



Neutral Citation Number: [2022] EWHC 1927 (QB)

Case No: QB-2021-002158

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ASBESTOS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 July 2022

Before :

MR JUSTICE JOHNSON

Between :

JAMES ANTHONY POWER

Applicant

- and -

(1) BERNARD HASTIE & COMPANY LIMITED

(2) CAPE DARLINGTON LIMITED

(3) CAPE INSULATION LIMITED

**(4) THERMAL INSULATION COMPANY
LIMITED**

(5) UNION INSULATION COMPANY LIMITED

Defendants

Ivan Bowley (instructed by Simpsons Solicitors) for the Applicant
A John Williams (instructed by DAC Beachcroft Claims Ltd) for the Defendants
Hearing date: 15 July 2022

Approved Judgment

Mr Justice Johnson :

1. This application raises the question whether the estate of a deceased claimant can take advantage of that claimant's right, under a provisional damages order ("PDO"), to ask the court to award further damages on the ground that he developed a condition or disease that was specified in the order.
2. The applicant is the nephew and executor of the estate of the claimant ("Mr Hammacott"). He says that he should be substituted as the claimant in these proceedings in the place of his deceased uncle, so as to be able to pursue an application under a PDO made in these proceedings. The defendants say that the right to pursue such an application does not survive Mr Hammacott's death.

The factual background

3. Mr Hammacott was born in 1940. He worked for each of the defendants during periods between 1956 and 1977. He claimed that he was exposed to asbestos and asbestos dust in the course of his employment. He developed asymptomatic pleural plaques and early asbestosis. In 1991 he issued proceedings against the defendants in the Cardiff District Registry of the High Court. Liability was admitted by the defendants. Mr Hammacott sought an award of provisional damages under Order 37 Rule 10 of the Rules of the Supreme Court ("RSC"). The application was heard by Kay J on 19 October 1993.
4. Kay J made an order that the defendants pay damages of £5,000 with interest of £233 on the assumption that Mr Hammacott would not (as a result of the acts and omissions giving rise to his claim against the defendants) develop certain identified conditions. Those included a serious deterioration of his asbestosis or asbestos related benign pleural effusion or asbestos related pleural thickening, in each case resulting in his inability to continue in any form of employment.
5. The order included the following paragraphs:
 - “3. The Plaintiff do have leave to apply (without time limit) for further damages pursuant to Order 37 Rule 10 if he does develop the aforesaid conditions or diseases or any of them.
 4. The documents referred to in the schedule to this Judgment shall be produced to the Court by the Plaintiff's solicitors so that those documents maybe preserved as material for any further assessment and the said documents will comprise the case file.”
6. The documents identified in the schedule to the order included an agreed statement of facts. That statement (which forms part of the same document as the order itself) included the following:
 - “3. It is agreed between the parties that the Plaintiff will be at liberty to apply for further damages pursuant to Order 37 Rule 10 of the Rules of the Supreme Court in the event of him developing [the conditions that are specified in the order].

4. It is also agreed between the parties that the Plaintiff can apply for further damages at any time during his life.”
7. Mr Hammacott died on 3 October 2017. The applicant says that he died from asbestosis and/or disabling asbestos related pleural effusions and/or disabling asbestos related diffuse pleural thickening.
8. Probate was granted on 7 June 2018. Mr Power is Mr Hammacott’s nephew, and the executor of his estate. He applied at the Cardiff Civil Justice Centre for an order that he be substituted as the claimant, and that the claim be transferred to the Royal Courts of Justice (“RCJ”) Asbestos List, and that it be listed for directions.
9. On 3 February 2021 His Honour Judge Harrison, sitting at Cardiff, made an order transferring this claim to the RCJ Asbestos List for further directions, including the application for the substitution of the claimant. There was a delay in the file being transferred from Cardiff to the RCJ. A new claim number was allocated to the case. There was then some further delay while the parties sought to identify the areas of dispute. At the court’s request, on 23 June 2022, Mr Power made a further application to be substituted as the claimant, in his capacity as the executor of the estate.

Legal framework

Substitution of party

10. Part 19 of the Civil Procedure Rules (“CPR”) makes provision for the substitution of parties.
11. CPR 19.5 applies to the substitution of a claimant after the end of a statutory limitation period. In such a case, the court may substitute a claimant if the relevant limitation period was current when the underlying proceedings were started, and the claimant has died and his interest has passed to the new party.
12. Where CPR 19.5 does not apply, CPR 19.2(4) enables the court to substitute a claimant if the existing claimant’s interest has passed to the new party, and it is desirable to add the new party so that the court can resolve the matters in dispute in the proceedings.

Provisional damages order

13. Section 32A Senior Courts Act 1981 states:

“32A Orders for provisional damages for personal injuries

- (1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.
- (2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a

judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person-

- (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
- (b) further damages at a future date if he develops the disease or suffers the deterioration.

...”

14. At the time the order in the present case was made, the relevant rules of court for the purposes of section 32A(2) were contained in RSC Order 37. Order 37 rule 8(2) and (3) stated:

“(2) An order for an award of provisional damages shall specify the disease or type of deterioration in respect of which an application may be made at a future date, and shall also, unless the Court otherwise determines, specify the period within which such application may be made.

(3) The Court may, on the application of the plaintiff made within the period, if any, specified in paragraph (2), by order extend that period if it thinks it just to do so, and the plaintiff may make more than one such application.”

15. Order 37 rule 10 provided that no application for further damages may be made after the expiration of a period specified under rule 8(2) (or such period as extended under rule 8(3)).

16. The CPR came into force on 26 April 1999. By rule 51, and paragraph 2(b) of practice direction 51A (“PD51A”), the general scheme from that date is to apply the CPR to defended cases so far as is practicable. Paragraph 11 of PD51A states that where a new step is to be taken in any existing proceedings on or after 26 April 1999, it is to be taken under the CPR. Paragraph 15(2) states that the general presumption will be that the CPR will apply to the proceedings from the first time that the case comes before a judge on or after 26 April 1999, unless the judge directs or the practice direction provides otherwise.

17. Part 41 of the CPR makes provision in respect of damages. CPR 41.1(2)(c) defines “award of provisional damages” to mean:

“an award of damages for personal injuries under which-

- (i) damages are assessed on the assumption referred to in [section 32A of the 1981 Act] that the injured person will not develop the disease or suffer the deterioration; and

(ii) the injured person is entitled to apply for further damages at a future date if he develops the disease or suffers the deterioration.”

18. CPR 41.2(2)(b) provides that an award of provisional damages must specify the period within which such an application may be made. Paragraph 2.3 of the Practice Direction to Part 41 (“PD41A”) states that the period “may be expressed as being for the duration of the life of the claimant.” CPR 41.2(3) provides that the claimant may make more than one application to extend the period. It does not require that any such applications must be made before the expiry of the period set by the PDO (or any such period as extended). CPR 41.3(1) provides that the claimant may not make an application for further damages after the end of the period specified under rule 41.2(2), or such further period as extended by the court.

Effect of death on causes of action

19. Section 1(1) Law Reform (Miscellaneous Provisions) Act 1934 states:

“(1) Subject to the provisions of this section, on the death of any person... all causes of action... vested in him shall survive... for the benefit of... his estate. Provided that this subsection shall not apply to causes of action for defamation.

(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

(a) shall not include—

(i) any exemplary damages;

(ii) any damages for loss of income in respect of any period after that person’s death;

...”

Right of action for wrongful act causing death

20. Section 1(1) of the Fatal Accidents Act 1976 states:

“If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.”

21. Section 2 of the 1976 Act requires that a claim under that Act must be brought by and in the name of the executor or administrator of the deceased.
22. Section 3 of the Damages Act 1996 provides that an award of provisional damages does not preclude an action under the 1976 Act:

“Provisional damages and fatal accident claims.

- (1) This section applies where a person—
 - (a) is awarded provisional damages; and
 - (b) subsequently dies as a result of the act or omission which gave rise to the cause of action for which the damages were awarded.
- (2) The award of the provisional damages shall not operate as a bar to an action in respect of that person's death under the Fatal Accidents Act 1976
- (3) Such part (if any) of—
 - (a) the provisional damages; and
 - (b) any further damages awarded to the person in question before his death, as was intended to compensate him for pecuniary loss in a period which in the event falls after his death shall be taken into account in assessing the amount of any loss of support suffered by the person or persons for whose benefit the action under the Fatal Accidents Act 1976 is brought.
- (4) No award of further damages made in respect of that person after his death shall include any amount for loss of income in respect of any period after his death.
- (5) In this section “provisional damages” means damages awarded by virtue of subsection (2)(a) of section 32A of the Senior Courts Act 1981... and “further damages” means damages awarded by virtue of subsection (2)(b) of [that section].
- (6) Subsection (2) above applies whether the award of provisional damages was before or after the coming into force of that subsection; and subsections (3) and (4) apply to any award of damages under the 1976 Act or, as the case may be, further damages after the coming into force of those subsections.

...”

Limitation

23. Mr Hammacott's claim was subject to the provisions of the Limitation Act 1980. There is no suggestion that his claim was brought after the expiry of the limitation period.
24. Section 11(4) of the Limitation Act 1980 provides that the time limit for actions in respect of personal injuries is 3 years from the later of the date on which the cause of action accrued and the date of knowledge (within the meaning of section 14 of the 1980 Act) of the person injured.
25. Section 11(5) of the 1980 Act provides that where the person injured dies before the expiration of the limitation period, then the limitation period for a claim under the 1934 Act is 3 years from the later of the date of death or the date of knowledge of the personal representative.
26. Section 12(2) of the 1980 Act provides that no action shall be brought under the 1976 Act after the expiration of 3 years from the later of the date of death or the date of knowledge of the person for whose benefit the action is brought.

Submissions

27. Ivan Bowley, on behalf of the applicant, submits that Mr Hammacott's original claim comprised a single cause of action. That continued, following the award of provisional damages, as comprising a right to apply for further damages. There was no time limit on such an application. Alternatively, if there was a time limit, that can be extended (and an application to extend the time limit can be made after the time limit has expired). The cause of action survives for the benefit of his estate. Mr Bowley relies on the decision of His Honour Judge Roberts in the County Court case of *Guilfoyle v North Middlesex University Hospitals NHS Trust* (Central London County Court, 4 April 2018). HHJ Roberts held that an administrator of a deceased's estate was entitled to seek further damages under a PDO that was made in the deceased's favour. Mr Bowley also points to *Green v Vickers* [2002] EWCA Civ 904. In that case, the widow of the beneficiary of a PDO issued fresh proceedings in order to claim additional damages under the 1976 Act and she was also substituted as the claimant under the 1934 Act. Accordingly, Mr Bowley submits that an order for substitution should be made to enable the applicant to pursue that claim.
28. A John Williams, on behalf of the defendants, submits that Mr Hammacott's original cause of action was determined by the judgment of Kay J. By reason of the doctrine of merger (under which the claim merged into the judgment) it had no independent vitality thereafter. There was therefore no cause of action to pass to Mr Hammacott's estate on his death. The statutory scheme provides that awards of further damages may be made to the "injured person" and for an application for further damages to be made by "the claimant." It does not provide for, or permit, an application to be made by anyone else, or further damages to be paid to anyone else. Parliament made provision to allow claims under the 1976 Act to be made following the death of a person who is the beneficiary of a PDO (see section 3 of the 1996 Act) but it made no equivalent provision to allow a claim under the 1934 Act to be made so that the estate could be awarded further damages under a PDO. That demonstrates a clear Parliamentary intent that the right to claim further damages does not survive the claimant's death. He points out that the

decision in *Guilfoyle* is not binding authority. He submits that it was wrongly decided, and that argument had not been advanced on the doctrine of merger.

29. In order to resolve the ultimate question as to whether an order for substitution should be made, and in light of the submissions advanced, the following issues arise:
- (1) Does the statutory framework limit the right to claim further damages under a PDO to the claimant?
 - (2) If not, did the order in this case limit that right to the claimant?
 - (3) If not, has the right to claim further damages expired by effluxion of time?
 - (4) If so, does the scheme permit a retrospective extension of time?
 - (5) If a claim for further damages could in principle now be made by someone other than Mr Hammacott, has a relevant cause of action now passed to the applicant?
 - (6) If so, should an order for substitution be made?
 - (7) If so, can the applicant (who will then be the claimant) seek to amend the proceedings to include (as well as the application for further damages under the PDO) a claim under the 1976 Act.

(1) Does the statutory framework limit the right to claim further damages to the injured person?

30. Section 32A(4) of the 1981 Act says that rules of court may provide that further damages may be awarded to “the injured person”. CPR 41.1(2)(c)(ii) provides, consistently with the governing statute, that where a provisional damages award is made, “the injured person” is entitled to apply for further damages.
31. Nothing in the statute permits an award of damages to anyone other than the injured person. Nothing in the rules permits an application for further damages to be made by anyone other than the injured person. Equally, however, nothing in the statutory framework prevents the injured person’s right to apply for further damages under a PDO from being transferred to a third party (where that is otherwise permissible). The definition of an “award of provisional damages” in CPR 41.1(2)(c)(ii) contemplates that the “injured person” may make an application for further damages, but that does not prevent the application being made by the executor of the injured person’s estate if the right to make the application has passed to the executor.
32. Mr Williams accepted that if Mr Hammacott had died after Kay J made the PDO, and before the provisional damages had been paid, then his estate would have been entitled to enforce the order. He also accepted that if Mr Hammacott had made an application for further damages, but had then died before the application had been heard, then his estate could have taken over that application. That shows that the stipulation in section 32A(4) of the 1981 Act that provision may be made for the awarding of further damages to “the injured person” does not prevent the damages being awarded to the injured person’s estate. Mr Williams’ concession is plainly correct: section 3(4) of the 1996 Act demonstrates that the statutory scheme does not preclude the payment of further damages to the injured person’s estate. Accordingly, I do not consider that there is

anything in the statutory scheme that prevents an application for further damages being made by someone other than the injured person, so long as the applicant has acquired the right to make the application.

33. The statutory framework therefore permits an application for further damages under a PDO to be made by the injured person, and does not prevent the application being made by anybody else who has validly acquired that right.

(2) Did the order in this case limit that right to Mr Hammacott?

34. For the reasons given above, the statutory framework does not prevent the right to claim further damages being transferred to the injured person's estate. That framework does not explicitly permit a court to limit the right to claim further damages in that way. I do not consider that there is any indication that the order of Kay J was intended to introduce such a limit.
35. The order itself simply provides that the claimant ("The Plaintiff" to use the language of the time) may make an application for further damages. It does not say that the application may only be made by Mr Hammacott personally, and does not prevent an application being made by his executor (if his executor is otherwise substituted as the claimant).
36. Mr Williams relies on the statement of facts which states that the application must be made during the claimant's lifetime, indicating, says Mr Williams, that the right was personal to the claimant. No such stipulation appears in the order itself. Even if it did, it deals with the time within which the application must be made. It does not have the effect that the application may only be made by the claimant personally. It would not, for example, prevent a trustee in bankruptcy from being able to make the application. Of course, the time limit has the practical effect that if the application is made within time, then there is no question of the application being made by the estate. That raises a separate question as to whether an out of time application can be advanced. It is not a sufficient basis for concluding that the order prevents the application being made by someone other than Mr Hammacott.
37. If the intention had been to limit the right to make the application to the claimant personally, then different words would have been used in both the order and the statement of facts.
38. Accordingly, the order did not limit the right to make a further application to Mr Hammacott alone.

(3) Has the right to claim damages expired by reason of effluxion of time?

39. CPR 41.2(2)(b) requires that a PDO must specify the period within which an application may be made. Here, the order states that an application may be made "without time limit". The defendants do not suggest that this is incompatible with the obligation to specify the period within which an application may be made, far less that it invalidates the order (and see Kemp & Kemp: Personal Injury Law Practice and Procedure at 8-024). There are many other cases in which the court has deliberately not imposed a time limit: *Thurman v Wiltshire and Bath Health Authority* [1997] PIQR Q115 *per* HHJ Hedley at Q118 is an example of a reasoned decision for not doing so (there was no

evidential basis upon which an appropriate time limit could be set, and the prejudice to the claimant of setting a time limit was greater than the prejudice to the defendant of not doing so).

40. The defendants rely on the statement of facts which states (consistently with what now appears at paragraph 2.3 of PD41A) that the parties had agreed that the claimant could apply for further damages at any time during his life. The defendants say that the statement of agreed facts is an interpretative aid to the order, and should result in the order being interpreted as imposing a time limit – namely that any application must be made during the claimant’s lifetime. I do not agree. The order expressly states that there is no limit of time for the making of an application. I do not consider that the statement of facts, which was appended to the order, enables the order to be read as providing a time limit when the order says in terms that there is no limitation of time. It is the order, rather than the statement of facts, that controls the right to claim damages. Correctly construed, it does not impose a time limit.
41. That means it is not strictly necessary to seek to construe the statement of facts. But if it were necessary to do so, the statement of facts can be read as an indication (consistent with the order) that the parties had agreed that the claimant should not be limited as to the time period within which he made an application. Stating that the claimant could make the application at any time during his life is effectively the same as stating that he could make the application at any time.

(4) If the time limit has expired, can it be extended?

42. For the reasons given in paragraphs 39 - 41 above, the order permitted an application for further damages to be made without time limit. There is therefore no need to apply to extend the time period within which an application may be made. If I am wrong about that, it is then necessary to address whether the time limit set in a PDO for seeking further damages can be (retrospectively) extended after its expiry. If not, there would be no purpose in substituting the applicant as the claimant.
43. If this case continued to be governed by the RSC, then an application for an extension of time had to be made before the expiry of the time limit (ie, on the assumption – contrary to my finding – that this is what the order specified, the application had to be made before Mr Hammacott died). That was the effect of RSC Order 37 rule 10. However, for the reasons given at paragraph 16 above, the CPR, not the RSC, now apply to this claim. That, at least, is common ground between the parties.
44. There is nothing in the statutory framework, the applicable rules of court, or the order itself, which prevents a time limit that is set in a PDO from being extended by the court. CPR 3.1(2)(a) provides that (except where the rules otherwise provide), the court may extend the time for compliance with any court order, even if an application for extension is made after the time for compliance has expired.
45. In *Blythe v Ministry of Defence* [2013] All ER (D) 326, a PDO was made in 1990. It provided that the period for seeking further damages was 20 years. The claimant applied 2 years after the expiry of that time period to extend the time during which he could apply for further damages. The Master granted the claimant’s application to extend time. An appeal to the High Court was dismissed. HHJ Gore QC held that CPR 3.1(2)(a) permitted an out of time application to extend the period to apply for further damages

under a PDO that was made pursuant to RSC Ord 37. The Court of Appeal dismissed a further appeal.

46. It follows that if the time limit under this PDO has expired, it is open to the court to grant an application for an extension of time. Such an application has not been made. It is not necessary to express any view on the merit of such an application.

(5) Did a relevant cause of action pass to the applicant?

47. This question arises because it is common ground that the only way in which the applicant might have acquired the right to pursue an application for further damages is by operation of section 1 of the 1934 Act. That provision provides (subject to specified exceptions) that causes of action vested in Mr Hammacott survived his death for the benefit of his estate (see paragraph 19 above).
48. Mr Hammacott had a cause of action against the defendants as a result of the facts which resulted in his original claim. He exercised that cause of action by bringing a claim. Ordinarily, where judgment is given on a claim, the cause of action “merges” with the judgment. This means that the original cause of action is extinguished, and the claimant’s continuing rights (if any) are those prescribed by the judgment: *King v Hoare* 153 ER 206 (1844) 13 M&W 494. I was not shown any authority as to the application of the doctrine of merger where judgment is given on a claim for provisional damages.
49. In principle, I accept Mr Williams’ submission that once judgment had been given Mr Hammacott’s original cause of action had no continuing vitality beyond that prescribed by the order of Kay J and rules of court. Mr Hammacott did not have a general continuing right to litigate his original cause of action, and no such right passed to his estate.
50. Once judgment was given for provisional damages, Mr Hammacott had a continuing residual right to seek further damages in accordance with the PDO and rules of court. That right existed where the conditions set out in the order of Kay J were satisfied. This, itself, amounts to a continuing cause of action. In *Ord v Upton* [2000] WLR 352 Aldous LJ said at 368C that a cause of action can be defined “as every fact which is material to be provided to entitle a party to success and every fact which the defendant would have a right to traverse.” Here, the relevant cause of action is the right to claim further damages under the order of Kay J. That is a right that vested in Mr Hammacott. It was therefore transferred to the applicant by operation of section 1 of the 1934 Act.
51. This shows why, when section 3 of the 1996 Act was enacted, Parliament made no equivalent provision so as to permit a 1934 Act claim to be advanced by the estate of a beneficiary of a PDO. It was not necessary to make such provision because the 1934 Act itself enables the estate to bring a claim. If Parliament had intended to exclude the right of an estate to bring a claim for further damages then the 1934 Act would have been amended accordingly, just as it excludes claims in defamation, or claims for bereavement damages or exemplary damages.
52. In *Guilfoyle* HHJ Roberts held that an administrator of a deceased’s estate was entitled to seek further damages under a PDO that was made in the deceased’s favour. Mr Williams is right that no argument appears to have been advanced in *Guilfoyle* as to the effect of the doctrine of merger, but that doctrine does not prevent rights under the PDO

passing to an estate. I respectfully consider that *Guilfoyle* was correctly decided. I note that the same result appears to have been reached in *Grice v Montracon Tasker Ltd* (Sheffield County Court, 23 August 2005) – see “Provisional damages awards: exceptions to the principle of ‘full and final settlement’” (2012) JPIL 112.

53. It follows that a relevant cause of action (the right to claim further damages under the PDO) passed to the applicant.

(6) Should an order for substitution be made?

54. For the reasons given above, the relevant cause of action is the right to claim further damages under the PDO. That right is not subject to a period of limitation under the Limitation Act 1980 or any other enactment. In particular, I do not consider that the limitation period in section 11(5) of the 1980 Act applies. That is the limitation period for a claim for personal injuries. What the applicant seeks to advance is an application for further damages under the PDO. That is not a claim for personal injuries within the meaning of section 11 of the 1980 Act. Where the claim is for further damages under the PDO there is no limitation period under the 1980 Act. The time period within which the application must be brought is prescribed by the PDO (or, as here, the PDO may provide that there is no time limit).
55. It follows that CPR 19.5 does not apply, and the application must be considered by reference to the general rules on substitution of parties under CPR 19.2.
56. Mr Williams says that there are no remaining matters in dispute in respect of the PDO. That, however, depends on his antecedent submissions that no rights under the PDO and associated rules of court survived Mr Hammacott’s death. For the reasons I have given, I do not accept those submissions. It follows there are remaining matters of dispute in respect of the PDO. Mr Hammacott’s interest in the PDO has passed to the applicant. It is desirable to substitute Mr Power as the claimant so that the court can resolve the matters in dispute in the proceedings. It follows that the test for substitution in CPR 19.2(4) is satisfied.
57. If, contrary to the findings I have made above, a relevant period of limitation has expired, then the substitution of the applicant is necessary within the meaning of CPR 19.5(2)(b) and 19.5(3)(c) because Mr Hammacott has died and his interest has passed to the applicant. It is not suggested that the limitation period had expired at the time Mr Hammacott issued proceedings in 1991. It follows that there is power under CPR 19.5(2) to substitute the applicant as the claimant.
58. Having found that there are remaining matters in dispute in these proceedings, and that it is necessary for the applicant to be substituted as the claimant to enable those matters to be resolved, there is no residual reason not to substitute the applicant as the claimant.
59. I therefore accede to the application that the applicant, in his capacity as executor, be substituted as the claimant in these proceedings.

(7) Can the applicant seek to amend the proceedings to include a claim under the 1976 Act?

60. Once Kay J gave judgment, the existing proceedings had run their course, save for the right to make an application for further damages pursuant to the PDO.
61. It is not necessary to rule on the question of whether it would be appropriate to permit an amendment to the existing proceedings so as to enable a claim to be advanced under the 1976 Act. No such application has yet been made. The matter was, however, subject to extensive argument by the parties and I set out my provisional views, whilst stressing that these are not intended to be binding on any future court.
62. It is common ground that the dependents of Mr Hammacott have a right of action under section 1 of the 1976 Act, and that such an action could be brought by way of a claim in the name of the applicant. Express provision is made for that by section 3 of the 1996 Act.
63. There would be good sense in the application for further damages under the PDO and the 1934 Act proceeding at the same time as the claim under the 1976 Act. If fresh proceedings are issued for a claim under the 1976 Act, then it is possible that the application of the overriding objective under CPR Part 1 would result in the court directing that it proceed together with the application for further damages.
64. An alternative way of achieving that aim, if it were possible and just to do so, would be to amend the existing proceedings so as to add a new cause of action under the 1976 Act. Ordinarily, it is possible to add a new claim to existing proceedings: see CPR Part 17. Mr Bowley argued that where a claimant in extant personal injury proceedings dies from their injury, it is routine for a claim under the 1976 Act to be added to the proceedings. This is for obvious reasons of convenience. So too here, he said, requiring a fresh claim to be brought would simply cause delay and increase costs.
65. In the type of case where Mr Bowley said the addition of a 1976 Act claim is “routine”, the limitation period for the 1976 Act claim will not have expired. Mr Williams was, understandably, concerned that such a course should not be taken if that would result in unfair prejudice to the defendants. In particular, he was concerned that it might have the effect of depriving the defendants of an accrued limitation defence.
66. Section 12 of the Limitation Act 1980 provides that no action under the 1976 Act may be brought after 3 years from the date of death, or the date of knowledge (within the meaning of section 14 of the 1980 Act) of the person for whose benefit the action is brought, whichever is the later. Mr Hammacott died more than 3 years ago. Subject to the question of date of knowledge, the limitation period has expired.
67. CPR 17.4(2) permits the addition of a new claim after the expiry of a period of limitation, but only where it arises out of the substantially the same facts as the existing claim. In order for a claim under the 1976 Act to succeed, it would have to be shown that Mr Hammacott’s death arose out of the defendants’ wrongful conduct. Those facts are no part of the proceedings that were brought by Mr Hammacott. The proposed 1976 Act claim does not therefore arise out of substantially the same facts as the existing claim.

68. Accordingly, unless the applicant can show that the limitation period has not expired, it may be that he will need to issue fresh proceedings if he wishes to advance a claim under the 1976 Act. Any limitation defence can then be determined in those proceedings (which could still be case managed with these proceedings).

Next steps

69. The parties have indicated that they are likely to be able to agree directions for the further progression of the claim. The applicant (now claimant) will need to decide whether he wishes to apply to amend the Particulars of Claim. If his proposed amendment is agreed, then the amendment can be made under CPR 17.1(2)(b). Otherwise, an application for permission to amend will need to be made. There may then need to be directions for an amended defence, and for the matter then to be listed for a case management hearing. Subject to any further representations from the parties, I will make directions accordingly.

Outcome

70. A beneficiary's right to apply for further damages under a PDO passes, on death, to their estate, and may be advanced by their executor. I will therefore order that the applicant be substituted as the claimant in these proceedings so as to enable him to pursue an application for further damages under the PDO.