Case No: A2/2002/0283QBENI
A2/2002/0297/QBENI

Neutral Citation No: [2002] EWCA Civ 1644
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)
(Mr Justice Morland)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 21st November 2002

Before:

LORD JUSTICE SIMON BROWN
(Vice-President of the Court of Appeal Civil Division)
LORD JUSTICE BUXTON
and
LORD JUSTICE CARNWATH

- -

Between:

HERBERT GEORGE SNELL & OTHERS	**Appellants**
- and -	
ROBERT YOUNG & CO LIMITED & OTHERS	**Respondents**

- -

(Transcript of the Handed Down Judgment of
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- -

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Judgment
As Approved by the Court

Lord Justice Simon Brown:

1. This appeal concerns a number of claims grouped together under a Practice Direction made by Lord Bingham CJ on 21 December 1998 under the heading "The Organophosphate Litigation", all of which have now been dismissed by Morland J as an abuse of process. As set out in the Practice Direction, the claims are for damages "in respect of organophosphate poisoning resulting from exposure to organophosphate products used in sheep dipping" and, pursuant to an order made by Master Miller, the assigned Master, they were included in a court register of such actions.

2. Although the history of this matter is lengthy and the documentation before the court voluminous, it is unnecessary for present purposes to refer to much of it. By way of general background the following brief account must suffice. The toxic effect of organophosphates has been well known for very many years. When this litigation was first intimated, it was envisaged that many hundreds of people connected with farming would be making claims alleging injury attributable to organophosphate exposure. In fact this did not occur and there were never more than 20 or 30 claims on the register. In January 1997 the generic legal aid certificate for these claims was awarded to Messrs Dawbarns (later transferred to Messrs Hodge Jones & Allen when the relevant partner moved). In April 1997, at a meeting attended by the generic solicitors, counsel and the Legal Aid Board, it was decided to carry out a medical pilot study to seek to establish a causative link between organophospate exposure and the medical conditions suffered by the various claimants. On 14 June 1999 Master Miller ordered each claimant to serve "a medical report substantiating the claimant's alleged injuries" and "complete data relating to the individual claimant generated as a result of the pilot study". The pilot study, however, albeit costing upwards of £800,000, was at best inconclusive. The medical reports served pursuant to the June 1999 order were unsatisfactory and on 1 February 2000 Master Miller ordered each claimant to serve further medical reports "that will address the issue of attribution as well as report on the injuries". In July 2000 the various defendants applied to strike out each of the claims.

3. I come now to a most important feature of this case, a press statement issued by Messrs Hodge Jones and Allen in December 2000 explaining why, in consultation with leading counsel, junior counsel and their experts, they had decided to advise against continuing with the litigation. I think it appropriate to set out the statement in full:

> "Most clients will have heard by now that the generic legal team has advised that the organophosphate sheep dip litigation does not have reasonable prospects of success and that the issued sheep dip cases should therefore be discontinued. the sheep dip litigation has been financed almost entirely from public funds made available by the Legal Aid Board, (now the Legal Services Commission). Lawyers acting for legally-aided clients have a duty to review at regular intervals the merits of the case and apply stringent cost benefit formulas in order to justify whether the case should continue.

The sheep dip litigation involved allegations about the safety of organophosphates used in sheep dip. Many different types of sheep dip were used over the years so there were over 20 manufacturer defendants in the action as well as MAFF and employers of farm workers.

Despite the fact that many thousands of dippings take place very year carried out by many farm workers, the number of clams presented to the court by August 2000 was only 25. We had great difficulty in obtaining convincing evidence to link the farmers' symptoms with the organophosphates in question, and with such small numbers of cases and the very large costs of investigation and trial, the generic team felt that further expenditure of legal aid or private funding could not be justified.

The sheep dip litigation proceeded at a fast pace after January 2000 when the Court began to issue directions for the progress of the litigation. We were ordered to plead all cases by March 2000 and serve medical reports in support of each claim. this was done. The Defendants' response in July 2000 was to issue applications to strike out most of the issued cases. We received the Defendants' evidence in support of their strike-out applications in August 2000 and discussed this evidence at a series of meetings with experts. Regrettably, taking into account all the evidence, we came to the conclusion that the strike-out applications could not be defended.

There were three main reasons for our decision.

1. In no case were we able to find convincing evidence from experts to definitively link a claimant's symptoms with organophosphates. In many cases, there were confounding factors such as a previous head injury or accident. In all cases it could not be ruled out that the symptoms were caused or contributed to by exposure to other chemicals encountered on the farm or in other work done by claimants. We had a meeting here with the generic team of counsel and various neurologists, neurophysiologists and a neuropsychologist to discuss some of the medical and scientific issues in detail before the statements of case were drafted. In the end, the medical experts were unable to attribute any abnormalities to long-term low level organophosphate exposure in general or to specific exposures in particular.

2. As yet there is little published scientific research that strongly supports a link between low-level organophosphate exposure and clinically significant long-term effects of any kind. This was a significant hurdle to be overcome. At the present time, the balance

of evidence does not support such a link. Some research does indicate an association between organophosphate exposure and the effects on the function of the nervous system, but the measured deficits are generally subtle and do not translate into symptoms. The Committee on Toxicity report on organophosphates concluded that a link was unlikely, although the report stated that there was insufficient evidence to allow for useful conclusions to be drawn about psychiatric illness. The report identified a gap in knowledge relating to the possibility that organophosphates cause disabling illness in a small sub-group of exposed persons. The Government has now commissioned further research specifically to look at this issue and whether there is any relationship between low-level exposure and long-term illness. That research is unlikely to reach conclusions and be published before 2002 at the earliest.

3. The small size of the cohort of cases could not justify continued large expenditure on the litigation. About 25 cases had been issued in the High Court but the generic team found that most of these cases were unsustainable because of confounding factors such as earlier accidents or other medical conditions.

We very much regret having to advise that the organophosphate sheep dip group litigation be brought to an end. We are well aware that many farmers are ill and we accept that their symptoms may have been caused by exposure to organophosphates. Unfortunately, however, there is at present insufficient supportive scientific evidence for any likelihood of success at trial. The range of symptoms and illnesses suffered by many claimants are relatively common in the general population and have many possible causes, including exposure to chemicals other than organophosphates. There is no definitive 'fingerprint' effect of organophosphates which would allow the symptoms to be attributed to the exposure.

It may be that further research will establish that there is a link between low-level exposure to organophosphates and long term ill effects. Even if this were the case, however, the problem would remain that each claimant would have to link their own symptoms on the balance of probabilities to identifiable organophosphates, and rule out any other possible confounding causes. This is a considerable hurdle to overcome. We consulted many medical and scientific experts in the hope of receiving a supportive opinion on this issue, but none were to assist us, either for the whole group or on a case by case basis.

In the end, our duty is to ensure that public money is spent wisely and we could not justify further public expenditure on

> the sheep dip litigation. The decision to advise against continuing with the litigation was taken by the whole generic team including our barristers Stephen Irwin QC, Charles Pugh and Barry Cotter and our consultant solicitor, Professor Mark Mildred.
>
> Colin Stutt of the Legal Services Commission wrote on 11th December to the Countess of Mar who had raised a number of points with the Commission about the Sheep case. He stated:
>
> > 'We remain of the view that the generic case is not strong enough in terms of establishing causation to justify further public funding. We realise that this decision came as a bitter disappointment to many clients. It is understandable that they feel the claims should or could be pursued if Hodge Jones & Allen had handled the cases differently. Whilst we understand the strength of feeling on this issue we do not agree with the criticisms being made. We are satisfied that the generic work has been competently handled by Hodge Jones & Allen and the rest of the legal team. The latest position of the claims is due to the inherent legal difficulties in the case, not to any lack of understanding of the issues by the legal team'."

4. That then was the essential background against which Morland J had to determine the defendant's applications to dismiss these claims, applications initially made under CPR Part 24 but subsequently extended to include an application to strike out the group of actions as a whole as an abuse of the court's process.

5. For reasons I shall shortly come to explain, those applications led in the event to two orders, dated respectively 29 July 2001 and 29 January 2002 and it is indisputable that by the latter order all the claims on the register were dismissed. The appellants' first and main ground of appeal, however, is that by the time of this second order the judge had disabled himself from making it, having by then plainly stated that under his original order he intended their particular claims to be allowed to continue. The appellants' alternative ground of appeal is that it was in any event wrong to dismiss these particular claims. This second ground, of course, is relatively straightforward but having regard to the particular nature of the first ground it is, I fear, impossible to avoid the cumbersome task of setting out verbatim substantial tracts from each of the several pronouncements made by the judge in the course of dismissing these claims, pronouncements in the form of three judgments, two orders and a "Note to All Parties". I shall take these pronouncements chronologically, keeping the quotations as short as possible. Without them, however, it would be impossible to understand the argument.

I Judgment of 31 July 2001

6. This judgment was delivered orally on Tuesday 31st July 2001 following a four-day hearing the previous week. It began:

> "The main application that I have to determine is an application on behalf of all the defendants that I should strike out all the remaining claimants in this group action, because to allow the action to continue would amount to an abuse of process. It is said that all the remaining claims are unviable and continuance of the action would involve serious injustice to the defendants who have already incurred substantial costs, and would incur even more substantial costs if the action proceeded further with no prospect of recovering those costs. A secondary application is made on behalf on individual defendants in respect of the claims of each of the eleven remaining claimants the submissions are that each claim has no realistic prospect of success and should be dismissed."

7. The judge then quoted from a number of Government reports upon the toxic effect of organophosphates and continued:

> "In general, the eleven claimants, who undoubtedly suffer ill health, attribute it to repeated exposure to organophosphates, at low levels, over a period of years. They have all been involved in farming and, in particular, sheep farming and sheep dipping, which commonly includes, as a constituent, organophosphate. Their symptoms of ill health are commonly suffered by members of the general population. Long-term, low-level exposure to organophosphates leave behind on the victim no identifying fingerprints. I suspect that, one day, it will be established scientifically, and accepted generally, that much of the ill health, feelings of malaise, flu-like symptoms and depressive illnesses experienced by the farming community are caused by their repeated exposure, over years, at low levels to a variety of toxic chemicals, including organophosphates."

8. The judge then noted that to succeed in such a claim the claimant has to prove on the balance of probabilities that his exposure to organophosphate was a material cause of his particular injury, that the defendant was responsible for that exposure, and that the defendant was negligent or otherwise in breach of duty or liable under the Consumer Protection Act 1987, and observed that even then "further hurdles may arise". He pointed out that even if organophosphates were responsible for some features of the claimants' ill health, there might be other causes for other features. Furthermore, even if the claimant suffered ill health as a result of organophosphate exposure, it would not necessarily follow that all his loss of earning capacity or the reduced profitability of his farming activities would be found attributable to that ill health. Accordingly he remarked that "although the amounts of some individual claims are

alleged to total many hundreds of thousands of pounds, I consider that the size of the claims are very speculative".

9. Having then pointed to the problems of limitation which some claimants would face, he continued:

> "The greatest problem facing the claimants in this case has been their inability to obtain evidence from the appropriate experts that their ill health has been caused by exposure to organophosphates. … Until a late stage during the four-day oral argument before me last week, I had hoped to be able, consistent with my duty, to give the claimants a further, and last, opportunity to obtain the evidence necessary to make their claims viable. I discussed the possibility of adjourning the defendants' applications for six to nine months to give the claimants this opportunity. Having considered all the submissions of counsel, and read over the weekend the whole of the transcripts of those submissions, I have reached the firm conclusion that I would be failing in my duty if I did not bring this group litigation finally, and immediately, to an end. Although I have reached this conclusion with some misgiving, because I am sympathetic to the farming community, whose health is likely to be adversely affected by repeated, low-level exposure to toxic chemicals, I am sure my decision is right. To adjourn the applications would raise false hopes, and result in the incurring of further great expense with no probable prospect of a worthwhile return. Already, well over £1 million has been spent in legal aid in funding the claimants and the group litigation. On their behalf, a pilot, scientific study was carried out at huge expense. It produced no reliable, positive findings in their favour. Their case still remains unviable. The defendants have also expended many hundreds of thousands of pounds in investigating into the claim, and have indeed been particularly co-operative in granting the claimants extensions of time. In my judgment, it would be oppressive to the defendants to allow the group litigation to continue. In reality, the group has ceased to exist. The claimants are a group of eleven disparate claimants, with claims of varying degrees of weakness, but all facing immense difficulties. This judgment is an introductory judgment towards my final judgment, but it is a final decision. I shall, in the late autumn I hope, be able to hand down a written judgment dealing, in some detail, with the whole history of the group litigation, and the cases of the eleven remaining claimants."

10. The judge then touched on the earlier history of the litigation, recited much of the press statement made in December 2000, and noted that the eleven claimants before him had, following that statement, been granted limited legal aid for the sole purpose of resisting the strike-out applications. He then turned back to the evidence and concluded that with regard to four of the eleven claimants "they have no realistic

prospect of success [and] therefore I can strike out those claims on that ground". He then turned to the other seven specific claims which were before him (which included six of the seven appellants now before us) and concluded:

> "The remaining seven claims are, at present, unviable due to the absence of appropriate expert evidence to establish causation. Moreover, each of these seven claims have significant innate weaknesses rendering little prospect of worthwhile success. However, I do not strike them out as having no realistic prospect of success because I cannot rule out the possibility that, if their claims were somehow provided with funding, disclosure of documents took place, and expert evidence of causation were obtained, and if the other weaknesses surmounted, they might become viable.
>
> In my written judgment … I shall review the facts and problems of each of the eleven claimants in some detail but I shall not be trying the individual claims on paper. It is as a result of highlighting the different facts and problems of the individual claims that I reach the conclusion that this group litigation should end forthwith and, by an overview, that the claims, both individually and as a whole are unviable."

II Order of 31 July 2001

11. So far as material the order provided:

> "1. The Organophosphate Group Litigation be dismissed.
>
> 2. That in relation to the individual claims of [Sayce, Bruce, Tyrer & Stoker] are struck out and dismissed [sic]
>
> 3. All other matters including questions of costs are stood over until 28 days after written judgment is handed down …"

III Judgment of 9 November 2001

12. This was a handed down written judgment. It began:

> "This judgment is to be read with the judgment given on 31st July 2001. I do not propose to repeat what I said in that judgment. Further detailed reading and re-reading of upwards of 30 ring-binders and transcripts of oral submissions have fortified my general conclusion that on the evidence as it now stands the claimants' claims are unviable, the group action would fail and that it would be unjust and oppressive to the defendants to allow it to continue in the hope that at some

> indefinite date in the future the claimants would be able to put their house in order and adduce sufficiently adequate evidence on the all-important issue of causation from experts with the relevant expertise."

13. There then followed an account of the history and progress of the litigation. The judge then cited briefly from Stuart-Smith LJ's judgment in *A B & Others -v- John Wyeth* [1994] 5 Med LR 149 (the benzodiazepine group litigation) at p152:

> "The court is concerned to see that its proceedings are not used in any way that is oppressive and vexatious to the other party or which involves serious injustice to him. If the court is satisfied that the proceedings do have that effect, it has power to strike out on the grounds that they are vexatious and an abuse of process."

14. I should quote the next three paragraphs:

> "17. The defendants are entitled to rely upon the facts that after the applications to strike out had been made the very experienced leading counsel in this field (Mr Stephen Irwin QC) had a series of meetings with experts and concluded that the strike-out actions could not be defended and that the Legal Services Commission, no doubt after careful consideration having invested over £1.1 [in fact £1.3 million] million in the litigation, withdrew funding.
>
> 18. I do not think that there is any likely prospect of the group action or indeed individual claims being progressed without funding and I think that there is no reasonable prospect of that funding being forthcoming.
>
> 19. The defendants' conduct throughout has been co-operative over extensions of time and complaisant towards failures to comply on the part of the claimants to orders of the court. Viewing the matter overall it would not be equitable to allow the group action to proceed even allowing for the fact that the slow pace of progress of the claims has in part probably been due to limited funding and in part due to the unsatisfactory manner in which the Pilot Study was conducted and the meagre results it produced. In my judgment the defendants are fully entitled to call it a day and limit their liability for their own almost unrecoverable costs already exceeding half a million pounds."

15. Under the heading "Group Action" the judge then noted that the claimants were hoping for time to obtain toxicological evidence and also disclosure from the

defendants of the chemical composition of their various products and in paragraph 26 stated:

> "I consider that it was unrealistic to suggest that the group action could have been made viable and ready for trial in less than two years by which time many more hundreds of thousands of pounds would have been spent with still a very uncertain prospect of any success."

16. The judge then pointed to the weakness of the claimants' neuro-psychological evidence and their lack of evidence of causation from neurologists and psychiatrists and concluded in paragraph 34:

> "The Executive Summary of the COT [Committee on Toxicity] Report illustrates that at present there is no or no substantial evidence that prolonged low-level exposure to organophosphates does cause physical or mental injury. Further research over an indefinite period of years may result in findings indicating that it does. In my judgment it would not be justifiable to keep the Group Action alive indefinitely in the hope that such evidence might emerge particularly as only eleven individual claims remain extant. To do so would be unfairly oppressive to the defendants who have been facing claims for over eight years."

17. The judge finally turned to deal with the eleven individual claims which he explored in detail over 30 closely typed pages.

IV The Judge's Note to All Parties dated 23 January 2002

18. On 22 January 2002 the claimants' solicitor Miss Charles of Gabb & Co, wrote to the judge's clerk stating that a difference of opinion had arisen between the parties as to the effect of the judgments of 31 July and 9 November 2001, the defendants asserting that "not only was the group struck out as a group but also all eleven cases were struck out individually as an abuse of process"; the claimants for their part contending that the seven individual claims had survived.

19. The judge in his Note stated that he had considered the letter of 22 January 2002 together with his judgments of 31 July and 9 November 2001 and continued:

> "For the avoidance of doubt I reaffirm that the Group Litigation has been dismissed and the individual claims of Sayce, Bruce, Tyrer and Stoker struck out and dismissed … The remaining individual claims listed before me … were not struck out as individual claims.
>
> However, even as individual claims they cannot be allowed to lie fallow. To allow them to do so would be unfair to the

defendants and would be a breach of the CPR and the court's duty to manage in the interests of justice litigation.

My proposal on which I am willing to hear oral submissions on 29 January is that I make an individual order in relation to those individual claims in the following terms:

> *Unless by no later than 1st October 2002 the Claimant shall have served on the Defendants expert evidence from witnesses with appropriate expertise establishing that the claim has realistic prospect of success together with a signed written opinion from Counsel to the same effect, the claim shall be automatically dismissed with costs without further Order*."

V Judgment of 29 January 2002

20. In the course of argument prior to delivering his *ex tempore* judgment on 29 January 2002 Morland J observed:

> "I think perhaps the only merit of that Note was the speed with which I answered the letter from Miss Charles. Although the proposal shows my heart was in the right place, I am not certain that my brain was."

21. The most material passages in the judgment are these:

> "5. Motivated, as I have been throughout this litigation, with sympathy for the claimants, undoubtedly suffering from ill-health after exposure to organophosphates but as yet unable to prove that organophosphate exposure was a causative factor of their ill-health, I floated the proposed order. My proposal was intended, subject either to agreement by the defendants or hearing their objections, to deal with a case where a claimant had at present an unviable claim but might be able within six months to obtain sufficient evidence on causation to make his claim viable without the necessity of bringing fresh proceedings.
>
> 6. Not surprisingly, the defendants have objected to my proposal and in my judgment their objections are well justified. My proposal could not, and was not intended to, alter the intention and effect of the judgments given by me in July and November of last year. At the hearing at the end of July I had two tasks. The first was to determine whether the Group Litigation should be brought to an end because its continuance would amount to an abuse of process. That inevitably entailed some detailed consideration of the strengths and

> weaknesses of the individual cases of claimants within the group. The second task, which was the defendants' fall back position, was to determine whether individual claims should be struck out because they had no realistic prospect of success, notwithstanding the early stage of the litigation, no defences having been served, nor specific disclosure, in particular in relation to chemical formulations, having taken place.
>
> 7. In my judgment, the intent and effect of my judgment is clear. The Group Litigation was dismissed and along with it all the individual claims, all of which were unviable comprised within the group. Dismissing the Group Action was not intended to allow a mini-group to arise Phoenix-like with new claimants legally aided joining in addition. Dismissing the Group Action and consequently the claims of the individual claimants within the group does not prevent such claimants bringing fresh claims so long as they have a viable case all importantly on the issue of causation, otherwise bringing a fresh claim would be an abuse of process. … It would be a matter of discretion for the court to decide whether or not to grant a stay. A factor might be the weight of evidence on the issue of causation.
>
> 8. I need only refer to a few passages in my judgments to show that their intent and effect was to bring to an end the Group Litigation along with the individual claims within it."

And the judge then quoted from his two previous judgments in support of the conclusion that he had indeed intended to dismiss all the individual claims within the Group Litigation.

22. The judgment concluded with the judge making final orders as to costs and finally rescinding the Practice Direction (having, as he stated, discussed it with Lord Woolf CJ the previous evening).

VI The Order dated 29 January 2002

23. So far as material the order provides:

> "1 The claims of the claimants in the Group Action constituted by the Practice Direction of Lord Bingham CJ dated 21st December 1998 who were on the group register on 31st July 2001 be dismissed on the grounds that the continuation of those claims is an abuse of the process of the court.

> Those people whose names were on the register on 31st July 2001 who were not served with Part 24 applications by the defendants shall have liberty to apply to vary this order. Initially such application is to be in writing.
>
> 2. The Practice Direction referred to in paragraph 1 above be rescinded.
>
> 3. In the cases of Bruce, Sayce, Stoker and Tyrer it is ordered that they be dismissed on the additional grounds that there was no reasonable prospect of success. In the cases of Snell, Ford, Taylor, Jones, Layton and Forbes the defendants' applications under CPR Part 24 be dismissed."

24. It is convenient at this stage, by reference to that order, to identify the seven appellants now before the court. They are the six claimants referred to at the end of paragraph 3 of the order (whose claims were not additionally dismissed under Part 24) together with Paul Cooper, another claimant on the group register on 31 July 2001 and whose claim, therefore, was dismissed under paragraph 1 of the order, but who had not been served with the applications leading up to the dismissals. It was with Mr Cooper (and a Miss Pollyanna Rees whose claim has since been discontinued) in mind that the second part of paragraph 1 of the order (the liberty to apply provision) was included. A discrete ground of appeal is raised on Mr Cooper's behalf and to that I shall come at the end of my judgment. For the sake of completeness I add at this stage only that the seventh of those whose individual claims were considered and not dismissed under Part 24 at the time of the original order, Mr Wilkes, discontinued his claim in December 2001.

25. I come now to the appellants' first and principal ground of appeal, their contention that by his Note of 23 January 2002 the judge resolved the ambiguity surrounding his earlier judgments and order and could not properly resolve it thereafter in a different way. That the order of 31 July 2001 was capable of being understood to leave the seven individual claims in being is, submits Mr Melville Williams QC for the appellants, plain. It is, he argues, one thing to dismiss "group litigation" as paragraph 1 of the order did; quite another to dismiss all the individual claims within the group. The court can always discharge such a Practice Direction (what would now be a Group Litigation Order ("GLO") under Part 19.11) and the various orders made under it and simply leave the actions thereafter to proceed individually. And that that is what the court was apparently doing by the July 2001 order is, he submits, strongly suggested by paragraph 2 of the order under which four individual claims were expressly struck out and dismissed, in apparent contrast to the remaining seven. Consistently with that, he submits, paragraph 3 of the order left over not only the question of costs but "all other matters", just as would be expected were the seven claims still in being. Why, moreover, the appellants ask forensically, would it be necessary or appropriate for the judge to consider the eleven individual claims in such detail and faithfully decide the defendants' Part 24 applications in respect of each if his adverse decision with regard to the group action necessarily carried with it the consequence that all the registered claims were dismissed? For good measure, he

points out, the defendants later agreed to the discontinuance of Wilkes's claim; how was that possible if it had already been dismissed?

26. Perhaps the best evidence of all, however, as to the ambiguity of the original order is to be found in the judge's subsequent note of 23 January 2002. By this he clearly indicated his own understanding that the seven claims remained in being. And by that note, runs the argument, the judge clearly resolved the ambiguity. He expressed his view "for the avoidance of doubt" and by way of "reaffirm[ation]". And that, submit the appellants, is that: the judge cannot then be permitted to change his mind as to what previously he had intended and ordered. These, submits Mr Melville Williams, are "high profile cases which have attracted a lot of publicity so that the adverse effect on the public perception of justice created by the judge's conduct … is likely to be widespread".

27. Strongly though these arguments were advanced, in my judgment they are unsustainable in the light of the judgments actually given on 31 July and 9 November 2001. Of course the order of 31 July could have been clearer and of course the judge's note of 23 January 2002 was most unfortunate. If, however, as I believe, those two judgments cannot sensibly be understood as concluding otherwise than that it would be an abuse of process for this litigation to continue, then it simply makes no sense to read the order as if it left the seven claims alive. The judge's note the following January must, I conclude, be treated as a regrettable aberration. As he suggested in argument six days later (see paragraph 20 above), his heart might have been in the right place but his brain was not.

28. I can explain really very briefly just why, having regard to the views expressed in the judgments, it would have made no sense to make the order which the appellants suggest was made here. It is necessary, indeed fundamental, to the appellants' argument that not merely *can* the court discharge a GLO (here a Practice Direction having, both sides agree, identical effect to a GLO) thereby freeing the parties from the constraints and disciplines of such an order and allowing them to proceed individually, but that that is precisely what the judge intended to do here. For the life of me, however, I can think of no reason why he should have taken that course. Nor, indeed, was either side inviting him to do so. It would have been the last thing the defendants wanted: their concern was to bring this litigation to an end, not to allow it to proliferate outside the constraints of a GLO. But nor were the claimants contending for such an order although clearly it would have many advantages and, unsurprisingly, they do not now ask (even under the second limb of their appeal) for the group's reinstatement.

29. Not merely, however, is there no possible reason why the judge should have wanted to release these claimants from the group and allow them to proceed individually with their claims, but time and again in the judgments he was expressing views consistent only with an intention to end the entire litigation including each and every claim on the group register. The defendants' "main application" was, he noted in his judgment of 31 July 2001 (see paragraph 6 above), to "strike out all the remaining claimants in this group action" as an abuse of process on the grounds that the defendants had already incurred substantial irrecoverable costs "and would incur even more

substantial costs if the action proceeded further". To have allowed the actions to have continued individually would not have prevented the defendants incurring further irrecoverable costs; quite the contrary. The same point falls to be made with regard to the judge's conclusions expressed later in his judgment (see paragraph 9 above) that "I would be failing in my duty if I did not bring this group litigation finally, and immediately, to an end" and that "it would be oppressive to the defendants to allow the group litigation to continue". Similar comments can be made with regard to the judgment of 9 November 2001: "that it would be unjust and oppressive to the defendants to allow [the group action] to continue" and that "in my judgment the defendants are entitled to call it a day and limit their liability for their own almost unrecoverable costs already exceeding £½ million" (see paragraph 14 above quoting paragraph 19 of the judgment below).

30. Nor is there anything in Mr Melville Williams' alternative contention that the judge misdirected himself in law by finally treating the initial strike-out of the group litigation as automatically striking out all the individual claims within it (see paragraphs 7 and 8 of the judgment of 29 January 2002 quoted in paragraph 21 above); as I have already endeavoured to explain, in the present context it would have made no sense whatever to strike out the group litigation and *not* strike out all the claims within it.

31. I conclude, therefore, that the judge was correct to say in paragraphs 7 and 8 of his final judgment that the intent and effect of his earlier judgments had been to bring all the individual claims to an end (notwithstanding that seven of them could not have been individually dismissed under Part 24), and I turn now therefore to the final question raised by Ground 1 of the appeal: did the judge's aberrant Note of 23 January 2002 somehow preclude him from ruling correctly on the matter six days later?

32. Part 40.12(1) provides that "the court may at any time correct an accidental slip or omission in a judgment or order". The authorities "establish that the slip rule cannot enable a court to have second or additional thoughts. Once the order is drawn up any mistakes must be corrected by an appellate court. However it is possible under the slip rule to amend an order to give effect to the intention of the court." - per Aldous LJ in *Bristol-Myers Squibb Co -v- Baker Norton Pharmaceuticals Inc* [2001] EWCA Civ 414 at paragraph 25. The appellants' submission here appears to be that the judge had already by his Note indicated how the original order of 31 July 2001 was to be understood and that he was not entitled to have "second thoughts" on the matter on 29 January 2002. I can deal with the argument very shortly. It seems to me impossible to regard the judge's Note as the exercise of his discretion under the slip rule, not least because it would have been quite improper to exercise this power at the behest of one party without first inviting submissions from the other party. To my mind the first and only exercise of the discretion under the slip rule was on 29 January 2002 when the judge recognised the clear intention expressed in his earlier judgments and by his final order amended the original order to give effect to that intention. To regard his Note as clearly erroneous, as by then he did, was not to have impermissible "second or additional thoughts".

33. Turning now to the second ground of appeal - the contention that it was wrong in any event to dismiss as an abuse of process the seven claims which the judge had felt it inappropriate to dismiss individually under Part 24 - I would first by way of prelude touch briefly upon the appellants' refrain that the court found these seven cases to have "a reasonable prospect of success". True it is that Part 24.2 allows the court to give summary judgment against a claimant if it considers that he "has no real prospect of succeeding on the claim" and that the judge did not exercise that power here. One must not overlook, however, the terms of his judgment (see paragraph 10 above). Having described the seven claims as unviable for want of proper evidence of causation and as suffering in addition "significant innate weaknesses rendering little prospect of worthwhile success", he declined to dismiss them under Part 24 only because "I cannot rule out the possibility that, if their claims were somehow provided with funding, disclosure of documents took place, and expert evidence of causation were obtained, and if the other weaknesses [were] surmounted, they might become viable". That was hardly a resounding endorsement of their future prospects. To my mind, indeed, the judge could well be thought to have applied the *Swain -v- Hillman* ([2001] 1 All ER 91) line of authorities somewhat over-indulgently toward these claimants; it seems to me wholly unsurprising that the generic counsel and solicitors acting for the group in December 2000 "came to the conclusion that the strike-out applications [then advanced solely under Part 24] could not be defended" (see paragraph 3 above).

34. Be that as it may, when it came to the abuse of process application, the judge's task, as he rightly pointed out, was to reach an overall view on this group litigation and, of course, as to this he concluded that "the claims both individually and as a whole are unviable" (see paragraph 10 above).

35. The only real guidance on the correct approach to the striking out of group litigation as an abuse of process is to be found in the *Wyeth* cases, two of which came to this court. The first, already briefly referred to in paragraph 13 above, concerned the striking out, in some 160 of the 5,000-odd actions started against manufacturers of benzodiazepine drugs, of alternative claims brought within those actions against prescribers of the drugs (health authorities and general practitioners). For present purposes I need cite only the following passage from Stuart-Smith LJ's judgment at p153:

> "In most cases it will be quite inappropriate for the court to enter upon the sort of cost benefit analysis which the judge undertook here. The court cannot weigh the plaintiff's prospect of receiving £1,000 against the defendants' costs of £10,000 which may be irrecoverable; that can only be done at the trial; alternatively it is a matter for the commercial judgment of the defendant whether he attempts to reach a settlement with the plaintiff: and in so doing he has to take into account as part of the equation that the plaintiff is legally aided or impecunious. But this case is quite different. One can see at a glance that the prescriber defendants will be put to astronomical expense in defending these contingent claims. And to what end? If the plaintiffs stood to obtain a substantial benefit, the position might well be different. But here the benefit is at best

> extremely modest, and in all probability nothing. That involves great injustice to the defendants."

36. The second benzodiazepine case in this court, *A B & Others -v- John Wyeth* [1997] 8 Med LR 57, concerned the striking out of 70 individual plaintiffs who, after the Legal Aid Board had taken the decision to refuse further funding to any of the 5,000-odd claimants within the group, gave notice that they nevertheless intended to pursue their claims in person. Once again I cite from Stuart-Smith LJ's leading judgment, this time at greater length from pp55-56:

> "[Counsel, acting without fee for one of the claimants, Mrs Newton] submitted that the judge was in error in approaching the question in the broad overall context of the litigation: he ought, he submitted, to have considered each individual case on its merits. The group litigation has effectively collapsed and the plaintiff could not be deprived of the right to pursue her cause of action simply because the amount she was likely to recover was modest compared with the irrecoverable costs of the defendants should the action fail. … Alternatively [counsel] submitted that, if the judge was correct in adopting the broad group litigation approach that he did, he sought to distinguish this case from the 'prescribers' case' on the facts, because in that case the claim against them was an alternative claim and the plaintiffs stood to gain little or nothing after irrecoverable costs and the Legal Aid Board's charge was set off against the damages. These are factual distinctions but in my opinion there is no distinction in principle if the judge was correct to regard this as still part of the group litigation and adopt the approach to such litigation which this court said was correct in the 'prescribers' case'.
>
> In my view the judge was correct. Even if [counsel] is entitled to say - and in my view he is not - that Mrs Newton faced no difficulties on causation and limitation, the fact is that she could only have brought her action as part of the group litigation. She was legally aided until January 1995. She had the benefit of the £3 million or so spent by the Legal Aid Board in pursuit of the generic issues, especially liability. She would never even have been able to issue her summons without the support of the group and legal aid. Simply because 4,930 cases have been discontinued or struck out, she cannot say 'you must judge my case as if I had got where I am by my own devices'.
>
> As the judge pointed out, it was the court that had created the framework of the group action - not the parties. His original order contains the provision that a plaintiff, once registered upon the register, should remain on it unless he served notice of discontinuance or was given leave to discontinue. I accept that the judge could have rescinded this order and dissolved the scheme if he had been asked to do so, and if in the interests of justice he had thought it right. But he was never invited to do

> so. … In any event even if her case is considered alone, she is still caught by the dilemma. If by some miracle funding were to be available for the case, having regard to the likely quantum of damages payable to her if successful - and the deductions from that which would have to be taken into account by way of irrecoverable costs and the legal aid charge - the judge would be perfectly entitled to conclude that the benefit to her was likely to be so small that it would be unjust in the circumstances of this case to allow the action to continue, involving, as it would, the defendants in enormous irrecoverable expenses if they succeeded."

37. Stuart-Smith LJ then turned to consider the suggested analogy with the case of a multi-millionaire which he found "not helpful" and continued:

> "The plain fact is, as the judge recognised, that without funding there was no prospect whatever of this case even being brought to trial, let alone to a successful outcome for the plaintiffs; and this is so whether Mrs Newton proceeds on her own or in conjunction with the [other claimants]. In my judgment once the judge has reached this conclusion, coupled with the conclusion that there was no prospect of funding, he had no alternative but to strike the action out. [Counsel] submits that to strike the action out as an abuse of process is premature. What the judge ought to have done was to make "unless" orders in respect of the outstanding steps that needed to be taken …. I cannot agree. Once it is apparent to the judge that the case cannot be brought to trial, it is his duty not to prolong the agony any longer. He must put a stop to further needless expense and strike the action out."

38. Let me now, in the light of that guidance, consider in turn each of the three specific criticisms which the appellants advance against Morland J's decision to strike out their claims (just as in the second *Wyeth* case the 70 remaining claims were struck out) as an abuse of the process of the court, on the basis that to prolong them would involve serious injustice to the defendants by exposing them to yet further irrecoverable costs.

39. Mr Melville Williams's first criticism, under the heading "Cost Benefit Analysis", seemed to me to change shape as it developed. First it was suggested that in making such an analysis the judge should have concentrated solely upon what the claimants stood to recover as damages if they succeeded, diminished only by whatever sums the Legal Aid Board (now the Legal Services Commission) could recover, under their charge, for example for the costs incurred in the abortive group litigation, and that the judge accordingly erred in having regard to the defendants' irrecoverable costs were the claims to fail. The simple answer to that criticism is that the judge here never purported to carry out any cost benefit analysis; all he said was that "the size of the claims [was] very speculative" (to my mind indisputably true) and in any event not sufficiently viable to justify their continuation. Thereupon it was contended that the

judge *should* have carried out a cost benefit analysis but failed to do so. The answer to that lies in the first *Wyeth* case:

> "In most cases it will be quite inappropriate for the court to enter upon the sort of cost benefit analysis which the judge [had there undertaken]."

In my judgment there was no need for such an analysis here and the judge rightly undertook none. The criticism under this head is ill-founded.

40. The second criticism is directed at the judge's conclusion in paragraph 18 of his November 2001 judgment (see paragraph 14 above) that there was no reasonable prospect of funding for the individual claims sought to be continued. Given that the Legal Services Commission had been prepared to fund the claimants' resistance to the Part 24 strike-out applications, submits Mr Melville Williams, the judge should have inferred that were that resistance successful the funding would thereafter have continued to allow the individual claims then to be properly progressed. For my part I reject this argument. It seems to me that once, following the strong statement made by the generic lawyers in December 2000, the Legal Services Commission had discharged the certificate for the group litigation, the judge was entitled to conclude that similar funding was unlikely to be reinstated. Puzzling though it may be as to why the Commission decided to fund the resistance to the strike-out applications, I too would decline to draw the inference that their funding would have continued into the indefinite future. They have adamantly refused to commit themselves to such a course.

41. Thirdly and finally under this ground of appeal, Mr Melville Williams criticises the judge's approach to the all-important issue of causation and complains that he declined to adopt a particular approach urged upon him by the appellants' solicitor, Miss Charles. This, to my mind, is a hopeless argument: following the unsuccessful pilot study the generic lawyers and their experts had already sought other ways of making these claims viable; the judge was perfectly entitled to decline the appellants' invitation to give them a yet further opportunity of obtaining satisfactory evidence on causation despite all the acknowledged difficulties in their path. It is not as if the judge was at heart unsympathetic towards these claimants; on the contrary, he had contemplated adjourning the strike-out applications for six to nine months to give them a final opportunity to obtain the necessary evidence and only with reluctance had concluded that he "would be failing in [his] duty" were he to do so - see his judgment of 31 July 2001 quoted in paragraph 9 above.

42. In short, I see no basis upon which the judge can be criticised for striking out these remaining claims as an abuse of process. Of course there are differences on the facts between this litigation and the *Wyeth* cases, prominent amongst them the relative smallness of the individual claims there and the certainty of no further legal aid becoming available (factors stressed here by the appellants). To my mind, however, the case for a strike-out was no weaker here than it was there. Here, after all, there were many fewer claims than in *Wyeth*, and many more difficulties in their paths.

43. I come finally to the discrete ground of appeal advanced on behalf of Mr Cooper, it being contended that, whatever order might properly have been made against the other claimants on the court's register, no order whatever should have been made affecting him since he, unlike them, had never been served with the strike-out proceedings. It is not sufficient, Mr Cooper submits, that by the order of 29 January 2002 he has liberty to apply to vary the decision insofar as it affects him; he is, he claims disadvantaged by the issue having already been decided against him. The burden, moreover, ought not to be upon him to take up a liberty to apply provision; rather his claim should remain in being unless and until he is served with proceedings to dismiss it. The course taken by the judge, submits Mr Melville Williams, violates Mr Cooper's rights under Article 6 of ECHR - see the ECtHR's judgment in *Ankerl -v- Switzerland* (1996) ECHR of 22 September 1996.

44. In my judgment there is nothing in this argument. The reason why Mr Cooper was not served with the strike-out proceedings was, as I understand it, because his injury occurred in Northern Ireland and a jurisdictional question arose with regard to his claim; only recently did the Treasury Solicitor on behalf of DEFRA agree to accept service of the proceedings in England. Mr Cooper now seeks to distinguish his particular claim on the facts from those of the other claimants within the group. He apparently wishes to assert that the products which harmed him were not such as are used in sheep dipping so that his claim ought never to have been included within the group register - although, as he concedes, there is nothing on the face of his pleading to suggest such a distinction. That contention, however, for what it is worth, seems to me something he can perfectly well put to the judge below by taking up the liberty to apply provision. I reject the argument that he is somehow disadvantaged by not having been made a party to the original hearings. It is not unusual to make orders against persons who have not been served with proceedings on the basis that they have liberty to apply to vary or discharge them; rather the practice is commonplace. Nor, indeed, does there appear to me good reason to suppose that Mr Cooper was in fact unaware of the proceedings over the last two years. He too was represented by Miss Charles of Gabb & Co and it is hardly to be supposed that she kept him in ignorance of the strike-out applications.

45. *Ankerl* to my mind provides no assistance to Mr Cooper. Paragraph 38 of the judgment there merely reminds us that "the Court's task is to ascertain whether the proceedings in their entirety were 'fair' within the meaning of Article 6.1". I have no doubt that these proceedings looked at in their entirety were fair. It remains open to Mr Cooper to invoke the liberty to appeal provision and seek to persuade the judge (initially by an application in writing) that there is good reason for his action to continue notwithstanding the dismissal of the other claims. In my judgment he is not being denied a fair hearing.

46. There is one last matter I should touch upon before ending this judgment. One of the appellants before us, Mr Evan Owen Jones, was separately represented by counsel. Quite why this was so, I am unable to see: certainly nothing in his grounds of appeal nor the facts of his case serve to distinguish his position from that of the other appellants. One point made by Mr Levene, however, a point foreshadowed by the court in the course of earlier argument, is to my mind sound: the effect of the order below is to prevent all these appellants from ever again seeking to litigate these

claims. The judge, therefore, was wrong to have said (in paragraph 7 of his judgment of 29 January 2002 - see paragraph 21 above) that:

> "Dismissing the group action and consequently the claims of the individual claimants within the group does not prevent such claimants from bringing fresh claims so long as they have a viable case all importantly on the issue of causation, otherwise bringing a fresh claim would be an abuse of process."

47. As Mr Levene points out, the House of Lords decision in *Walkeley -v- Precision Forgings* [1979] 1 WLR 666 effectively prevents a claimant commencing a claim outside the limitation period when he has earlier brought a claim within the period. *A fortiori* this must be so when the earlier proceedings were themselves brought outside the limitation period. In such circumstances a claimant cannot rely on s33 of the Limitation Act 1980.

48. That misunderstanding does not, however, in my judgment invalidate the exercise of the judge's discretion to strike out these claims. The reality is that not only are these claimants now barred for all time but so too are likely to be a number of others said to be waiting in the wings, in particular some 30 such claimants whose legal aid certificates gave them leave to issue but not to serve their claims. No doubt if these others somehow come to obtain radically new and compelling evidence of causation they may be able, not only to serve their proceedings, but also successfully to resist the almost inevitable strike-out applications that would follow. Theoretically, therefore, their position is better than that of the claimants whose claims have now been struck out. That, however, could be no reason for refusing to strike out the existing claims as an abuse of process. The judge's decision in that regard cannot, I repeat, be impugned.

49. I would dismiss these appeals.

Lord Justice Buxton:

50. I respectfully agree with the whole of my Lord's judgment. I venture to add only two short observations.

51. First, there appeared to be some inclination on the part of the appellants to argue that it was a relevant consideration that once they started proceedings complaining of the effects of organophosphates used in sheep dipping they had had no choice as to whether or not to be joined in the group litigation; and that that should be a consideration when deciding whether to permit individual claims to remain on foot even after the "group litigation" had been dismissed.

52. There are two short answers to any such argument. The first, as to justice and fairness, is that given by Stuart-Smith LJ in the passage from his judgment in the *Wyeth* case that is set out by my Lord at his §36. The machinery of group litigation

has been developed precisely to accommodate claimants who could not possibly hope to litigate successfully on their own, but who, with the support of public funding that can be justified when a large number of cases is involved, may be able to establish an arguable case. There was no prospect of any of the present claimants litigating on their own. The course that they adopted, of participating in the group litigation, was forced on them not by an arbitrary rule, but by their own forensic interests.

53. Second, having enjoyed the benefit of participating in the group litigation, the claimants must bear the burden, if that is the right expression, of the outcome of that litigation. The detailed and very proper statement on the part of the group solicitors that is set out in §3 of my Lord's judgment makes it clear that there was no prospect of any of the cases proceeding: because the pre-condition, essential to all the cases, of a link between exposure and injury could not be established. Without the group litigation, none of the claimants would have proceeded even that far, because none of them severally could have funded, or have had funded for them, the £800,000 investigation into their cases. That matter having been extensively, though unsuccessfully, investigated on their behalf, there can be no justification for leaving their actions alive in what I have to say, I trust without disrespect, was a hope that something different might turn up.

54. Secondly, and linked to the last point, it was suggested in argument that criticisms could be made of the generic study, and that the actions should be kept on foot to permit those criticisms to be pursued. This appeared to be a new argument, so far as I could see not ventilated, or at least not ventilated in any clear form, before the judge. It proposes a course that, I have to say, is quite unacceptable. I have already indicated that it is quite unreal to regard individual claimants as unwilling parties to the group litigation, obliged to accept without protest whatever decisions, legal or scientific, were made on their behalf. In the absence of what would have to be cogent evidence to the contrary, it is to be assumed that those advising in the group litigation acted competently, and with regard to their clients' instructions, just as would advisers in any other form of litigation. Their clients are bound by their conclusions. And, on a practical level, such investigation as we made of this claim indicated that, far from being a short issue of further evidence, it involved a great deal of conceptual difficulty, and would reopen the whole area of scientific enquiry. In view of the history of this case, that could not be contemplated in any event.

55. These are merely footnotes to my agreement with my Lord in dismissing these appeals.

Lord Justice Carnwath:

56. I agree.

57. I would only add that one of the sources of confusion in this case may have been the indiscriminate use of the terms "group action" and "group litigation". The latter is the correct term, both under the Practice Direction which applied in this case, and under CPR. CPR 19.10 provides for a "group litigation order ('GLO')" which is:

> "an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of law or fact".

58. In the same way the Practice Direction in the present case (21st December 1998) referred to "the organophosphate litigation", and applied to "all actions concerning claims for damages in respect of organophosphate poisoning…", as defined by the Direction. Under these procedures, therefore, it is clear that the term "group litigation" is simply a collective description for the individual claims brought under the special procedure. It does not connote a separate action by the group.

59. This terminology may be contrasted with the form of "group action", discussed, for example, in the Law Society's report "Group Actions Made Easier" (1995). One recommendation was for a change of practice, so as to dispense with the issue of individual proceedings by each plaintiff in the group, and a procedure whereby, once a group action had been declared, additional claimants would be allowed to join the action by filing a notice to join a plaintiff register (paras. 6.10.3-4). This proposed model was not adopted.

60. Turning to the present case, the usage has not been consistent. The term "group action" was used in many of the particulars of claim. However the order of 31st July 2001 referred to "the organophosphate group litigation" which was dismissed. This in my view can only be interpreted as a shorthand for all those claims which were covered by the Practice Direction. On this basis paragraph (2), which referred to the individual claims being struck out, was strictly unnecessary.

61. The detailed judgment of 9th November 2001 reverted to the terminology of "group action". Thus in paragraph 12 the Judge referred to the applications before him as "applications to strike out the group action and individual claims". He then dealt, first, with the "group action" (paras 20ff), before discussing the individual "claims" sequentially (paras 40 ff). The same dichotomy was again reflected in his letter of 23rd January 2002. He used the correct term "group litigation", but he continued apparently to treat it as referring to a separate action, which had been "dismissed", distinct from the individual claims. The order of 29th January again referred to "the group action"; but this time it made the matter quite clear by indicating that the claims on the group register on 31st July 2001 were dismissed as an abuse of process, and that four claims are dismissed "on the additional grounds that there was no reasonable prospect of success".

62. This last order correctly reflected the substance of the Judge's decision. In agreement with the two judgments already delivered, I consider that it was the only reasonable conclusion on the case.

Order: Appeal dismissed. Order as per draft order. Permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)