Neutral Citation Number: [2021] EWHC 782 (QB)

Case No: QB-2017-002244

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2021

Before :

MR JUSTICE CAVANAGH

- -

Between :

SKX	**Claimant**
- and -	
Manchester City Council	**Defendant**

- -
- -

Mr Philip Davy (instructed by **Uppal Taylor**) for the **Claimant**
Mr Steven Ford QC and Mr Nicholas Fewtrell (instructed by **Manchester City Council**) for the **Defendant**

Hearing dates: 24 and 25 February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE CAVANAGH

Mr Justice Cavanagh:

Introduction

1. The claimant, SKX, claims damages against the defendant for personal injuries arising from childhood sexual abuse. The abuse was carried out in 1989 by the Chief Executive of the privately-run children's home to which the claimant had been sent at the age of 15, whilst in the defendant's care. The claimant does not seek damages on the basis that the defendant local authority was directly at fault for the abuse that he suffered. Rather, the claimant contends that that the defendant is liable on one of two alternative grounds, namely that the local authority is vicariously liable for the acts of the Chief Executive of the children's home, or that the local authority's duty to protect and to care for the claimant was a non-delegable duty, so that the defendant is liable even though the defendant was not itself at fault for the abuse suffered by the claimant.

2. Under section 1 of the Sexual Offences (Amendment) Act 1992, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication of it if it is likely to lead members of the public to identify that person as the victim of that offence. I have, accordingly, referred to the claimant by letters, SKX, in the title to this judgment, and I will call him "the claimant" in the body of the judgment.

3. The parties have agreed that there should be a trial of three issues at this stage of the proceedings. These are:

   (1) Whether the defendant is vicariously liable for the actions of the abuser?;

   (2) Whether the duty of care owed by the defendant to the claimant is non-delegable?; and

   (3) Given that the primary limitation period had expired by the time the claimant commenced these proceedings, should the claim be struck out as being out of time, or should the Court exercise its discretion under section 33 of the Limitation Act 1980 to extend time?

4. The claimant was born in 1974 and is now 47 years old. The claimant suffered a troubled childhood and was taken into care by the defendant local authority under section 2 of the Child Care Act 1980. Whilst the claimant was in its care, the defendant placed the claimant, successively, in three residential placements. These were at Buglawton School, Langport Children's Home, and the Bryn Alyn Community ("the BAC"). The BAC was a privately-owned children's residential community which operated a number of children's homes in North Wales and Shropshire. At any one time, well over 100 children were resident at BAC homes, and more than 70 local authorities in England and Wales placed children in BAC homes at one time or another during the 1970s to 1990s.

5. The claimant was placed in Bryn Alyn Hall, part of the BAC, in February 1989. He spent a total of 31 days in Bryn Alyn Hall between February and May 1989, interspersed by periods when he absconded from the home. Whilst the claimant was at Bryn Alyn Hall, he was subjected to serious sexual abuse from the Chief Executive

of the BAC, John Allen, including forced masturbation and buggery. The claimant had previously been subjected to sexual abuse by fellow residents (not members of staff) at Buglawton School, but this claim relates solely to the abuse that he suffered at Bryn Alyn Hall.

6. John Allen has been convicted at three major criminal trials of numerous historic sexual offences, including rape and buggery of minors who were resident at the BAC. At the second of those trials, on 26 November 2014, Allen was convicted of 33 sexual offences, including one count of buggery and three counts of indecent assault against the claimant. The claimant gave evidence at the trial. John Allen was sentenced to a lengthy period of imprisonment. He was sentenced to a further lengthy period of imprisonment after a third trial in 2019.

7. The defendant accepts that the claimant suffered the sexual abuse that he alleges at the hands of John Allen. The abuse of children at BAC homes and at other homes in North Wales was the subject of a major public inquiry which was chaired by Sir Ronald Waterhouse and which resulted in a report, "Lost in Care", which was published in February 2000.

8. The claimant has had a very troubled adulthood. He has lived with drug addiction and by the age of 21 had a substantial heroin and cocaine dependence. He has been convicted on numerous occasions of criminal offences and he has spent a large proportion of his adult life in prison. The claimant has found it very difficult to keep and form relationships.

9. This is not the first time that claimant has attempted to recover damages for the harm that he has suffered. Shortly after the Waterhouse Inquiry report, a large number of former residents of the BAC brought proceedings against the company which owned the BAC, Bryn Alyn Community (Holdings) Limited ("the Company"), for compensation. The claims were dealt with pursuant to a Group Litigation Order. The claimant was one such claimant, though he was not selected as a lead claimant. By the time the proceedings were commenced, the Company was in liquidation, and so took no part in the litigation. The claims were defended by the Company's insurers, Royal & Sun Alliance plc.

10. A trial involving the first tranche of 14 claimants took place in 2001, and on 26 June 2001 Connell J gave judgment in the claimants' favour. The defendants appealed on the issue of limitation and the claimants cross-appealed on the quantum of damages. The Court of Appeal gave judgment in the claimants' favour on 12 February 2003, in **KR and others v (1)Bryn Alyn Community (Holdings) Limited (In Liquidation) (2) Royal & Sun Alliance Plc** [2003] EWCA Civ 85; [2003] EWCA Civ 783; [2003] QB 1441.

11. The insurers then declined to pay the judgment sums, in reliance upon an exclusion clause in their contract of insurance with BAC. Simon J rejected the insurer's arguments, in **KR and Others – v – Royal & Sun Alliance Plc** [2006] EWHC 48 (QB). The insurers appealed and were partially successful, in that the Court of Appeal held that the exclusion clause excluded recovery in respect of abuse that was committed by the managerial employees of the Company, who included John Allen. This was because the deliberate acts of such managerial employees were to be equated with the deliberate acts of the Company itself, and such acts were excluded

by the exclusion clause: see [2006] EWCA Civ 1454; [2007] Bus LR 139. An application by the claimants for permission to appeal to the Supreme Court was dismissed.

12. As the claimant in the present case had been abused by John Allen, this meant that his hopes of recovery from the Company or its insurers were at an end. There was no point in seeking damages from John Allen himself. Allen has now been in prison for many years and is likely to remain there for many years to come.

13. The claimant also sought compensation from the Criminal Injuries Compensation Authority, following the trial of John Allen in 2014, but his applications were rejected because he had unspent criminal convictions.

14. In December 2016, the claimant was contacted by his civil solicitors, who advised him that there had been changes in the law and that further proceedings were now being contemplated against local authorities who placed children in the BAC.

15. The claim herein was issued on 23 February 2017. This is approximately 28 years after the events to which the claim relates. Pursuant to the provisions of the Limitation Act 1980, the limitation period did not begin until the claimant's 18th birthday, on 11 February 1992, and so the three-year primary limitation period expired on the claimant's 21st birthday, on 11 February 1995, which was 22 years before the claim was commenced.

16. The claimant's claim is one of a number of similar claims which have been brought against local authorities by claimants who were abused at the BAC. These claims were stayed pending the outcome of appeal to the Supreme Court in the case of **Armes v Nottinghamshire County Council** [2017] UKSC 60, [2018] AC 355, a claim by a claimant who had suffered abuse after being placed in foster care by a local authority. The Supreme Court in **Armes** dealt with arguments based both on the non-delegable duty issue and vicarious liability. The Supreme Court handed down its judgment in **Armes** on 18 October 2017. In August 2018, the Court ordered that the claimant's claim in these proceedings would proceed as a lead claim, and the similar claims have been stayed pending the outcome of this claim.

17. It is impossible to examine the issues in this case without feeling great sympathy for the claimant. There is no doubt that he suffered serious sexual abuse, whilst a child, at the hands of John Allen. However, through no fault of his own, he has been unable to recover any compensation from the Company, because it is in liquidation, and he has been unable to recover any compensation from the Company's insurers because the contract between the Company and its insurers excluded liability for the deliberate actions of the Company itself or its managers. It is for that reason that he has turned his attention to a claim against the local authority which sent him to the BAC.

18. This is a no-fault claim: the claimant does not contend that there was any fault on the part of the defendant or its employees. It is common ground between the parties that in theory a child who had been in a local authority's care could maintain a claim in negligence if the local authority had been negligent in sending the child to a particular residential placement (for example if there were warning signs that were abusers on the staff), or if the local authority had been negligent in monitoring the treatment of

the child whilst he or she was in the residential placement (for example because the child had told his or her social worker that s/he was being abused, but the social worker did nothing about it). However, no such claim is being advanced on the claimant's behalf in the present case. Rather, the claim is being put on the basis that it does not matter that neither the defendant nor its employees were themselves at fault in any way: it is being submitted that the continuing responsibility of a local authority for a child in its care in these circumstances is such that the local authority has either assumed a non-delegable duty, or is vicariously responsible for the acts of the senior managers of the company in charge of the placement. (I should add that the claimant's witness statement dated 1 April 2019 alleges that he told his social worker that John Allen had been "playing with" him, but she did nothing about it. However, this does not form the basis of any claim against the Defendant.)

19. However, the fact that a claimant has arguably been unfortunate in being unable to obtain damages from those who were primarily responsible for his abuse does not mean necessarily that the Court must find someone else to vest with liability. As I will explain, there have been important recent judgments of the Supreme Court (including **Armes**) both on the issue of non-delegable duty and on the issue of vicarious liability, and the answer to the issues relating to liability that are raised in these proceedings is, in my judgment, to be found in the application of the principles set out in those cases to the facts and circumstances of this case.

20. It has not been necessary for me to hear much evidence. The claimant has provided the court with two witness statements, but he was not required to attend to give evidence orally or to be cross-examined. The only witness that I heard from was Ms Catherine Dorey, Principal Lawyer in the Litigation Section, Legal Services, at the defendant local authority. She was called primarily to give evidence about the extent to which the defendant had sought to locate witnesses who could, at this distance in time, give evidence about the events at Bryn Alyn Hall in early 1989. This evidence is potentially relevant to the limitation issue.

21. The claimant has been represented by Mr Philip Davy of counsel, and the defendant by Mr Steven Ford QC and Mr Nicholas Fewtrell. I am grateful to counsel for their very helpful submissions, both oral and in writing.

22. I will first set out the relevant statutory framework relating to the taking of children into care in the 1980s and their placement in privately-run children's homes. I will then deal in turn with each of the three issues that arise for determination.

The duty owed by local authorities to children in care and the statutory authorisation for the claimant's placement in Bryn Alyn Hall

23. At the time of the claimant's placement at Bryn Alyn Hall, the statutory framework for the care of children by local authorities was set out in the Child Care Act 1980 ("the 1980 Act"). This Act was repealed with effect from 14 October 1991, and replaced by the Children Act 1989. The main principles under which children are taken into care remains, however, broadly the same now as it was in 1989.

24. The claimant was taken into care by the defendant local authority pursuant to its duty under section 2(1)(b) of the Child Care Act 1980. Section 2 provided, in relevant part:

> **"Duty of local authority to provide for orphans, deserted children etc.**
>
> 2 (1) Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen—
>
> (a) …
>
> (b) that his parents or guardian are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing; and
>
> (c) in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child,
>
> it shall be the duty of the local authority to receive the child into their care under this section.
>
> (2) Where a local authority have received a child into their care under this section, it shall, subject to the provisions of this Part of this Act, be their duty to keep the child in their care so long as the welfare of the child appears to them to require it and the child has not attained the age of eighteen."

25. This form of care arrangement is sometimes referred to as "voluntary" care, to distinguish it from cases in which a child is committed to a local authority's care pursuant to a care order, in accordance with the 1980 Act, section 10. Section 10 provided, in relevant part:

> "10 (1) It shall be the duty of a local authority to whose care a child is committed by a care order or by a warrant under section 23(1) of the Children and Young Persons Act 1969 (which relates to remands in the care of local authorities) to receive the child into their care and, notwithstanding any claim by his parent or guardian, to keep him in their care while the order or warrant is in force.
>
> (2) A local authority shall, subject to the following provisions of this section, have the same powers and duties with respect to a person in their care by virtue of a care order or such a warrant as his parent or guardian would have apart from the order or warrant and may (without prejudice to the foregoing provisions of this subsection but subject to regulations made in pursuance of section 39 of this Act) restrict his liberty to such extent as the authority consider appropriate."

26. Part III of the 1980 Act dealt with the treatment of children who were or had been in the care of local authorities. Section 17 provided:

> **"Children to whom Part III applies**
>
> 17. Except where the contrary intention appears, any reference in this Part of this Act to a child who is or was in the care of a local authority

> is a reference to a child who is or was in the care of the authority under section 2 of .this Act or by virtue of a care order or a warrant under section 23(1) of the [1969 c. 54.] Children and Young Persons Act 1969 (which relates to remands to the care of local authorities)."

27. Accordingly, Part III applied both to those children who were taken into care under section 2 of the 1980 Act and those who were committed to the local authority's care by a care order and who were covered by section 10.

28. Section 18 dealt with the general duty of a local authority in relation to children in their care, and section 18(1) provided:

> "(1) In reaching any decision relating to a child in their care, a local authority shall give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding."

29. The power to place children in residential placements was set out in section 21, which provided, in relevant part:

> **"Provision of accommodation and maintenance for children in care**
>
> 21 (1) A local authority shall discharge their duty to provide accommodation and maintenance for a child in their care in such one of the following ways as they think fit, namely.—
>
> (a) by boarding him out on such terms as to payment by the authority and otherwise as the authority may, subject to the provisions of this Act and regulations thereunder, determine; or
>
> (b) by maintaining him in a community home or in any such home as is referred to in section 80 of this Act; or
>
> (c) by maintaining him in a voluntary home (other than a community home) the managers of which are willing to receive him ;
>
> or by making such other arrangements as seem appropriate to the local authority.
>
> (2) Without prejudice to the generality of subsection (1) above, a local authority may allow a child in their care, either for a fixed period or until the local authority otherwise determine, to be under the charge and control of a parent, guardian, relative or friend."

30. It is common ground that section 21(1) permitted a local authority to place a child in its care in a residential placement in a privately-run children's home or school such as those in the BAC. It is not clear to me whether placement in a home such as Bryn Alyn Hall was a placement in a "community home", for the purposes of section 21(1)(b), or amounted to "making such arrangements as seem appropriate to the local

authority", for the purposes of the "sweeping-up" wording at the end of section 21(1), but nothing rests on this. Either way, the use of homes in the BAC for children in the care of local authorities was permitted by section 21(1) of the 1980 Act.

31. The reference to "boarding out" in section 21(1)(a) is a reference to placing a child with foster parents. Section 27 permitted the Secretary of State by regulations to make provision for the welfare of children who were boarded out by local authorities under section 21(1)(a) of the 1980 Act. At the relevant time, the Secretary of State had made regulations under this section.

Vicarious liability

32. Mr Davy invited me to deal first with the question of vicarious liability, because it is a logically prior question to the question whether the defendant owed a non-delegable duty to the claimant. This is because the issue of non-delegable duty only arises if a claimant cannot succeed on the basis of vicarious liability. This was made clear by Lord Sumption in the leading case on non-delegable duty, **Woodland v Swimming Teachers Association and others** [2013] UKSC 66; [2014] AC 537, at paragraph 4:

> "The issue on this appeal is…nothing to do with vicarious liability, except in the sense that it only arises because there is none."

33. I agree that it is convenient to deal first with the vicarious liability argument.

34. The contention on the part of the claimant is that the defendant local authority is vicariously liable for the abuse carried out by John Allen, even though he was an employee of the company which ran the BAC, rather than an employee of the defendant itself. It is common ground between the parties that a series of Supreme Court cases in recent years have led to the incremental extension of the doctrine of vicarious liability, extending it beyond the scope of the traditional employer/employee relationship. So, for example, in **Armes**, the Supreme Court held that a local authority was vicariously liable for acts of abuse that were carried out by a foster parent against a child who had been placed in the local authority's care pursuant a care order, and who had been placed with the foster parents by the local authority. Mr Davy submitted that, by parity of reasoning with **Armes,** a local authority which has placed a child in care with a privately-run children's home is vicariously liable for the abuse carried out by an employee of the home, or at least by a very senior employee of the care home, such as John Allen. For the defendant, Mr Ford QC submitted that the limits of the extension of vicarious liability were made clear by the Supreme Court in the most recent case in which vicarious liability was dealt with, the case of **Various Claimants v Barclays Bank** [2020] UKSC 13; [2020] AC 973, and that it is clear, in light of the **Barclays Bank** case, that the defendant in the present case is not vicariously liable for the abuse perpetrated on the claimant by John Allen.

35. I will first summarise the relevant principles as they are set out in the Supreme Court judgments, and I will then apply them to the facts in the present case.

36. Before I move on to consider the guidance of the Supreme Court, however, I should mention one matter. This is that it is clear that two persons can, at the same time, be

vicariously liable for the acts or omissions of another person. This was made clear by the Court of Appeal in **Viasystems (Tyneside) Limited v Thermal Transfer Ltd** [2005] EWCA Civ 1151; [2006] QB 510, and was approved by the Supreme Court in the **Christian Brothers** case, referred to below. It follows that there is no simple answer to the claimant's vicarious liability claim arising from the fact that it is clear that the Company was itself vicariously liable for John Allen's abuse.

The recent Supreme Court authorities

37. The important relevant recent judgments of the Supreme Court on vicarious liability are: **Various Claimants v Catholic Child Welfare Society and others** [2012] UKSC 56; [2013] 2 AC 1 ("the **Christian Brothers** case"); **Cox v Ministry of Justice** [2016] UKSC 10; [2016] AC 660; **Armes**; and the **Barclays Bank** case. (There is another recent Supreme Court case on vicarious liability, **WM Morrisons Supermarkets Plc v Various Claimants** [2020] UKSC 12; [2020] AC 989, but that case is not concerned with the type of relationships that might give rise to vicarious liability).

38. In the **Christian Brothers** case, Lord Phillips said, at paragraph 21, that the test for vicarious liability requires a synthesis of two stages. The first stage is to consider the relationship of the wrongdoer and the person who is alleged to have vicarious liability and to see whether that relationship is one that is capable of giving rise to vicarious liability. The second stage is to determine whether there is a sufficiently close connection between that relationship and the tortious conduct. The issue that arises in the present case is the first stage question: is the relationship of a type that is capable of giving rise to vicarious liability? If the answer is "yes", then the defendant accepts that stage two is also satisfied.

39. Each of the relevant recent Supreme Court cases dealt with the question as to whether a particular relationship which was not a traditional employment relationship could nonetheless give rise to vicarious liability. As Lord Phillips put it in **Christian Brothers** at paragraph 19, "The law of vicarious liability is on the move". It is now recognised that vicarious liability can arise even if there is no relationship of employer and employee. In the **Christian Brothers** case, the Supreme Court held that a religious order was vicariously liable for physical and sexual abuse that had been carried out by teaching brothers who were members of the order (and that this was in addition to the vicarious liability of the diocesan bodies which employed the brothers to teach in the schools where they carried out their abuse). In **Cox,** the Supreme Court held that the Ministry of Justice was vicariously liable for the injury caused to a prison catering manager who had been injured when a prisoner, who was working in the prison kitchen, accidently dropped a heavy bag of rice on her back. In **Armes,** as I have said, the Supreme Court held that a local authority was vicariously responsible for the abuse perpetrated by a foster parent on a child in the care of the local authority who had been placed with the foster parent. In **Barclays Bank,** the Supreme Court held that the Bank was not vicariously liable for the acts of a doctor, not an employee of the Bank, who sexually assaulted applicants for jobs with the Bank who were referred by the Bank to the doctor for pre-employment medical examinations.

40. It is now clear in light of these authorities that there has been an incremental change in the scope of the law of vicarious liability, so that it can arise in the context of

relationships that are "not employment but which are sufficiently akin to employment to make it just to impose such liability" (**Barclays Bank,** at paragraph 16, per Baroness Hale, giving the judgment of the Court).

41. As Mr Ford QC submitted, the Supreme Court in **Barclays Bank** summarised and explained the principles that had been set out in the earlier Supreme Court judgments and so it is convenient to start with the **Barclays Bank** judgment when identifying what those principles are.

42. At paragraph 15 of her judgment in **Barclays Bank**, Lady Hale referred to the list set out by Lord Phillips in **Christian Brothers**, at paragraph 35 of the judgment, of five "policy reasons" or "incidents" which usually make it fair, just and reasonable to impose vicarious liability upon an employer for the torts committed by an employee in the course of his employment. These are:

> "(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
>
> (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
>
> (iii) the employee's activity is likely to be part of the business activity of the employer;
>
> (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
>
> (v) the employee will, to a greater or lesser degree, have been under the control of the employer."

43. In the Supreme Court's judgment in **Barclays Bank,** the Court made clear that these five "incidents" were not intended to be a set of criteria which are to be applied in non-employment cases to decide whether vicarious liability exists. Rather, Lord Phillips was setting out the policy reasons why vicarious liability exists in traditional employer/employee cases. Lady Hale pointed out at paragraph 18 that Lord Phillips had not asked himself whether the five "incidents" were present when he considered whether there was vicarious liability in the **Christian Brothers** case. Rather, he applied an "akin to employment" test and addressed himself to the detailed features of the relationship. He focussed upon whether the relationship was as close an employment relationship would have been (see Lady Hale, paragraph 18).

44. Lady Hale also pointed out, at paragraph 19, that in the **Woodland** case on non-delegable duty, Lord Sumption had said, at paragraph 3, that the effect of the **Christian Brothers** judgment was to expand the boundaries of vicarious liability "to embrace tortfeasors who are not employees of the defendant but **stand in a relationship which is sufficiently analogous to employment**" (my emphasis). Lord Sumption observed that vicarious liability has never been extended to those who are truly independent contractors, such as the sole trader who provided swimming lessons for school children in **Woodland** itself.

45. Lady Hale next addressed the **Cox** case, at paragraph 20. She acknowledged that in that case Lord Reed, who gave the judgment of the Court, focused on the five "incidents", but he did not give equal emphasis to each one. Lord Reed summed up the principle at paragraph 24 of the judgment as follows:

> "The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question."

46. Lady Hale drew particular attention to the passage in parentheses, which showed that Lord Reed thought that the question of vicarious liability came down to whether the wrongdoer was engaged in "the conduct of a recognisably independent business of his own or a third party." This was the same as the "akin to employment" test. Lady Hale said, at paragraph 23:

> "There is nothing in Lord Reed's judgment to cast doubt on the classic distinction between work done for an employer as part of the business of that employer and work done by an independent contractor as part of the business of that contractor."

47. The final authority that Lady Hale addressed was the **Armes** case. In that case, Lord Reed, who gave the judgment of the majority of the Court (Lord Hughes dissented), said that, while the classic example of a relationship justifying the imposing of vicarious liability was employer and employee, "the doctrine can also apply where the relationship has certain characteristics similar to those found in employment" (paragraph 54). Whilst Lord Reed once again examined the five "incidents", his conclusion was that "the foster parents…. cannot be regarded as carrying on an independent business of their own."

48. Lady Hale said, at paragraphs 25 and 27:

> "25. There is nothing, therefore, in the trilogy of Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded….
>
> 27. The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether

> workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in **Christian Brothers**, **Cox** and **Armes** , will usually lie in understanding the details of the relationship. **Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents**."
>
> (emphasis added)

49. At paragraph 26, Lady Hale approved the reasoning of the Singapore Court of Appeal in **Ng Huat Seng v Mohammed** [2017] SGCA 58, in which the Singapore Court said that the recent Supreme Court judgments had fine-tuned the existing framework underlying the doctrine of vicarious liability so as to accommodate the more diverse range of relationships which may be encountered in today's context. Vicarious liability applies to relationships which, when whittled down to their essence, possess the same fundamental qualities as in employer/employee relationships. The Singapore Court of Appeal further said that there is nothing fair, just and reasonable in imposing liability upon a party for the tortious acts that are committed by an independent contractor which is, by definition, engaged in its own enterprise.

50. It is clear, in my judgment, in light of the above analysis of the law by the Supreme Court in **Barclays Bank,** that the central question is whether the relationship between the wrongdoer and the person who is alleged to have vicarious liability is akin to employment. If the wrongdoer is carrying out an independent business of his own or that of a third party, then there will be no vicarious liability and there will be no need to consider the five incidents.

Application of the legal principles as set out in the recent Supreme Court authorities to the present case

51. In my view, applying the principles of vicarious liability as identified by the Supreme Court in **Barclays Bank** and the cases that preceded it, it is clear that the defendant local authority is not vicariously liable for the abuse perpetrated by John Allen upon the claimant. At the relevant time, John Allen was not in a relationship akin to employment with the local authorities that placed children in the BAC. He was carrying out an independent business on behalf of a third party, the company that operated the BAC. That business was no doubt vicariously liable for John Allen's actions, but the defendant was not.

52. The fact that the defendant placed children with the BAC did not mean that employees of the Company were in a relationship akin to employment with the defendant. It does not matter that John Allen was a senior employee of the Company, and it would not matter if John Allen was a majority shareholder in the Company. This would potentially be relevant to Allen's relationship with the Company, but it did not affect the nature of Allen's relationship with the defendant. All it would mean was that John Allen was, in effect, in a relationship of independent contractor with the defendant, rather than being the employee of the independent contractor. (The nature of John Allen's relationship with the Company was not explored in the hearing before me, but the Court of Appeal judgment in the insurance case, [2006] EWCA Civ 1454, said that John Allen was the majority shareholder in the Company until an unspecified date in 1989, and that, whilst majority shareholder, he was in charge of all operations

and treated the Company as his own. The Court of Appeal said, at paragraph 65, "It is not just the case that he was managing director and majority shareholder of the Company; he was Bryn Alyn.")

53. In the present case, there was a classic client/independent contractor relationship between the defendant local authority and the Company that ran the BAC. The Company was an independent business, with a well-defined corporate structure and a turnover of several million pounds per year. At any time, the BAC looked after children from a large number of local authorities of which the Defendant was just one. The defendant was just another client. The Company was not part of the defendant's organisation and was not integrated into its structure. The local authority entered into specific agreements with the Company whenever it sent a child to the BAC. I have seen a letter dated 9 February 1989 sent from the Company to the defendant when the claimant was accepted to the BAC. This letter confirmed that the Company was prepared to offer the Claimant a placement with the BAC, and set out the fees that it would charge. Because of the passage of time, and because of the destruction of the Company files in an accidental warehouse fire in October 1996, it is not possible to know whether, in addition to this letter, a more detailed contract was entered into between the local authority and the Company in relation to the claimant, setting out their respective obligations towards each other, or whether there was an overarching agreement between the parties which applied to all placements, but this does not matter. Whether this was so or not, the fact remains that the Company was an independent contractor, a business operating for profit, which provided a service to the local authorities consisting of the provision of care and accommodation for the persons who were placed at the BAC.

54. It follows that, in this case, it is clear that the tortfeasor, John Allen, was part of the Company's independent business, and so, following the guidance of Lady Hale at paragraph 27 of **Barclays Bank,** it is not necessary to consider the five "incidents" that were mentioned by Lord Phillips in the **Christian Brothers** case. This is a case in which it would not be fair, just, or reasonable to vest the defendant with vicarious liability for John Allen's actions.

55. Mr Davy made submissions about the degree of control which the defendant exercised over the BAC, but in my judgment, this is beside the point. It is clear that the defendant did not exercise any control over the day-to-day operations of the BAC. As I have said, the defendant was just one of a large number of clients of the company's business. There has not been, and could not have been, any suggestion that the Company was a sham, or a "front" for activities which were in reality the activities of the defendant. There was a genuine arms-length relationship of independent contractor between the defendant local authority and the business that John Allen worked for, and this is, in my view, fatal to the argument that the defendant is vicariously liable for John Allen's actions.

56. To the extent that the defendant had ongoing responsibilities for monitoring and checking up on children after they had been placed in the BAC, this would have been potentially relevant if a case had been advanced that the defendant or its social workers had been negligent in their monitoring function, but no such case is being put forward. The existence of any such responsibilities does not give rise to vicarious liability for the acts of the independent contractor.

57. The position of an employee of a company that runs a privately-owned children's home can readily be distinguished from the position of a foster parent which, was found, in **Armes,** to give rise to vicarious liability on the part of the local authority. In **Armes**, the foster parents were in a relationship with the local authority which was akin to employment. There was no company in between the foster parents and the local authority. The local authority recruited the foster parents as individuals, in the same way that it would recruit employees, the authority paid allowances to them, and provided them with equipment and in-service training. The Supreme Court in **Armes** said that the foster parents were not, in those circumstances, to be regarded as carrying on an independent business of their own (see judgment, paragraph 59).

58. I should add that Mr Davy made submissions about the various ways in which the facts of the present case can be distinguished from the facts of the **Barclays Bank** case. I agree that the facts are completely different. The **Barclays Bank** case was concerned with a doctor with an NHS practice who, as a side-line, conducted medical examinations of potential employees for various employers including Barclays Bank. However, what matters is the application of the legal principles that were identified by the Supreme Court in **Barclays Bank,** not the extent to which the facts of that case and this are similar**.** When those principles are applied, it is clear that there is no vicarious liability in the present case. It is worth noting, however, that there is one major similarity between the facts in **Barclays Bank** and the facts in the present case in that, in both cases the party that was alleged to have vicarious liability had referred the victims to the wrongdoer and so had inadvertently been responsible for placing them in danger. It is clear from the outcome in **Barclays Bank** that this feature, is not enough, of itself, to give rise to vicarious liability.

59. It is also instructive to note that, whilst the **Woodland** case was not a case about vicarious liability, it is clear from Lord Sumption's comment at paragraph 3 of his judgment in that case, set out at paragraph 32, above, that Lord Sumption was of the view that there was no vicarious liability in that case. There were obvious similarities between the facts in **Woodland** and in the present case. In both cases the tortfeasors were employees of independent contractors who were employed by a public authority to carry out a function which was, under statute, the responsibility of the public authority. In the **Woodland** case, the function was that of providing physical education to school students during school hours, whereas in the present case the function is that of looking after a child in care.

60. For all of these reasons, I am satisfied that the defendant is not vicariously liable for the abuse which the claimant suffered at the hands of John Allen.

Non-delegable duty

61. As with vicarious liability, there are recent Supreme Court judgments which set out the principles to be applied to determine whether a non-delegable duty exists in a particular case. The cases are **Woodland** and **Armes.**

62. In the **Woodland** case, the Supreme Court held that a local education authority was liable for injuries suffered by a school pupil who suffered a severe brain injury during a swimming lesson that had been arranged by the school at a pool run by another local education authority and which had been supervised by a swimming teacher and life guard who had been employed by the independent contractor who organised and

provided the lesson. The Supreme Court held that the essential feature of a non-delegable duty of reasonable care was that a defendant had control over a vulnerable claimant for the purpose of performing a function for which the defendant had assumed responsibility, and that, within school hours, a school was in such a position of responsibility and control over a pupil. The Supreme Court held that it was fair, just and reasonable to hold a school liable for injury caused by the negligence of an independent contractor to whom it had delegated its educational function and control over a pupil during the school day.

63. In **Armes,** the Supreme Court considered whether a local authority owed a non-delegable duty to ensure that reasonable care was taken for the safety of children in care when they were placed in the care and control of foster parents, under the 1980 Act, section 21, so that the local authority was liable for abuse carried out on the child by a foster parent. The Supreme Court rejected this argument, holding that the statutory regime did not impose responsibility upon the local authority for the day-to-day care of the child whilst in a foster placement, or a duty to ensure that no harm came to the child in the course of that care.

64. On behalf of the claimant, Mr Davy submitted that a local authority owed a non-delegable duty of care to a child in "voluntary" care when that child was placed in a privately-run care home under the 1980 Act, section 21(1), and that this consisted of a continuing duty to provide daily care for and to protect the child. He submitted that a local authority has a duty to protect a child in care and that this duty cannot be delegated to someone else if the child is placed in a children's home operated by a third party. The claimant's placement at the BAC was organised by the defendant, which had an antecedent relationship with the claimant and with other children in care, pursuant to which the defendant was required to care for, as well as to accommodate, the claimant. Mr Davy said that local authorities are in the same position, as regards children in their care, as local education authorities are to school pupils during the school day.

65. Mr Davy submitted that, in **Woodland,** at paragraphs 22-23, Lord Sumption (with whom Baroness Hale, Lord Clarke of Stone-Cum-Ebony, Lord Wilson and Lord Toulson agreed) identified the five defining features of cases of non-delegable duty, each of which, he submitted, can be found in the present case. These are:

(1) The vulnerability of the claimant;

(2) An antecedent relationship;

(3) The claimant has no control over the way that the defendant decided to perform its obligations to him. In the present case, it was the defendant that chose to place the claimant in the BAC;

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed toward the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it; and

(5) The third party has been negligent in the performance of the very function assumed by the defendant and delegated by the defendant to him.

66. On behalf of the defendant, Mr Ford QC submitted that the judgment of the Supreme Court in **Armes** provides a complete answer to the claimant's claim based on non-delegable duty. For the same reasons that the Supreme Court held in **Armes** that a local authority does not owe a non-delegable duty to protect a child in care from harm when that child is placed with foster parents under the 1980 Act, section 21, the local authority in the present case did not have a continuing non-delegable duty to protect the claimant from harm after placing him at the BAC, pursuant to the same section. The key point in both cases, counsel for the defendant submitted, is that by placing a child in care with foster parents or in a children's home, the local authority was "discharging" the duty it owed to the child to look after and protect the child on a day-to-day basis. This was clear from the language of section 21 itself.

67. In response, Mr Davy submitted that it is clear from the statutory language of section 21 that all that is "discharged" by the local authority placing a child in a children's home is responsibility for providing accommodation and maintenance for the child in care. The wider and more fundamental duty to care for and protect the safety of the child, as set out in sections 2 and 18 of the 1980 Act, is non-delegable and remains with the local authority throughout the placement. Mr Davy drew support for this contention from the judgment of HHJ Godsmark QC in the case of **JB and BB v Leicestershire County Council** (Nottingham County Court, 6 April 2014), in which the judge found that the local authority owed an overarching non-delegable duty to children who were sexually abused after being placed with foster parents whilst in the care of the local authority in the 1960s.

68. Mr Davy submitted that it would be wholly unconscionable for persons in the position of the claimant to be left uncompensated for the abuse that they have suffered.

69. In addition, Mr Davy submitted that **Armes** can be distinguished from the present case, in two respects.

70. First, he said that **Armes** was different from the present case in that the Supreme Court in **Armes** held that the local authority was vicariously liable for the acts of the foster parents, whereas, in the present case, if the Court needs to deal with non-delegable duty, this will be because the Court has rejected the claimant's argument that the defendant is vicariously liable for John Allen's acts of abuse.

71. Second, he pointed out that the claimant in **Armes** had been taken into local authority care pursuant to a care order, and the duty to care for her arose under the 1980 Act, section 10, whereas the claimant had been taken into "voluntary" care under section 2, and the duty to care for him arose under that section.

The Supreme Court judgments

72. It is helpful first to look at the Supreme Court judgments in **Woodland** and **Armes.**

73. In **Woodland**, in the Court of Appeal, the non-delegable duty was described as a "duty to provide that care is taken" as opposed merely to a duty to take care (see

paragraph 24). A similar description was given by Lord Reed in **Armes** at paragraph 31.

74. In the Supreme Court in **Woodland**, Lord Sumption identified two categories of case in which a non-delegable duty has been identified. The first is concerned with the performance of particularly hazardous functions and has no application to the present case. The second, which is directly relevant, was summarised by Lord Sumption at paragraph 7, as follows:

> "7. The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty on the defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully. The contracting party will normally be taken to contract that the work will be done carefully by whomever he may get to do it: see **Photo Production Ltd v Securicor Transport Ltd** [1980] AC 827 , 848 (Lord Diplock)."

75. At paragraph 23 of the judgment, Lord Sumption said that cases of a non-delegable duty are characterised by the following defining features (which are the five features that were referred to at paragraph 65, above):

> " (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's

> custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him."

76. At paragraph 25, Lord Sumption said that the Courts should be sensitive about imposing unreasonable financial burdens upon those providing critical public services, and so a non-delegable duty of care should be imputed to schools (or, by extension, local authorities) only so far as it would be fair, just and reasonable to do so. At paragraph 25(3), Lord Sumption said that this was not an open-ended liability, because schools (and so other public authorities) will only be liable for the negligence of independent contractors if the latter are performing functions which the school has assumed for itself a duty to perform. They will not be liable for the negligence of independent contractors "where on analysis, their own duty is not to perform the relevant function but only to arrange for its performance."

77. In her concurring judgment, with which Lord Clarke of Stone-Cum-Ebony, Lord Wilson and Lord Toulson also agreed, Lady Hale said, at paragraph 38,

> "38. I also agree that the principle will apply in the circumstances set out by Lord Sumption JSC at para 23, subject of course to the usual provisos that such judicial statements are not to be treated as if they were statutes and can never be set in stone."

78. Lady Hale also said that it was not helpful to describe the school as being in loco parentis, because a school may owe greater duties to a child than a parent does (paragraph 41).

79. The facts of **Armes** were much closer to those of the present case than the facts of **Woodland**, though, as Mr Davy points out, there were also differences. The statutory background was the same, save that the local authority's duty to care for Ms Armes arose under section 10, because she had been committed to its care by a care order, rather than section 2, as in the present case, and the local authority had placed Ms Armes with foster parents, rather than in a privately-run home.

80. In **Armes,** Lord Reed said that tortious liabilities based not on personal fault but on a duty to ensure that care is taken are exceptional, and have to be kept within reasonable limits (paragraph 32). He said that the five criteria identified by Lord Sumption were intended to identify the circumstances in which the imposition of a non-delegable duty was fair, just and reasonable, but that it was important to bear in mind Lady Hale's cautionary observation that such judicial statements are not to be treated as if they are statutes, and can never be set in stone. The criteria may need to be reconsidered, and possibly refined, in particular contexts. However, it would not usually be necessary for the judge to apply the five criteria and then to determine what was fair and just as a second stage of the analysis. To do so would be duplicative, and would also be apt to give rise to uncertainty and inconsistency (paragraph 36).

81. At paragraph 37, Lord Reed said:

> "37. The critical question, in deciding whether the local authority were in breach of a non-delegable duty in the present case, is whether the

> function of providing the child with day-to-day care, in the course of which the abuse occurred, was one which the local authority were themselves under a duty to perform with care for the safety of the child, or was one which they were merely bound to arrange to have performed, subject to a duty to take care in making and supervising those arrangements."

82. I interpose to say that, in my judgment, this is also the critical question in the present case.

83. At paragraph 38, Lord Reed said that the non-delegable duty could come into being by being created by statute, but that "everything turns on the particular statute." He said that the question was:

> "….whether the local authority had a statutory duty to provide the children with day-to-day care, or only to arrange, supervise and pay for it."

84. Lord Reed said that section 10 of the 1980 Act imposed upon the local authority the same powers and duties in relation to the child as a parent or guardian would have. These include "the general duty to safeguard and promote the child's health, development and welfare, and the right to direct, control and guide the child's upbringing." (paragraph 40).

85. Also in paragraph 40, Lord Reed asked, rhetorically, "Should these parental powers and duties be construed as imposing a tortious duty not merely to take care for the safety of the child, but to ensure that care is taken?" It is clear from the rest of the judgment that the Supreme Court answered this question in the negative (see, in particular, paragraph 41). Lord Reed recognised that local authorities are in a different position from parents in a number of ways, but that does not entail that a different duty altogether should be imposed on them (paragraph 43).

86. At paragraphs 44-45, Lord Reed referred to the obligation, set out in section 18(1) of the 1980 Act, for local authorities to give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood, but said that if this gave rise to a non-delegable duty, this would risk creating a conflict between the local authority's duty towards the children under section 18(1), and their interests in avoiding exposure to such liability. It would also render a local authority strictly liable even if the local authority placed the child with its own parents (as the local authority was entitled to do under sections 18 and 21), and this would give rise to a form of state insurance for the actions of the child's family members.

87. Furthermore, Lord Reed said that the implication of the use of the word "discharge" in section 21(1) is "that the placement of the child constitutes the performance of the local authority's duty to provide accommodation and maintenance" (paragraph 47). The local authority is not delegating its duty to "provide daily care", but is discharging its function to provide such care. This does not mean that a local authority ceases to owe any duty towards a child when the child is placed but:

> "…. this suggests that the duty of the local authority is not to perform the function in the course of which the claimant was abused (namely,

the provision of daily care), but rather to arrange for, and then monitor, its performance."

88. Finally, Lord Reed noted that section 22 of the 1980 Act gave the Secretary of State power to make regulations imposing duties on local authorities in relation to the approval of households where children are boarded out, the inspection and supervision of the premises, and the removal of the children if their welfare requires it. He said that it might be thought that there would be no need for such regulations if the local authority was in any event responsible for all the wrongs that might befall children in foster care. The implication of section 22 is that a local authority's duties are discharged in relation to the boarding-out of children by means of prior approval of the households in which they are placed, and the subsequent inspection, supervision and removal if appropriate, in accordance with the regulations (paragraph 48).

89. For these reasons, the Supreme Court held that the local authority in **Armes** did not owe a non-delegable duty to provide day-to-day care for, and protect, Ms Armes, when she was placed with foster parents.

Application of the legal principles as set out in the recent Supreme Court authorities to the present case

90. In my judgment, it is clear, in light of the principles identified by the Supreme Court in **Woodland** and **Armes** that the defendant in the present case did not have a non-delegable duty to protect the claimant when he was placed in a privately-run residential home. The reasoning of the Supreme Court as applied to children in foster care in in **Armes**, with minor alterations, applies equally to the present case.

91. As in **Armes**, the central question is whether the defendant local authority had a statutory duty (1) to provide children such as the claimant with day-to-day care, or only (2) to arrange, supervise and pay for it. The clear answer, in light of the reasoning in **Armes,** is (2): a local authority's duty under the 1980 Act, was to arrange, supervise and pay for the child's day-to day-care. There was no non-delegable duty to ensure that care was taken for the claimant whilst he was placed with a third party in accordance with the defendant's power so to do under section 21(1).

92. Moreover, in light of the Supreme Court judgment in **Armes,** it is clear that, when it placed the claimant in the BAC, the defendant performed and discharged its duty to provide accommodation and maintenance and daily care for the claimant. The language of section 21(1) makes clear beyond doubt that when a child was placed in accordance with that section, the defendant's duty was discharged, not delegated. The defendant could be liable for negligence if it failed to take reasonable steps to monitor the safety of the claimant whilst he was in a placement, but the defendant did not have strict liability for any breaches of duty that were perpetrated by the third-party person or organisation to whom care of the claimant was passed in accordance with section 21(1).

93. I do not accept Mr Davy's submission that, when the claimant was placed in the BAC, the defendant discharged its duty to accommodate and maintain the claimant, but a broader and overriding non-delegable duty to care for and protect the child continued

to vest in the defendant local authority. In my judgment, such an argument cannot stand in light of the reasoning of the Supreme Court in **Armes,** and the outcome in that case**.** If such an argument were correct, **Armes** would have been decided differently. Indeed, Mr Ford QC, who was leading counsel for the defendant in **Armes,** informed me that this argument had been advanced on behalf of the claimant in **Armes**, but did not find favour (though Lord Reed did not specifically refer to it). Mr Davy was junior counsel for the claimant in **Armes,** and he did not dispute that the argument had been advanced in that case.

94. In my judgment, this argument is based on a false dichotomy. It draws a distinction between responsibility for accommodating and maintaining the child, which Mr Davy accepts is passed to the third party, on the one hand, and responsibility for the care and protection of the child, which Mr Davy submits remains with the local authority, on the other. However, this is a distinction without a difference. This is made clear in paragraph 47 of Lord Reed's judgment in **Armes.** In that paragraph he refers to "accommodation and maintenance" and to provision of daily care on the basis that they are the same thing. Protection is not something different again: this is an aspect of the provision of daily care.

95. I do not think that Mr Davy can rely upon the judgment of HHJ Godsmark QC, in **JB and BB v Leicestershire County Council.** It is true that, in that case, the judge accepted that a non-delegable duty to protect a child from abuse remained with a local authority, even after a child had been placed with a third party (see judgment, paragraphs 104-115). However, that case was decided over three years before **Armes,** and the reasoning of the County Court in **JB and BB** cannot stand in light of the binding reasoning of the Supreme Court in **Armes.** The two cases cannot be distinguished. Like **Armes, JB and BB** concerned a child (in fact, two children) who had suffered sexual abuse whilst placed with foster parents.

96. At one stage in his oral argument, Mr Davy submitted that if the Supreme Court in **Armes** thought that the reference to "accommodation and maintenance" in section 21(1) encompassed the other duties and responsibilities owed by a local authority to children in care, such as the duty to care and protect the child, then the Supreme Court is wrong. It is plain that this is indeed what the Supreme Court thought. With respect, I entirely agree with the analysis of the Supreme Court in **Armes,** but, even if I thought it was wrong, I would still be bound by it and would still have to apply it.

97. Moreover, it is clear, in my judgment, that the reference to the "duty to provide accommodation and maintenance for a child in [the local authority's] care", which is discharged by placing the child with a third party in accordance with section 21(1) of the 1980 Act, is a reference to the duty to receive and keep the child in the local authority's care, as set out in sections 2 and 10, and encompasses the general duty to give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood, in section 18.

98. As for Mr Davy's submission that it is wholly unconscionable for persons in the position of the claimant to be left uncompensated for the abuse that they have suffered, I do not accept that this is a reason to impose a non-delegable duty upon the defendant in these circumstances. The law provides a remedy for a person who is sexually abused by a manager in a residential home in circumstances such as this (in addition to the criminal sanction). The victim can sue the perpetrator in tort, and the

perpetrator's employer will be vicariously liable, and may itself be directly liable for any tortious failures to supervise the wrongdoer. If the local authority acted negligently in sending the child to the residential home, or acted negligently in failing adequately to monitor his treatment whilst he was there, then the local authority may be directly liable in negligence. Alternatively, again, the local authority may be vicariously liable for the negligence of its social workers in placing the child in the home or in failing to take reasonable steps to monitor. Against that background, it is not unconscionable that the law does not also render the local authority strictly liable for the abuse by an employee of the independent contractor which is proprietor of the home, especially as the local authority would not realistically be able to supervise the employees at all times so as to ensure that abuse did not take place. The reason why this claimant has been left uncompensated is because he has faced the perfect storm of (1) the perpetrator being without funds; (2) the perpetrator's employer being in liquidation; (3) the treatment not being covered by the policy of insurance between the employer and its insurer; and (4) there being no basis for alleging that the defendant local authority or its employees have themselves acted negligently in a way that caused of facilitated the abuse. As I said earlier in this judgment, I have great sympathy for the claimant as a victim of sexual abuse for which he has received no compensation, but that does mean that it would be fair or reasonable to make the defendant liable to pay compensation to him on a no-fault basis, let alone that it would be unconscionable to refrain from doing so.

99. In any event, the Supreme Court in **Armes** stressed that there is no second stage in the non-delegable duty analysis, at which the Court must consider whether it would be fair, just, or reasonable to vest liability with the defendant.

100. I now come to the two grounds that Mr Davy put forward for distinguishing **Armes** from the present case.

101. The first was that the local authority in **Armes** was vicariously liable for the actions of the tortfeasor, whereas the very fact that I am dealing with the non-delegable duty point in this case shows that I have rejected the submission that the defendant authority was vicariously liable for John Allen's abuse in the present case. This is not a relevant ground of distinction. There is no basis for thinking that the Supreme Court's reasoning in **Armes** as regards the legal principles underlying non-delegable duties would have been any different if the Supreme Court also held that the local authority had been vicariously liable for the actions of the foster parent. They are two separate and parallel sets of legal principles. Ms Armes did not lose her argument about non-delegable duty because she was successful with her vicarious liability argument. The law relating to non-delegable duties does not operate differently according to whether a defendant is also vicariously liable for the injury in question.

102. The second ground of distinction relied upon by Mr Davy was that the claimant in **Armes** had been taken into local authority care under the 1980 Act, section 10, following the making of a care order, whereas the claimant in the present case had been taken into "voluntary" care under section 2. Once again, this is not a relevant ground of distinction. Sections 2(1) and 2(2) of the 1980 Act imposed a duty upon the defendant to receive the claimant into its care and to keep him in its care so long as the welfare of the claimant appeared to the local authority to require it and he remained under the age of 18. This is identical to the duty that was imposed by section 10 of the Act (the section that applied in the **Armes** case), save that the duty in

a section 10 case applied only so long as the child was committed to the local authority's case by a care order. The provisions of Part III (including sections 18 and 21) applied in the same way to children who were taken into care under section 2 as it did to children who were taken into care under section 10. This is set out in section 17 of the 1980 Act. The general duty of a local authority in relation to children in its care, imposed by section 18, applied in exactly the same way whether the duty was imposed by section 2 or by section 10. Similarly, section 21 applied in exactly the same way whether the local authority was under a section 2 duty or a section 10 duty.

103. It is true that, unlike in section 2, section 10(2) specifically said that a local authority shall have the same powers and duties with respect to a person in their care by virtue of a care order as his parent or guardian would have, but this difference is not material. In my judgment, it is clear from the statutory framework that a local authority had the same powers and duties in relation to a child in care whether section 2 or section 10 applied to the child's case. The reason why the point was specifically mentioned in section 10, but not in section 2, was to emphasise that in a care order case it is the local authority, rather than the parents, which has the powers and duties ordinarily enjoyed by a parent and guardian. Even if I am wrong about this, the effect of section 10(2) would, if anything, have been to give a local authority a wider range of powers and duties in a care order case, than in a section 2 case. This means that, in so far as different arguments for non-delegable duties could be advanced in section 2 and section 10 cases, the stronger arguments would have been in a section 10 case, like **Armes**, rather than in a section 2 case, like the present.

104. For completeness, there is also no basis for distinguishing **Armes** on the basis that the child in **Armes** was placed with foster parents, whereas the claimant in the present case was placed in a privately-run children's home. The reasoning of the Supreme Court in **Armes,** in the section of the judgment relating to non-delegable duty, applies equally to both types of case, save for the relatively minor point made by Lord Reed about the Secretary of State's power under section 22 to make regulations in foster cases.

105. Finally, the conclusion that there is no non-delegable duty in the present case is consistent with the legal principles set out by the Supreme Court in the earlier case of **Woodland.** Though four of the five criteria for a non-delegable duty, as identified by Lord Sumption and as set out in paragraph 65, above, are present, the other one is not. The criterion which is not present is number (4), namely that:

> "The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed toward the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it"

106. This criterion is not satisfied because the defendant local authority in the present case did not delegate to the BAC the function of daily care and protection of the claimant: rather, the defendant discharged its duty in that regard by placing the claimant with the BAC. In any event, as Lady Hale stressed in **Woodland,** and as Lord Reed reiterated in **Armes,** these criteria are not to be treated as statutes and are not set in

stone. In my judgment, by far the clearest guide to the answer to question relating to non-delegable duty in the present case is the reasoning of the Supreme Court in **Armes**, a case which is very close to the facts of the present case.

107. For all of these reasons, the defendant did not owe a non-delegable duty to provide daily care for and protect the claimant when he was placed in the BAC.

The limitation issue

108. The claimant submits that I should exercise my discretion under section 33 of the Limitation Act 1980 to permit the claim to proceed, notwithstanding that it was issued outside the primary limitation period.

109. The defendant submitted that, if I were to find in the defendant's favour on the substantive points of law, no purpose would be served by disapplying the limitation period so as to mean that the claim is in time. This is because, whatever view I take on the limitation issue, the claim must be dismissed.

110. Mr Ford QC further submitted that, even if I were minded to find in the claimant's favour on either of the substantive issues, or I thought that it was necessary to investigate the facts in greater detail in order to reach a view, I should still decline to exercise my discretion under section 33 of the Limitation Act 1980 so as to bring the claim in time. This is primarily because the defendant is placed at a disadvantage because the effluxion of time has hampered the defendant's ability to obtain relevant evidence.

Is there any point in extending time?

111. The defendant's main point is that, since the claimant has lost anyway, there is no point in extending time. It will not help the claimant.

112. It is, of course, right that, even if I extend time, the claim will still be dismissed. However, it is possible that this case may go further, and an appellate court may reach a different conclusion on one or both of the substantive issues from the conclusions that I have reached. If that were to happen, then it would matter to the claimant that I had extended time. Also, I have heard full argument on the limitation point, and so I will deal with it, albeit fairly briefly.

The legislative framework

113. It is now settled that an action for deliberately inflicted personal injury is subject to the limitation period laid down by section 11 of the Limitation Act 1980. Section 11 provides, in relevant part:

> "(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.
>
> (4) … the period applicable is three years from—
>
> (i) the date on which the cause of action accrued; or

(ii) the date of knowledge (if later) of the person injured."

114. In the present case, it is common ground that there are no knowledge issues.

115. Where a claimant was under the age of 18 when the cause of action accrued, and there are no knowledge issues, the three-year primary limitation period runs from the date of the claimant's 18th birthday, rather than from the date on which the cause of action accrued, if earlier (Limitation Act 1980, section 28(1) and 28(6)).

116. In the present case, since the cause of action accrued before the claimant's 18th birthday, the three-year primary limitation period expired three years after that date, i.e. on his 21st birthday. The claimant's 21st birthday was 11 February 1995.

117. The claim herein was presented on 23 February 2017. This was 22 years after the primary limitation period expired, and nearly 28 years after the events to which this claim relates took place.

118. The Court's discretion to extend time is set out in the Limitation Act 1980, section 33. This provides, in relevant part:

> "**33. Discretionary exclusion of time limit for actions in respect of personal injuries or death.**
>
> (1)If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> (a)the provisions of section 11 …. of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b)any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
>
> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> ….
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 ….;

> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d)the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

119. In **RE v GE** [2015] EWCA Civ 287, Lewison LJ (with whom Pitchford LJ agreed) said:

> "76. The overriding question is whether in all the circumstances of the case it is "equitable" to allow the action to proceed. "Equitable" means fair; and that means fair to both claimant and defendant, not just to the claimant."

120. Lewison LJ went on to say that whether a fair trial was still possible is a necessary but not sufficient factor in deciding whether to extend time.

121. In **CD v Catholic Child Welfare Society & others** [2018] EWCA Civ 2342, Lewison LJ said:

> "35. It follows that the disapplication of the limitation period is an exception to the general rule. For that reason the burden of persuasion lies on the claimant. Delay of itself may not preclude disapplication of the limitation period. What is of importance is what prejudice the defendant has suffered by the delay: see **Cain v Francis** [2008] EWCA Civ 1451, [2009] QB 754 at [73]. Indeed, in **AS v Poor Sisters of Nazareth** [2008] UKHL 32, 2008 SC (HL) 146, a case about the Scottish equivalent of section 33, Lord Hope (with whom the other law lords agreed) said at [25]:
>
> "The issue on which the court must concentrate is whether the defender can show that, in defending the action, there will be the real possibility of significant prejudice. As McHugh J pointed out in **Brisbane South Regional Health Authority v Taylor** (p 255) it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation for the

> delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour."

The key relevant factors for the exercise of the discretion

122. The effect of the Limitation Act, section 28, is that the primary three-year limitation period did not start to run until the claimant reached the age of 18. However, it is clear that, when considering the length of, and reason for the delay, the extent of evidential prejudice, and the other matters set out in section 33(3), the Court should take account of the impact of the whole of the period since the cause of action arose, not just from the claimant's 18th birthday: see **Donovan v Gwentoys Ltd** [1990] 1 WLR 473 (HL), at 478H and 479G-480C. On that basis, the delay that has to be considered is nearly 28 years.

123. In exercising the discretion, it is necessary, of course, to consider all of the circumstances of the case. However, as Mr Ford QC submitted in oral argument, there are two main factors that the Court should take into account in deciding whether to exercise the discretion to extend time. The first is the length of, and the reason for, the delay, and the second is the impact of the delay on the cogency of the evidence and upon the ability of the defendant to put forward its defence.

124. I agree that these are the most important factors, and I will deal with these two factors first. It is convenient to deal with them in reverse order.

Has the cogency of the evidence been impaired, or the defendant been disadvantaged, by the delay in issuing proceedings?

125. In my judgment, in the particular circumstances of this case, the answer is "no".

126. In the event, I have found in the defendant's favour on the two substantive issues. The defendant is not liable to pay damages to the claimant and so has not been disadvantaged by the delay in issuing proceedings.

127. Even if I had not found in the defendant's favour, I do not think that the defendant would have been significantly disadvantaged in relation to the liability issues by the delay in issuing proceedings. This is because there are no important relevant witnesses whose recollections have faded, and there are no lines of evidential enquiry which have been closed off to the defendant by the effluxion of time.

128. As regards the non-delegable duty issue, this is a pure point of law, decided by reference to the Supreme Court authorities, the statutory framework, and the undisputed facts. This means that the defendant has not been disadvantaged by the effluxion of time. There are no significant evidential issues in respect of which the delay has caused difficulties for the defendant.

129. So far as the vicarious liability issue is concerned, this point did require some examination of the facts, because it depended on the nature of the relationship

between the defendant, on the one hand, and the Company and John Allen, on the other. However, I was not disadvantaged by the absence of detailed evidence on this matter. The fundamental nature of the relationship between the defendant and the Company was clear and undisputed: the Company was a corporate entity, separate from the defendant, which operated as an independent contractor which provided services to local authorities by offering placements in its homes for children in the care of the local authorities, in return for fees. I have seen a letter from the Company to the defendant dated February 1989 which confirmed the offer of a placement for the claimant and which set out the Company's scale of fees. I do not think that I would have been assisted by any further contractual or other documentation between the Company and the defendant, or by any witness evidence on this subject: the nature of the relationship was obvious, and any further information about it would not have altered the analysis that I set out above in the section of this judgment that deals with vicarious liability. Moreover, any relevant documents that were held by the Company were almost certainly destroyed in a fire as long ago as 1996.

130. In relation to the question whether the sexual abuse actually took place, there is no issue between the parties. The defendant accepts that the claimant was sexually abused by John Allen as he alleges, and, indeed, a jury has found that this took place, applying the criminal standard of proof. The passage of time and paucity of evidence in relation to the treatment of the claimant the BAC in the period from February to May 1989 therefore does not disadvantage the defendant in any way, in relation to liability.

131. As I have found against the claimant on liability, the issue of assessment of damages does not arise. Even if it had done so, I do not think that, in the unusual circumstances of this case, the defendant would be significantly disadvantaged by the delay in commencing these proceedings. Very fairly, on behalf of the defendant, Mr Ford QC accepted that the defendant had not been significantly disadvantaged by evidential difficulties relating to remedy, and did not seek to rely on any such difficulties as part of his argument based on evidential prejudice.

132. In my view, the defendant was right to make this concession. If damages had been an issue, it is true that there would have been difficult issues of causation. These are canvassed in the joint causation experts' report of Dr Cosmo Hallstrom and Professor Anthony Maden, dated 1 August 2019. In particular, the claimant had suffered traumatic experiences before he was placed in the BAC, including difficulties in his home life and sexual abuse by fellow residents at Buglawton School. He also suffered traumatic experiences after he left the BAC, including many years of drug abuse. He was regarded by the experts as an unreliable informant. In those circumstances, it would have been difficult to work out the extent to which the claimant's difficulties were the result of the abuse that he had suffered at the hands of John Allen. However, I do not think that it would have been significantly easier to resolve these difficulties if the claimant's claim had been issued before the expiry of the primary limitation period.

133. In these circumstances, the defendant has not suffered any disadvantage or real possibility of significant prejudice as a result of the delay in issuing proceedings.

The length of, and the reason for, the delay

134. In my judgment, the sheer length of the delay is not a good reason, in itself, to decline to extend time, in circumstances in which, for the reasons I have already given, the defendant is not prejudiced by the delay.

135. Moreover, in the particular circumstances of this case, I do not think that the reasons for the delay mean that I should decline to extend time.

136. This is not a case in which the claimant first sought a civil remedy for his abuse at the hands of John Allen when he commenced these proceedings in 2017. As set out at paragraphs 9-16, above, he had first attempted to seek redress from the Company, over 20 years ago, by taking part in the group litigation. It was only in 2006, following the conclusion of the proceedings against the Company's insurers, that this litigation came to a successful end. In his second witness statement, the claimant says that he was advised at that stage that no other legal avenues for redress were open to him. Then, in 2014, the claimant unsuccessfully sought compensation from the Criminal Injuries Compensation Authority, following the conviction of John Allen, also in 2014, for abuse against him.

137. The trigger for the present proceedings was that the claimant's former solicitors contacted him in December 2016 to inform him that, in light a change in the law, there was now a chance of obtaining compensation from the local authority that had placed him in the BAC. He and his legal advisers acted swiftly thereafter, issuing his claim in February 2017 (it was subsequently stayed pending the outcome of the appeal to the Supreme Court in **Armes**).

138. It is not obvious to me what change in the law prompted the claimant's former solicitors to contact him in late 2016. There was no relevant change to statute law about that time, so far as I am aware. The **Woodland** case had been decided several years before, in October 2013. The **Armes** judgment in the Court of Appeal was in November 2015 (and did not offer much hope to those in the claimant's position) and judgment in the appeal to the Supreme Court was not given until November 2017, some time after the claim was presented. Mr Davy's skeleton argument refers to the judgment in **Cox** in the Supreme Court, but that was is March 2016 and was of limited significance, save that it indicated a general relaxation in the legal rules relating to vicarious liability.

139. Nonetheless, I can see that, by late 2016, the claimant's former solicitors could reasonably have taken the view that the direction of travel in the case law gave rise for greater hope than in the past that those in the claimant's position might have a good claim against the local authority which placed them in the home at which they were abused. I think that it would be unduly harsh to criticise his former solicitors on the basis that they might have prompted him to bring a claim against the defendant a bit earlier than they did, especially as they were no longer acting as his solicitors in 2016. I do not think that any criticism of the claimant's solicitors would be fair (and the defendant did not advance any such criticism).

140. It is, furthermore, an important consideration, in my view, that the claimant had led a chaotic adult life, with drug addiction and long periods in and out of prison, but, nonetheless, he has taken active steps for over 20 years to obtain a civil remedy for the abuse that he had suffered. I think that it would be harsh, in these circumstances, to decline to exercise the discretion in his favour. Even, if, contrary to my view, it

was fair to criticise the claimant's solicitors for being dilatory, I do not think that it would be right to hold the claimant responsible for any such failing. It is not surprising that a lay individual did not think to bring a claim against the local authority which placed him in the children's home.

The other factors set out in section 33(3) and all of the circumstances of the case

141. As for the other factors, set out in section 33(3)(c) to (f), these are essentially dealt with in the preceding paragraphs. The defendant has not delayed unduly, but this is not an important factor in this case. Whether or not the claimant counts as disabled for the purpose of section 33(3)(d), his addictions and his chaotic lifestyle, which may well have been substantially caused by the abuse that he suffered, are likely to explain the extent to which he was dilatory in presenting his claim. He acted promptly and reasonably when he was notified by his former solicitors of the possibility of claiming against the local authority, and he took appropriate advice.

Conclusion

142. For the above reasons, it is appropriate to extend time under section 33 so as to bring the claim in time, notwithstanding that I have gone on to dismiss the claim. I agree with Mr Davy that it would be regrettable in the extreme if the Claimant were to find himself 'shut out' from obtaining redress, in spite of his repeated and diligent attempts over the last two decades to seek redress for the harm caused to him as an innocent victim of childhood sexual abuse.

143. However, for the reasons that are set out in this judgment, this claim is dismissed.