim is properly arguable I would not now strike the Claim out. Nevertheless I have no doubt that it was proper to serve a notice under CPR. 7.7 and make an application reliant on it. The claimants should have engaged with the defendant about the notice and responded to it. They had no procedurally justifiable reason, in my judgment, for "keeping their powder dry" and refusing to serve the claim form.

Particulars of the claimants and of their claims

86. CPR 16.2 sets out what a claim form must contain and is supplemented by Practice Direction 16 which requires the following specific details:

> "2.2 The claim form must include an address at which the claimant resides…
>
> 2.5 If the claim form does not show a full address, including postcode, at which the claimant(s)…reside or carry on business, the claim form will be issued but will be retained by the court and will not be served until the claimant has supplied a full address, including postcode, or the court has dispensed with the requirement to do so…
>
> 2.6 The claim form must be headed with the title of the proceedings, including the full name of each party. The full name means, in each case where it is known:
>
> (a) in the case of an individual, his full unabbreviated name and title by which he is known…"

87. CPR 16.2(1)(a) requires the particulars of claim to "contain a concise statement of the nature of the claim" which includes "a concise statement of the facts on which the claimant relies" in accordance with CPR 16.4(1)(a). The notes in the White Book at 16.4.1 make the self-evident point that the pleading must include "all the facts necessary for the purpose of formulating a complete cause of action".

88. The defendant submits that in respect of the claimants other than Ms Stewart-Taylor there are serious procedural deficiencies with the claim form and the particulars of claim, including failures to provide full details of the parties' names and addresses in

accordance with the Practice Direction and a failure to plead any facts which would amount to a complete cause of action.

89. The claimants accept that there are some errors in providing correct names and addresses but they submit that (1) any errors in the particulars of the claimants could be cured by amendment, (2) the current particulars provide sufficient information to enable the defendant to know the case which it has to meet, (3) insofar as further particulars are appropriate a request should be made under CPR 18 and an opportunity to amend should be afforded rather than seeking to strike the Claim out, (4) there is no prejudice to the defendant from the current form of the claim form and particulars whereas only the claimants would suffer prejudice if the Claim were to be struck out, (5) in group litigation generic pleadings are the norm so far as liability is concerned and individual details of loss and damage can be provided in the claimants' witness statements in due course, and (6) the Claim is arguable and it would be neither necessary nor proportionate to strike it out at this stage when appropriate case management directions could be given to deal with any perceived shortcomings in the way in which the claimants currently put their case. Insofar as the alleged defects may be cured by amendment the claimants seek permission to amend.

90. Had I not struck the Claim out I would, in the exercise of my case management powers, directed the claimants to amend the defects in their claim form and particulars of claim within an appropriately limited period of time rather than striking them out immediately. The consequences of not providing the relevant particulars would have been to remove from the Claim the party whose details or case had not been adequately particularised.

Conclusion

91. For the reasons which I have set out above I have come to the conclusion that the Claim was not brought within the principal or secondary time limits provided by section 118(1) of the Act and should be struck out. In the circumstances the claimants' application for judgement in default does not arise.