Neutral Citation Number: [2023] EWHC 1475 (KB)

Appeal No: QB-2022-000158

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

On Appeal From Master Davison

Case No: QB-2021-002484

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2023

Before :

LORD JUSTICE DINGEMANS
Vice President of the King's Bench Division
and
MR JUSTICE ANDREW BAKER

- -

Between :

DAVID ABBOTT and others	**Claimants / Appellants**
- and -	
MINISTRY OF DEFENCE	**Defendant / Respondent**

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- -

Harry Steinberg KC, Kate Boakes & David Green (instructed by **Hugh James Solicitors**) for the **Claimants**
David Platt KC & Peter Houghton (instructed by **Keoghs LLP**) for the **Defendant**

Hearing date: 17 May 2023

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Approved Judgment

This judgment was handed down remotely at 14.00 hrs on 16.6.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

Mr Justice Andrew Baker :

Introduction

1. This is an appeal against an Order of Master Davison dated 25 July 2022, brought with permission granted on the papers by an Order dated 13 March 2023. That Order directed that the appeal should be heard, if possible, by a Divisional Court in view of the potential importance and general applicability of issues raised as to the meaning and effect of CPR 7.3 and CPR 19.1. In the event, the appeal turns principally on CPR 7.3 and there is very little in dispute as regards CPR 19.1.

2. By a High Court Claim Form dated 28 June 2021 issued by Hugh James Solicitors, proceedings were commenced against the defendant ('the MoD') on behalf of 3,559 individuals, namely David Abbott ('Mr Abbott'), whose name and address were given on the first page of the Claim Form, and 3,558 others, whose names and addresses were set out in a schedule attached to and forming part of the Claim Form. On 20 October 2021, pursuant to CPR 17.1(1), the personal details given in the schedule were corrected for some claimants, and some claimants were removed entirely by the striking through of their rows in the schedule.

3. As thus amended, the Claim Form instituted High Court proceedings for the pursuit by Mr Abbott and the 3,449 others identified in the amended schedule of causes of action for damages against the defendant, to be set out later in particulars of claim. The Claim Form gave these "*Brief details of claim*":

   "*The claimants were and/or are employees and/or members of Her Majesty's Army, The Royal Navy, The Royal Air Force and/or members of the armed forces. The claimants bring a claim for damages arising out of their exposure to excessive noise during the course of their service and/or employment with the defendant. The claimants have suffered injury as a result of this exposure, caused by the negligence and/or breach of statutory duty of the defendant, their servants and/or agents.*"

4. Although that description goes wider, we were told that all causes of action to be pursued will be for noise-induced hearing loss ('NIHL') alleged to have resulted from exposure to excessive noise levels during military service. Thus each claimant's cause or causes of action (as will be alleged) will be for compensatory damages in respect of such military NIHL ('M-NIHL'), for which it will be said the MoD is liable. It is part of the claimants' case, which is contentious between them and the MoD, that there are distinct characteristics to M-NIHL, as against other kinds of NIHL. That feature of the litigation is relied on when it comes to the application of CPR 7.3, with which this appeal is concerned. I therefore make clear that I adopt the label M-NIHL for convenience only.

5. The Claim Form was issued when it was to ensure that the claimants would not be affected by the Overseas Operations (Services Personnel and Veterans) Act 2021, which applies only to claims issued after 30 June 2021. Schedule 2 to the 2021 Act amends the Limitation Act 1980 and the Foreign Limitation Periods Act 1984 as regards actions in respect of personal injury or death relating to overseas operations of the armed forces. The detail of those amendments does not matter for present purposes.

6. Hugh James are also the claimants' solicitors responsible for a Claim Form issued in 2017 (Claim No. QB-2017-006007, *Turner et al v MoD*) by which around 200 other claimants sought to pursue similar claims. The resulting separate proceedings are now being managed together by Garnham J ('the M-NIHL Litigation', as I shall call it), alongside procedurally similar proceedings brought by action groups the members of which say that the MoD is liable to them for non-freezing cold injury ('NFCI') said to have been suffered through exposure to excessive cold during military service ('the M-NFCI Litigation') or for post-traumatic stress disorder ('PTSD') allegedly arising from military service ('the M-PTSD Litigation'). Master Davison is the appointed Master for the M-NIHL Litigation and the M-NFCI Litigation; Master Cook is the appointed Master for the M-PTSD Litigation.

7. In Claim No. QB-2019-000555, *Bargh et al v MoD*, a number of claimants had issued a single claim form for the pursuit of their respective causes of action against the MoD (as they would allege) for NFCI damages. (In his judgment in this case, Master Davison said there were 5 claimants in *Bargh et al*, but that may have been a slip, as we were told by counsel it was in fact 45.) In December 2019, Senior Master Fontaine ruled that a single claim form should not have been used, on the basis that those claimants' respective causes of action had very little in common except that they were for a similar type of injury and were brought against the same defendant. In *Turner et al v MoD*, there had been a case management order staying the litigation, in favour of negotiated dispute resolution, with liberty to lift the stay, in respect of any given claimant, if NDR was not successful. In the light of Senior Master Fontaine's ruling in *Bargh et al*, Master Davison raised the issue whether a single claim form should have been used in *Turner et al*, leading to a further case management order requiring that any *Turner et al* claimant who sought to lift the stay would have to issue a fresh, separate claim form, but on the basis that its deemed date of issue would be that of the original bulk claim form.

8. Subsequently, HHJ Cotter QC (as he was then) had given directions in relation to a single claim form issued by more than 100 claimants, for the pursuit by them of M-NFCI claims. Those directions provided for a case management solution similar to that proposed by the claimants in this claim, as described below. The directions included a mechanism for additional M-NFCI claimants to be added to that claim form.

9. These proceedings, *Abbott et al v MoD*, came before Master Davison for case management on 7 July 2022. For that hearing (and subsequent to it) it was (and has remained) common ground between the claimants, acting by their solicitors, and the MoD, acting by theirs, that the just and proper way to deal with the litigation would be to:

   (i) manage the cases of all the claimants in *Turner et al v MoD* and *Abbott et al v MoD* together;

   (ii) identify and try first a number of lead cases to be selected from that very large cohort, with tailored directions for disclosure providing for full standard disclosure in the selected lead cases and some measure of generic disclosure in relation to common issues;

   (iii) direct Hugh James to create and maintain a claims register, updated every three months, with basic particulars of the individual claims encompassed by the

litigation and their current status from time to time (e.g. whether active, discontinued, settled or otherwise disposed of).

10. That proposed case management method has been adopted through successive Orders of Master Davison and Garnham J. The resulting directions have some similarities with those that might be found in a Group Litigation Order ('GLO') under Section III of CPR Part 19 and CPR PD 19B. That is not a surprise; and a GLO is not the only means by which a large number of claims giving rise to common issues of fact or law may be managed.

11. Master Davison took the view that the use of an 'omnibus' claim form by which to commence proceedings on behalf of the 3,500-odd *Abbott et al* claimants was not permitted under the CPR. The concern that an omnibus claim form should not have been used was not raised by the MoD, but by the Master of his own motion. However, the MoD argues that Master Davison's view is correct, and the appeal concerns its correctness or otherwise, not the fact that the MoD did not originally take the point itself.

12. The analysis put forward by Mr Steinberg KC on behalf of the claimants, and maintained before us as the basis for the appeal, was as follows:

"*3. CPR r19.1 provides:*

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

4. The phrase "any number" is important to stress. The rules expressly contemplate that there should be no absolute limit on the number of claimants who may be parties to a single claim. Sheer weight of numbers is an impermissible factor to take into account in determining whether a claim form is in order, or not.

5. This principle is subject to CPR r7.3:

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

6. The editors of the present (2022) edition of The White Book state that the sole test for joinder in one set of proceedings is one of convenience, e.g. ¶7.3.5:

The test for joinder in r.7.3 is merely whether the several claims "can be conveniently disposed of in the same proceedings". In terms neither the rule nor its related practice direction provides any further test.

7. Therefore, the governing principle is not whether there is a large number of claims. Rather, it is the convenience of disposing of the issues in those claims in a single set of proceedings. The level of commonality between the claims is the most important factor in determining whether it would, or would not, be convenient to dispose of them all in a single set of proceedings."

13. In consequence of the view he took, Master Davison issued the Order under appeal on 25 July 2022, having on 15 July 2022 provided to the parties and published an approved judgment setting out his reasons: [2022] EWHC 1807 (QB). Master Davison described the judgment (*ibid*, at [1]) as "*the polished (and expanded) version of an ex tempore*

judgment which I gave in the course of [the CMC]". Hugh James sought in addition a transcript of the Master's *ex tempore* reasons (to be approved by him), but that request was refused. I would endorse that refusal. I agree with Master Davison that having perfected what he said at the hearing in the form of his written judgment *inter alia* "*in order to spare the claimants the time and expense of obtaining a transcript*" (*ibid*, also at [1]), the written judgment must stand as the approved final record of the reasons for the Order subsequently made. There was no reason to create or consider a transcript of what Master Davison may have said at the hearing.

14. The Order recited *inter alia* the court's ruling "*that, as a matter of law, it was impermissible under CPR7 and CPR19 … for the claimants to issue their claims by a single claim form*", and ordered that:

    (i) each claimant named on the omnibus claim form, other than Mr Abbott, had to "*issue a separate claim by issuing a new claim form and paying the appropriate fee*" by 4 pm on 13 January 2023;

    (ii) the deemed date of issue of any such new claim form would be 28 June 2021 for the purpose of the Limitation Act 1980;

    (iii) upon any such new claim form being issued, the name of the claimant in question would be struck out from the schedule to the omnibus claim form; and

    (iv) at 4 pm on 13 January 2023, subject to any further order to the contrary, the claim of any claimant who had not issued such a new claim form would stand struck out.

15. Thus, the Claim Form originally issued in June 2021, as amended in October 2021, for the pursuit by 3,500-odd claimants of their respective M-NIHL causes of action against the MoD would survive for the pursuit by Mr Abbott alone of his; and Master Davison required that a further 3,449 claim forms be issued, each for the pursuit by one individual of their respective M-NIHL causes of action.

16. That requirement had stark consequences, set out in a statement of Simon Ellis of Hugh James dated 21 April 2023, permission for which we gave at the appeal hearing since it concerned factual developments after the claimants' appeal papers were prepared and submitted. Thus:

    (i) of the 3,449 claimants obliged by Master Davison's Order to issue new individual claim forms, 3,017 did so, 48 did not (so that their claims were automatically struck out), and 384 did not because their claim did not proceed as a result of settlement, discontinuance or some other reason, such as the death of the claimant;

    (ii) although therefore the vast majority of claimants complied with the Order, that has involved a huge amount of work for Hugh James and the court office. In summary:

        (a) Hugh James informed each claimant (other than Mr Abbott) that they had to issue a new claim form and asked them to complete a Help with Fees ('HWF') Form if appropriate;

(b) once HWF Forms had been received, Hugh James submitted them to the Fees Office for processing;

(c) in the normal way, once any given HWF Form had been processed, a certificate was issued by the Fees Office stating whether the claimant was eligible for fee remission, and, if so, whether partial or full remission, enabling Hugh James to file a signed claim form electronically and pay the issue fee, to the extent not remitted, so that the claim form could then be issued by the court;

(d) the court office was overwhelmed by the volume of claim forms and HWF Forms, resulting in long delays and a need to vary the Order to avoid claims being struck out unfairly;

(e) as of 21 April 2023, when Mr Ellis signed his witness statement, some 142 claim forms duly lodged with the court had still not been issued and 438 HWF Forms had still not been processed;

(f) aside from the administrative burden of issuing over 3,000 claims in a matter of months, there have been particular problems in respect of court fees.

17. As regards that last point (problems in relation to court fees):

(i) many claimants assessed as entitled to partial remission were charged nonetheless the full £10,000, with some being charged more than once;

(ii) Hugh James had to bear the cost of those overpayments as the issue fees were paid through their PBA account, placing a large financial burden on the firm (by Mr Ellis' calculation, an overcharge of about £430,000 of which around £340,000 had not been reimbursed at the date of his statement);

(iii) on Monday 13 February 2023, the court office asked Hugh James to top up its PBA account to enable £10,000 issue fees to be deducted in about 40 claims the following weekend, despite all of the claimants in question being entitled to fee remission, apparently because the court fees system requires the full sum to be charged and the overpayment to be subsequently reimbursed. This amounted to a request for the claimants (in practice, Hugh James) to make £400,000 available at five days' notice, despite this being very considerably higher than the sum owed, a request Hugh James felt obliged to refuse;

(iv) the identification and remedying of such errors generated significant additional work for both Hugh James and court staff, including it seems weekend overtime being required of court staff to try to reduce the backlog;

(v) a bespoke arrangement has recently been proposed by the court office to abandon the normal PBA process for this litigation, with court fees to be paid by Hugh James by cheque.

18. The claimants did not criticise court staff for the problems that have been encountered, but drew attention to them to illustrate what they say are untoward practical effects of the Order under appeal. To summarise, as the claimants put it:

    (i) the Order had to be varied to avoid hundreds of claims being unfairly struck out;

    (ii) even as varied, the Order overwhelmed the Fees Office and resulted in delays and Hugh James overpaying well over £400,000, much of which is still to be reimbursed;

    (iii) yet the 3,000+ claims are to be dealt with together through joined-up case management and an initial trial of lead cases, in substance just as the parties had proposed, so that apart from massively increasing the administrative burden and cost of the initial process of getting the litigation going, it is not apparent that the Order has served any practical purpose.

19. If (as Master Davison considered) the CPR require over 3,000 individual claim forms, one per claimant, in this litigation, then those practical effects might be a reason to call for reform of the rules, although it would then be relevant to consider a submission advanced for the MoD that the real problem was that so many claimants' claims were left to the last minute before being commenced (relative to the commencement date of the 2021 Act). As it is, however, for the reasons I set out below, in my judgment the CPR do not create that requirement, and Master Davison erred in concluding that they do. In my view, the practical effects did not need to be imposed on the parties and the court office; and, if my Lord agrees, this appeal should be allowed.

20. I would add this final introductory note, before turning to consider Master Davison's judgment. Mr Platt KC invited the court to be influenced by an "*intuitive reaction that group litigation involving thousands of claimants … should not attract a Court fee similar to a single personal injury claim by a single individual in the High Court.*" For what it is worth, that is not my intuitive reaction. In any event, court fees are a matter for the Lord Chancellor under s.92 of the Courts Act 2003. They are not a matter for the Civil Procedure Rules Committee. I do not see how the meaning of the CPR provisions with which this appeal is concerned could properly be affected by the choices the Lord Chancellor has made or might make from time to time over the setting of issue fees, having regard *inter alia* to the need to maintain access to justice (see s.92(3) of the 2003 Act).

21. The court fees policy the Lord Chancellor has adopted has not been that the cost per claimant of commencing High Court proceedings should be similar, though the number of claimants per claim form may vary, or that the cost of commencing proceedings that are similar in general nature should be similarly expensive as a proportion of the sums at stake. Under the Civil Proceedings Fees Order 2008, as it has been amended from time to time to date, a claim form for the pursuit of damages not limited to £200,000 or less attracts a single issue fee of £10,000, whether there is one claimant or there are many claimants, and whether the claim is a little over that limit (say, £250,000) or larger by orders of magnitude (say, £2 billion). The question whether, in the present case, the 3,000+ *Abbott et al* claimants were properly joined as co-claimants to a single claim form depends on the meaning and effect of CPR 7.3 and 19.1, not on any view that might be formed of how much in issue fees such a large cohort of claimants ought to pay.

The Judgment

22. Master Davison's judgment is concise, and can be found readily through the National Archives (https://caselaw.nationalarchives.gov.uk/). In summary, he reasoned as follows:

    (i) (at [6]), it might be that CPR 19.1, under which "*any number of claimants or defendants may be joined as parties to a claim*", applies only where there is, as the Master put it, "*just one claim – not multiple claims*", but even if not, "*rule 19.1 is subject to … rule 7.3, which states that "a claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings*"" (Master Davison's emphasis);

    (ii) (at [6]), the 3,000+ claims in *Abbott et al v MoD* "*plainly cannot be conveniently disposed of in the same proceedings. Indeed, … the contrary is not seriously arguable. The claims are far, far too disparate in terms of the periods and circumstances in which each claimant sustained his or her NIHL. They have a common defendant and common themes. But that is all. They otherwise present a huge variety of unitary claims*";

    (iii) (at [6]), the determination of lead claims at a trial, leaving other claims within the proceedings to be tried (if necessary) at one or more later trials would not amount to disposing of all the claims in the same proceedings. That is the substance of Master Davison's reasoning, in that the fact that there could not be a trial of 3,000+ claims at one sitting was, in his view, an objection that could not be met by the technique of identifying and trying common issues and selected lead claims;

    (iv) (at [7]), that if a GLO had been made, each claimant would have to issue their own individual claim form in order to get their claim onto the GLO Register, and given the obvious similarity between a GLO and the parties' proposed approach to managing this litigation it was inappropriate for the claimants here to be treated differently;

    (v) (at [8]), that proceedings in which the claims of 3,000+ claimants were covered by a single claim form would put an impossible strain on the court's digital case management system (CE-File).

23. Finally, Master Davison considered (at [9]) whether, if he was right that the omnibus claim form used here was not permitted by the CPR, it would be acceptable to stay the claim and require fresh claim forms only of claimants who did not settle their respective individual claims (presumably by some date that would have been specified if he had adopted that solution). He did not regard that as an appropriate course to adopt. There is no appeal against that further conclusion, if Master Davison was correct to rule that the CPR did not permit the omnibus claim form.

24. So as to focus the primary discussion that will follow, I deal first with Master Davison's analogy with GLOs (paragraph 22(iv) above) and his reliance upon possible difficulties with CE-File (paragraph 22(v) above). Both are flawed, in my view.

The GLOs Point

25. CPR PD 19B provides, by paragraph 6.1, that once a GLO has been made, "*a Group Register will be established on which will be entered such details as the court may direct of the cases which are to be subject to the GLO*"; and, by paragraph 6.1A, that "*A claim must be issued before it can be entered on a Group Register*."

26. On any view, paragraph 6.1A requires that to be eligible to be registered as a case subject to a GLO that has been made, a given claimant's individual claim must be within the scope of a claim form issued by or on behalf of that claimant. But paragraph 6.1A neither states nor implies that each prospective GLO claimant must have issued their own, individual claim form. There is no reason why there should be a special rule, as regards how many claimants or claims may properly be covered by a single claim form, for claims that are or might later come to be within the scope of a GLO. CPR PD 19B is not apt to regulate the permissible content of claim forms as regards the number or types of claimants or claims that may be included, nor does it purport to do so.

27. On this point, Master Davison considered that *Boake Allen v Revenue & Customs Commissioners* [2007] UKHL 25, [2007] 1 WLR 1386 supported his conclusion that there was a GLO rule of 'one claimant per claim form'; and Mr Platt KC submitted that there is such a rule, and that *Boake Allen* "*puts the point beyond doubt*". Mr Platt conceded, however, that if a multi-claimant claim form were issued properly within CPR 7.3 and the claimants' individual claims fell within the scope of a subsequent GLO, the claim form as originally issued would qualify for the purpose of PD 19B paragraph 6.1A. An example used was of construction workers claiming for injuries suffered on a building site by a scaffolding collapse. If the claims involved an allegation of a systemic flaw in the scaffolding that was common to dozens of such incidents that were being litigated, it is not difficult to envisage the possibility of a GLO being made.

28. That concession seems to me fatal to the submission that PD 19B paragraph 6.1A requires one claim form per claimant; but even without the concession, I would reject the submission. *Boake Allen* concerned UK advance corporation tax in relation to dividends declared by UK subsidiaries of non-UK parent companies. A GLO was used. In the House of Lords, Lord Woolf, *obiter*, considered aspects of the GLO regime under the CPR. In doing so, he said at [32] that "*it is necessary for each individual potential member who wishes to join the GLO to make an individual claim under CPR Pt 7 or Pt 8.*"

29. If as routinely occurs (whether in the context of mass claimant litigation or not) two or more claimants' claims are included in a single claim form, under either CPR Part 7 or CPR Part 8, each such claimant makes their individual claim by the issue and service of that claim form, in the sense referred to by Lord Woolf. The contrast indicated by Lord Woolf's *dictum*, given its context, is between the making by a claimant of their own litigation claim and the inclusion of that claim within the scope of a GLO. The steps required for the former, absent any GLO, must have been taken by a claimant who wishes to join a GLO, whether the GLO is made before or after the claimant has taken those steps. In my view, that is all that Lord Woolf was noting.

30. Furthermore, given the identity of the claimants in the *Boake Allen* case, it is highly improbable that each of them issued their own, separate, claim form; and the summary of the facts by Lloyd LJ in the Court of Appeal appears to confirm that they did not, but

rather (for example) Bush Boake Allen Inc and its several relevant subsidiaries issued together a single claim form (see [2006] EWCA Civ 25 at [14]).

31. *Boake Allen* therefore gives no support for Master Davison's conclusion and Mr Platt KC's submission that GLOs require one claimant per claim form, and I consider, instead, that the following White Book note is accurate (n.19.22.3, 2023 Ed.):

> "*Practice Direction 19B … provides that claimants must issue a claim form (and pay the issue fee) before their claim can be entered on a group register. See the dicta of Lord Woolf in Boake Allen Ltd … . CPR r.19.1 provides that any number of claimants may be joined as parties to a claim, so a large number of claimants in a prospective GLO may be added into one claim and registered in respect of that claim.*"

The CE-File Point

32. It is sufficient to dispose of this point to say that 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 Part 7 and Part 19. Master Davison's reliance on what he thought would be CE-File difficulty was reliance upon an irrelevant consideration. For completeness, I consider that his assessment of that consideration was flawed in any event, as I explain in the paragraphs that follow.

33. The sole foundation identified by Master Davison for a conclusion that the CE-File system could not cope with litigation initiated by an omnibus claim form for the pursuit of claims by 3,000+ claimants is the fact that CE-File "*has no facility to create sub-files for individual, unitary claims*" (judgment at [8]). Why that might mean that such litigation would place "*an impossible strain*" on the CE-File system is not evident; why Master Davison thought it would do so is not explained in the judgment.

34. Master Davison said the difficulty of no sub-files was illustrated by the fact that when Hugh James wrote to the court on 6 July 2022, stating under a heading "*Jan Flynn v MOD; Claim number: QB-2021-002484*", that "*this matter has settled by way of the Claimant's acceptance of the Defendant's Part 36 offer dated 20 June 2022. We would be grateful if you could kindly update the court file*", court staff initially interpreted that as meaning that proceedings under the *Abbott et al v MoD* omnibus claim form had settled generally so that the court file could be closed.

35. That looks to me a simple misunderstanding, easily cured. With hindsight, it may be said that Hugh James' letter might helpfully have said in terms that Mr Flynn was claimant no.1109 and that the settlement being notified was of his claim within the litigation only. So far as CE-File is concerned, all the letter required was that it be uploaded under a suitable Description, perhaps "*Letter for file – claim by Claimant No.1109 (Jan Flynn) settled*", or similar.

36. That small episode was no evidence of an inability of CE-File to cope, nor any evidence that an omnibus claim form (and corresponding single CE-File case file) would cause greater difficulty for the management of the litigation using CE-File than the view adopted by Master Davison that there needed to be 3,000+ separate claim forms, and correspondingly 3,000+ separate CE-File case files. The parties were not given the chance to make enquiries so as to provide evidence on the true position as regards the

CE-File practicalities. If it be permissible to work from the personal knowledge and experience of a judge of the operation of CE-File, my conclusion would be that Master Davison's solution is much more impractical and burdensome than that of an omnibus claim form and a single CE-File case file.

37. There is no evidence that CE-File is failing to cope or is thought likely to be unable to cope with these current examples, referred to in argument, of mass claimant litigation where, by a single claim form or a limited number of claim forms, huge numbers of claimants have each pursued what are or may be, strictly speaking, their own, separate and individual, causes of action, but which raise common issues of fact and/or law:

- the *Bille and Ogale Group Litigation* (c.2,400 claimants, 4 claim forms (one of which has 2,335 of the claimants on it), *Alame et al v Royal Dutch Shell plc et al* [2022] EWHC 989 (TCC));
- the *Nchanga Copper Mine Group Litigation* (1,825 claimants, 1 claim form, see [2019] UKSC 20 and [2020] EWHC 749 (TCC));
- the *Mercedes Emissions Group Litigation* (c.230,000 claimants, 41 claim forms, see *Cavallari et al v Mercedes Benz Group AG et al* [2013] EWHC 512 (KB), and *Rawett v Daimler AG* [2022] EWHC 235 (QB), [2022] 1 WLR 5015);
- *Municipio de Mariana et al v BHP Group (UK) Ltd et al* [2022] EWCA Civ 951, [2023] EWHC 1134 (TCC) (initially, more than 200,000 claimants, 1 claim form; now more than 720,000 claimants, 2 claim forms).

38. If the administrative capabilities of CE-File and the court staff operating it were a relevant consideration, I am confident that the court would prefer to administer this litigation under a single omnibus claim form, and thus a single CE-File case file, than under 3,000+ separate files.

39. I note in passing (going back to the GLO point, above) that it does not seem to have occurred to anyone involved that GLO registration required there to be, for example, 2,400 separate claim forms in *Bille and Ogale*, 230,000-odd separate claim forms in *Mercedes Emissions*, or (now) 720,000-odd claim forms in *Municipio de Mariana*.

Conclusion on the GLO and CE-File Points

40. For the reasons set out above, in my view Master Davison was wrong to think that if there were a GLO in this case each claimant would have to issue their own separate claim form, and was also wrong to have regard to CE-File practicalities (which in any event he misjudged). That does not answer the question on this appeal, rather it means only that Master Davison's decision to require each *Abbott et al v MoD* claimant to issue their own separate claim form must stand or fall on his decision that that was required by the language of CPR 7.3, read with CPR 19.1.

Main Discussion

41. CPR Part 7 sets out rules on how to start proceedings. CPR 7.2(1) provides that:

"*Proceedings are started when the court issues a claim form at the request of the claimant*".

The use of the definite article and the singular ("*the claimant*" rather than "*the claimant(s)*" or "*a claimant*") is not significant. It could not be suggested that CPR 7.2(1) implies that there can be only one claimant per claim form.

42. CPR Part 19 sets out rules about parties, i.e. parties to proceedings, providing rules about legal persons being, becoming, or ceasing to be, parties. CPR 19.1, the opening general rule about parties, provides that:

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

Reading CPR 19.1 with CPR 7.2(1), and with the detailed rules that follow in CPR 19.2 to 19.7 about adding, substituting or removing parties, the reference to parties being joined "*as parties to a claim*" is plainly a reference to a set of proceedings commenced by a claim form. It is not a reference to an individual cause of action or claim for relief. That said, because the word 'claim' can be used to denote something more specific, for example a particular cause of action or a specific allegation even, depending on the context, it might be even clearer if CPR 19.1 referred to "*a claim form*" or "*proceedings*" rather than "*a claim*".

43. Here again, therefore, I agree with the Editors of the White Book, this time in their opening note under CPR 19.1 (n.19.1.1., 2023 Ed.). It states the effect of the rule in these terms, namely that: "*A single claim form can be used by one or more claimants to commence proceedings against any number of defendants (r.19.1).*" They might equally accurately have said "*any number of claimants*".

44. In the event, what I have said so far was not contentious before us. Mr Platt KC accepted that, contrary to a submission he had made to Master Davison and repeated in his skeleton argument for the appeal, realistically he could not suggest that "*claim*" in CPR 19.1 means cause of action.

45. Rather, Mr Platt KC argued, "*claim*" in CPR 19.1 must mean a claim properly brought pursuant to CPR Part 7 or Part 8 (or as the case may be, I add for completeness, since some specialist proceedings are not commenced under Part 7 or Part 8). The qualification 'properly' in that formulation had in mind the test of convenience under CPR 7.3, to which I must turn. As White Book note 19.1.1, quoted in paragraph 43 above, goes on to say: "*However, there are limitations. The claims included in a claim form issued under Pt 7 must be "claims which can be conveniently disposed of in the same proceedings" (r.7.3; as to the application of this rule to a claim form issued under Pt 8, consider PD 49E para.4.1 …).*"

46. To be clear, though, I do not agree that proceedings commenced by a single claim form are only a single "*claim*" within the meaning of CPR 19.1 if the CPR 7.3 test of convenience is satisfied. If the failure to satisfy that test is of such nature or consequence that the just course is to require the irregularity to be rectified, the offending claims can be removed from the proceedings. In any given case, that might or might not involve the removal of parties. In this case, it did, since Master Davison's view was that no two claimants' claims met the test of convenience. Procedural machinery was built into his Order so that claimants who operated it could avoid becoming time barred if they were

not time barred when the omnibus claim form was issued. However, the substance was that Master Davison removed all the claimants from these proceedings, apart from Mr Abbott, pursuant to CPR 19.4(11). The procedural machinery treated the omnibus claim form as having been effective for limitation purposes in respect of any cause of action that was not already time barred by 28 June 2021. Preserving that effectively became a condition of removal under CPR 19.4(11).

47. That then brings me to CPR 7.3 and the test of convenience. CPR 7.3 provides that:

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

That connotes also, or implies, by way of converse, that a claimant should not use a single claim form to start claims not all of which can be conveniently disposed of in the same proceedings. As shorthand, I shall refer to the disposal of multiple claims in the same proceedings as their 'common disposal' (and I shall use 'separate disposal' to connote, by contrast, the disposal of claims in separate proceedings).

48. In the CPR 7.3 sense, each claimant on a multi-claimant claim form uses that claim form to commence litigation upon all causes of action pleaded under it. To quote again from White Book note 19.1.1, because here again it is accurate, "*In a claim brought by two or more claimants, the claimants must act together to present a joint case throughout the proceedings and also at trial, unless the court specially orders otherwise (Lewis v Daily Telegraph (No.2) [2064] 2 Q.B. 601 …).*" This is a matter of procedural law, separate from any substantive question that will operate cause of action by cause of action as to which claimant or claimants has or have any relevant right or entitlement. Thus, in the present case, by the omnibus claim form, as amended in October 2021, all 3,450 claimants used the claim form to start all the claims (in the cause of action sense) brought under it.

49. The "*Brief details*" stated in the omnibus claim form were therefore accurate in stating that by the claim form, "*The claimants [all of them] bring a claim [singular, i.e. this single set of proceedings] for damages arising out of their exposure to excessive noise during the course of their service and/or employment with the defendant*." That is not falsified by the fact that, analysed at the level of the causes of action that the bringing and pursuit of that 'claim' would encompass, each of the 3,000+ claimants had their own cause(s) of action (if any), and none of the claimants was suing with any of the other claimants upon a joint entitlement to damages.

50. Therefore, as Mr Steinberg KC accepted, the omnibus claim form should not have been used unless it is convenient to dispose of all the claimants' respective separate causes of action in the same proceedings, that is to say in a single set of proceedings. There are some basic points I would note before coming to the point of contention.

51. First, it was common ground, and I also agree, that "*disposed of*" here means finally determined, to the extent disputed. That is not the same as 'case managed' (or the like). If many claims (in the cause of action sense) would be conveniently determined in a single set of proceedings, so that they could properly be brought under a single claim form, it may well be convenient for them to be case managed together even if there are multiple claim forms (and no consolidation). But it can also be convenient to manage

multiple sets of proceedings together although there is no thought of common disposal and it would offer no particular convenience as against separate disposal.

52. Second, the test of convenience is only that common disposal be convenient. It does not require common disposal to be the only possible or reasonable way of determining the set of claims in question, or that separate disposal would be inconvenient. No doubt it may often be the case that the reasons why common disposal will be convenient, if that is the position, will justify a stronger conclusion that common disposal will be the most (or even the only) convenient solution. But that is not required before CPR 7.3, on its plain terms, is satisfied.

53. Third, convenience is an ordinary word conveying usefulness or helpfulness in respect of a possible course of action. It does not need further elaboration or lengthy definition. CPR 7.3 thus requires, but requires only, that common disposal, rather than separate disposal, would be convenient. That is to say, it asks of the claims that have been brought under a claim form, however few or many there are, whether, to the extent they are disputed, it would be possible and useful or helpful to have all of them finally determined in the same proceedings rather than in two or more separate proceedings.

54. Master Davison took disposal of a set of claims "*in the same proceedings*" to mean and require the final determination of those claims at, or by a judgment given upon, a single trial. For the 3,500-odd claims encompassed by the omnibus claim form, he considered that:

    (i) "*There obviously could not be a trial of [those] 3,500 claims at one sitting*" (I have added 'those' because that must be the sense of what the Master said – it would not be true, stated in the abstract, that 3,500 claims could never be tried at one sitting, as it all depends on what the claims are);

    (ii) "*It is not realistic to suppose that the other 3,484 cases would be resolved or fully resolved by the outcome of the lead cases*" (the case management proposal at that stage being for a first trial of 16 lead cases), and so "*The other cases, or a great many of them, would still have to be litigated and ultimately tried*";

    (iii) "*Thus this one claim, if allowed to proceed on the basis proposed, would generate, or would, at the very least, be capable of generating multiple tracks and multiple trials*";

    (iv) the 3,500-odd claims <u>therefore</u> could not conveniently be disposed of in the same proceedings. Indeed, he considered it was "*not an arguable proposition*" that they could be.

55. There could be no criticism of Master Davison's conclusion if he was correct to insist that it had to be possible for a single trial to be capable of finally determining all the claims. Nor was any such criticism put forward as a ground of appeal. Rather, the appeal was put forward on the basis that the Master was wrong to equate 'the same proceedings' with 'a single trial'.

56. There is not, as such, a definition of the word 'proceedings' in the CPR. It is not one of the terms defined in CPR 2.3, the CPR interpretation rule. Nor does it appear in the glossary referred to in CPR 2.2 ('the Glossary'). I agree with Mr Platt KC that, as ever,

meaning will depend on context, and that the word 'proceedings' is capable of different meanings, depending on the context. For example, there have been decisions in the context of costs as to whether first instance and appeal proceedings are a single set of proceedings or distinct sets of proceedings, where the decision has turned on the subject matter or purpose of the provision under consideration, as a matter of specific context: see, for example, *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23, and the cases referred to by Lord Sumption JSC at [18].

57. Mr Platt KC also referred to *Wagenaar v Weekend Travel Ltd* [2014] EWCA Civ 1105, in which the Court of Appeal gave a confined meaning to the word 'proceedings' as it appears in CPR 44.13(1), because that was the sensible meaning in the context of that rule. It is the opening rule in Section II of CPR Part 44. That is the part of the CPR setting out the current regime of Qualified One-Way Costs Shifting ('QOCS') relating to certain types of claim.

58. In *Wagenaar*, at [39], Vos LJ (as he was then) said that the word 'proceedings' is a "*wide word which could, in theory, include the entire umbrella of the litigation in which commercial parties dispute responsibility for the payment of personal injury damages*". The claimant had suffered personal injury in a skiing accident and sued her package holiday company. The holiday company made a Part 20 claim against the claimant's ski instructor, saying that if there was negligence at all, it was the ski instructor who was negligent. At a single trial, both the claimant's claim and the Part 20 claim were dismissed. The question was whether the basic QOCS rule of CPR 44.14(1) applied to the Part 20 claim, since CPR 44.13(1) provided that Section II of Part 44 applied to "*proceedings which include a claim for damages for – (a) personal injuries …*". As an ordinary use of language, the Part 20 claim was part of proceedings in which the claimant's claim was determined, that is to say proceedings that included a claim for personal injuries. The trial judge had applied CPR 44.14(1) to the Part 20 claim, meaning that the ski instructor could not enforce the costs order made in her favour against the holiday company when the Part 20 claim failed.

59. An answer to that may have been that CPR 44.14(1) did not apply to the Part 20 claim because the holiday company was not making a claim for damages for personal injuries. On that approach, Section II of Part 44 could have applied to the proceedings, but the holiday company would not have been a 'claimant' for the purpose of the QOCS rules (CPR 44.14-44.17). CPR 44.13(2) defines 'claimant' for the purpose of those rules as "*a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim*"; and the sense of that as regards a counterclaimant or Part 20 claimant is surely that they must be bringing a claim to which Section II applies within their counterclaim or Part 20 claim.

60. In any event, Vos LJ's reference to 'proceedings' being a word that "*could, in theory*" encompass the "*entire umbrella of the litigation*" can be seen as a reflection of the facts of that case and the fact that the decision was against the application of QOCS to the Part 20 claim. I do not think it should be taken to suggest, and certainly *Wagenaar* did not decide, that the ordinary meaning of the word 'proceedings' is not the wide meaning Vos LJ identified, and on the question of ordinary meaning I respectfully adopt what Lord Sumption JSC said in *Plevin*, at [20], as follows:

"*The starting point is that as a matter of ordinary language one would say that the proceedings were brought in support of a claim, and were not over until the courts had disposed of that claim one way or the other at whatever level of the judicial hierarchy. The word is synonymous with an action.*"

61. That seems to me the sense of the word 'proceedings' when it is used in the CPR, unless the particular context of the rule in which it is encountered, including the purpose of that rule, indicates a different meaning, as it did in *Wagenaar*. As CPR 1.1(1) provides, the CPR constitute a procedural code "*with the overriding objective of enabling the court to deal with cases justly and at proportionate cost*", which requires *inter alia* that so far as practicable parties are on an equal footing "*and can participate fully in proceedings*" (CPR 1.1(2)(a)), and which is an objective to be furthered by active case management to include "*encouraging the parties to co-operate with each other in the conduct of the proceedings*", "*deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*", and "*deciding the order in which issues are to be resolved*" (CPR 1.4(1)(a), (c) and (d)). At that most basic level, the CPR contemplate and provide that one set of proceedings may involve more than one method of dispute resolution, including the possibility of more than one trial. CPR 2.1(1) provides that, subject to the exceptions identified in CPR 2.1(2), the CPR "*apply to all proceedings in … (b) the High Court …*". Against that general background, CPR Part 7 sets out the primary rules for how to start 'proceedings', and CPR 7.2 provides that "*Proceedings are started when the court issues a claim form at the request of the claimant.*"

62. Thus, 'proceedings' in the context of CPR 7.3 are constituted by, and their scope and content is defined initially through, the issuance of a claim form as required by CPR 7.2. A defendant may widen that scope by making a Part 20 claim, i.e. either a counterclaim (which requires that at least one claimant is the defendant, or one of the defendants, to the additional claim), or an additional claim against existing parties or new parties (or both) that is not a counterclaim. The Glossary says in terms that a counterclaim is a claim "*included in the same proceedings as the claimant's claim*". There is no such provision in relation to additional claims other than counterclaims, but in my view that is plainly the position. They are brought in the same proceedings because they are not brought by a fresh Part 7 claim form (or equivalent).

63. In any given case, there may well be a single final trial at which all claims, counterclaims and other additional claims (if any) are finally determined. But that may not be the best way to manage the proceedings. Indeed, it might be judged inconvenient to have only one final trial, or impractical to make the attempt. However, so long as the claims, counterclaims and other additional claims are proceeding under the Part 7 claim form (or equivalent) by which proceedings were initiated, there will be one set of proceedings and all claims, etc, will be disposed of, as and when they are, in the same proceedings.

64. With that understanding of what it means to commence and pursue 'proceedings' governed by the CPR:

    (i) when CPR 7.3 refers to the use of "*a single claim form*" for the disposal of multiple claims "*in the same proceedings*", the 'proceedings' in question are the proceedings, i.e. the single set of proceedings, that will be commenced by the posited claim form that asserts the multiple claims; and

(ii) the view that CPR 7.3 requires it to be possible or practicable for all claims asserted to be finally determined, if disputed, at one trial sitting, cannot stand.

65. Mr Platt KC relied on observations of Nicklin J, *obiter*, in his judgment after an uncontested trial against a large number of defendants said to have been involved in unlawful encampments: *Thurrock Council v Stokes and other* [2022] EWHC 1998 (QB) at [22]. Having conducted that trial, Nicklin J thought it at least arguable that, if the point had been taken, CPR 7.3 might have been held inapplicable as between different alleged episodes of unlawful encampment involving different alleged wrongdoers. Given the circumstances in which Nicklin J made his observations, it is understandable that he had a particular focus on whether it would have been feasible for a single trial to investigate all of the alleged episodes and the liability of all of the defendants. However, I do not read him as proposing that a single trial of all causes of action pleaded has to be feasible before CPR 7.3 can be satisfied. It is not realistic or useful to try to decide how the argument that Nicklin J thought there had been room to have, over the application of CPR 7.3 on the facts of that case, would have turned out. That he thought there had been room to have the argument in that case takes the present appeal nowhere.

66. The conclusion in paragraph 63 above and the rejection in paragraph 64 above of the view that CPR 7.3 requires a single final trial hearing to be possible or practicable do not create self-fulfilling circularity, as Mr Platt KC argued. He said that nowadays there will be a case management solution to almost any complication or broadness of scope of proceedings. Therefore, he contended, unless there is a requirement that a single final trial of all claims could take place, it will be possible to say of any cohort of claims asserted by any group of claimants, as long as they have common representation so they can be co-claimants, that the claims can be managed without separate proceedings and CPR 7.3 is thus satisfied. But that wrongly equates convenience of common disposal with case manageability; and it overlooks the burden, which will be on the claimants if the point is taken, to show that it is convenient for the determination of the multiple claims to be achieved in the same, i.e. a single set of, proceedings, rather than in multiple sets of proceedings.

67. In that regard, I agree with a different submission advanced by Mr Platt KC. He argued that the fact the parties' common case management proposals were not derailed, as to their substance, by Master Davison's decision – indeed, they have since been approved by him and by Garnham J, and are now being implemented – did not establish that common disposal was convenient. That was a fair riposte to reliance by Mr Steinberg KC on the case management reality as a proof of the pudding in the eating. Again, but on the claimants' side this time, that reliance wrongly equated case manageability with common disposal convenience.

68. The feasibility for the court, and no doubt the great convenience to the parties, of the claimants' M-NIHL claims being subject to joint case management, is not proof that it is useful or helpful for any one claimant's M-NIHL claim to be determined *in the same action* as any other claimant's M-NIHL claim, *rather than that they be determined in different actions*. That is shown here by the fact that there is now common case management of the claimants' M-NIHL claims together with (a) the *Turner et al v MoD* cohort of M-NIHL claims, (b) the M-NFCI Litigation, and (c) the M-PTSD Litigation. The case management convenience of having those different claim cohorts considered alongside each other, as the respective sets of proceedings make progress, has not required them all to be consolidated into a single set of proceedings. Nor would

consolidation offer any particular advantage. It could not be said to be useful or helpful for (say) the M-PTSD claims to be determined in the same action as the M-NIHL claims rather than in separate actions, even though there are reasons why it is useful or helpful for the two sets of claims to be case managed together.

69. That is not to say that it would never be convenient to dispose of (say) an M-PTSD claim and an M-NIHL claim in the same proceedings. Two examples illustrate the point, and the second helps in identifying the key that unlocks the present appeal. Suppose there were no mass claimant litigation in relation to either type of injury that might add another dimension, and then:

    (i) A soldier claims to have suffered both M-PTSD and M-NIHL as a result of negligence for which it will be alleged that the MoD is liable. It is not difficult to imagine that, other things being equal, it would be convenient for all that soldier's causes of action, as might be pleaded, to be determined in a single action against the MoD.

    (ii) A number of soldiers from the same company, some of whom allege M-PTSD, some of whom allege M-NIHL, some of whom allege both, all say their injuries resulted from the same episode or episodes in their common military service histories. It is easy to imagine that, in respect of each of them, it would be convenient to have their causes of action across both types of injury determined in the same action and that, in respect of all of them, it would be convenient to have their claims determined in the same action as that in which their comrades' claims are determined.

70. In that example, the cohort could be large enough, even if nothing like the thousands of claimants we have here, that a single final trial of all issues in all claims might not be realistic. The case management of whether and if so how to deal with issues relating solely to each of the different types of injury might not be trivial, for example whether as a matter of case management it would be convenient for them to be dealt with at the same trial hearing or at separate trial hearings. However, what would surely make it convenient for there to be only one set of proceedings is that it would be useful and helpful, indeed highly desirable in the interests of justice, for significant common issues of fact and (it may be) all issues in at least some of the claims to be tried in such a way that, thereafter, in the context of each claimant's individual case the findings made would be binding on both the claimant and the MoD. That is achieved without more by the claimants being co-claimants on a single claim form. It may be that it could be achieved by other means too; but CPR 7.3 does not require that common disposal is the only method by which the advantage that makes it convenient might be achieved.

71. The question here was not whether the full cohort of 3,000+ M-NIHL claims encompassed by the omnibus claim form, as amended, could be tried at a single trial hearing; it was whether that cohort of claims had sufficient commonality of significant issues of fact that it would be useful or helpful, in the interests of justice, that any determination of those issues in proceedings brought by any one of the claimants against the MoD in respect of their M-NIHL injury claim would be binding also as between the MoD and any other of the claimants in respect of their such claim. I thus agree in substance with the analysis put forward by Mr Steinberg KC (see paragraph 12 above):

(i) CPR 19.1 provides that any number of claimants (or defendants) may be joined as parties to a claim, i.e. to a set of proceedings commenced by a single claim form under CPR Part 7 (or equivalent).

(ii) The CPR therefore provide no absolute limit on the number of claimants on a single claim form. Weight of numbers, without more, is not relevant to whether it is proper to use a single claim form.

(iii) The qualification to that is CPR 7.3 and its test of convenience. A single claim form should only be used to start multiple claims (in the cause of action sense) "*which can be conveniently disposed of in the same proceedings*". As White Book n.7.3.5 says, that is the sole test stated by CPR 7.3, and "*In terms neither the rule nor its related practice direction provides any further test.*"

(iv) The governing principle, therefore, is not whether there is a large number of claimants and/or causes of action. Rather, it is the convenience of disposing of the issues arising between the parties in a single set of proceedings. The degree of commonality between the causes of action, including as part of that the significance for each individual claim of any common issues of fact or law, will generally be the most important factor in determining whether it would, or would not, be convenient to dispose of them all in a single set of proceedings.

72. Within Master Davison's reasoning, albeit the focus was on the impossibility of a single final trial of all 3,000+ claims, there are views on commonality, namely that the claims are "*disparate in terms of the periods and circumstances in which each claimant sustained his or her NIHL. [The claims] have a common defendant and a number of common themes. But that is all. They otherwise present a huge variety of unitary claims.*" Of the proposal to select and try 16 lead cases, the Master said that would "*not meet the objection. It is not realistic to suppose that the other 3,484 cases <u>would be resolved or fully resolved by the outcome of the lead cases</u>*" (emphasis added).

73. Expressing that affirmatively, in terms of what CPR 7.3 required, the sense is that the level of commonality had to be such that all claims would be resolved, or all but resolved, by the determination of the 16 lead cases. In my view, CPR 7.3 neither states nor implies such a test. If there are likely to be common issues of sufficient significance that their determination would constitute real progress towards the final determination of each claim in a set of claims, that could be enough for a conclusion that common disposal rather than separate disposal of that set of claims would be convenient.

74. I consider therefore that in testing the matter by the impossibility of a single trial determining all the claimants' M-NIHL claims in one go, and by setting the commonality bar too high, Master Davison misdirected himself as to the meaning of CPR 7.3. It was not suggested that, if that be the conclusion on appeal, the matter should be remitted to Master Davison for a fresh decision rather than that we assess for ourselves whether CPR 7.3 was satisfied.

75. In the event, at a further case management conference before Garnham J and Master Davison sitting together on 21 April 2023, a trial of lead claims was ordered in the M-NIHL Litigation with a trial window of Michaelmas Term 2025, on a time estimate expressed as "*16 weeks (10 weeks sitting with what are likely to be three 2 week breaks for judgment)*". A "*list of generic issues*" set out in a schedule was approved, but

without explanation of, or ruling as to, the legal effect of such approval. The lead claims to be tried are to be taken from 8 lead cases and 12 reserves, to be identified, the intention being that the reserve cases be suitable, and made ready, to be tried as lead cases if lead cases originally selected (or earlier substituted) settle or are discontinued. Directions were given for pleadings, disclosure, factual and expert evidence, and other pre-trial steps.

76. Mr Platt KC proposed that it was likely the findings made upon the trial of lead claims would be treated by the parties as persuasive. However, he was also candid that the MoD's formal position was that those findings will not be binding except in respect of the lead claims that are tried, so the MoD will not be bound as against other claimants by findings adverse to it, and other claimants will not be bound as against the MoD by findings adverse to the lead claimants. Mr Steinberg KC did not accept that. It is not necessary for the disposal of this appeal to resolve that dispute. It suffices to say that the MoD's formal position is not self-evidently wrong, but it could not be advanced if the proceedings were still constituted by the omnibus claim form (or if, to like effect, the 3,000+ separate sets of proceedings now in existence were all consolidated). On the face of things, that would seem to make it convenient, as the claimants have said all along, for there to be a single action.

77. If the commonality across the claims cohort were very limited, there might not be that convenience after all. But in that case also, it would be difficult to see why trying lead cases would result in findings that might even have persuasive significance to any real extent for other cases in the cohort. Thus, the MoD's acceptance that the approach now approved by Garnham J is not merely good case management, to avoid the parties having to deal with a huge practical burden of litigating thousands of claims simultaneously, but rather there is enough commonality for the content of whatever may be decided in 8 lead claims, if selected well, to be of real significance for all the rest, to my mind concedes the convenience of common disposal, whereby it will be put beyond argument that the significance in question has the character of findings that bind and not merely findings that may have a persuasive impact.

78. We were taken through the approved list of generic issues during argument. With the benefit of that list, and of counsel's explanations of the significance of some of the issues, and without putting this forward as exhaustive, in my view there are questions that are likely to be important across the claims cohort as to:

    (i) the content of any duty of care during different periods of time, with particular reference to (a) changes in health and safety at work legislation or regulations and/or (b) the promulgation from time to time of guidance in relation to military noise exposure as a health risk;

    (ii) the existence or content of any duty of care during training or service overseas;

    (iii) the adequacy of standard protective equipment, training and instruction provided to military personnel;

    (iv) the suitability or sufficiency of standard diagnostic criteria for NIHL, and normal methods for detecting and/or quantifying NIHL, as tools for confirming (or not) and/or measuring NIHL caused by exposure to excessive noise of particular types said by the claimants to be particular to the military;

(v) the 'latency issue' (as it has been called), *viz.* whether NIHL can be assessed for all practical purposes as coterminous with any period of exposure to excessive noise or whether hearing deterioration may occur subsequent to the cessation of exposure;

(vi) whether and if so to what extent natural or age-related hearing loss is accelerated by military noise exposure;

(vii) the significance (if any) of asymmetric hearing loss for the purpose of a claim that M-NIHL has been suffered.

79. The nature and likely importance to all the claims of those common issues persuades me, by a clear margin, that it would be convenient for all the claims to be disposed of in the same proceedings rather than in separate sets of proceedings (whether, that is, one set of proceedings per claim, as Master Davison required, or sets of proceedings in which the claimants were grouped in some way but not so as all to be privy to one omnibus claim form). That is so even if it is also true, as I apprehend it may be, that a final determination of any given claim, if tried on its own, would involve other issues as well.

80. In *Durrheim at al v Ministry of Defence* [2014] EWHC 1960 (QB), Patterson J, DBE, was concerned with M-NIHL claims then in progress in County Courts around the country, or in prospect. Some 45 County Court claims had been issued and 29 further claims were at the pre-action stage (*ibid* at [6]). I infer, although this is not said in terms, that each claimant had issued their own claim form. Senior Master Whitaker had refused an application by the MoD for an order requiring all those claims to be transferred to the High Court for centralised case management and providing for a common case management process and timetable. The judge was not persuaded that that refusal was wrong; indeed she regarded it as having been the correct decision. The MoD's appeal against the refusal of its application was therefore dismissed.

81. I do not think that decision affects the present case. It did not concern CPR 7.3 and the onus was on the MoD to persuade the court that it should not allow the various claimants, as they had chosen, to pursue their individual claims separately in the County Court. The degree to which, as the judge saw it, the MoD's liability, if any, to each claimant would ultimately turn on facts individual to that claimant was emphasised. That emphasis notwithstanding, I do not think it can be said that if the claimants had been acting collectively, and preferred to pursue a single claim as co-claimants, the judge would have said they could not properly do so by operation of CPR 7.3. As I noted at the outset, common disposal may be convenient even if a single action is not the only reasonable way in which to determine multiple claimants' similar claims.

82. Mr Steinberg KC submitted that the view that Master Davison was wrong to require each claimant to issue their own claim form resonates with an observation of Picken J in *Rawet v Daimler AG, supra*, at [48]. In that case, your Lordship decided, with Picken J, that CPR 17.1(1) allowed a claim form to be amended prior to service to add, remove or substitute a party, including by adding an additional claimant, without obtaining the consent of the other parties or the permission of the court. The contrary view of Mann J in *Various Claimants v G4S plc* [2021] 4 WLR 46 was not followed, and at [48] Picken J described that contrary view as "*too formalistic*" and "*inconsistent with the overriding objective*", noting that "*To require claimants in group litigation to have to*

issue separate proceedings every time that additional claimants are sought to be added entails a disproportionate approach to costs and, worse still, potentially represents a denial of access to justice." Mr Steinberg argued that the same could be said here of Master Davison's requirement in this group litigation that every claimant issue their own claim form in order to have their claim prosecuted as part of the group. I agree, and am glad therefore to have found, although it means respectfully differing from Master Davison, that CPR 7.3 did not require or justify his decision in this case.

Conclusion

83. For those reasons, and if my Lord agrees, I would allow this appeal and invite counsel to assist as to the precise form of order to be made.

84. I have not judged it necessary in order to resolve this appeal to consider the comparative merits or demerits of a GLO in relation to M-NIHL claims. I do though add this, in case either of the parties view it as relevant to the terms of any order to be made consequent upon allowing the appeal, namely that:

(i) if the only consideration is how most appropriately to deal with the M-NIHL claims on which Hugh James are instructed for the claimants, it may be that a GLO would add nothing;

(ii) there may, however, be wider considerations, since we were told by Mr Platt KC that the MoD has been notified to date, in total, of some 7,690 claimants or possible claimants in this jurisdiction (there is apparently also a large number of claimants in Northern Ireland), so that as things stand Hugh James represent only c.50% of the potential litigation cohort here. Mr Platt indicated on instructions that there are now around 20 other claimant firms of solicitors involved and around 100 other claim forms have been issued;

(iii) Master Davison gave other firms of solicitors instructed in M-NIHL claims against the MoD the opportunity to make representations about the case management of the *Abbott et al v MoD* claims, and some did so, for the case management conference he heard in October 2022 at which he adopted the basic approach proposed for the *Abbott et al* cohort of identifying lead cases for a first trial;

(iv) we were told that the gist of the representations made was to the effect that those other firms did not wish the claims they are carrying to be embroiled in the *Abbott et al* litigation being pursued by Hugh James, but it is not obvious that that should be decisive against the making of a GLO, if any interested party wished now to contend that there should be one and issued an appropriate application; and

(v) if any such application is to be made, then other things being equal it ought to be made in the near future, while the *Abbott et al* litigation is still in its early stages (for all that it was commenced some two years ago now), with lead case Particulars of Claim yet to be pleaded (they are due in mid-July 2023).

Lord Justice Dingemans :

85. I agree that the appeal should be allowed for the reasons given by Mr Justice Andrew Baker, and I have added this short judgment because Master Davison's judgment about CPR 7.3 raised issues which might, if correct, have implications for many different actions. The starting point is that the issue of whether "claims can be conveniently disposed of in the same proceedings" within the meaning of CPR 7.3 is a fact specific inquiry, as appears from paragraphs 51 to 53 of the judgment above. I turn to consider some of the points made by Master Davison.

86. First, while any Court will try to avoid giving an interpretation to a procedural rule which would lead to absurd consequences, I do not consider that either the potential problems envisaged with the use of CE-file by Master Davison if the 3,449 other claimants had been permitted to remain on the claim form, or the practical problems encountered by Hugh James solicitors in attempting to comply with Master Davison's order for service of separate claim forms for all of the claimants (the problems are summarised in the judgment at paragraph 16 above), affect the proper construction of CPR 7.3. The question simply remains whether the "claims can be conveniently disposed of in the same proceedings" and not whether there are or might be difficulties in issuing the proceedings or putting orders on to CE-file.

87. Secondly, it has never been the practice that under Group Litigation Orders (GLOs) each individual claimant had to issue a separate claim form, as Master Davison had suggested, see the judgment at paragraph 22(iv) above. There are many examples of numerous claimants in GLOs who have issued proceedings on one claim form. Some of these are set out in the bullet points in paragraph 37 of the judgment above. The fact that there has been a practice of permitting thousands of claimants to be added on a single claim form does not mean that Master Davison's judgment is wrong, but it does suggest that the proposition that such a practice is contrary to the CPR needs to be carefully examined.

88. Thirdly, I agree with Mr Justice Andrew Baker that Master Davison was wrong to consider that the 3,450 claimants all had to have their claims disposed of in one single trial, for the reasons given from paragraphs 55 to 64 of the judgment above. This appears to have formed an important part of Master Davison's approach.

89. Fourthly, the fact that different answers have been given in different sets of proceedings to the question whether claims can "be conveniently disposed of in the same proceedings" is unsurprising. This is because the question is fact specific to the claimants and the claim form. In *Bargh v Ministry of Defence*, referred to in paragraph 7 of the judgment above, there were a number of claimants making claims for non freezing cold injury ("NFCI") which appeared to have very little in common. On the other hand the claims by the 100 or so claimants referred to in paragraph 8 of the judgment above, appeared to have sufficient common features to mean that they would be "conveniently disposed of in the same proceedings".

90. Fifthly, in this particular appeal, it is apparent that the claims of the claimants can be "conveniently disposed of in the same proceedings" for the purposes of CPR 7.3. This is because there are many common issues raised by the claims made by the claimants. These include in particular the question of diagnostic criteria for military Noise Induced

Hearing Loss (NIHL), as well as the other matters set out in paragraph 78 of the judgment above.

91. Finally, it is apparent that the proceedings by the 3,018 claimants for military NIHL are being carefully case managed on a continuing basis by Mr Justice Garnham and Master Davison. It will be for Mr Justice Garnham and Master Davison to reflect on the submission made on behalf of the Ministry of Defence that findings made in lead claims may not bind other claimants, see paragraphs 76 and 77 of the judgment above, and to take such steps as they see fit to deal with that point.