Seroxat Litigation: Judgment for GSK with indemnity costs and £4.5m interim payment in landmark product liability group action success

On 3 July 2020 the judgment of Lambert J was handed down in the High Court in the Seroxat Group Litigation *Bailey and others v GlaxoSmithKline* [2020] EWHC 1766 (QB). Following GSK's success in the Court of Appeal on the question of the scope of the Claimants' claims, GSK applied for judgment on the basis that the claims were legally untenable. Judgment has been entered in GSK's favour along with an award of costs, in part on an indemnity basis.

BACKGROUND - THE SEROXAT GROUP LITIGATION

1. The High Court (Lambert J) has today handed down judgment in the Seroxat litigation. Members of Henderson Chambers (instructed by Addleshaw Goddard) have acted for GSK throughout this long-running pharmaceutical product liability group action. The final judgment is available here.

2. The Seroxat group action concerns a very widely used selective serotonin re-uptake inhibitor ("SSRI") anti-depressant and anxiolytic medicine, manufactured by GSK. The Claimants alleged that Seroxat was defective within the meaning of the Consumer Protection Act 1987 (the "CPA") because they claimed that its capacity to cause symptoms on discontinuation was worse than other SSRIs.

3. The Claim Form was issued as long ago as 2007, although the litigation was effectively stayed for almost five years from December 2010 after the Claimants' public funding was withdrawn on merits grounds. Although most of the Claimants discontinued following the withdrawal of public funding, a group of over 100 of them then obtained third-party funding and the litigation was revived in 2015.

4. Over a series of hearings before Foskett J, the court set out the nature of the Claimants' case which was being permitted to proceed to trial. Lambert J was appointed as the trial judge in November 2018. The trial, listed for three months, started before her at the end of April 2019.

THE TRIAL AND THE CLAIMANTS' APPEAL

5. During oral openings at trial the Claimants asserted that, in determining whether the safety of Seroxat is *"such as persons generally are entitled to expect"* under s.3 CPA, the court should proceed on the basis that Seroxat has no relative benefits when compared with other medicines in the appropriate comparator class. The court should therefore assume a *"level playing field*" of risks and benefits as between the medicines in the contended comparator class, save for the single characteristic said to constitute the "defect": i.e. the alleged tendency to cause more frequent, more severe and/or longer-lasting discontinuation symptoms.

6. GSK denied the Claimants' factual allegations and further disputed that their approach was correct and/or permissible. In order to assess whether a medicine was "defective" within the meaning of the CPA, GSK asserted that it is necessary to take a holistic approach to the assessment of its safety by considering its risks and benefits. The Claimants' pleaded case did not do this.

7. GSK's position was that the litigation had been carefully case-managed in advance of trial and that the Claimants' case had, based on their own pleadings, been tightly defined in the series of interim rulings by Foskett J (including in particular in his judgment of March 2017) and Lambert J. These had held that the Claimants' case was that Seroxat was defective simply because it was alleged to be *"worst in class"* for discontinuation symptoms, with an associated allegation of a failure to warn that Seroxat was "worst in class" in this respect.

8. In particular, GSK submitted that the previous court rulings had determined that the relative risks and benefits of Seroxat, whether in comparison with other SSRIs or otherwise, did not form part of the Claimants' pleaded case. It was not open to the Claimants to seek to expand their pleaded case on defect at trial, contrary to the earlier court rulings, to try and include them. GSK had maintained from the outset that the Claimants' approach to the assessment of defect, relying on a single adverse event, was wrong as a matter of law, logic

and evidence, and that a holistic approach was required in determining the safety of a prescription medicine.

9. Following the completion of oral openings, Lambert J accepted GSK's position. She ruled on 9 May (at [2019] EWHC 1167 (QB)) that the Claimants' case was limited to the allegation that Seroxat was "*worst in class*" for discontinuation symptoms when compared with other drugs in the comparator class. It could not be extended to the relative risks and benefits of Seroxat and its comparators more generally, on the basis of an assumed *"level playing field"* or otherwise.

10. The Claimants appealed against her ruling and the trial was adjourned for that purpose. The Court of Appeal (The Senior President of Tribunals, Hamblen LJ and Jackson LJ) heard the appeal on 31 October 2019 and unanimously dismissed it with costs:
http://www.bailii.org/ew/cases/EWCA/Civ/2019/1924.html

11. Hamblen LJ's judgment, with which the rest of the Court agreed, was handed down on 8 November. It dismissed the appeal with costs, and essentially upheld the decision of Lambert J for the reasons she had given. The Court of Appeal confirmed that the Claimants' case on defect had been clearly defined in the series of previous court rulings. Indeed, in March 2017 Foskett J had stated that the case had only been permitted to proceed on the basis of the Claimants' narrow pleaded case as defined by the court. If the Claimants had taken issue with the characterisation of their pleaded case, they should have appealed those earlier court rulings; but they did not do so.

12. In dismissing the appeal the Court of Appeal also held that the approach adopted by the Claimants at trial involved advancing a risk/benefit case when the trial judge had expressly determined that it would not feature; this was *"plainly impermissible"*, was done *"far too late"* and with *"obvious unfairness to GSK"*. In a welcome development for product liability practitioners, the Court of Appeal cited with approval the need for a holistic approach to the assessment of defect under the CPA, as set out by the Hickinbottom J in *Wilkes v DePuy International Limited* [2016] EWHC 3096 (QB). The Claimants were subsequently refused PTA by the Supreme Court.

THE RETURN TO THE HIGH COURT

13. The decision of Lambert J of 9 May 2019, as upheld by the Court of Appeal, was confined to the scope of the claimants' case and did not end the litigation. In December 2019 GSK applied to the court for "Question 1" from the list issues at trial to be considered separately and determined in GSK's favour. Q1 read as follows:

> *1. Is it appropriate in principle to assess whether the prescription-only medicine Seroxat is defective pursuant to s. 3 of the Consumer Protection Act 1987 ("the Act") by seeking to establish whether it is "worst in class" in that:*
>
> *a. It causes adverse effects on discontinuation which are (i) of a greater incidence (ii) a greater severity and (iii) a longer duration than the other medicines in the class; and that*
>
> *b. Such adverse effects prevent or make more difficult the ability of users to discontinue, withdraw from or remain free from Seroxat than is the case with the other medicines in the class?*

14. GSK's position was that the question should be answered in the negative and that, given the way the claimants had put their case, the claims should therefore be dismissed. GSK also applied for its costs (including a payment on account), and contended that for a period, its costs should be on the indemnity basis.

15. The hearing was listed for 12-13 May 2020 before Lambert J. At 5pm on 7 May, the claimants informed GSK and the court (via their counsel) that they would not contest GSK's application and intended to submit to judgment, limiting their submissions to the issue of costs.

16. At the hearing, the claimants sought to argue, in particular, that GSK should have applied to strike out their case (or obtain summary judgment) much earlier, rather than allowing a case which was obviously misconceived to proceed to a long and expensive trial. Since GSK had failed to apply to end the litigation at an interim stage when it could and should have done, it should be deprived its costs of the trial.

17. GSK's submitted that the claimants' approach to the question of costs was unsupported by any authority: there was no reason not to follow the usual rule

that costs follow the event. Indeed, the belated acknowledgement by the claimants that their case was untenable was not a reason to deprive GSK of its costs; it was an argument why GSK should get its costs on the indemnity basis. The claimants' conduct met the test of being *"out of the norm"*, laid down by Lord Woolf in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnston* [2002] EWCA Civ 879.

THE JUDGMENT OF LAMBERT J

18. Lambert J accepted GSK's position. After setting out the procedural history of the case and the background to the application, she awarded GSK its costs of the action in accordance with CPR 44.2. She then decided that costs should be assessed on the indemnity basis from a date 28 days after the decision of Andrews J in *Gee v Depuy International Limited* [2018] EWHC 1208 (the judgment in the *Depuy Hips Litigation*) was handed down. That decision had followed the holistic approach to the assessment of defect as applied in *Wilkes*. Once the Seroxat claimants had had time to digest that decision, and it was known that there would be no appeal, it should have been absolutely clear that their case would not succeed. She also ordered a payment on account of GSK's costs in the sum of £4.5m, noting the general rule in CPR 44.2(8) that the making of an interim order on account of costs was the default position.

19. The Court noted that the Claimants' approach to opening their case at trial, contrary to previous court rulings, was *"truly startling"* (para 26). There was *"more than an air of unreality"* to the Claimants' position at the hearing given their *"consistent position"* during the litigation that the case should proceed to trial and the Claimants would win: by arguing that GSK should be deprived of its costs by virtue of the weakness of their own case, the Claimants were trying to *"have their cake and eat it"* (para 50).

20. In considering the application for indemnity costs, Lambert J, having set out the law, stated that the issue was *"straightforward"*: the court's previous rulings on the Claimants' case were *"crystal clear"*, and decisive of its scope (para 66). Following the decision in *Gee*, it was clear that *"the Claimants were pursuing a case which was quite simply unarguable"* (para 67). Continuing the litigation beyond that point was *"unreasonable to a high degree… and compellingly so"* (para 68).

21. This alone was sufficient basis to award indemnity costs, but was *"compounded"* by the Claimants' subsequent conduct. The Claimants repeatedly sought to shift their case, without applying to amend, and then *"opened the case in a way which was eye-catchingly inconsistent with two prior unappealed rulings"* and resulted in *"the waste of the trial costs"* (para 69). Lambert J was in *"no doubt at all"* that indemnity costs *"would be the fair and just order"* to make (para 71).

COMMENT

22. The decision is a remarkable end to 13 years of litigation. It is an illustration of how product liability group actions can be successfully defended and it illustrates the crucial importance of careful pleading and taking proactive steps to seek the determination and upholding of the issues that will proceed to trial. The claims pre-date the QOCS regime but the award of indemnity costs in favour of the manufacturer in a major group action of this nature is noteworthy to say the least.

23. Although the Court did not need to determine substantively GSK's application concerning the correct approach to defect in the context of a prescription-only medicine, the judgment on indemnity costs clearly endorses the approach taken in *Gee* and *Wilkes*. When read with the earlier Court of Appeal Seroxat judgment, these cases can now be taken as authoritative statements of the law: claimants who fail to plead a case which accepts an holistic approach to the assessment of defect are unlikely to succeed, and may be at risk of indemnity costs.

24. Malcolm Sheehan QC, Adam Heppinstall and James Williams of Henderson Chambers appeared for GSK. They were instructed by Addleshaw Goddard LLP, where the team was led by Louisa Caswell and included Mark Chesher, Sivan Daniels, Cécile Burgess, Gabriella Coombe and Megan Goodman. Addleshaw Goddard, and barristers from Henderson Chambers led by Charles Gibson QC, have acted for GSK throughout the litigation.

Henderson Chambers
3 July 2020