Case No: G00HF194

IN THE COUNTY COURT AT OXFORD

St Aldates
Oxford OX1 2TL

Date: 6 August 2020

B e f o r e:

HER HONOUR JUDGE MELISSA CLARKE

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B e t w e e n:

MR MATTHEW WATERFIELD and 25 others

Claimants

- and -

(1) DENTALITY LTD T/A DENTALITY @HODDESTON
(2) DR VISHAL SHAH
(3) MS E. PARIKH
(4) ISHDENT LTD

Defendants

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Mr William Poole (instructed by Cleversons) for the **Claimants**
Ms Nadia Whittaker (instructed by Medical Protection Society) for the **First** and **Second Defendants**
Ms Romilly Cummerson (instructed by Hempsons) for the **Third** and **Fourth Defendants**

Hearing date: 4 August 2020

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Her Honour Judge Melissa Clarke:

Introduction

1. Cleversons solicitors, acting for 26 potential claimants, applied in the County Court at Hertford for a Group Litigation Order ("GLO") by application dated 24 June 2020 ("the Application"). I will refer to those potential claimants as "the Claimants" and the potential defendants as "the Defendants" although no claims have yet been issued. I transferred the application to Oxford to be heard before me in my capacity as Designated Civil Judge for Thames Valley, Bedfordshire & Hertfordshire and heard it on 4 August 2020 by remote videolink over CVP, in open court. Before me were Mr William Poole for the Claimants, Ms Nadia Whittaker for the First and Second Defendants and Miss Romilly Cummerson for the Third and Fourth Defendants. I have had the benefit of a skeleton argument from Ms Whittaker for which I thank her. I thank all Counsel for their oral submissions.

2. Before the hearing I had the opportunity to read the Application which was supported by a witness statement from Mr David Durkin-Finch, partner of Cleversons solicitors, a witness statement in response from Joseph McCaughley, solicitor at the Medical Protection Society who has conduct of the matter for the First and Second Defendants, and a large number of documents contained in the Application bundle. I have also considered the draft GLO filed with the Application.

3. After hearing Counsels' submissions I indicated that I would take some time to reflect on what I had heard and provide my judgment in writing in draft the same day, 4 August 2020. I did so. This is the final form of that judgment which I hand down today 6 August 2020.

Background

4. The First Defendant is a dental practice in Hoddeston, Hertfordshire ("the Practice") from which the Second Defendant, Dr Shah, practices as a dentist. The Third Defendant, Ms Parikh, is a dental hygienist who provided services to the Practice from June 2017, through her company the Fourth Defendant.

Although there may be some dispute about this, the evidence I have seen suggests that the Practice and Dr Shah referred patients to Ms Parikh, those patients paid the Practice for her services, and the Practice took a 55% share of the fees Ms Parikh charged, remitting the remaining 45% to her.

5. On or about 6 November 2018 one of the Dental Nurses at the Practice raised concerns that Ms Parikh was not following the Practice's policy for decontamination of instruments. She raised her concerns with the Practice Manager, who raised those concerns with Dr Shah.

6. At a meeting between Dr Shah and Ms Parikh on 9 November 2018 Ms Parikh admitted reusing dental equipment (specifically, scaler tips) on multiple patients rather than carrying out decontamination and sterilisation procedures between each one. Dr Shah terminated her contractual relationship with the Practice and on 12 November 2018 notified the matter to Public Health England ("PHE") and the General Dental Council ("GDC"). PHE investigated and published a report on 4 March 2019.

7. In May 2019 Dr Shah in conjunction with PHE sent out letters to the 563 patients of the Practice who had been treated by Ms Parikh informing them of the admitted breach of duty of care in their treatment by Ms Parikh and alerting them to the risk of blood borne viruses to which they had been exposed. It advised them to undergo blood screening, in particular for HIV 1 and 2, Hepatitis B and Hepatitis C. It is apparent from Dr Shah's note of his meeting with Ms Parikh that a key area of his concern was that she had treated a patient at the Practice known to be HIV positive, although this particular risk factor was not set out in the patient notification letters.

8. Of these 563 patients, Cleversons solicitors have signed up 26 Claimants who have indicated their intention to pursue claims against the Defendants for damages. The parties are aware of one other potential claimant who is represented by another firm of solicitors. Cleversons has sent out letters of claim for each Claimant, the earliest on 14 May 2019.

9. There has been extensive pre-action correspondence between the parties, much of which is contained in the Application bundle. On 30 June 2020 Ms Parikh

served a letter of response to the letters of claim, admitting breach of duty. Although Ms Parikh held professional indemnity during the relevant time with the Medical Defence Union, it has confirmed to the Claimants' solicitors that it will not indemnify her in respect of these claims.

10. For that reason, the Claimants seek to pursue the Practice and Dr Shah. In the letters of claim they allege that the First and/or Second Defendants owe a non-delegable statutory duty to its patients which was breached by Ms Parikh's actions; and/or that the First and/or Second Defendants are vicariously liable for Ms Parikh's breach of duty. At the time the Application was made, the First and Second Defendants had not yet responded to the letters of claim, but Dr Shah and the Practice have now provided a letter of response denying any liability for the actions of Ms Parikh on the basis that she provided her services to the Claimants as an independent contractor.

11. At the hearing today, Mr Poole for the Claimants suggested that they may also pursue a case in contract: namely that the provision of Ms Parikh's dental services was pursuant to a contract with the First and/or Second Defendants and that those services were provided in breach of the implied term that they would be performed with reasonable care and skill. Dr Shah has not yet had the opportunity to respond to this.

The Law

12. Section III of Part 19 of the Civil Procedure Rules, supplemented by Practice Direction 19B, provides a procedure for managing group litigation. CPR 19.10 and 19.11 provide:

> Definition
> **19.10** A Group Litigation Order ('GLO') means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues').
>
> Group Litigation Order
> **19.11**
> (1) The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues.
> (Practice Direction 19B provides the procedure for applying for a GLO)

(2) A GLO must –
(a) contain directions about the establishment of a register (the 'group register') on which the claims managed under the GLO will be entered;
(b) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and
(c) specify the court (the 'management court') which will manage the claims on the group register.

13. Practice Direction 19B provides so far as is relevant:

2.3 In considering whether to apply for a GLO, the applicant should consider whether any other order would be more appropriate. In particular he should consider 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.

Application for a GLO

3.1 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.

3.2 The following information should be included in the application notice or in written evidence filed in support of the application:
(1) a summary of the nature of the litigation;
(2) the number and nature of claims already issued;
(3) the number of parties likely to be involved;
(4) the common issues of fact or law (the 'GLO issues') that are likely to arise in the litigation; and
(5) whether there are any matters that distinguish smaller groups of claims within the wider group.

The Group Register

6.1 Once a GLO has been made a Group Register will be established on which will be entered such details as the court may direct of the cases which are to be subject to the GLO.

6.1A A claim must be issued before it can be entered on a Group Register.

6.2 An application for details of a case to be entered on a Group Register may be made by any party to the case.

6.3 An order for details of the case to be entered on the Group Register will not be made unless the case gives rise to at least one of the GLO issues.
(CPR 19.10 defines GLO issues)

14. There is no dispute between the parties that the purpose of the group litigation procedure is to enable group litigation to be managed by the parties and the courts in an efficient and cost-effective manner; that the effect of a judgment

in GLO litigation is to bind the parties to all other claims on the group register unless the court otherwise orders; and that whether or not to make a GLO is a matter in the court's discretion. The parties rely on a number of authorities which provide useful guidance on the exercise of that discretion:

i) *Alyson Austin and Ors v Miller Argent (South Wales) Limited* [2011] EWCA Civ 298 in particular [35] of the judgment of Jackson LJ *"…The making of a GLO commits both the parties and the court to the allocation of substantial resources to the conduct of group litigation. The court will not make a GLO before it is clear that there is a sufficient number of claimants, who seriously intend to proceed and whose claims raise common or related issues of fact and law.";*

ii) *Hobson and Ors v Ashton Morton Slack Solicitors and Ors* [2006] EWHC 1134 (QB), particularly [72] of the judgment of Sir Michael Turner, quoted with approval by the Moore-Bick J at [51] in *Jackson v Thompson Solicitors and Ors [2016] EWCA Civ 138*.

15. The discretion must be exercised in accordance with the overriding objective to deal with cases justly and at proportionate cost, which includes those things listed in CPR 1.1(2):

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
  (i) to the amount of money involved;
  (ii) to the importance of the case;
  (iii) to the complexity of the issues; and
  (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.

The Claimants' position

16. Mr Durkin-Finch's evidence is that the Application has been made pre-action in order to save additional costs. He says in support of the Application:

i) *"The Claimants have considered the consolidation of claims as an alternative, however given the early stages of these proceedings and the fact that all matters revolve around the same continuous cause of action, ie. poor hygiene practices, it is believed a Group Litigation Order is the most cost effective and proportionate manner in which to deal with these claims";*

ii) Making the GLO will have the effect of:

a) Establishing a group of Claimants who suffered injury or damage as a result of the poor hygiene practices.

b) Creating and publishing a register and facilitating further Claimants to join the group in the future.

c) The sharing and consequential limitation of costs to both the Claimants and the Defendants.

17. Mr Durkin-Finch identifies the common issues for the GLO to be:

i) Whether the First and Second Defendants were in breach of their duty of care and/or negligent to the Claimants and further have a non-delegable duty in relation to the care of their patients, the Claimants. In the alternative are they vicariously liable for the actions of the Third and Fourth Defendants in relation to the sanitisation/decontamination practices at the Practice and their failure to follow industry standard procedures as set out within the letter of Public Health England dated 30th April 2019;

ii) If so, whether the exposure caused the claimants personal injury suffering and loss of amenity and related financial losses;

iii) if (i) and (ii) above are not accepted, then whether the Third and Fourth Defendants' admitted breach of duty and exposure caused the Claimants personal injury, suffering and loss of amenity and related financial losses.

18. In fact, at the Application hearing Mr Poole presented for the Claimants a quite different set of justifications and identifies a different set of common issues for the GLO.

19. In relation to the common issues, Mr Poole accepts that that those set out at para 17 (ii) and (iii) above relating to causation and loss are not common issues, but individual to each Claimant. He suggests the following list of common issues instead:

    i) Whether or not there was a contract between the Claimants and the First and/or Second Defendants;

    ii) If so, whether or not it was an implied term of that contract that dental services received would be performed with reasonable care and skill;

    iii) Whether the First and/or Second Defendant has a non-delegable statutory duty towards the Claimants;

    iv) Whether the First and/or Second Defendants are vicariously liable for the admitted breach of duty by Ms Parikh and any injury or loss caused by such breach.

20. Mr Poole submits that these common issues should be determined by the court as preliminary issues pursuant to a GLO, as then the court's decision will bind all the Claimants and any additional claimants who join the GLO Register. Accordingly, he submits, a decision on those issues will be of benefit to all of them.

21. Mr Poole submits that without a GLO in the terms sought, each Claimant will be required to serve both evidence of injury and a condition and prognosis report. Although he was naturally reticent at appearing to give evidence, in light of the absence of evidence on the point from Mr Durkin-Finch, Mr Poole suggested that the court might consider that a report on breach of duty would cost about £1000 and double that for a condition and prognosis report, which could transpire to be money wasted if the court then determined that the First and Second Defendants had no liability, as the Third Defendant did not have

indemnification from her insurer behind her, and it seemed unlikely that the Third or Fourth Defendants had sufficient assets to enable the Claimants successfully to enforce any awards against either of them.

22. Mr Poole submits that if all of the claims were issued at the same time and then consolidated, that would be a significant amount of work for the parties and the court in terms of investigating causation, filing medical evidence, pleading, allocating and case managing, which again might transpire to be wasted if it was later found that the First and Second Defendant did not have any liability for Ms Parikh's admitted breach of duty. He submits that if a lead case or cases were chosen as representative, and the court found that the First Defendant was liable, it would not bind the other Claimants who could insist upon their own trial. For those reasons he submits that the GLO is to be preferred.

23. Although it had been suggested by the Defendants that the GLO would cost a lot, Mr Poole argues that the court has the power to budget those costs and can control them that way. In addition, he did not anticipate the determination of the common issues as a preliminary matter to require a lengthy trial. He estimated it could be done in two or possibly three days.

24. Mr Poole states that the Claimants would not have been seeking a GLO if Ms Parikh was indemnified, as given her acceptance of breach of duty, the courts would only be looking to the Claimants to establish causation and loss which are not common to the Claimants but individual to each of them. For that reason, Mr Poole submits, the Claimants propose that the GLO would be discharged at the final determination of the preliminary issue. This proposal is not contained in Mr Durkin-Finch's witness statement nor reflected in the Claimants' draft GLO.

The Defendants' position

25. All four Defendants share a common position on this Application and oppose the making of a GLO. They submit that the Application should be refused for the following reasons:

i) The mere fact that there are common issues between the parties is insufficient to justify the making of a GLO. The court must be satisfied that nothing else will do.

ii) The Claimants have failed properly to consider whether any other order is more appropriate for this litigation in breach of the express requirement contained at paragraph 2.3 of PD19B;

iii) The Claimants have failed to provide sufficient information about the claims as required by paragraph 3.2 PD19B, which is egregious in circumstances where no claims have yet been issued, there is no draft master or generic Particulars of Claim and no evidence that any of the Claimants have suffered any compensatable loss;

iv) The Claimants have failed to provide any evidence as to what specific costs they contend will be saved by a GLO as opposed to an alternative means of approaching this litigation. There is only Mr Durkin-Finch's bare assertion that a GLO "*will be the most cost-effective and proportionate manner*" to conduct the litigation. Miss Whittaker submits that the court will be aware from its own experience, and from the authorities that "*the making of a GLO commits both the parties and the court to the allocation of substantial resources to the conduct of group litigation*" (per Jackson LJ in *Alyson Austin*);

v) The court is unable to assess proportionality without understanding how many Claimants have suffered an actionable loss, and should not assume it, particularly where it appears that the quantum of damages for each Claimant is likely to be no more than one to two thousand pounds;

vi) In addition, the court should take into consideration that the Claimants will no doubt seek to shield themselves from any costs consequences associated with a GLO through QOCS;

vii) Mr Durkin-Finch's argument that a GLO should be made in order to identify a group of claimants is not a good reason to make a GLO as

Chief Master Fontaine made clear in *Schmitt and others v Depuy International Limited* [2016] EWHC 638 (QB) in the context of a hip prosthesis litigation;

viii) The Claimant's approach of seeking a court order waiving the requirement to comply with the Pre-Action Protocol for the Resolution of Clinical Disputes and waiving any breaches of that protocol (a) will discourage settlement, which is counter to the overriding objective; and (b) is unattractive. There are good reasons for the requirements of the Pre-Action Protocol.

Discussion and determination

26. In my judgment, this application is both inadequate and premature, for the reasons which follow.

27. Firstly, the Claimants have failed to put before the court evidence that there are any Claimants who seriously intend to proceed to litigation, let alone that there are a sufficient number of them to justify the making of a GLO, although Jackson LJ at [35] of *Alyson Austin* makes clear that the court will not make a GLO unless it is satisfied on this point. In my judgment it is not sufficient merely to state that it has 'signed up' 26 potential claimants and knows of one more, being patients to whom were sent the notification letter by Dr Shah and PHE. The mere fact that they were patients of Ms Parikh who have instructed solicitors to send letters of claim does not entitle the court to draw the inference, without more, that they are Claimants who seriously intend to proceed to litigation.

28. Connected with this is the fact that there is not even an assertion that the Claimants or any of them have suffered any injury sounding in damages. As I have stated, no claims have yet been issued, which of itself is not a reason not to make a GLO. However, as the Defendants point out, the Claimant's solicitors have not put a draft or generic particulars of claim before me. It may be that they are not yet able to produce one because they do not yet know whether any of the Claimants have suffered any injury sounding in damages. In particular, there is no evidence before me that any of the Claimants have

tested positive for blood borne viruses, and no evidence that any of the Claimants have suffered a recognised psychiatric injury arising from being notified of the risk that they may have been exposed to blood borne viruses.

29. I asked Mr Poole if he is aware whether any of the Claimants have indeed tested positive for blood borne viruses, and although he cannot give evidence, he indicated that the injuries the subject of the Claimants' claims are likely to be psychiatric in nature. He further accepts for the Claimants that there have been no investigations of those injuries to date. If they do not fall within the category of recognised psychiatric injury, then there is no injury sounding in damages and so it seems possible, and perhaps even likely, that the claims of some of those 27 potential claimants may not be able to proceed. Those who have not suffered an injury sounding in damages cannot be considered to be Claimants who seriously intend to proceed to litigation.

30. Also connected with this point is the fact that the Claimant's solicitors have filed a statement of costs, signed as true by Mr Durkin-Finch, indicating that only one hour of chargeable time has been spent in communicating with the Claimants about the GLO Application. That suggests to me that the risks, costs and benefits of a GLO have not yet been discussed with the Claimants. It is possible that some of the Claimants will not be willing to proceed with litigation once these discussions have taken place.

31. In those circumstances, where there are no issued cases, there has been no attempt to carry out even a preliminary review of the merits as to causation of the 26 claimants represented by Cleversons, and where it seems likely that the GLO has not yet been discussed with the Claimants, I cannot be satisfied that there are a sufficient number of Claimants who seriously intend to proceed to litigation.

32. Mr Poole for the Claimants objects to Miss Whittaker's submission that 27 claimants is not enough to justify making a GLO in circumstances where those claims are likely to be low-value claims for minor psychiatric injuries, and submits that the threshold is not fixed and depends on the circumstances of the case. True as that is, the discretion whether to make a GLO or not is to be

exercised in accordance with the overriding objective, i.e. to deal with cases justly and at proportionate cost. If the Court cannot form a view about the likely number of Claimants who seriously intend to proceed to litigation, it cannot properly carry out the proportionality assessment that the overriding objective requires. I bear in mind that the class of potential claimants numbers over 500 people, but the fact that only 27 have expressed an interest in litigation so far, and the fact that there is no evidence before me that any of those 27 have been infected with blood borne viruses, suggests to me that it is unlikely that there will be a significant wave of additional claimants who will proceed to litigation.

33. Secondly, I accept the Defendants' submission that the Claimants' solicitors have failed adequately to address whether any other order than a GLO would be more appropriate, as required by CPR 19.11 and PD19B para 2.3. Mr Durkin-Finch does not appear, in his witness statement at least, to have given proper consideration to the alternatives, including consolidation of claims and the bringing of a representative claim pursuant to Section II of Part 19 of the CPR. He merely mentions that consolidation of claims was considered, before making the bald assertion that a GLO is *"the most cost effective and proportionate manner"*. This is insufficient. Although Mr Poole has done the best that he can to construct an argument, submitting that a GLO will provide a binding decision for all parties on the GLO Register, and that a GLO is the *"vehicle of choice"* where the common issues involve medical investigation and treatment, he cannot fix the Claimants' solicitor's failure to adequately consider whether any other order would be more appropriate. In any event:

i) On the first point, I accept Miss Whittaker's submissions, adopted and endorsed by Miss Cummerson, that pursuant to CPR 19.6 any judgment or order resulting from the determination of the preliminary issues in a representative claim would be binding on all persons represented in the claim, and that the practical effect of a decision of one claim amongst consolidated claims is that it would likely be accepted by the other Claimants;

ii) On the second point, the common issues in this case do not really involve medical investigation and treatment, because breach of duty by Ms Parikh has been accepted. They involve discrete preliminary issues of vicarious liability, non-delegable duty of care, and contract formation.

34. Returning to Mr Durkin-Finch's bald submission that the proposed GLO is the most proportionate and cost-effective manner to run the litigation, I have already set out the Court's difficulties in assessing proportionality on the information and evidence before it. In terms of cost-effectiveness, I accept the Defendants' submission that the Claimants' solicitors have provided no evidence on this point. Mr Poole's submissions suggest that the costs saved are the Claimants' costs in obtaining evidence of injury, causation and prognosis, but (a) in order for a Claimant to join the GLO Register it will need to issue a claim, and even if the court waived the requirement to file medical evidence in support (which it is not inclined to do for the reasons the Defendants give), the claim would still need to plead the particulars of injury and causation and so some investigation would be required; and (b) the Claimants' solicitors put no evidence or analysis before me to explain why the they consider the GLO will be more cost effective than, for example, consolidating claims or proceeding with a representative claim.

35. Finally, I accept the Defendants' submission that Mr Durkin-Finch's justification that a GLO should be made in order to identify a wider group of claimants is not a good reason to make a GLO.

36. I note for completeness that despite Miss Whittaker informing the court that there had been some discussion between Counsel before the hearing about the possibility of Mr Poole requesting an adjournment of the hearing to seek to make good some of the evidential and other deficiencies of the Application, he did not make such a request.

37. Although I have not addressed every submission made before me, I have addressed the key submissions. For all reasons I have given, I decline to make a GLO in the terms sought. It may be that the Application has simply been

made prematurely, such that it may be appropriate to reconsider the issue of whether a GLO should be made at a later date. I will grant the Claimants' solicitors liberty to reapply in those circumstances.

Conclusion

38. The Application is dismissed.