IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

No. CO/3602/2019

Neutral Citation Number: **[2019] EWHC 3238 (Admin)**

Royal Courts of Justice

Thursday, 7 November 2019

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

THE QUEEN
on the application of
(1) FREDERICK BATES
(2) ELEANOR BATES — Claimants

- and -

SIR BRIAN LANGSTAFF
as Chairman of the Infected Blood Inquiry — Defendant

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MISS J. KENTRIDGE (instructed by MLaw) appeared on behalf of the Claimants.

MISS J RICHARDS QC and MR M. HILL (instructed by the Government Legal Department) appeared on behalf of the Defendant.

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**J U D G M E N T**

MRS JUSTICE COCKERILL:

1 This is a case about the ability of two individuals who were infected, or affected, by contaminated blood or blood products during the 1970s and 1980s to be represented at The Infected Blood Inquiry, which is currently ongoing, by a specific legal representative who they have personally selected, and in whom they have placed their trust.

2 The first Claimant is Mr Bates, who is a haemophiliac who was infected with Hepatitis A, B and C as a consequence of his treatment for haemophilia. He is now 70 years old. He discovered in the 1990s, as a result of investigations that he instigated, that he had been infected. Long before that, however, in the early 1980s he had become too ill to remain in employment, and he was forced into premature retirement at the age of 33. That has led to considerable financial hardship for himself, his wife Eleanor, who is the second Claimant, and their two children.

3 Despite the hardships which his illness has forced upon the Claimants and the many difficulties which they have faced, they have been tireless campaigners for the proper recognition of, and compensation for, those affected with Hepatitis viruses as a result of treatment with contaminated blood products. They have campaigned by writing letters to Members of Parliament, they have attended the surgeries of their local MPs, they have campaigned at the House of Commons, they have done research for a group set up to support those infected with Hepatitis C. As a result of all of that work, the Claimants have been recognised as "core participants" (as the terminology goes) at The Infected Blood Inquiry.

4 The reason why they are here, represented before the Court today, is that the Defendant, the Chair of the Inquiry, has refused to recognise their selected solicitors as recognised legal representatives within the terms of the Rules.

5 The further background to this is that on 28 February 2019 the Claimants authorised a firm called MLaw to act on their behalf in relation to the Inquiry. I have had it explained to me, and I entirely accept, how much effort was put into that determination and how very important it is to them.

6 On 11 July 2019, MLaw applied for the Claimants to be recognised as "core participants" in the Inquiry, and those applications ask that MLaw be recognised as the legal representatives of the Claimants. Documents which evidence the lobbying and campaigning for address and for the public inquiry, evidencing the work which the Claimants had done, were attached to the applications. By determinations dated 29 August 2019 the Defendant decided that each of the Claimants would be grant "core participant" status, but he refused to designate MLaw as their "recognised legal representative". This is an approach which he has taken in relation to some other applications for "core participant status" also. The terms of that refusal are set out at paragraph. 14 of the Claimants' skeleton:

> "8. I should add a word about the designation of Mr Bates' recognised legal representative ('RLR'). The same considerations that I set out in my determination dated 22 March 2019 also apply to him. His interests and the facts that he is likely to rely upon are similar to those of other core participants, bringing him within the operation of Rule 7. Equally I see no reason why it would not be fair and proper for him to be represented by one of the firms which are already representing other core participants. Mr Bates may nominate a law firm already recognised for

the purposes of the Inquiry to be his RLR - those I consider to be potentially appropriate are Collins Solicitors, Eversheds Sutherland, Leigh Day, Thompsons Solicitors Scotland, Watkins and Gunn, Hudgell and Milners Solicitors. Though he has already engaged MLaw in respect of making a statement, and in making this application successfully, Rule 7 is such that I cannot recognise MLaw as his legal representative more generally for purposes of the Inquiry.

9. If it is the case that Mr Bates does not wish to engage a qualified lawyer who has already been recognised for the purposes of the Inquiry in respect of core participants, he may participate in the Inquiry as an unrepresented core participant. Should Mr Bates not inform me of which option he elects by 30 September July 2019, or seek more time within which to make a choice, I will assume he has chosen to participate as an unrepresented core participant."

7 The decision cross-refers to another decision in a related case, namely one of 22 March 2019. So far as relevant this says:

"I have no doubt that it would be fair and proper for [them] to be represented by one of those firms which are already recognised as representing other core participants. Put the other way around, there is no reason why it would be unfair or improper for that to happen.

8. MLaw makes a powerful case that it has extensive experience in inquiry work, specifically in relation to infected blood. It has much to offer many clients. These features cannot however trump the provisions

> of the Inquiry Rules 2006. It follows from what I have said above that I am not free to recognise MLaw as the legal representative of [*that individual*] This is because Rule 6 does not apply because their circumstances fall within Rule 7: I consider the interests they have in the outcome of the Inquiry are similar to those of many other core participants; the facts they are likely to rely on in the course of the Inquiry are similar; and that it is fair and proper for them to be jointly represented with some of those others. Accordingly, despite the submissions made to me, I must reject this application . . .”

8 The Claimants seek to challenge the Defendant's decisions refusing to designate MLaw as their recognised legal representative because of the very great concern which they have to have available to them those legal representatives they have so carefully selected, and in whose expertise they have so much faith. This is very clear to me, and their position is, I should make plain, entirely understandable.

9 The first and really main ground of challenge is that the Defendant misinterpreted and misapplied Rule 7 of the Inquiry Rules 2006 ,(“the 2006 Rules”). A further ground of review, although it was accepted that it is, in essence, hand in glove with the first ground, is that viewed in context, and in the light of the importance of the issues at stake for the Claimants, the Defendant's decisions were irrational.

10 Permission to apply for judicial review was refused on the papers by Chamberlain J on 18 October 2019. There is a related case ( *R (AB) v Chairman of the Infected Blood Inquiry* (CO/3617/2019) in which application for permission has been adjourned to a rolled-up hearing which is listed to take place on 20 November 2019.

11 On 25 October 2019 the Claimants filed this application to renew their application for permission, which has taken place before me this morning. During the course of the submissions which have been made, I have been very much assisted by detailed and careful skeleton arguments lodged by both parties, and by the oral submissions of Miss Kentridge, who appears for the Claimants.

12 The case, as now advanced, focuses on the first ground, the main issue being that the Rules were construed more narrowly than was necessary, and what is added by way of expansion, though the Defendant would say that they are new grounds in themselves, are four so-called anomalies:

(i) The approach taken in relation to the Claimants was inconsistent with the approach taken by the Defendant in relation to the approval of four other legal representatives at an earlier stage.

(ii) The approach gives rise to unintended consequences, because if Rule 6 is the only gateway to the designation of an additional recognised legal representative for a "core participant". The Claimants can never achieve this because, as between the two of them they necessarily fall within the terms of Rule 7.

(iii) The explanation adopted erroneously places upon "core participants" such as the Claimants, the burden of showing that the condition specified in Rule 7(1) are not met when the terms of Rule 7 make clear that the questions of whether these conditions are met are an assessment to be made by the Defendant at each case.

(iv) The approach fails to take into account the other language and effect of Rule 6(1)(b), in particular a dichotomy which is said to arise as regards to the approach to witnesses.

13 Despite the fullness and care with which this case has been argued, I am not persuaded that the points relied are arguable. I will start with the legal backdrop. The Inquiry is established under section 1 of the Inquiries Act 2005 ("the 2005 Act"). Pursuant to sections 3 and 4 of the 2005 Act, the Defendant was appointed to undertake the Inquiry alone. The Terms of Reference were set out in accordance with section 5 of the 2005 Act.

14 Section 17(3) of the Inquiries Act 2005 ("the Act") provides:

> "**17 Evidence and procedure**
>
> …
>
> (3) In making any decision as to the procedure or conduct of an inquiry, the Chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

15 Matters of evidence and procedure in relation to the Inquiry are governed by the Inquiry Rules 2006 (SI 2006/1838) ("the 2006 Rules"). So far as material, these provide:

> **"Core participants**
>
> **5.**—(1) The Chairman may designate a person as a core participant at any time during the course of the inquiry, provided that person consents to being so designated.

(2) In deciding whether to designate a person as a core participant, the Chairman must in particular consider whether—

(a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;

(b) the person has a significant interest in an important aspect of the matters to which the inquiry relates; or

(c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.

….

**Recognised legal representative**

**6.**—(1) Where—

(a) a core participant, other than a core participant referred to in Rule 7; or

(b) any other person required or permitted to give evidence or produce documents during the course of the inquiry, has appointed a qualified lawyer to act on that person's behalf, the Chairman must designate that lawyer as that person's recognised legal representative in respect of the inquiry proceedings.

**7.**—

(1) This Rule applies where there are two or more core participants, each of whom seeks to be legally represented, and the Chairman considers that—

(a) their interests in the outcome of the inquiry are similar;

(b) the facts they are likely to rely on in the course of the inquiry are similar; and

(c) it is fair and proper for them to be jointly represented.

(2) The Chairman must direct that those core participants shall be represented by a single recognised legal representative, and the Chairman may designate a qualified lawyer for that purpose.

> (3) Subject to paragraph (4), any designation must be agreed by the core participants in question.
>
> (4) If no agreement on a designation is forthcoming within a reasonable period, the Chairman may designate an appropriate lawyer who, in his opinion, has sufficient knowledge and experience to act in this capacity."

16 The Claimants' first ground of challenge against the Defendant's refusal to designated MLaw as their recognised legal representative is that it derives from an incorrect interpretation of Rule 7 of the 2006 Rules. Their second ground is that, views in its full context, and in light of the importance of the issues at stake for the Claimants, the refusal was irrational.

17 As the Defendant submitted, the exercise which I have to perform is, to some extent, informed by the fact that the Body whose decision is sought to be challenge is an Inquiry. The Defendant has referred me in this connection in its ground, to some relevant law, in particular *R(On the Application of Associated Newspapers) v The Rt Hon Lord Justice Leveson* [2012] EWHC 57, the judgment of Toulson LJ, *Regina v Lord Saville of Newdigate & Ors.* [2000] 1 WLR 1855 and *R(On the Application of Decoulos) v The Leveson Inquiry* [2011] EWHC 3214. Those authorities speak with one voice. They emphasise that this Court should be very slow indeed to conclude that a Tribunal of this sort has erred or that its decision is irrational.

18 I note the submission made on behalf of the Claimants that this test places the hurdle too high. I do not accept this submission. While I do accept, as I must, what Lord Mance said in *Kennedy v The Charity Commission* [2015] AC 455 namely that the threshold for

irrationality is context specific, and while I also entirely accept that the issue here is a grave one, so too, one might say, was the context for the *Saville Inquiry* from which Toulson LJ drew in the *Associated Papers* case. The *Kennedy v The Charity Commission* case was also it must be said a case on rather different facts.

19 Although the challenge here concentrates on the question of error of law, which must be easier to establish than irrationality, the position remains, in my judgment, that plain and clear grounds for an error of law would have to be demonstrated in the final analysis for such an argument to succeed, and while the exercise in which I am engaged here is the permission stage, where the question is only one of arguability, that question of arguability arises against that background.

20 I conclude, as I have said, that the hurdle cannot be met, but I will also add that, even were the standard of review not quite so high as those authorities suggest, my conclusion on this matter, which is effectively a question of construction, would not be different in any respect.

21 One of the things which is noteworthy about this application is that, really, not a huge attempt has been made by the Claimants to construe the relevant provisions of the Rules as a coherent whole, so as to explain or justify the conclusion to which they come. Underpinning the entirety of the argument is that it simply must be wrong that the Claimants are not entitled to the legal representatives of their choice.

22 The way that the argument is put forward is, in some ways, an argument based on a misreading of the facts. The Claimants say that because other firms were appointed, for example, and because Rule 7(4) contains the word "may" it somehow follows that the Chairman can simply continue to add legal representatives for each new “core participant” recognised. This is an approach which flies in the face of sense, as well as of a coherent

reading of the relevant provisions. Further, it is the logic of the argument that the "must" provision in Rule 7(2) is actually next door to meaningless; that is a conclusion to which this Court would obviously be unwilling to make if another sensible construction offered itself. It was a striking feature of the Submissions advanced for the Claimants that no real attempt was made to grapple with what provision 7(2) did mean if it did not mean what the Defendant submitted.

23 I have said that this Court would obviously be unwilling to come to this conclusion if another sensible construction offered itself. There is another sensible construction. A sensible construction is that offered by the Inquiry, and so very carefully set out by Chamberlain J in refusing permission on the papers. I wholeheartedly endorse Chamberlain J's approach, and I am expanding on it in this judgment largely in hopes that it may assist the Claimants, for whose position I obviously have considerable sympathy, to understand why this application cannot progress.

24 The scheme set up by the Rules is clear. Rule 7(1) works out the question of who can, and should sensibly, in the interests of justice, expedition and maintaining reasonable costs, be regarded as sufficiently aligned as to be represented by one legal representative. Rule 6 ensures that where core participants are not aligned, each can have legal representation of their choice.

25 Rule 7(2) then, on its face, and in the most explicit terms, imposes a duty; that duty in any case where the conditions set out in Rule 7(1) are satisfied, is to direct that core participants whose interest in the outcome of the inquiry is similar, and in respect of whom the other conditions are satisfied, "*shall be represented by a single recognised legal representative*". The duty is clear and unambiguous, the Inquiry must do this. There is then a power, having

directed joint representation, the Chairman then has a power to designate a qualified lawyer for that purpose.

26 The potential complications are imposed by sections 7(3) and 7(4). They are essentially procedural expansions of how that power is to work. If possible, the legal representation is to be agreed. If there is no agreement within a reasonable time section.7(4) expands the "may", which appears in section7(2). The result is that the Chair does not have to designate a lawyer but he may do so, and any lawyer that he may designate must comply with certain provisions, in the sense of being an appropriate lawyer who, in his opinion, has sufficient knowledge and experience to act in this capacity. What is, however, clear there is no provision, as was tacitly submitted, that it should be the case for any participant to have representation by a lawyer whom he could trust, that is, that there is no provision guaranteeing a participant of the lawyer of his choice.

27 It appears to me, looking at the decision that, (perhaps unsurprisingly,) the Respondent's application of the Rules was faultless. First, there is the question of whether the Claimants fell within Rule 7(1). Chamberlain J said:

> "The determinations of 29 August 2019 make clear at section8 and the Defendant considered that the conditions in Rule 7(1) were satisfied in relation to the Claimants. This included the condition in Rule 7(1)(c), which the Chairman addressed in terms ('I see no reason why it would not be fair and proper for him to be represented by one of the firms which are already representing other core participants.') This was a judgment that, given his knowledge of the issues to be considered by the Inquiry, he was well placed to make. Neither the Applicant's application to be recognised as a core participant and to be represented

by MLaw, nor the Statement of Facts and Grounds contain anything to support the suggestion that this judgment was arguably unreasonable in the *Wednesbury* sense."

28 This is plainly right. There can be no challenge to the Respondent's determination that the Claimants fell under Rule 7(1), nor has one ever been suggested. I note that the Claimants accept that they "*necessarily fall within Rule 7*", however this acceptance appears to be on a different basis to that advanced by the Defendant, and a somewhat fallacious one. Their position within Rule 7 does not rest on their shared interest *inter se*, but on their shared interest with other core participants, as is apparent from the way the Defendant dealt with the matter, which was to give separate determinations to Mr and Mrs Bates - considering each of their applications in the context of the other core participants already established and who already had legal representation, thereby dovetailing with the provision of Rule 7(1).

29 As for the suggestion, which was effectively the "third anomaly" which was raised on behalf of the Claimants that the Claimants did not have an opportunity to establish that they did not fall within Rule 7(1), it was admitted that this is effectively a new ground raised at a late stage. I do not need to rule on that because it is hopeless for the reasons which I give. To the extent that it was a new ground I would, for that reason, refuse permission, and also because it is raised at a very late stage.

30 In terms of the merits of this argument, the problem for the Claimants is this: they plainly provided details about themselves and their interests with the application of a core participant status. The Defendant only had that material and the material from the Inquiry to date to work on. That is plainly the material which the Rules contemplate him using as the basis for his decision. He made that decision. The decision was one within his discretion. In each case he had to consider both the similarity of interest within subsections (a) and (b),

and whether it was fair and proper for different groups to be jointly represented; he had to do that on the basis of the material which was submitted to him. The result of that decision was one which could only be challenged on irrationality grounds and, again, subject to the caution expressed for such challenge in the authorities. The "fair and proper" condition is one which would be intensely fact dependent. The Chairman was well placed to assess whether it was satisfied on the facts of each case as Chamberlain J noted.

31 This intersects also with the Claimants' argument that there was an inconsistency between this decision and previous decisions to allow separate representation. The fact that the conditions were not satisfied in some previous cases cannot assist the Claimants. The question is whether, on the material before the Defendant, he could be satisfied that the conditions of Rule 7(1) were satisfied. He made that decision and no rationality challenge has ever been made. Any rationality challenge of that decision is now hopelessly out of time. Even now the Claimants do not actually say that they were within Rule 6.

32 It is not enough to say, as was argued before me this morning, that the Claimants took it that the Defendant was not open to this argument, when there is no sign at all of any basis for a distinction being made by any means, including, indeed, orally this morning. Further, when one considers the fact that one of the groups identified by the Defendant, which is already interested and represented, is a group of people who were infected via blood products supplied by the NHS, which is, of course, how Mr Bates was infected, it is hard to see how the conclusion that the Claimants shared interests with this group could have been subject to an irrationality challenge.

33 That being the case, the Defendant was entirely right to conclude that Rule 7 applied, and that he "must direct" the Claimants be represented by the same legal representative as those with whose interests they were aligned.

34 The Claimants suggest that the Defendant could simply have added MLaw to the list. However, again, the basis for this approach is not explained, I am afraid, remotely adequately, and Miss Kentridge, despite some pressing on my part, was not able to assist me in any great measure as to how that argument was said to sit within Rule 7.

35 I accept, as did Chamberlain J, the Defendant's submission that, on the proper construction of the Rules, if MLaw were designated as the Claimants' representatives, it would then have been necessary to consider the position of other parties who were already represented by other lawyers, and the result would have been for other participants who had been represented by other firms for some time to move from those firms to MLaw. The Claimants have naturally shied away from this conclusion, as it is obvious that the result, involving a waste of time and costs, would have been neither fair nor desirable. Although that was not spelled out in section 8 of the determination, it was part of the known factual background against which the determination must, as Chamberlain J said, be read. In that context, in my judgment, the Chairman was correct to say that, having been satisfied that the conditions were met, he could not recognise MLaw as the Claimants' representative.

36 I should also deal specifically with what was identified as the "first anomaly", which was really where most of the argument advanced on behalf of the Claimants fell, and that was the fact that other lawyers had been instructed, and the approach to the instruction of those other lawyers. The first point is that what the Defendant did in directing the other groups to have separate representation appears to have been to decide that they did not fall within Rule 7(1). He was, therefore, not exercising, as was submitted before me, a discretion under Rule 7, but under Rule 6. Although Miss Kentridge has tried to persuade me that the recognition could readily be read as occurring under Rule 7, I do not find that argument at all persuasive against the background of the lack of a coherent way of explaining how the decision works under Rule 7, against the background of the Statements of Approach and Intent, which make

it clear that the Chairman has been having regard to the exact issues which would govern whether groups fell outside Rule 7(1), such that approval for different firms would then be appropriate under Rule 6.

37 The fact that the conclusions in relation to those groups are expressed within the Statement of Approach and Statement of Intent as collective conclusions rather than individual conclusions does not affect this. What we see is effectively a grouping of individual decisions. It does not affect the basis on which the decision is made. The basis for the way in which the conclusion was arrived at is clear from the Defendant's grounds, in the Statement of Approach and, even more so, from the Statement of Intent, which explains the different groups which were represented by each firm of solicitors. I would add that on the materials which I have seen and, in particular, looking at the Statements of Approach and Intent one can readily see the ways in which the groups would not satisfy the test in Rule 7(1), and it would be appropriate for separate representation.

38 The approach sought to be taken to Rule 7 was unconvincing. What Rule 7 is plainly looking at is the question of how to deal with the possibility of a multiplicity of legal representatives, rather than a disjunction between individual applicants and joint applicants, and the approach adopted - simply to rely out of context on the words "*two or more core participants*" without trying to integrate it at all into what Rule 7 and Rule 6 together are trying to achieve -illustrated that there was really no coherent argument.

39 Like Chamberlain J, I do not accept that the challenge to the decision will significantly disadvantage the Claimants. They have the choice of being represented at public expense by any one of a number of reputable and experienced firms, which have been engaged in work on the Inquiry for some time, and who have satisfied the Chair of the Inquiry as to their suitability. The fact that the Claimants are not to be represented by their first choice firm is simply a consequence of Rule 7, which is a Rule which properly promotes the public

interest in the official conduct of Inquiries, and how that Rule operates in the context of the timeline of this case.

40 I reiterate I do entirely understand the Claimants' wish for separate representation. I entirely understand that in an ideal world this would be possible. However, the Defendant has to operate within the framework of the rules which are designed to prevent the process being slowed, and rendered unfeasibly expensive by proliferation of legal teams, much of whose work would overlap.

41 I should also deal with the supposed clash between Rule 6(1)(b) and Rule 7(2). Again, were this a question of amendment, I would not permit the amendment on the basis that it is raised late and that it is hopeless. It is simply a case of comparing apples with oranges. Witnesses will (i) have different interests to each other; and (ii) generally have little involvement in the process. Separate representation is, therefore, (i) appropriate, and (ii) cost effective. It also may not be publicly funded. Core participants, on the other hand, will be integrally involved, and their legal bills, which will be publicly funded, will be significant. It therefore makes perfect sense for there to be an arrangement for them to share representation. That is what the Rule very clearly states there is, and what must happen if the conditions of Rule 7(1) are met.

42 As to the second ground, this is not arguable in the light of my conclusion on ground 1 but, in any event, the hurdle for this argument is even higher than the hurdle for an error of law. The argument that the effect is that core participant status is being denied is not arguable, given that there is a perfectly adequate basis for the Claimants to have effective legal support. Rule 7 explicitly makes clear that a core participant is entitled to an appropriate lawyer who, if he cannot agree that lawyer with the Chairman, will be one who, in the Chairman's opinion, has sufficient knowledge and experience to act in that capacity. The

fact that MLaw may have particular skills does not mean that a decision to operate within the scope of the Rule is irrational. As Miss Kentridge realistically accepted in argument, this irrationality argument really adds nothing more than an extra resonance to the first argument. However, given my very clear conclusions on the first argument, it cannot take the matter any further.

43 For those reasons I dismiss the application.

**LATER**

MRS JUSTICE COCKERILL: Thank you. Miss Richards, I am going to allow you the costs of preparing the acknowledgement of service. I am not going to give you the costs of appearance today. It is an exceptional course, and although I have had some fairly sharp things to say about the case, I do not think it is quite at the level where I should give costs.

Thank you all very much indeed. Is there anything else we need to deal with?

MISS RICHARDS: No, my Lady.

MRS JUSTICE COCKERILL: Thank you.

**CERTIFICATE**

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