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Case No: QB 2021-002484

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2023

Before:

MR JUSTICE GARNHAM
and
MASTER DAVISON

- -

Between:

Mr David Abbott and others	**Claimant**
- and -	
Ministry of Defence	**Defendant**

- -
- -

Harry Steinberg KC and Aliyah Akram (instructed by **Hugh James Solicitors**) for the **Claimants**
David Platt KC and Peter Houghton (instructed by **Keoghs**) for the **Defendants**
Chris Barnes KC and Amrit Atwal (instructed by **Alma Law, AWH Solicitors, BLZ Solicitors, Clear Law, Eldred Law, Gorvins, Greenbank Lawyers, Imperium Law, Irwin Mitchell, Jiva Solicitors, JMW Solicitors, Kinetic Law, M&S Law, Russell Worth Solicitors, Simpson Millar, Slater and Gordon, Veritas Solicitors LLP, and Watkins & Gunn**) for the Opposing Parties

Hearing dates: 20 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE GARNHAM

Garnham J :

Introduction

1. This is the judgment of the Court following a Case Management Hearing (CMH) conducted on 20 October 2023.

2. During the course of that hearing we made orders concerning the discontinuance of the unitary claims that had been commenced by the Claimants after Master Davison's order of 25 July 2023 and the application to add claimants who served in the UK special forces (and the application to add so called "MAB Claimants"). The terms of these orders are set out in an order of the Court.

3. We adjourned an application for costs arising out of the abandoned unitary claims to enable the parties (i) to make formal application to HMCTS for return of court fees, (ii) to issue any necessary applications to have HMCTS joined as a party, and (iii) to prepare skeleton arguments on the issue. We indicated that if the costs matter remained in dispute we would hear that application in early December 2023.

4. The one remaining matter raised in the CMH concerned the Claimants' application for a Group Litigation Order ("GLO"). That application is supported by the Defendants, but opposed by a significant number of claimants in other proceedings represented by firms of solicitors other than Hugh James solicitors (hereafter "HJS").

5. The issue for us at this stage is whether the threshold requirements for a GLO are met. Were we to find those requirements are met we would need to consider whether such an order ought to be made, a question which would involve consideration of the alternatives.

6. We had the benefit of detailed written and oral arguments on the GLO application from Mr Harry Steinberg KC for the Claimants, Mr David Platt KC for the Defendants, and Mr Chris Barnes KC, who was instructed by 18 firms of solicitors whose clients oppose the making of a GLO. His submissions, he told us, were supported by another 18 firms of solicitors who also oppose the grant of a GLO. The solicitors representing these opposing parties are instructed, we were told, by more than 5,000 claimants who seek to pursue claims for damages for noise induced hearing loss ("NIHL") caused in the course of their work for HM Armed Forces. For convenience, we will refer to these claimants as the 'opposing parties'. We are grateful to all counsel for their helpful submissions.

Background

7. In 2017 HJS issued a claim form in proceedings entitled *Turner et al. v MOD*, by which 200 Claimants sought to pursue claims for damages for hearing loss which they claimed were the result of exposure to excessive noise during military service.

8. By an order dated 24 April 2020 Master Davison gave the parties in *Turner* a deadline of 22 August 2020 to make an application for a GLO if they thought that appropriate. The Claimants made no such application.

9. On 28 June 2021 HJS issued a High Court claim form against the MOD on behalf of Mr David Abbott and 3,558 others.

10. On 25 July 2022 Master Davison held that it was impermissible for the Claimant to begin this claim by a single claim form. The Claimant appealed that decision and, on 17 May 2023, the appeal was heard by a Divisional Court (Dingemans LJ and Andrew Baker J). The appeal was allowed ([2023] EWHC 1475 (KB)). In the course of their judgments members of the court made observations about the future conduct of these proceedings. Andrew Baker J said:

> "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.
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> 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.
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> 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…

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;
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> (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
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> (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)."

11. Dingemans LJ said at paragraph 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."

12. These observations by the members of the Divisional Court, it would appear, were the immediate prompt for the present application.

CPR 19 and PD19B

13. CPR 19.21 to 19.26 makes provision for GLOs. 19.21 (previously 19.10) provides a definition of a GLO:

> "A Group Litigation Order ('GLO') means an order made under rule 19.22 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues').

14. CPR19.22 provides that the court has a discretion to make a GLO; "*the court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues. The multiple parties may be claimants or defendants*" (see *Austin & Ors –v— Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928 per Jackson LJ at 35).

15. Pursuant to 19.222(b) a GLO must "*specify the GLO issues which will identify the claims to be managed as a group under the GLO*".

16. 19.23 sets out the effect of a GLO. It provides that where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues –

> (a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and
>
> (b) the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.

17. Rule 19.24 deals with case management in respect of GLOs; 19.25 deals with removal from a GLO register; and 19.26 deals with test claims.

18. Practice Direction 19B ("the PD") supplements CPR 19. It provides the procedure for applying for a GLO where the multiple parties are claimants and sets out the preliminary steps which should be taken by the solicitor acting for the proposed applicant before applying for a GLO. He or she should consult the Law Society's Multi Party Action Information Service in order to obtain information about other cases giving rise to the proposed GLO issues. The PD says that it will often be convenient for the claimants' solicitors to form a Solicitors' Group and to choose one of that Group to take the lead in applying for the GLO and in litigating the GLO issues.

19. The PD provides that the lead solicitor's role and relationship with the other members of the Solicitors' Group should be carefully defined in writing and will be subject to any directions given by the court under CPR 19.24(c).

20. By paragraph 2.3, in considering whether to apply for a GLO, the applicant should consider whether any other order would be more appropriate, and in particular whether, in the circumstances of the case, it would be more appropriate for – (1) the claims to be consolidated; or (2) the rules in Section II of Part 19 (representative parties) to be used.

21. By paragraph 3.1 of the PD, an application for a GLO must be made in accordance with CPR Part 23, may be made at any time before or after any relevant claims have been issued, and may be made either by a claimant or by a defendant.

22. The following information should be included in the application notice or in written evidence filed in support. These will be relevant considerations in deciding how the court's discretion should be exercised.

> i) a summary of the nature of the litigation;
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> ii) the number and nature of claims already issued;
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> iii) the number of parties likely to be involved;
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> iv) the common issues of fact or law (the 'GLO issues') that are likely to arise in the litigation; and

v) whether there are any matters that distinguish smaller groups of claims within the wider group.

23. If this court considers that it would be appropriate to exercise its discretion to make a GLO, it would make an order subject to the consent of The President of the Queen's Bench Division.

Competing arguments

24. On behalf of the HJS, Mr Steinberg refers to the 8th witness statement of Simon Ellis of HJS which sets out the reasons for applying for a GLO.

25. Mr Steinberg began by explaining his clients' failure to seek a GLO by the date indicated by Master Davidson. He said that the Claimants' position has changed over the last 3 years as a result of the following five developments. First, he refers to the recent remarks by the Divisional Court set out above. Second, he says the defendants have changed their position and have now indicated that they would support the making of a GLO. Third, he refers to the increasing number of claims being brought by firms other than HJS, said by Mr Bird of the MOD's solicitors, Keoghs, now to total almost 5000. Fourth, he notes the change in the defendant's stance to the question whether findings in the present proceedings without a GLO would be binding or only persuasive (about which we say more below.) And fifth, he refers to a persisting concern that, without a GLO, trials will take place in other claims in which the generic issues will need to be determined by a court without the benefit of evidence prepared for the Test Claims in this litigation.

26. Mr Steinberg further submits that military deafness claims are not typical noise related hearing loss claims. He says there are significant common issues amongst such claims which, once determined, would constitute real progress towards the final determination of the whole cohort of military deafness claims. He says that the generic issues approved as part of the case management process in the present proceedings have been incorporated in the draft GLO order. He points to the generic issues that arise in the claims of the lead claimants, for example, exposure to excessive noise whilst deployed overseas, complaints about the adequacy of hearing protection equipment and the development in most of the claimants of asymmetric hearing loss.

27. The defendants support the application for a GLO. Mr Platt points out that the core principle of the regime in CPR 19 is that a GLO provides for the management of "*claims which give rise to common or related issues of fact or law*". He says the relevant considerations are the nature of the litigation, the number and nature of claims already issued, the number of parties likely to be involved, the GLO issues likely to arise and whether any matter distinguishes a small group of claims within the wider group.

28. Mr Platt refers us to the witness statement of Mr Ryan Bird of Keoghs, who explains that it is the view of the MOD that the prospective involvement of a large number of third party NIHL claims now makes an order of a GLO "*almost irresistible*". He says it would be "*clearly unworkable*" to have the HJS claims proceeding in the High Court "*via bespoke group litigation and thousands of other random claims proceeding in courts across the country*". He says the absence of a GLO would be inconsistent with good litigation governance and that there is no sensible alternative method of dealing with what he estimates to be about 10,000 claims.

29. Mr Platt also refers to the witness statement of Simon Ellis of HJS who gives a number of reasons that would justify the grant of a GLO. He refers to the number of Claimants or potential Claimants of whom the Defendants are aware who have instructed solicitors other than Hugh James. He says that gives rise to the possibility that other claims will reach trial before the test claims but without the benefit of the comprehensive expert evidence being obtained in this litigation. That, he says, gives rise to the risk of inconsistent and irreconcilable decisions as well as to the risk of court resources and costs being wasted on duplicate claims. He says the key benefit of a GLO would be that "*all claims with similar features would be captured within the present arrangement*".

30. Mr Platt refers the court to a number of cases where GLOs have been made (for example *Hutson Steel v Tata Steel* [2016] EWHC 3031(QB) and *Evans v Secretary of State for Health* [2017] EWHC 3572 (QB)).

31. As to the threshold criteria, he submits that the claims cannot be consolidated and cannot proceed by way of representative parties. He says the number of claims in issue here is plainly sufficient for GLO. He says that the claims are of a type - personal injury arising from exposure to noxious phenomenon - which is recognised as appropriate for a GLO. He says the issues identified in the HJS proceedings are common or related issues of fact or law. He says that the huge number of claims currently issued or contemplated cannot be satisfactorily and effectively managed in accordance with normal procedures and that the alternatives are all unpalatable.

32. On behalf of the opposing parties, Mr Barnes submits that a GLO is neither necessary or workable. He makes the following points. First, he says, referring to the order of Master Davison of 24 April 2020, that the time for making the application has expired. He says there has been no application for relief from sanctions. Second, he says that the decision of the Divisional Court does not impact on the decision whether a GLO is necessary or appropriate. Third, he says that the opposing parties will suffer prejudice as a consequence of the delay in making the application and as a consequence of the GLO being made at all.

33. Fourth, he argues that Hugh James Solicitors have at no stage sought to discuss the need for GLO with any of the firms he represents. He says there has been no attempt to consider how the military deafness claims as a whole might properly be managed. He says no claims have been registered with, or notified to, the Law Society's Multi Party Action Information Service. He says Hugh James have not served the application for GLO upon all the firms of solicitors whom he represents and some of those firms have until recently been completely unaware of this application.

34. Fifth, he points to the order of this Court of 21 July 2023 where we observed that there had been no taxonomy or classification of the other claims. He says that there has been no attempt on the part of Hugh James Solicitors to classify the claims so that, in the absence of individual pleadings from each Hugh James claimant, the court and the parties can have no idea as to whether there are issues capable of being determined that might impact on other claims. He says that, in making this application, the claimants has failed to comply with PD 19B.

35. Finally and most importantly, he submits that the threshold criteria have not been met. He says the court cannot be satisfied that the claims give rise to a common or related issue of fact or law. He says the resolution of such issues as are listed in the draft GLO

are not likely to assist in resolving the principle issues in the wide cohort of cases because these issues are highly fact sensitive.

36. Mr Barnes makes a number of further points on the merits of a GLO. He says that there is no need for a GLO; that the existing management of the *Abbott* claims would be a more appropriate way forward; that the majority of the claimants he represents have after the event (ATE) insurance cover which, in the majority of cases, would not cover a GLO and the existing funding arrangement with individual claimants he represents do not cover a GLO.

37. He argues that the risk of inconsistent judgments is not in reality a matter of concern. Military deafness claims have been brought for many years without inconsistent judgments posing an issue. He says that to the extent that there are issues the resolution of which might be relevant to another claim, the normal doctrine of precedent would apply.

38. Looking at the individual claims in respect of which the solicitors who instruct him are involved, he says that some of those claims are at a very advanced stage and are expected to settle. Liability is admitted in many of them and many claimants have already received offers of settlement. He says that if a GLO is made there is likely to be very significant delay.

Discussion

39. There is no dispute that the claims of the HJS claimants and those of the opposing parties cannot be consolidated and cannot proceed by way of representative parties, that the number of claims here is sufficient for a GLO, and that the claims are of a type - personal injury arising from exposure to noxious phenomenon - which is recognised as appropriate for a GLO

40. There are three major issues to address before the grant of a GLO in this case could sensibly be contemplated. Those are: (i) the effect of making an order on the access to justice for the opposing parties; (ii) the extent to which findings in test cases under the GLO would be binding on other actions; and (iii) the related issue of the utility of a GLO in a case such as this. We deal with each point in turn.

Access to Justice

41. CPR 19.22(1) stipulates that Practice Direction 19B provides the procedure for applying for a GLO. It appears to us that there has been a wholesale failure by HJS, as the solicitor acting for the proposed GLO applicant, to comply with that Practice Direction in making this application.

42. It is right to note that, in preparation for the case management conference in *Abbott v MoD* in October 2022, Master Davison gave other firms of solicitors the opportunity to make representations. However, HJS have not consulted the Law Society's Multi Party Action Information Service in order to obtain information about other cases giving rise to the relevant issues. HJS have not formed the appropriate Solicitors' Steering Group. They have not devised a proper method to select one firm of solicitors, out of those acting for claimants in such cases, to take the lead in applying for the GLO and in litigating the GLO issues. Instead, HJS have simply assumed that they will be that firm.

The PD provides that the lead solicitor's role and their relationship with the other members of the Solicitors' Group should be carefully defined in writing. That has not happened.

43. The result is that there is no common approach to this application from solicitors acting for claimants in the cases likely to be caught by the proposed GLO, and no established mechanism for resolving differences between those firms or managing the process. On the contrary, the approach of HJS has, it appears, alienated many of the other firms acting for M-NIHL claimants. In substance, the Court is being asked to impose a GLO in the face of strongly expressed objections from 36 firms of "other solicitors" representing some 5000 claimants.

44. In the *VW NOx litigation* [2018] EWHC 2308 (QB) Senior Master Fontaine said at paragraphs 16 – 17

> …The reasoning underpinning CPR 19PDB is to ensure that by the time claimant solicitors seek to engage with defendant solicitors in respect of a proposed GLO application they have co-ordinated the claims and identified GLO issues, which means co-ordinating the pleadings and causes of action and putting in place a structure which will enable the court to order a GLO which will justly and efficiently dispose of the claims caught by the GLO issues. The court will also be concerned at the GLO hearing to ensure that funding is in place, costs sharing is in place, and that all the claimant groups are able to speak with one voice. There is no requirement of perfection, and there will often be certain points that need to be agreed, but there will be a certain threshold at which remaining issues that are not agreed will be capable of being determined by the court. That is why paragraphs 2.1 and 2.2 of the Practice Direction refer to the formation of a solicitors' group, the identification of lead solicitors and in fact say that where one firm does take the lead, their relationship with the other firms in the group "should be carefully defined in writing". This is designed to ensure that the second pre- application stage can take place, namely discussion with the defendant. The defendant needs to know that it is dealing with a notional lead solicitor who can speak with the authority of the group that has been co-ordinated. Group procedures are seeking, so far as possible, to ensure that where there are a multiplicity of claimants, claims, and issues, they are treated, for all practical purposes, as one claim. The structures are intended to enable the defendants to conduct themselves as they would if they were facing a claim by one or more claimants in a more straightforward fashion.

45. In that case the court was concerned with a case where the defendants opposed the grant of a GLO, but the points made by the Senior Master are equally apposite here where a GLO is opposed by many of those acting for claimants likely to be effected.

46. It was common ground before us that, if a GLO were to be granted, the MoD would apply to stay all other M-NIHL cases around the country. Accordingly, the effect of a

GLO would be to restrict the access to the Court of many claimants not represented by HJS until the lead cases within the GLO are resolved, a period unlikely to be less than two years. In our judgment, the court should be slow to take a step that would have that consequence, especially where large numbers of claimants would be disadvantaged or delayed in their pursuit of proper compensation, and where the procedures for achieving unanimity of approach have been ignored by the applying firm. We note, in that context, the evidence of Mr Evatt of Alma Law to the effect that some of the claims in which solicitors other than HJS are instructed are at an advanced stage and are expected to settle. He says "*Liability is admitted in many of them and many Claimants have already received offers of settlement*." We accept the submissions of Mr Barnes that a large number of other claimants would be disadvantaged, at least in the short and medium term, were this the course the court decided to adopt. Whatever stage their claims had reached, their actions are likely to be stayed to permit the GLO to operate.

47. It is no answer to these concerns that the stay would not affect cases not yet issued or cases that did not involve GLO issues. The GLO issues as drafted, or re-drafted, will be aimed at catching all or most M-NIHL claims. And it seems to us fair to assume that the MOD will not negotiate non-issued claims before the lead claims are tried. Such a moratorium might be more attractive in circumstances where access to justice considerations were offset by ultimate costs savings, an issue to which we return below.

48. Of course, it may be possible for HJS to remedy the procedural position by complying with the Practice Direction in future months. But certainly for the present, we regard HJS's failures in this regard as a factor pointing firmly away from the grant of a GLO. To grant such an order in this case would have the effect of severely limiting the access to justice of those represented by firms other than HJS.

The Binding Nature of Judgments in the GLO

49. In paragraph 12 of his statement of 9 October 2023, Mr Bird, on behalf of the MOD, sets out the defendants' "*position*" as to the binding effect of decisions in related cases. That paragraph identifies what Mr Bird has been "advised" on the topic but we take it to represent the MoD's stance on the issue. Indeed, Mr Platt indicated that he had assisted in the drafting of this part of the statement. Mr Bird says this: "I am advised that the position is this:

    i) The doctrine of "res judicata" will operate to bind all those claims where a finding of fact or law falls within this legal principle in circumstances where the issue is later considered by another Court;
    ii) If there is a GLO and additional claimants participate, then findings in the GLO will bind those additional cases which otherwise would not be so regarded. However it would be open to a party in a non-participating claim in a subsequent High Court dispute to argue (for instance) that the original finding of law by a Judge of equal status (e.g. in the lead case process) was wrong and should not be followed—or that the expert medical evidence should be interpreted differently on the facts of the later case;
    iii) Within the enclosure of the GLO, findings of act or law (e.g. the meaning of a particular provision in the Noise Regulation) are binding on participating litigants. The principle is enshrined in CPR 19.23 (1)(b).
    iv) However, the extent to which any such findings are truly "binding" (rather than highly persuasive or influential) should not be overstated. Findings of fact are

> usually case specific. A finding that Serviceman A who served in the Parachute Regiment between 1985 and 1995 in N. Ireland has Noise Induced Hearing Loss as a result of exposure to military noise does not "bind" Serviceman B whose was deployed with the Green Jackets in Germany and Cyprus between 1990 and 2005. Both these claims will have different factual matrix and different arguments over breach of duty, contributory negligence, limitation, medical causation and quantum. All these elements are fact and case specific.
>
> v) However the practical effect of findings made in the lead cases (e.g. on medical causation and breach of duty or contributory negligence) are likely to be highly influential in the resolution of a large number of other claims.
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> vi) The issue of whether Prof Lutman or Prof Moore is correct in his interpretation of some key disputed medical issues (such as the dynamics of M-NIHL, hearing loss latency and the primacy of the audiogram) is a key part of the litigation. A resolution in the lead cases will bind other cases within the GLO if a binary or transmissible finding is made. It will not be determined by itself whether Serviceman C has in fact developed Noise Induced Hearing Loss or whether he left the armed forces due to injury or of his own volition."

50. In general terms, we agree with that analysis. The outcome of the lead cases would, potentially, be binding on all those named as Claimants in the Hugh James Military Deafness Litigation. Furthermore, the doctrine of precedent will apply, most notably if an issue is considered in the High Court. It is not necessary to have a GLO to achieve those outcomes. A GLO would go further and would also bind the "other claimants". But, as was pointed out by both the MOD and the opposing parties in argument before us, because the individual claims are so fact sensitive, the lead claims will not, in fact, be dispositive of either the bulk of the HJS claims or the other claims.

51. A similar position obtained in *Durrheim v Ministry of Defence* [2014] EWHC 1960 (QB). The MoD had sought the transfer of various personal injury claims, made by serving and former service personnel alleging noise-induced hearing loss, from the county courts to the High Court. They argued that the handling of numerous cases of the same type in different county courts would be more expensive and less efficient than dealing with them in one place. Its application was a preliminary step to establishing a scheme of common case management, such as the making of a group litigation order or directions for trial of lead or test cases. The Senior Master found that expense and efficiency did not amount to a sufficient reason, given the factual differences between the cases. He observed that the transfer of the cases would be likely to cause unnecessary delay, and he noted that it was not easy to find funding for group actions.

52. The MoD appealed, arguing, amongst other points, that the Senior Master had failed to consider proportionality, specifically in relation to the duplication of disclosure and expert evidence, contrary to the overriding objective. Pattison J dismissed the appeal. At paragraph 94 of she said:

> I have looked at the extremely useful spreadsheet that was produced by the appellant which illustrates the variety of weapons involved, each as a noise source. By way of example some 20 light weapons are listed. In addition, there was considerable variety of PPE. The noise exposure occurred in a wide variety of situations including active operations and

> training. In those circumstances an assessment of noise exposure in one case will be of limited, if any utility, in relation to another.

53. We conclude that, in circumstances like the present, the fact that judgment in a GLO case is binding on all claims caught by that GLO does not weigh heavily in the scales in favour of granting the order.

The Utility of a GLO now

54. Against that background, we are, at least for the present, unpersuaded that a GLO would be beneficial to the administration of justice or an effective means of saving costs, certainly in circumstances where such an order would have the adverse effect on access to justice discussed above. We say that for the following reasons.

55. There is no dispute that, in principle, a GLO may be suitable for "industrial disease or accident" claims. The paradigm example is perhaps a claim by numerous factory employees about injuries sustained in consequence of a particular industrial process, where the allegations of negligence are common to all. In *Hutson*, the court held it was appropriate to make a GLO in respect of claims brought by or on behalf of former employees of Tata Steel who claimed to have suffered ill health as a result of harmful emissions at coke plants throughout England and Wales. GLOs are also appropriate in cases where there are huge numbers of claims each, or most of which, raise similar issues of facts and law (such as was the case in the *VW NOx Emissions Group Litigation* [2020] EWHC 783, where a software function in a car engine manufactured by Volkswagen, which enabled the engine to recognise when it was being tested for compliance with vehicle emissions standards and to produce fewer emissions of nitrogen oxide as a result was a prohibited "defeat device" for the purposes of Article 3 (10) of EU Parliament and Council Regulation 715/2007.)

56. This case seems to us a much less obvious candidate for a GLO. Actions for damages for noise induced hearing loss (NIHL) have a long history, going back many decades. Such actions have been brought by servicemen against the MOD since the Crown Proceedings Act of 1987 repealed the immunity conferred on the Armed Forces by section 10 of the Crown Proceedings Act 1947. The general principles applicable to such proceedings are well established. The circumstances in which the thousands of claimants in the HJS cohort, and those who form the opposing parties, sustained their injury vary considerably and the allegations of breach of duty appear more diverse.

57. It is right to observe, as did Mr Platt, that the wording of CPR r 19.21 deals with claims which "*give rise to common or related issues of fact or law (the "GLO issues*")". The rule does not stipulate that the GLO issues must be dispositive of the GLO claims. That distinction is reflected in the Divisional Court's decision in this case; they said that "*real progress*" towards the resolution of the other claims (paragraph 73) and/or "*real significance*" for all the rest of the claims (paragraph 77) was enough to justify an omnibus claim form. Nevertheless, this remains a highly relevant factor in the decision whether or not to make a GLO. If the lead claims will not dispose of the other claims, or a good proportion of them, that diminishes the utility of a GLO.

58. We say "appear" because we have been taken to the pleadings in only a small sample of the relevant claims. In giving reasons for our order of 21 July 2023 we noted that "…the *extent to which (judgments in the lead claims) will bind other claimants will still*

depend on those other claims presenting issues that are the same as the lead claims or so similar that (such judgments) must be treated as binding. At the present time, in the absence of any taxonomy or classification of the other claims, it is not possible to form a view". That still remains the position. Despite those observations, HJS have made no attempt to classify their claims or otherwise to make good the submission that judgment on the issues raised in the lead cases would, on the facts, bind other cases in the group. What material we have from HJS on this topic is contained in the witness statement of Mr Ellis dated 7 August 2023 in support of the GLO application, which in turn refers to his second statement dated 15 March 2018. The relevant paragraphs are 5 – 13 and 10 – 25, respectively. These paragraphs place the claimant cohort into 8 separate categories of Armed Forces personnel and the sources of noise exposure described are very diverse in terms of type, settings and scale. If this evidence can be called a classification at all, it is one that offers little encouragement for the proposition that the lead cases will be dispositive.

59. In circumstances where the findings in the lead cases will be dispositive of few, if any, of the other claims, the duplication of effort will not be avoided. Those other claims will still need to be thoroughly investigated and presented in detail. Furthermore, a GLO will impose its own burden of administration, effort and costs. As it is put by the authors of *Class Actions In England and Wales*, 2nd Ed, at 3-010:

> "If the common issues are limited, so too may be the benefits of a GLO; where each of the claims to be grouped have at their core issues which must be determined on a case-by-case basis, a GLO may not be appropriate".

60. Finally, we consider briefly the other arguments said to favour the immediate grant of a GLO.

61. It is suggested that without such an order there is a risk of inconsistent judgments in M-NIHL cases around the country. We accept that such a risk exists but observe that to date no such inconsistency has emerged. Plainly, there would be benefit in an early High Court hearing of some of the issues in the HJS litigation (a matter we return to below) but we have seen no evidence to suggest that this threat is significant.

62. It is suggested that, absent a GLO, the MoD will spend vast amounts of time and money travelling around the country responding to numerous, similar, individual actions, (playing "*whack-a-mole*" as Mr Platt put it). Again we have seen no evidence that this is likely. There is nothing to suggest that there are huge numbers of county court cases likely to go to trial in the near future, and we anticipate that proper case management in the individual cases will greatly reduce that risk.

63. It is said that a GLO will avoid the duplication of evidence in successive cases. However, first, that assertion presupposes the same issue will be litigated repeatedly and that seems to us very unlikely. And second, there is no evidence that that has occurred to date.

64. It is said that if there is no GLO, the "*flood gates*" will open. But there is no empirical evidence of a likely flood of claims being litigated to trial. In fact, on figures produced by Mr Barnes (and not disputed by Mr Steinberg or Mr Platt), in the last five years 4,153 M-NIHL claims have been settled with only 2 or 3 trials resulting.

Conclusions

65. We conclude that the Claimants, supported though they were by the Defendants, have failed to make out their case that the threshold requirements for a GLO are met. Accordingly the application for such an order is dismissed.

66. We do not, however, exclude the possibility that a GLO might be justified at some stage in the future if, for example, there is the flood of cases in the County Court, or inconsistent decisions at Circuit Judge level emerge. If there was a renewed application, it would be essential that the solicitors making the application had followed the guidance in the Practice Direction before doing so.

67. By way of a postscript, we would add that, were it thought there might be benefit in obtaining an early judgment of the High Court on one or more of the issues currently assigned to the test cases, (perhaps the issues arising from the disagreement between Professor Moore and Professor Lutman about diagnostic criteria, latency and synaptopathy), we would be willing to hear an application that that be treated and heard as a preliminary issue in the present proceedings.