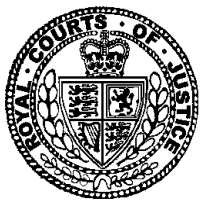

Neutral Citation Number: [2021] EWCA Civ 1827

Case No: B3/2020/1937

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT SALISBURY

HIS HONOUR JUDGE PARKES QC

E93YX179

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 2 December 2021

Before:

LORD JUSTICE UNDERHILL

(Vice-President of the Court of Appeal (Civil Division))

LADY JUSTICE KING

and

LORD JUSTICE STUART-SMITH

- -

Between:

JADE PAWLEY **Appella**

- and –

(1) **WHITECROSS DENTAL CARE LIMITED**

(2) **PETRIE TUCKER AND PARTNERS LIMITED** **Respond**

- -

- -

Ben Collins QC (instructed by **Dental Law Partnership Ltd**) for the **Appellant**

Andrew Warnock QC (instructed by **Weightmans LLP**) for the **Respondents**

Hearing date: 27 October 2021

- -

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be

Thursday 2 December 2021 at 10:30am

Approved Judgment

Lord Justice Stuart-Smith:

Introduction

1.
This appeal arises out of facts that are unexceptional and give rise to an issue that arises routinely in the same or similar circumstances. The Claimant was a patient at the Defendants' dental practice between 2012 and 2018. During that time she was treated by four different dentists at the practice, to whom I shall refer collectively as "the Dentists". On 26 September 2018 she issued these proceedings in the County Court, alleging that her treatment was negligent. She chose to sue the Defendants and not the Dentists, alleging that the Defendants owed her a non-delegable duty of care and that they are to be held vicariously liable for the negligence of those individuals who treated her.

2.
By their defence, the Defendants denied the existence of a non-delegable duty and denied that they are vicariously liable for any negligence on the part of the individual dentists that the Claimant may prove. They pleaded that they "cannot confirm nor deny [the Claimant's] allegations of negligent treatment as this is a matter for the [Dentists], for whom the Defendants are not responsible". Referring to the expert report served by the Claimant with her Particulars of Claim, the Defendants pleaded that they "note, but do not agree, the report … ." However, they also pleaded that they reserved the right to adduce their own expert evidence to challenge the report "in due course and as directed by the court."

3.
The Defendants, while maintaining their defence to the claim brought against them, also pleaded that "pursuant to contractual entitlement, [they] reserve the right to pursue contribution proceedings from the [Dentists] and/or join them to these proceedings" but that they did not do so "at this stage in the interests of saving costs and the overriding objective." This court has no details of any contractual entitlement, though we are told that it is routine in such arrangements for there to be contractual terms which include an obligation upon individual dentists to indemnify the practice against liability it might incur as a result of negligence on the dentist's part.

4.
The Claimant has stuck to her guns and resisted any temptation to join the individual dentists as additional defendants. In doing so, she runs the risk that she may lose against the Defendants even if one or more of the dentists was in fact negligent. However, that is her decision which she has taken with the benefit of advice from reputable solicitors and counsel. This court is not privy to her actual (and privileged) reasons for taking that decision, though her counsel's skeleton argument outlines the sort of considerations that might lead a potential claimant reasonably to decide to sue the practice rather than individual dentists.

5.
Instead of applying to join the Dentists as additional parties pursuant to CPR Part 20, the Defendants applied pursuant to CPR Part 19 to join them as additional defendants to the Claimant's claim. We are told that it is not uncommon for patients to sue the practice and not the individual dentists, for sensible reasons. In some cases it may be difficult or impossible to trace all individual treating dentists; and where individual dentists are traced they may not have professional indemnity cover or may not engage with their insurer. Even if all treating dentists are traced and are insured, difficult

questions of causation and apportionment may arise. Separately indemnified and represented dentists may wish to rely upon separate expert and lay evidence and may raise individual defences that create conflicts that are avoided if the Claimant can get home on an allegation against the practice of non-delegable duty or vicarious liability. Limiting the number of defendants limits the number of targets and opponents with whom the claimant has to deal, which should simplify negotiations and limits the burden of costs that will be incurred in the action. Equally, we are told that it is not uncommon for defendant practices that are sued on the basis of alleged non-delegable duties or vicarious liability to apply to join individual treating dentists as additional defendants in the main proceedings rather than joining them as Part 20 defendants. This appeal therefore arises in that general context.

6.
By way of introduction it is sufficient to say that the researches of Counsel have identified one decision of the High Court where a claimant has succeeded on a preliminary issue which raised the question of non-delegable duty or vicarious liability on the part of a dentists' practice in circumstances that appear broadly similar to the facts of the present case: Hughes v Rattan [2021] EWHC 2032 (QB), a decision of Heather Williams QC sitting as a Deputy High Court Judge. We were told that permission to appeal has very recently been granted. That being so, it may be material to record that the Defendants have not applied to strike out the Claimant's claim or for summary judgment pursuant to CPR Part 24, and it has not been submitted to us that the Claimant's claim as originally constituted against the Defendants alone is fanciful.

7.
The District Judge acceded to the Defendants' application. On the Claimant's appeal, the County Court Judge (to whom I shall refer as "the Judge") upheld the decision of the District Judge. The issue in this appeal is whether the Judge was wrong to reject the Claimant's appeal. In my judgment he was, for the reasons set out below.

The relevant provisions of the CPR and procedural framework

8.
The Judge concentrated on the provisions of CPR Part 19, not least because the District Judge had relied upon them in reaching her decision and the Defendants relied upon them once more before him. However, a proper appreciation of and approach to the issues before the court must also take into account CPR Part 20.

9.
CPR Part 19 is concerned with the addition or substitution of parties into existing proceedings. No question of substitution arises in this case. So far as relevant, CPR Part 19 provides:

"**Parties – general**

19.1 Any number of claimants or defendants may be joined as parties to a claim.

I ADDITION AND SUBSTITUTION OF PARTIES

Change of parties – general

19.2

(1) This rule applies where a party is to be added … except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).

(2) The court may order a person to be added as a new party if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

(3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.

(4) …

…

Procedure for adding and substituting parties

19.4

(1) The court's permission is required to remove, add or substitute a party, unless the claim form has not been served.

(2) An application for permission under paragraph (1) may be made by –

(a) an existing party; or

(b) a person who wishes to become a party.

…

(4) Nobody may be added or substituted as a claimant unless –

(a) he has given his consent in writing; and

(b) that consent has been filed with the court.

…

(6) When the court makes an order for the removal, addition or substitution of a party, it may give consequential directions about –

(a) filing and serving the claim form on any new defendant;

(b) serving relevant documents on the new party; and

(c) the management of the proceedings.

Special provisions about adding or substituting parties after the end of a relevant limitation period

19.5

(1) This rule applies to a change of parties after the end of a period of limitation under –

(a) the Limitation Act 1980;

(b) …

(c) … .

(2) The court may add … a party only if –

(a) the relevant limitation period was current when the proceedings were started; and

(b) the addition … is necessary.

(3) The addition … of a party is necessary only if the court is satisfied that –

(a) …

(b) the claim cannot properly be carried on by or against the original party unless the new party is added … as claimant or defendant; or

(c) …

(4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that –

(a) (i) section 11 (special time limit for claims for personal injuries); or

(ii) section 12 (special time limit for claims under fatal accidents legislation), of the Limitation Act 1980 shall not apply to the claim by or against the new party; or

(b) the issue of whether those sections apply shall be determined at trial.

10.
Practice Direction 19A provides that an application to add a new party should be supported by evidence (paragraph 1.3), and that a new defendant does not become a party to the proceedings until the amended claim form has been served on him (paragraph 3.3). It is not otherwise necessary to refer to its provisions.

11.
Practice Direction 19B is specific to Group Litigation, which gives rise to case management issues that are far removed from the normal run of litigation between individual (or small numbers of) claimants and defendants. It is not relevant to the present proceedings except, possibly, by way of contrast.

12.
CPR Part 20 deals with counterclaims and other additional claims. It is not necessary to refer to the provisions relating to counterclaims, either against the claimant or against a person other than the claimant. “Additional claims” are defined for the purposes of the Rules as “any claim other than the claim by the claimant against the defendant”. CPR 20.6 deals with a defendant’s additional claim for contribution or indemnity from another party. A defendant who has filed an acknowledgement of service or a defence may make an additional claim for contribution or indemnity against a person who is already a party to the proceedings by filing a notice and serving it on the other party. A defendant does not need the court’s permission if they serve their notice with their defence or in other specified circumstances which do not presently apply here.

13.
CPR 20 sets out the procedure for making any other additional claim. So far as relevant it provides:

“**Purpose of this Part**

20.1 The purpose of this Part is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner.

…

Procedure for making any other additional claim

20.7

(1) …

(2) An additional claim is made when the court issues the appropriate claim form.

…

(3) A defendant may make an additional claim –

(a) without the court’s permission if the additional claim is issued before or at the same time as he files his defence;

(b) at any other time with the court’s permission.

…

(4) Particulars of an additional claim must be contained in or served with the additional claim.

(5) An application for permission to make an additional claim may be made without notice, unless the court directs otherwise.

…

Matters relevant to question of whether an additional claim should be separate from the claim

20.9

(1) This rule applies where the court is considering whether to –

(a) permit an additional claim to be made;

(b) dismiss an additional claim; or

(c) require an additional claim to be dealt with separately from the claim by the claimant against the defendant.

…

(2) The matters to which the court may have regard include –

(a) the connection between the additional claim and the claim made by the claimant against the defendant;

(b) whether the additional claimant is seeking substantially the same remedy which some other party is claiming from him.

Effect of service of an additional claim

20.10

(1) A person on whom an additional claim is served becomes a party to the proceedings if he is not a party already.

(2) …

…

Case management where a defence to an additional claim is filed

20.13

(1) Where a defence is filed to an additional claim the court must consider the future conduct of the proceedings and give appropriate directions.

(2) In giving directions under paragraph (1) the court must ensure that, so far as practicable, the original claim and all additional claims are managed together.

14.
It is not necessary to refer to Practice Direction PD20 in detail. Paragraphs 5.1-5.4 recognise that where the defendant to an additional claim files a defence, the court will arrange a hearing to consider case management of the additional claim; and that the court has very wide powers of case management in such circumstances, including the power to give directions (a) about the way any claim, question or issue set out in or arising from the additional claim should be dealt with, and (b) as to the part to be played by the additional defendant and the extent to which the additional defendant is to be bound by any judgment or decision to be made in the claim.

15.
There are therefore two possible routes to be considered when it is suggested that it is necessary or desirable that someone who is not presently involved in the litigation should have some involvement. By its express terms Part 20 is the relevant route where a defendant suggests that, although they contest liability, they are or should be entitled to an indemnity or a contribution from someone else in the event that they are held liable to the claimant.

The evidence in support of the application

16.
The Defendants' application was supported by a witness statement from their solicitor, which said that the application was brought pursuant to CPR Part 19.2(2) and/or 19.4 and 19.5 and was to join the Dentists as additional defendants to the claim.

17.
Much of the material in the solicitor's witness statement is pure submission. However, the following strands emerge:

i)
The Defendants contend that it was desirable and necessary for the resolution of the issues in dispute in the claim that the Dentists be joined so that they can defend themselves from the allegations of negligence that are made against them or make appropriate admissions in respect of those allegations;

ii)
Joinder would ensure that the parties are on an equal footing in the litigation and that the claim is dealt with fairly in accordance with the overriding objective;

iii)
The Defendants are severely hampered in pleading to the Particulars of Negligence against the Dentists, who are not its employees and who are best placed individually to plead to those allegations of negligence;

iv)
Given that the allegations of negligence are “expressly directed against” the Dentists, it must be necessary and desirable that they play a part in the litigation;

v)
Findings in the action as presently constituted “will inevitably affect [the Dentists’] rights and they ought to have the opportunity to defend themselves against the allegations that are pleaded against them by being included in the action”;

vi)
Each of the Dentists has their own indemnity insurance;

vii)
It would be positively disadvantageous to the Claimant personally not to have the Dentists included in the action;

viii)
The Dentists ought to have been included in the action by the Claimant from the outset;

ix)
The claim cannot properly be brought against the Defendants without joining the Dentists.

18.
To put some of these assertions into perspective, the Judge below asked the Defendants if any of the Dentists had refused to co-operate with the Defendants and was told that they had not yet been asked to give witness statements. The Judge took that as a No, and so do I. There is no evidence to suggest and no reason to believe that the Dentists will not give the Defendants full co-operation, at least if the Defendants resolve not to join them as Part 20 defendants.

19.
The other point to make at this stage is that, although I would accept that findings of negligence made in the context of the action as brought by the Claimant against the Defendants may exercise influence on the Dentists’ thinking if they were to be sued later for an indemnity or contribution, such findings would not be binding on the Dentists. It is therefore strictly inaccurate to suggest that findings in the action as constituted by the Claimant will inevitably or even probably affect the Dentists’ rights.

The judgments below

20.
The District Judge accepted that it was the Claimant’s choice to make the election that she had as to who she wished to sue and described the application by the Defendants to “tidy that up” by joining the Dentists as “perhaps somewhat unusual”. She recorded that the Dentists were neutral on the application, and that there was clearly communication going on between the Dentists and the

Defendants. She held that she had a power under the Rules to join the Dentists, that the relevant limitation period had expired and that CPR 19.5 was engaged. She considered that the Claimant's decision just to sue the Defendants had "created a particularly difficult situation for the court in terms of the most effective case management way forward". She then turned to the Claimant's proposal that there should be a hearing of preliminary issues about the existence of any non-delegable duty and vicarious liability. She speculated about what might happen if the Claimant lost on those issues, and whether the Claimant might at that stage try belatedly to bring an out-of-time action directly against the Dentists or a derivative action against her professional advisers. On the basis of these and other considerations, she formed the view that she was not sympathetic to the Claimant's proposals. She then went on to conclude that the requirement under CPR 19.5 of it being "necessary" to bring in the Dentists was met.

21.
The kernel of the District Judge's reasoning appears at [32], where she said:

"32. There is clearly a dispute between the claimant and the proposed defendants, the four dentists here. I accept the submissions of Mr Piper, that the subsequent authorities including primarily paragraph 60 of the [Pablo Star] somewhat overtake the earlier case of Milton Keynes v Viridor Ltd. That means that I do not have to consider the issue of whether or not the claimant consents to the addition of the four dentists as defendants on this occasion. The stress that was put on the interpretation of CPR 19.2 - referred to as a 'lodestar', is effectively allowing parties to be heard, including those who wish to effectively intervene, which is what the dentists are seeking to do, and be heard and for the court to have the most effective way to adjudicate on the issues. The court do not deal with or are concerned by the consent of the claimant on that occasion."

22.
On appeal, the Judge expressed the view that the Defendants' decision to apply to join the Dentists as additional parties rather than bringing additional claims pursuant to CPR Part 20 was "curious". And he expressed scepticism (which I share) at the Defendant's apparent reliance upon "nobly altruistic reasons" that the Dentists should be protected from having findings of negligence made in their absence or that their absence would be positively disadvantageous for the Claimant. In the context of contested litigation where all parties were fully and properly represented, the Judge's observation that "the claimant and the dentists can look after themselves" was sound.

23.
In summarising the submissions before him, the Judge referred to the judgment of Coulson J in Milton Keynes Council v Viridor [2016] EWHC 2764 (TCC), [2016] 6 Costs L.R 1041 on an application to join a defendant against the wishes of the Claimant. At [9]-[12] of Viridor Coulson J said:

"9. First, I do not consider that the court has the power to join a party as a defendant, in circumstances where the claimant opposes that joinder. No authority in support of such a novel proposition was cited to me."

Coulson J then set out the terms of CPR 19.2(2) and continued:

"11. The proposed joinder of VWML is not caught by either of these provisions. There is no matter in dispute between the Council and VWML; indeed, the Council has made it plain that, because there is no dispute between it and VWML, it does not wish for VWML to be joined into the proceedings as a defendant. Neither is there any pleaded issue between VWML and the defendant.

12. Furthermore, I consider that it would be a nonsense if a defendant could join another defendant into the proceedings against the claimant's wishes, in circumstances in which that claimant would then become potentially liable for the costs of the new defendant. A claimant is entitled to bring proceedings against the parties with whom it considers that it has a dispute. A claimant cannot be forced to issue proceedings against any other party. Accordingly, these amendments fail in principle."

24.
The Judge also referred to the decision of the Court of Appeal and the dictum of Sir Terence Etherton MR in In re Pablo Star Ltd [2017] EWCA Civ 1768, [2018] 1 WLR 738, where the Master of the Rolls said at [60]:

"In considering whether or not it is desirable to add a new party pursuant to CPR r 19.2(2) two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1."

25.
The Judge formed the view that Coulson J's dictum was obiter and therefore not binding upon him. If he was wrong about that, he considered that it did not apply if a claimant had a dispute with the party who was to be joined, and that this case fell within that category.

26.
The kernel of the Judge's reasoning is to be found at [38]-[40] and [48]-[50] of his judgment, where he said:

"38. To the claimant's attractive submission that it cannot be right that she should be compelled to sue other defendants, with potentially greater costs liability, when she has chosen, no doubt on advice, to limit her claim to the practice owners and operators, the defendants say – there is no such rule in CPR 19.5 or in 19.2. If there was such a rule, it could easily have been stated in 19.5, and 19.4(2)(a) enables an application for permission to be made by an existing party, which must envisage an application made by a defendant, as here, which is not consented to by the claimant.

39. It seems to me that this submission is sound. For what it is worth, I see that the note to 19.2, at 19.2.1, states that persons can be made defendants against their will and against the will of the claimant or other parties. I cannot see any jurisdictional bar to joinder of a defendant against the claimant's wishes.

40. In this case, there is a dispute between the claimant and the dentists. She alleges that they negligently inflicted injury upon her. Their rights, moreover, are bound to be affected by the determination of the issues in the action. The defendants draw attention to Sir Terence Etherton MR's reference at [60] of Pablo Star to two lodestars in considering whether or not it is desirable to add a new party pursuant to CPR 19.2(2): the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case, and the overriding objective in CPR Pt1.

…

48. I do not think that (as Ms Campbell-Clause submitted) where CPR 19.5(4) is used it means that the 19.2(2) criteria continue to apply, because 19.2(1) expressly provides that they do not apply when the case falls within 19.5, but in my judgment it does mean that the court can, in a personal injury case, decide to add a defendant even if that joinder is not 'necessary' per 19.5(2).

49. Presumably, in that case, the court is entitled to take into account all the circumstances, including the overriding objective. That was what the district judge sought to do. She was entitled to take the view that the proposed preliminary issue would cause delay and risked wasting costs, because it would probably involve the dentists giving evidence twice, because if it succeeded it would still be necessary to try out the issues of breach of duty, causation and loss, and because if it failed, there was a risk that the claimant would then try to join the dentists (or to sue her legal advisers); and that the best way to ensure that the litigation was, as she put it, 'future-proofed', with all parties before the court and no risk of further applications by the claimant if the preliminary issue did not go her way, was to order the joinder of the dentists at this stage. By that means, all the parties would be before the court and all issues could be determined at one trial.

50. That was a case management decision, and I am unable to see that in reaching that decision the district judge reached an erroneous conclusion with which I could or should interfere."

The appeal

27.
The Claimant was represented before us by Mr Ben Collins QC and the Defendants by Mr Andrew Warnock QC. Their written and oral submissions were conspicuously clear and helpful, for which I thank them both.

28.
The Claimant has permission to pursue two grounds of appeal, which I shall refer to as Grounds 1 and 2:

i)
Ground 1 is that the Court wrongly distinguished the case law and failed to give any or any adequate weight to the statement of Coulson J in Viridor that a claimant could not be forced to bring proceedings against defendants and become liable for their costs;

ii)
Ground 2 is that the Judge wrongly conflated the issues of "necessity" and "necessary" in that he imputed a wider power under CPR 19.5(4) which relied upon "all the circumstances, including the overriding objective", to allow the joinder of the Dentists, when such was inconsistent with his finding that it was not necessary under CPR 19.5(2) and 19.5(3)(b) to join them.

Ground 1: failure to give any or any adequate weight to the statement of Coulson J in Viridor that a claimant could not be forced to bring proceedings against defendants and become liable for their costs.

29.
Mr Warnock confirmed that the Defendant's intention and the effect of the Judge's order was that the Claimant was compelled to amend the Claim Form and Particulars of Claim to plead a claim for damages against the Dentists. It therefore went beyond being a mechanism to ensure that the Dentists would be bound by any findings that might be made as between the Claimant and the Defendants.

30.
By the end of the hearing it was common ground between the Claimant and the Defendants that the words of the relevant rules are wide enough to include a power to join parties as defendants and that an application to join may be made by an existing party (whether claimant or defendant) or a person

who wishes to become a party. I agree that this is correct because of the broad terms of CPR 19.2 and CPR 19.4(2). The issue, therefore, is not whether a power exists under the Rules but whether it is wrong to exercise it in circumstances such as the present, for the reasons indicated by Coulson J.

31.
Subject to two qualifications, I fully endorse and adopt the approach of Coulson J as being correct in any normal claim for damages where the Claimant has chosen to sue some but not all potential defendants and has advanced their claim against the chosen defendants on a basis that cannot be dismissed as fanciful. The first qualification I would make is that Coulson J's reference to the Court not having the power to join a party where the Claimant opposes that joinder should be read in the context that, on a literal interpretation, the rules are wide enough to create a power to add a party as a defendant and do not exclude that power where the claimant opposes joinder. I would therefore prefer to say that it is wrong in principle in such a case for the court to exercise the power to join a party as a defendant and to require the claimant to pursue a claim against the newly-joined party where the claimant opposes that joinder. The second qualification is that the principle is not limited to cases where the claimant would become potentially liable for the costs of the new defendant.

32.
It is axiomatic that no one may be compelled to bring proceedings to claim damages for injury loss or damage caused by another person's tort. This has two consequences of fundamental importance. First, a person who is competent to litigate is entitled to decide who they will sue. Second, a person who is competent to litigate is entitled to decide what cause or causes of action they will pursue against those they have chosen to sue. The principle applies even (or particularly) where the choice that the claimant makes may expose them to a greater risk of failure than would be the case if every conceivable basis for a claim is pursued. This is not least because the overriding objective encourages claimants (and other litigants) to streamline proceedings where possible, in order to limit the number and complexity of issues to be tried by the court, and thereby to save expense and to generate litigation that is proportionate to the amount of money involved, the importance of the case, the (necessary) complexity of the issues and the financial position of the parties.

33.
It follows that a decision to bring a claim for damages on a particular basis should in all normal circumstances be respected, particularly when it serves to limit the number of parties and thereby tends to save expense and to approach the litigation proportionately. In the present case, whatever the outcome of an appeal in Hughes v Rattan, there are obvious and sound reasons why the Claimant might choose to adopt the route she has, even if it means that she is exposed to a greater risk of failure overall than if she had chosen to expand the scope of her claim by also suing the Dentists. There is nothing abnormal about the circumstances of her claim that require her decision to be overruled or justify compelling her to sue the Dentists.

34.
The reasons for not requiring a claimant to sue a party against their wishes become even more compelling where the proposed defendant has or may have either a partial or a complete defence to the claim that would be brought. The most obvious example of such a defence is limitation. In the present case, it is common ground that most of the treatments of which the Claimant complains happened more than three years before any joinder of the Dentists. They have on the face of it a clear defence to some or all of any claims that the Claimant may bring against them. The inappropriateness of the order made by the District Judge and the Judge comes into sharp focus if one contemplates how the Claimant could formulate the necessary application under s. 33 of the Limitation Act 1980 to

disapply the time limits that would otherwise apply to her claim against the Dentists. Without in any way pre-judging the outcome of such an application, the fact that her delay in bringing proceedings was the result of her deliberate decision not to sue the Dentists before she did is not a comfortable starting point for her.

35.
The existence of a potential limitation defence was recognised by the District Judge and the Judge, who ordered that the issue of limitation should be tried at trial. To my mind, this raises two difficult questions. First, the Claimant submits that she would be entitled to discontinue against the Dentists. That is not accepted by the Defendants. It is not necessary or desirable to decide the point in the abstract; but I can see force in the Defendants' submission that it could be described as an abuse of the process for the Claimant to discontinue against the Dentists when she has been ordered by the Court to sue them. Without resorting to the doctrine of abuse of process, it may more simply be said that to discontinue would be a breach of the Court's order requiring them to be sued. Whatever the correct analysis and outcome, this question once again emphasises the intolerable position facing the Claimant if the order of the Courts below were to be upheld.

36.
The second question raised by the possibility of a limitation defence is the threshold that has to be satisfied for an order to be made, which is the subject of Ground 2: see [47] below.

37.
The Defendants relied upon two authorities in support of the decision of the courts below. The first in time is Davies and ors. v Department of Trade and Industry [2006] EWCA Civ 1360, [2007] 1 WLR 3232. The context for that decision was extensive multi-party litigation brought by coal miners claiming damages for chronic knee injury from the DTI as successors to their employers, British Coal. The proceedings were subject to a Group Litigation Order ("GLO") covering ten common or related issues of fact or law. Some of the claimants had been employed during the relevant period both by British Coal and by contractors engaged by British Coal, who were collectively described as CMC. CMC applied for the issues encompassed in the GLO to be widened and for them to be joined because they were concerned that, at some time in the future, the DTI might seek contribution from them and they would be disadvantaged by not having been heard from the outset. The Judge at first instance held that he had the power to join CMC pursuant to CPR 19.2. He declined to do so but said that the position should be kept under review. He considered that CMC's interest was potential and did not at that stage conflict with the interest of the DTI. Furthermore, if the DTI were successful in defending the miners' claim, there would be no need for contribution proceedings to be brought by the DTI against CMC, and much cost would be saved by their not having been added.

38.
The Court of Appeal upheld the judge both in relation to his conclusion that he had power to join CMC and in relation to his exercise of discretion in declining to join them at that stage. At [12] Waller LJ emphasised that the very wide power conferred by CPR 19.2 confers a discretion: CMC had no right to be joined. As I have said, it is now common ground (and I agree) that the words are wide enough to confer a power: the question is how and when it should properly be exercised. As to that, it is immediately to be recognised that multi-party litigation, whether subject to a GLO or not, gives rise to challenges that are far removed from a typical personal injury claim such as the present. I would respectfully endorse and adopt as still being fully applicable what was said by Steyn LJ in AB v John Wyeth & Brothers Ltd (1992) 12 BMLR 50, 61 and quoted by Waller LJ at [15] of Davies:

“The procedural powers of a judge in control of a group action are not tied to transitional procedures. Subject to the duty to act fairly, the judge may and often must improvise: sometimes that will involve the adoption of entirely new procedures. The judge's procedural powers in group actions are untrammelled by the distinctive features of the adversarial system. The judge's powers are as wide as may be necessary to control the litigation fairly and efficiently.”

39.
The second authority upon which the Defendants relied was Pablo Star. Once again, the circumstances of that case are far removed from the facts of the present. The context was an application to restore a company to the Register of Companies. The Welsh Ministers formed the view that the court may have been misled by the applicant for restoration, and applied, pursuant to CPR 19.2, to join the proceedings. The registrar allowed the application. The Judge allowed the appeal against that decision, holding that a third party’s desire to be joined to assist the court in determining whether it had been misled was not a proper basis for joinder. The Court of Appeal dismissed the Welsh Ministers’ appeal.

40.
The facts of Pablo Star are clearly distinguishable because an application to restore a company to the Register is far removed from adversarial litigation in tort such as the present; and the outcome provides no support for the Defendants application in the present case. However, at [51] Sir Terence Etherton MR (with whom Longmore and Irwin LJJ agreed) held that the words of CPR 19.2(2) should be given a wide meaning and that “in dispute” should be interpreted as meaning “in issue”. On that basis he held that the Welsh Ministers’ application fell within CPR 19.2(2) even though the issue they wished to raise had not previously been raised in the proceedings. However, he went on to hold that it was not desirable to join the Welsh Ministers, for reasons which do not readily apply to the very different factual context of the present case. In the course of that section of his judgment he made the statement of principle that I have set out at [24] above.

41.
The Pablo Star statement of principle is not in doubt; but it does not justify a conclusion that the Dentists should be joined in the present case. First, as I have said, if the Dentists are not joined, their rights will not be affected in the sense that any decision made in the proceedings between the Claimant and the Defendant will not be binding on them. Second, it is not the Dentists who consider that their interest requires them to be joined as parties: it is the Defendants who have made the application, for the reasons that they have asserted in their evidence. Third, even giving the most general and generous scope to any concerns that the Dentists might have, in the absence of present Part 20 proceedings, their concerns are (as in Davies) only potential. Fourth, an appeal to the overriding objective supports the Claimant’s decision to pursue the streamlined claim that she has.

42.
If a defendant wishes to involve an additional party in a case such as the present, the conventional route (as was recognised by the District Judge and the Judge) is to join them by Part 20 proceedings, particularly if they have an interest (as the Defendants obviously do in the present case) in securing an indemnity or a contribution from the Part 20 defendant.

43.
The Defendants have, thus far, chosen not to issue Part 20 proceedings against the Dentists. One reason suggested by Mr Warnock was that to do so might be seen by the Dentists as a hostile act which precludes further co-operation between them and the Defendants. In my judgment this possible

concern can be overstated, for two reasons. First, there is no conflict of interest between the Defendants and the Dentists on the issue whether the Dentists were negligent. Second, it is always open to a defendant to bring their Part 20 proceedings on a more or less contingent basis. Thus it is routine for Part 20 proceedings to be brought on the basis that (a) the claimant has brought the proceedings against the defendant, (b) the defendant denies liability to the claimant for the reasons set out in the defence, but (c) if the defendant is held liable to the claimant, it claims an indemnity or such contribution as may seem just to the Court, whether pursuant to the Civil Liability (Contribution) Act 1978 or on some other basis. In relation to (c), it is open to the defendant to decide how assertively it will pursue the indemnity or contribution. For example, in the present proceedings there is the suggestion that the defendant may have a contractual right to an indemnity. It is not obliged to rely upon it. At the other end of the scale, it is routine (both in personal injury and other litigation) for a defendant relying upon the 1978 Act to say merely that they will rely upon such allegations of negligence as the Claimant may prove. Such a stance in many cases enables the defendant and the Part 20 defendant to make common cause on whether the claimant's allegations of negligence are well founded.

44.
The issuing of Part 20 proceedings does not affect and is not affected by the Court's normal case management powers. Specifically, it is open to the court managing the litigation to order the trial of preliminary issues whether or not the Dentists are joined either as parties to the Claimant's claim or by way of part 20 proceedings; and, if Part 20 proceedings are issued, the court can make appropriate case management orders about the extent to which findings in the main action are binding in the Part 20 proceedings and vice versa: see paragraphs 5.1-5.4 of Practice Direction PD20.

45.
For these reasons, I consider that the Claimant is entitled to succeed on Ground 1 because inadequate weight was given by the Courts below to the principle expressed by Coulson J in Viridor.

46.
It will be apparent from what I have said already that there may be exceptional cases in which different considerations apply. Nothing that I say should be taken as casting doubt upon the jurisdiction available to the court in an appropriate case involving a GLO; or upon the established jurisdiction in cases such as Gurtner v Circuit [1968] 2 QB 587. However, there is nothing exceptional about this case.

Ground 2: wrongly conflating the issues of "necessity" and "necessary" in imputing a wider power under CPR 19.5(4) which relied upon "all the circumstances, including the overriding objective".

47.
The Judge held that, if the applicable test was that laid down by CPR 19.5(2), the test of necessity was not satisfied. I agree with that assessment. However, he held that the CPR 19.5(2) threshold did not apply to a case such as the present, which fell within CPR 19.5(4). At [49] of his judgment, which I have set out above, he adopted an approach of taking into account all the circumstances, including the overriding objective. The Claimant submits that he applied the wrong test.

48.
Where no question of limitation arises, the threshold to be satisfied is that it is "desirable" to add the new party: see CPR 19.2(2). In most cases where a change of parties is proposed after the end of a period of limitation, the threshold is that the addition of the party is "necessary", which means that

the claim cannot properly be carried on by or against the original party unless the new party is added: see CPR 19.5(2) and (3). However, special provision is made for claims for personal injuries by CPR 19.5(4). As set out above, the provision is stated to be "in addition" to the rest of CPR 19.5 and specifies that the court may add a party where it either disapplies s. 11 of the Limitation Act or directs that limitation and disapplication of s. 11 shall be determined at trial. What CPR 19.5(4) does not say is whether the threshold in such cases is that it is "desirable" or that it is "necessary" to add the party. There is logic in the suggestion that (a) in a case where s. 11 is disapplied by the Court there is no further limitation issue and therefore the test should be that adding the party is "desirable" but that (b) in a case where limitation is left to trial the test should be that it is "necessary" to join the party. On the other hand, it could be said that leaving limitation over to trial means that the limitation defence is not established and that therefore to require necessity is too high a threshold. The problem is that the rule neither says nor indicates how this conundrum should be resolved.

49.
Fortunately, if my lord and my lady agree with me on Ground 1, it is not necessary to reach a concluded view on where the threshold should be set for a case falling within CPR 19.5(4). For the reasons I have given, a threshold test of desirability (which would bring into play all the circumstances and the application of the overriding objective) would not be satisfied in the present case.

Conclusion

50.
I would allow this appeal.

Lady Justice King

51.
I agree.

Lord Justice Underhill

52.
I agree that this appeal should be allowed. As Stuart-Smith LJ says, it is in all ordinary circumstances a matter entirely for a claimant's choice who they wish to bring a claim against. In this case, by adding the Dentists as defendants the Court was, necessarily, requiring the Claimant to make a claim against someone she had chosen not to sue. That seems to me to have been wrong in principle; and it also leads to conundrums of the kind relating to limitation which Stuart-Smith LJ notes at para. 35 of his judgment and in relation to Ground 2. If there are good reasons why someone against whom a claimant does not wish to make a claim should be a party to the proceedings, that can be achieved by the use of Part 20. I accept that the power conferred by CPR 19.2 (2) (a) is expressed in entirely general terms, and there may be exceptional circumstances in which it is right to add a defendant against whom the claimant advances no claim: group litigation may be an example. But there were no such circumstances here.