SUPREME COURT JUDGMENT IN THE ATOMIC TEST VETERANS LITIGATION

In what will become a leading case on limitation, group actions and causation, the Supreme Court has handed down its decision in Ministry of Defence v AB and others [2012] UKSC 9 (14th March 2012). The Supreme Court (Lords Wilson, Mance and Brown in the majority; Lords Phillips, Kerr and Lady Hale dissenting) has dismissed the veteran claimants' appeal against the decision of the Court of Appeal [2010] EWCA Civ 1317, which had held that all nine Lead Claims in the Group Action were statute-barred and were not permitted to proceed under the discretion under s.33 of the Limitation Act 1980.

Neither the Supreme Court nor its predecessor the House of Lords had previously considered the question of how a court should approach limitation in a group action; furthermore the Court was for the first time being asked to look at the line of the Court of Appeal authority that the merits of the action are relevant under section 33. The Court was also asked by the Claimants to consider the novel proposition that they commenced their proceedings without section 14 statutory knowledge, which they only acquired after the proceedings were started; to that end this will also be an important authority on the test for knowledge. The Court also took the opportunity to confirm that there is unlikely to be any further extension to the *Fairchild* exception to the traditional rules of causation.

PROCEDURAL SUMMARY

This was a Group Action brought by some 1,011 Claimants, comprising mainly former servicemen, as well as their administrators, executors and dependents, who had participated in the atmospheric tests of thermonuclear devices in the region of the Pacific Ocean between 1952 and 1958. The Claimants alleged that they had suffered personal injuries as a result of exposure to ionising radiation at the tests.

The Court of Appeal, reversing Foskett J's judgment at first instance, had found that all nine Lead Claims were statute-barred under s.11 (or s.12, where the claim was brought on behalf of a

deceased) of the Limitation Act 1980 ("the Act"), and should not be allowed to proceed under s.33 of the Act, on the grounds that the claims were weak on the merits.

The Claimants appealed to the Supreme Court.

STATUTORY KNOWLEDGE

This issue concerned the interpretation of sections 11 and 14 of the Limitation Act 1980. Section 11(4) provides that claims in respect of personal injuries must be brought within three years from the date on which the action accrued, or three years *"from the date of knowledge (if later) of the person injured."* Section 14(1) provides that a person's "knowledge" comprises knowledge of certain facts, including knowledge *"that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty."*

It was the Claimants' case that they did not acquire statutory knowledge until 2007, when a report ("the Rowland report") was published that provided some support for the claimants' allegation that they had been exposed to ionising radiation at the tests. Prior to this, their belief that they had been so exposed did not equate to statutory knowledge, because there was no evidence to support this. On this basis, it was the Claimants' argument that they had issued proceedings without statutory knowledge and that the claims were brought in time.

The MOD argued that the case law was clear that knowledge under section 14 is to be construed as knowing *"with sufficient confidence to justify embarking on the preliminaries to the issue of a writ"*; it is not necessary for a claimant to know *"for certain and beyond possibility of contradiction"* that his injury is attributable to the relevant act or omission of the defendant (*Haward v Fawcetts* [2006] UKHL 9, per Lord Nicholls). Therefore, the date of the publication of the Rowland report did not determine when the limitation period started to run; the relevant question was when the claimants themselves came to believe that their injuries had been caused by exposure to ionising radiation at the tests. In most cases, this was many years before the claims had been brought.

The Supreme Court held that the Court of Appeal had not erred in finding that all nine Claimants had acquired knowledge on the basis of their belief in the cause of their injuries, and not when the Rowland report was published. Lord Wilson referred to the argument advanced by the veterans that a claimant may reach the stage of issuing proceedings without having acquired statutory knowledge, as *"a legal impossibility"* (para 3), and found it *"heretical"* to suggest that a claimant could escape

the statutory limitation period by making that assertion (6). Lord Walker, similarly, stated that *"the practical result of [this] analysis would be a situation that Parliament cannot have intended when it enacted [the limitation] provisions"* (67).

SECTION 33: THE MERITS OF THE CLAIMS – CAUSATION

It had been the Claimants' case in the Court of Appeal that they may eventually be able to prove causation in their claims if the Supreme Court extended the established principles. The Court of Appeal considered that the prospect of this was *"so remote that it can be safely discounted"* ([2010] EWCA Civ 1317, at 155). Finding that the Claimants' considerable difficulties on causation must be given due weight in the discretionary exercise, the Court of Appeal held that the claims should not be permitted to proceed.

In the Supreme Court, all seven Justices recognised the Claimants' difficulties on causation. The majority (Lords Wilson, Mance, Walker and Brown) held that, because of this, the claims should not be permitted to proceed under s.33; the minority (Lords Phillips, Kerr and Lad Hale) declined to decide the s.33 issue.

Lord Wilson found it plain that the claims *"have no real prospect of success"* and, in such circumstances, considered it would be *"aberrant"* to allow the veterans to proceed (1). Lord Wilson considered that *"it would have been absurd for the Court of Appeal to have exercised the discretion to… allow [the veterans] to proceed"* (27). Lord Brown also found that *"these claims have no reasonable prospect of success"* (73) and, on the evidence as it stands, *"are doomed to fail"* (75). Lord Mance considered that the veterans *"clearly have no case on causation"* (86), and stated that *"if proceedings have no proper basis in fact, they should not be allowed to persist"* (88).

In the minority, Lord Phillips *"endorse[d]"* the conclusion of the Court of Appeal that the veterans' cases on causation *"faced very great difficulties"* (155). Lady Hale said that *"There is still no evidence to supply a causal connection between that exposure and the claimants' various illnesses"* (172). Lord Kerr also accepted that *"the evidence on this issue does not look especially promising for [the veterans] at present*" (212).

The Court was unanimous in its judgment that the idea that the *Fairchild* exception to causation could offer some hope to the Claimants was *"a hope without prospects of success"* (85).

The result of the Claimants' unsuccessful appeal, therefore, is that the decision of the Court of Appeal stands, and all nine lead claims are statute-barred.

GROUP ACTIONS AND LIMITATION

The proposition that the Supreme Court's approach to the generic legal issues in this appeal should in any way be informed by the fact that the lead cases were part of a Group was firmly rejected (15). It is in the very nature of group litigation that the findings of the Court will be binding on the other claims, unless the Court orders otherwise. The contention that just because some members of the group will be able to proceed (and that a trial will have to be held in any event) means that all members of the group should proceed to trial whether time barred or not, and regardless of prospects of success, was not accepted by the Court and the method of trying limitation in group actions through lead claims was endorsed.

Charles Gibson QC, Head of Henderson Chambers led the Counsel team for the Ministry of Defence which also included Adam Heppinstall as Junior Counsel. They were assisted by Hannah Wilson and Hannah Curtain.

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