14 March 2012

PRESS SUMMARY

Ministry of Defence (Respondent) v AB and others (Appellants) [2012] UKSC 9
On appeal from [2010] EWCA Civ 1317

JUSTICES: Lord Phillips (President); Lord Walker; Lady Hale; Lord Brown; Lord Mance; Lord Kerr; Lord Wilson

BACKGROUND TO THE APPEALS

Between October 1952 and September 1958 the Respondent ['the MoD'] carried out experimental atmospheric explosions of 21 thermonuclear devices in the South Pacific, involving 22,000 soldiers, sailors and airmen [**90**]. From these servicemen are drawn the majority of the 1011 claimants in this case, most of whom caused their claims to be issued on 23 December 2004 and some of whom did so later ['the Veterans']. Some of the claims are brought by the personal representatives of veterans who have sadly died [**90**]. The Veterans allege that they were exposed to fallout radiation from the nuclear tests and that this exposure has caused illness, disability or death [**90**]; both exposure and causation are denied by the MoD.

The claims were made subject to a Group Litigation Order because they gave rise to common or related issues of fact or law [**15**]. There is an issue as to whether many of the claims are time-barred under the provisions of the Limitation Act 1980, section 11(4) of which provides that an action shall not be brought after the expiration of *"three years from (a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured*" [**2**]. The group and the MoD each selected five lead claimants for the trial of the limitation issue [**91**]. The Veterans alleged that they did not have the requisite knowledge within the meaning of the Limitation Act 1980 until 29 June 2007, some two and a half years after most of them caused their claims to be issued, when a report by Dr Rowland [the 'Rowland Report'] demonstrated an abnormal incidence of chromosomal changes in blood samples of 50 New Zealand veterans, who had served on ships that were no closer to the tests than had been most, if not all, of the Veterans, thus providing objective evidence of exposure to low dose fallout radiation [**97**]. The Veterans accept that there is no credible evidence to prove that this exposure caused their injuries [**25**]. The MoD, whilst denying both exposure and that such low-dose exposure could cause injury, contended that the Veterans knew the facts alleged more than three years before issuing their claims. At first instance, five lead claimants were found to have issued within the limitation period and Foskett J exercised his discretion under section 33 of the Limitation Act 1980 to allow the remaining five cases to proceed [**104**]. The Court of Appeal held that nine of the claimants had acquired knowledge more than three years before proceedings were commenced and that Foskett J had erred in the exercise of his discretion under section 33, so that none of the nine claims should be permitted to proceed [**105**]. The nine claimants appeal to the Supreme Court.

This appeal raises three issues: (i) how is knowledge to be defined for the purposes of section 11(4) of the Limitation Act 1980; (ii) is it possible for a claimant to commence proceedings before having acquired the knowledge that would normally cause time to run, and if so what is the proper approach of the court to such proceedings; and (iii) should the court exercise its discretion under section 33 of the Limitation Act 1980 to allow the claims to proceed in the event that they had not been commenced within the limitation period?

JUDGMENT

The Supreme Court dismisses the appeal by a 4-3 majority; Lord Phillips, Lady Hale and Lord Kerr dissenting.

REASONS FOR THE JUDGMENT

The Limitation Act 1980 ['the 1980 Act'] provides that the limitation period is to be triggered by a claimant's actual or constructive knowledge of certain facts [**111**]. Two questions arise in respect of knowledge: firstly, *what* is it that the claimant has to know at the date of knowledge? Secondly what state of mind, assessed subjectively or objectively or a mixture of the two, amounts to knowledge for this purpose [**30**]? What the claimant must know depends on the interpretation of section 14(1) of the 1980 Act, in particular section 14(1)(b) which provides that one of the facts is that "*the injury was attributable in whole or in part to the act or omission which is alleged to*

constitute negligence, nuisance, or breach of duty" [**30**]. "*Attributable*" refers to causation and means capable of being attributed or ascribed to [**34**], and has been interpreted as directed to a real possibility of a causal link [**35**]. It is a legal impossibility for a claimant to lack knowledge of attributability for the purposes of section 14(1) after issuing his claim [**3, 70**]. The Claimant must verify his claim form by a statement that he '*believes*' that the facts stated in it are true, which can be regarded as an explicit recognition that he has knowledge for the purpose of section 14(1) [**3**]; further, the inquiry mandated by section 14(1) is retrospective [**4**] and is predicated on the assumption that there is a valid cause of action [**2**].

A claimant is likely to have developed the requisite state of mind to amount to knowledge of the facts specified in section 14(1) when he first came *reasonably* to believe them [**11, 50**], that is to say that he held a belief which is more than a mere suspicion, but rather is held with sufficient confidence to justify that he should reasonably begin an investigation into whether he has a valid claim and, if so, how that claim can be established in court [**12**], and which also carries a degree of substance rather than being the product of caprice [**11**]. The test is objective, without regard to a claimant's personal characteristics, which can be taken into account at the later stage of exercising discretion under section 33 of the 1980 Act [**47**]. A distinction is to be drawn between knowledge of the 'essence' of a claim and the evidence necessary to prove it to the requisite legal standard [**58**]. The facts by reference to which limitation are to be assessed are those pleaded or later asserted, and the question is not whether those facts give rise to a good claim in law [**86**]. Once the requisite knowledge has arisen, evidential difficulties confer no right to a further, open-ended, extension of the limitation period [**25**].

A claimant will not always have acquired knowledge by the date when he first consults an expert [**13**]. Section 14(3) recognises that some facts may be ascertainable only with the help of experts, so the court will have regard to the confidence and the substance of a claimant's belief prior to consulting an expert and the effect on that belief of receipt of the expert's report [**13**]. An expert may assist a claimant in acquiring knowledge of the facts required by section 14 or he may provide evidence to help him substantiate the claim [**14**].

Application of this test to the facts of the nine lead cases [**16 – 24**] drives a conclusion that, prior to three years before issue, each reasonably believed that their injuries were capable of being attributed to the nuclear tests, particularly in light of their many private and public statements about the cause of their conditions, the nation-wide campaign for compensation, applications for war pensions and applications to the ECtHR [**25**], as well as the fact that it was common knowledge from at least the 1980s that exposure to fallout radiation could cause leukaemia, many other forms of cancer, infertility and other serious injuries [**63**]. The difficulty for the Veterans had been to produce cogent evidence, whether from their individual medical histories or from epidemiological material, that the dose of radiation was sufficiently high to establish a causative link with their injuries [**64**]. The Rowland Report was evidential, rather than assisting the Veterans in acquiring knowledge of the essence of their claim [**64**].

The Court of Appeal correctly declined to exercise its discretionary power under section 33 of the 1980 Act to disapply section 11 [**26**]. Having weighed all the other relevant factors [**26**] and in light of its unusual advantage in the mass of detailed material summarised by the judge [**27**], that Court held that the Veterans had very great difficulties in establishing causation. The fact is that the Veterans' claims have no real prospect of success and it would be absurd to disapply section 11, only for their claim inevitably to be struck out [**27**].

The minority considers, however, that knowledge and belief are different concepts [**174**], and that a claimant's subjective belief is not a sensible basis for deciding whether the claim is time-barred [**168**]. A claimant can be said to have '*knowledge*' only when he has a reasonable belief that is founded on known fact [**141**] or objective fact [**170**]. It is even possible for a claimant to lack knowledge of attributability at the time when he issues his claim so that the limitation period has yet to begin to run [**146**]. At the time when the Veterans issued proceedings, there were no known facts capable of supporting a belief that their injuries were attributable to exposure to ionising radiation [**139**], thus none of the claims is time-barred. Lord Phillips would have held that the initiation of the group action did not constitute an abuse of process and it would not have been right to strike it out on that basis [**153**], and, although the Veterans do not have a reasonable prospect of success, the Court of Appeal was correct not to grant the MoD summary judgment in the absence of a formal application [**158**]. Lord Kerr agrees that it was correct not to strike out proceedings and to refuse to grant summary judgment [**212**, **214**].

References in square brackets are to paragraphs in the judgments.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
www.supremecourt.gov.uk/decided-cases/index.html