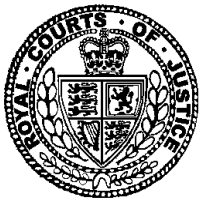

Neutral Citation Number: [2024] EWHC 1966 (KB)

Case No: QB-2019-001608 & 6 OTHERS

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2024

Before:

MR JUSTICE GARNHAM
&
MASTER DAVISON

- -

Between:

RICHARD NEIL ADAMS AND ORS	**Claimants**
- and –	
MINISTRY OF DEFENCE	**Defendant**

- -
- -

Mr Harry Steinberg KC and **Mr James Pickering** (instructed by **Hugh James** solicitors) for the **Claimants**
Mr Andrew Ward (instructed by **Clyde & Co** and **Keoghs LLP**) for the **Defendant**

Hearing dates: 8 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Garnham and Master Davison:

Introduction

1. Messrs Hugh James Solicitors are acting for three large (and in some cases overlapping) cohorts of ex-military personnel who have sustained (1) noise induced hearing loss, (2) non-freezing cold injuries ("NFCI") and (3) post-traumatic stress disorder. The defendant is the Ministry of Defence. In the first two cohorts, the claims have been pursued by means of what have come to be called "omnibus" Claim Forms, whereby multiple claimants have been joined to one Claim Form. In this judgment, we are dealing with the NFCI claims. The question has arisen whether these claims should continue via an omnibus Claim Form, or whether some other, and if so what, procedural vehicle would be appropriate. The question arises in the following way.

2. The earliest Claim Form, QB-2019-000555, was issued in February 2019 from the Central Office. There were 45 claimants. Senior Master Fontaine was the assigned Master. On 2 December 2019, she ruled that it was not appropriate to join 45 claimants to the same Claim Form and, after that ruling, various individual Claim Forms were issued. Notwithstanding the views expressed by Senior Master Fontaine, two further omnibus Claim Forms were issued out of the Bristol District Registry. These were case managed by His Honour Judge Cotter QC, as he then was, and subsequently Sweeting J. So as to permit efficient case management of the entire cohort, those claims that had been issued in London were transferred to the Bristol District Registry for case management there. By order of Sweeting J dated 13 December 2022, the NFCI cohort, comprising by then 7 claims (most of them multiple claims) was transferred, or transferred back, to London. Sweeting J directed that "the claim number to be used in respect of all claims forming part of this cohort hereinafter shall be QB-2019-001608 and all claims listed above and all documents shall be CE-filed using only this Claim Number". The claims were stayed, subject to a provision that allowed the stay to be lifted and the claims to become active claims, by service of Particulars of Claim and supporting documents, at the rate of 6 per calendar month (subsequently varied to at least 4).

3. In the meantime, by an order dated 10 October 2020, Judge Cotter had made an order for the trial of lead cases raising generic issues. Those issues were resolved by agreement ("the Memorandum of Agreement") at a settlement meeting on 24 May 2021. The method used to resolve them was a "matrix" whereby liability was admitted subject to a deduction based on the date of first exposure to allegedly causative cold conditions. The matrix applied and was binding across the entire cohort. But it did not, by itself, dispose of any given case because issues of individual diagnosis, causation and quantum were not (and could not have been) resolved by the lead cases.

4. The case came before the court for case management (Master Davison, sitting alone) on 29 April 2024. As at that date, QB-2019-001608 comprised 604 claims of which 566 were ongoing (i.e. had not been settled or discontinued). Keoghs LLP were acting for the MOD in 25 ongoing claims and Clyde & Co in the remainder. Pursuant to the order of Sweeting J dated 10 May 2022, Hugh James were at liberty to add further claims by amendment and there was no backstop or cut-off date for further claims. Two features were apparent at the CMC:

i) The resolution of generic issues by agreement had fulfilled the primary purpose or motive for the joinder of multiple claimants. From that point on, the claims were being, and could only be, progressed and tried individually.

ii) The joinder of so many individual claims on to one Claim Form had given rise to administrative difficulties, which are discussed below.

5. In the light of the above, Master Davison directed that a hearing was to be listed to consider "whether these claims can / can still be conveniently disposed of in the same proceedings" (the wording of CPR r.7.3). Until that issue was determined, it was also directed that no further claims should be added to the Claim Form.

6. The difficulties referred to at paragraph 4(ii) above were as follows. All legal systems maintain a case file. In England & Wales, the file is digital and exists on a case management system called CE File. CE File essentially operates as a large bundle of digitised documents which is compiled and added to in roughly chronological order. It has limited search facilities and no facility at all for creating sub-files. A combination of the following problems presented themselves. First, when the claims were ordered to be transferred / transferred back to the Royal Courts of Justice, that order was not fully actioned at the transferring courts, and so the file was incomplete. (This was no fault of the parties.) Second, CE File is not set up to cater for the same defendant (in this case the MOD) being represented by two different firms of solicitors. To put that another way, CE File assumes that a party to the claim has one, and only one, firm of solicitors representing. Third, because CE File does not allow the creation of sub-files, having multiple, active cases – all at different stages of progress – on a single file presents logistical difficulties for the staff whose job it is to action case management orders and directions. It also makes it difficult and time-consuming for judges looking at the file to find particular documents. These problems had led to many CE File submissions being rejected or queried, a large backlog and a series of internal discussions as to a better way forward. These discussions eventually led to a further order dated 24 May 2024 which (1) split the file into those cases where Keoghs acted for the MOD and those where Clyde & Co acted and (2) directed that, going forward, cases where the stay was lifted and which therefore became active claims (accruing at the rate of at least 4 every month) should be progressed within a new, separate court file which would be given its own case number.

7. The result is that the omnibus Claim Form is now, in effect, a repository for claims which, when they become active claims, are transferred to a new file. The omnibus claim is, accordingly, being progressively "disaggregated" (an expression not found in the rules but which featured prominently at the hearing before us).

The law – CPR rule 7.3

8. Rule 7.3 is in these terms:

> "A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings".

9. Rule 7.3 falls to be considered in conjunction with rule 19.1 which is in these terms:

> "Any number of claimants or defendants may be joined as parties to a claim."

10. The principles which apply to the construction of rule 7.3 were considered by the Court of Appeal in the recent decision of *Morris and Ryan & Ors -v- Williams & Co. Solicitors (A Firm)* [2024] EWCA Civ 376. The Court there conducted a comprehensive review of Rule 7.3 and relevant authorities, which included the Divisional Court's (also recent) decision in *Abbott & Others v Ministry of Defence* [2023] 1 W.L.R. 4002.

11. The acid test is convenience. In *Morris,* Sir Geoffrey Vos M.R. stated at paragraph 48:

> "I do not think that the courts need to define the meaning of a simple English word such as 'conveniently'. 'Convenience' is a most ordinary word…The question is rather: in what circumstances can multiple claims be conveniently disposed of in the same proceedings?" [paragraph 48]

12. The question of "convenience" is a matter of broad judicial discretion. Sir Geoffrey Vos M.R. stated:

> "The court will determine what is convenient according to the facts of every case." [paragraph 49]
>
> "Many matters will be relevant to that question. But the matters that are most relevant to the ultimate question of convenience will vary across the wide spectrum of cases that have been and will in the future be brought under 19.1. This court would not wish to confine the discretion of judges in deciding that question under rules that are written in plain English." [paragraph 56]

13. Convenience does *not* require that the trial of common issues brought by multiple claimants should produce a binding determination on all parties: see *Morris* at paragraphs 33, 35 and 49. To the extent that binding determinations are required or desirable, that may be achieved by joinder of multiple claimants. But (as recognized by Andrew Baker J in *Abbott*, see paragraph 70) it may be achieved by other means too, which, assuming common case management of the cohort of claims, might include a simple order so directing.

14. Convenience does *not* require "a single final trial hearing to be possible or practicable": see *Abbott* at paragraphs 63 – 66, *per* Andrew Baker J.; and *Morris* at paragraph 31.

15. No gloss is to be put on the meaning of convenience. Accordingly, the Court of Appeal in *Morris* ruled that the three tests set out by the Divisional Court in *Abbott* were not correct:

> "I turn next to the question of whether any of the three tests promulgated in Abbott are correct. I have described the three tests as the real progress test, the real significance test and the test that requires that the determination of common issues in a claim by multiple claimants under 19.1 would bind all parties. I do not think any of these tests is appropriate to exclude cases from the ambit of 19.1. It seems to me that 19.1 and 7.3 must be construed as meaning what they say: any number of claimants or defendants may be joined as parties to proceedings, and claimants may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings. There is no exclusionary rule of real progress, real

> significance or otherwise. The court will determine what is convenient according to the facts of every case."

16. The factors set out at paragraphs 13 and 14 above, and the three tests promulgated in *Abbott* as referred to at paragraph 15 above, may be relevant factors to be taken into account as part of the Court's broad judicial discretion as to convenience, but they are not mandatory: see *Morris* at paragraphs 51 and 56.

17. To the above summary of the present state of the authorities we add two further observations.

18. First, convenience is not to be judged exclusively from the perspective of the parties. It seems to us legitimate and appropriate also to take into account the convenience and capacities of the court and the court system. This is indeed mandated by the Overriding Objective contained in CPR r.1 which states that cases are to be dealt with justly and at proportionate cost and that this, by r.1(2)(e), "includes, so far as is practicable – allotting to [each individual case] an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".

19. Second, the statutory predecessor of CPR r.7.3 was RSC O.15 r.5. That rule was phrased in these terms:

> "(1) If claims in respect of two or more causes of action are included by a plaintiff in the same action…, or if two or more plaintiffs…are parties to the same action, and *it appears to the Court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient*." (Our emphasis)

The power to order separate trials or make such other order as might be expedient is now contained in the very wide case management powers listed in CPR r.3.1(2). The point to note is that it was in the direct contemplation of RSC O.15 r.5 and, in our judgment, remains in the contemplation of CPR r.7.3, that claims that were originally properly joined to one Claim Form may be disaggregated if that has become inconvenient.

The parties' submissions

20. Both sides opposed the disaggregation of the NFCI claims. They maintained that, notwithstanding the resolution of the lead claims via the Memorandum of Agreement and the litigation moving into another and distinct stage requiring assessment of each individual claim, a single omnibus Claim Form remained convenient. Their argument can be summarised as follows:

(1) All the claims are for NFCI and there are close factual similarities between them. All are subject to the Memorandum of Agreement, which resolved issues of breach of duty, contributory negligence and limitation.

(2) The remaining issues of medical diagnosis, causation and quantum are in each case informed by generic expert evidence from vascular consultants and neurologists instructed by each side (as well as expert medical evidence specific to the individual

case). That generic expert evidence was directed to be admissible across the cohort by virtue of the order of Sweeting J dated 10 May 2022.

(3) Although each case would require individual determination, the test of convenience did not require that all the claims be resolved at one trial, nor that the outcome of one claim should be determinative of other claims. In any event, the outcome of the quantum assessments would, at the least, be persuasive in other claims where the same or similar issues arose. An example of this was the issue presented by Raynaud's disease (where that was said to be present), namely whether Raynaud's disease, rather than NFCI, was the cause of the claimant's problems.

(4) The parties had cooperated to ensure the smooth running of the whole cohort of claims. This cooperation had included the use of template directions which, in the vast majority of the claims and subject to variations reflecting the needs of each individual case, were agreed.

(5) There would be no obvious benefit to the parties in requiring them to separate out individual claims. The claims would be progressed in the same way, but would be subject to an additional burden of cost and administration, including the issue fee (up to £10,000) and the time costs of advising each claimant and liaising with the court. There would also be a burden of administration on the court.

(6) The parties acknowledged the difficulties which had arisen with CE File. But these difficulties had been addressed by the orders already made which had hived off to a different file those cases where the MOD was represented by Keoghs and directed that claims becoming active claims should be given their own file and case number. Further, difficulties with CE File were subordinate to the rules. The following passage from the judgment of Andrew Baker J in *Abbott* was relied upon:

> "… difficulties, if there are any, with how CE-File would deal with litigation under the omnibus claim form as issued cannot determine the propriety of using such a claim form, which turns on the meaning and effect of the relevant provisions in CPR Pts 7 and 19…"

(7) An analogy was drawn with *Abbott* where an omnibus Claim Form was approved by the Divisional Court in a much larger cohort of military noise deafness claims. Although the reasoning that led to that conclusion was criticised by the Court of Appeal in *Morris*, they did not doubt or criticise the outcome.

Discussion

21. Not without hesitation, we have decided that for this particular cohort of claims and in the particular circumstances that have arisen, we should not disturb the *status quo*.

22. Our hesitation arises in the following way. The cases have already been disaggregated – for reasons which the parties acknowledge are well-founded. We accept that difficulties with CE File cannot be determinative of the propriety of using or continuing to use a single, omnibus Claim Form. So, if rules of court mandated the use of a single Claim Form then, however administratively difficult that turned out to be, the court would have to find some way of accommodating or managing that situation. But, as we have already observed, the relevant rule looks to "convenience" and it seems to us

that that can and should include the convenience of the court and the court's systems – not least because that is a factor which impacts directly on the parties themselves and, indirectly, upon other court users and the wider public. The resources of the court are shared and finite and the court is entitled, if not bound, to consider convenience in a context that goes beyond the narrow interests of the particular parties before it.

23. The analogy the parties drew with the *Abbott* cohort of military noise deafness claims is not exact. Although some generic issues in the military noise deafness cohort have been compromised (in much the same way as in the NFCI cohort), others are going forward to a trial of lead cases. The stage has not been reached in *Abbott* where each individual claim falls to be progressed to its own trial or assessment of damages. Had that stage been reached, then *Abbott* would be presenting the very same problem as we are currently confronting, which is whether, once multiple claims have reached the stage of individual assessment, it can be said to be convenient that they are disposed of within the same set of proceedings. *Prima facie*, it seems to us that the answer to that is, no. Adopting the language of *Abbott* (and recognising that these matters are relevant not mandatory) it can no longer be said that the omnibus Claim Form is promoting "real progress" or "real significance" or a "binding effect" across the cohort. Further, pursuant to the order of Master Davison dated 24 May 2024, albeit without the issue of individual Claim Forms or payment of the issue fee, the active claims in this cohort are, to all practical intents and purposes, already being treated as separate, individual claims, each with its own case number. That there are factual similarities, a body of common expert evidence and template directions does not, in our view, take matters very much further because such conveniences as arise from these factors would arise equally if the claims were disaggregated but still subject to overall case management by one judge. The same goes for the persuasive effect of decisions in individual cases. That does not require or depend on those cases being part of an omnibus Claim Form.

24. There are, however, factors pulling the other way. Whilst we might not ourselves have approved the use of a single, omnibus Claim Form from the outset (see further below), such orders were made by His Honour Judge Cotter QC and Sweeting J and the parties have for some years proceeded on that basis. To the extent that the omnibus Claim Form has become inconvenient, the parties were correct to say that the court has now addressed that by measures short of requiring the issue of new Claim Forms and that there would be no obvious gain to be had if that was required. The 24 May 2024 Order was a pragmatic response to the situation that had arisen and was well within the scope of the court's wide case management powers. By contrast, to require new, individual Claim Forms at this stage would involve the parties in work which was essentially duplicative and which would impose its own administrative burden on the court. Further, such a requirement would frustrate the legitimate expectations of the claimants concerned, (some of whom are also part of the *Abbott* litigation where, through no fault of theirs, the claims were disaggregated and then, pursuant to the order of the Divisional Court, re-aggregated). We are reluctant to inflict further upheaval.

25. Given that the Claim Form in QB-2019-001608 is already overloaded, we propose to order that no more claims be added to that file nor to the other, associated files, but that new claimants, instead of being added to that Claim Form, must issue a fresh Claim Form with a maximum number of claimants which, subject to anything the parties may wish to submit, we will provisionally fix at 60. Only the name of the first claimant will be entered on to the front page of CE File. The other claimants are to be listed in a

numbered schedule, which may be added to until the maximum is reached, whereupon a further Claim Form is to be issued. When claims become active, they will, as presently provided for in the 24 May 2024 Order, be given their own case number. But we will make a qualification to that order. Provided that active claims are marching in step towards a common trial date, there is no reason why they cannot be dealt with in tranches (as Mr Steinberg KC indeed suggested). The size of each tranche will be dictated by the number of claims that can conveniently be tried at one sitting. Our provisional thinking is that a realistic maximum is three and that, given the near certainty of settlements along the way, a maximum tranche size for active claims should be six.

Postscript

26. Omnibus Claim Forms are topical at the moment. When such orders were made in this cohort of claims, the judges concerned did not have the benefit of argument nor the benefit of the cases cited above, which have given valuable guidance on the subject. As a result of the decisions in *Abbott* and *Morris*, omnibus Claim Forms and CPR r.7.3 are the subject of consideration by the Civil Procedure Rule Committee. In these circumstances, we make just one further, short observation.

27. Where it appears at the outset that claims which are sought to be joined to an omnibus Claim Form will not, via trial of lead cases, be dispositive or at least largely dispositive of the cohort, that is a relevant factor in deciding whether to issue an omnibus Claim Form. To put that differently, if it can be anticipated that a stage will be reached where the cases in the cohort will all require individual determination, then a court may be hesitant to approve the use of an omnibus Claim Form because of the practical difficulties that may be encountered and as are exemplified by this case. To put that differently again, the convenience of such a Claim Form may be short-lived.

Disposal

28. We invite the parties to submit an order reflecting the rulings set out above.