Neutral Citation Number: [2020] EWHC 771 (QB)

Case No: HQ15A05254

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE BRITISH STEEL COKE OVEN WORKERS LITIGATION
THE HON MR JUSTICE TURNER
CHIEF MASTER GORDON-SAKER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

MAURICE HUTSON & ORS	**Claimants**
- and -	
TATA STEEL UK LIMITED	**Defendant**

- -
- -

Benjamin Williams QC (instructed by **Irwin Mitchell LLP** and **Hugh James Solicitors**) for the **Claimant**
Roger Mallalieu QC (instructed by **BLM**) for the **Defendant**

Hearing date: 20 March 2020

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10:30 on Friday 3 April 2020.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. In this group action, it is alleged that some of those employed by the defendant's predecessors over the years were exposed to dust and fumes at work and, as a result, went on to develop occupational diseases involving mainly, but not exclusively, respiratory conditions. The defendant is liable to compensate the claimants in respect of their injuries in so far as they may be proved to have been tortiously caused.

2. The litigation is subject to a costs budgeting regime. For this purpose it has been divided into phases. The costs for each phase are budgeted at the commencement of the phase to which it is intended to apply. Phase 1 commenced on 13 March 2018 and concluded on 20 March 2020 whereupon phase 2 commenced.

3. Before proceeding further, I wish to express my gratitude to Chief Master Gordon-Saker who was appointed under section 70 Supreme Court Act 1981(1) to assist me as an assessor.

4. Three issues arose at the CCMC:

   (i) The claimants apply retrospectively to amend their phase 1 budget to increase the sums to be allowed in respect of two categories of expenditure;

   (ii) The claimants seek to put forward sums in respect of items within the forthcoming phase 2 budget period in excess of those which the defendant is prepared to agree;

   (iii) The parties are in dispute over the appropriate order for costs arising from a hearing on 5th November 2019.

5. I will deal with each issue in turn.

PHASE 1 VARIATION

6. The claimants wish to amend their budgeted costs for phase 1 in respect of two elements. Case Management Conference ("CMC") and Costs Case Management Conference ("CCMC") costs to be increased by £125,548.82; and Group Co-ordination costs to be increased by £249,996.

7. The Court's jurisdiction to entertain such an application is said to be founded upon PD 3E para 7.6 which provides:

> "7.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the

> amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed."

8. The "significant developments" relied upon by the claimants arise from an unsuccessful application by the defendant to have the question of limitation tried as a preliminary issue which it is said resulted in the prolongation of the procedural timetable by about a year thereby giving rise to unforeseen additional expenditure. For full details regarding the nature and outcome of the application, reference can be made to ***Hutson v Tata Steel UK Ltd (formerly Corus UK Ltd)*** [2019] EWHC 1608 (QB).

9. As for timing, the claimants argue that under CPR 3.15, the court retains full powers of control over all costs after the initial case management order regardless of whether such control is exercised prospectively or, as in this case, retrospectively:

> "3.15(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs."

10. The defendant contends that the costs budgeting regime is intended, on a proper and purposive construction of the Rules and Practice Direction, to permit variation only in respect of future costs regardless of the timing of the preceding costs management order.

11. The various competing arguments are set out in Cook on Costs 2020 at Chapter 15.8 in which the authors conclude that the position "remains far from clear".

12. In ***Sharp v Blank*** [2017] EWHC 3390 (Ch) Chief Master Marsh concluded that the jurisdiction to make a retrospective variation did exist. That decision is not, however, binding on this Court.

13. For the sake of argument, without, however, purporting to reach any concluded view on the issue, I am prepared to assume that the Rules equip the court to exercise such a power. Nevertheless, that is not an end of the matter.

14. The first remaining hurdle which the claimants must surmount is to satisfy the "significant developments" criterion. At first blush, one might be tempted to assume that the defendant's unsuccessful limitation application fell into this category. However, although the application can fairly be said

to have been unforeseen it is less clear that the consequences were significant. At this stage, it is necessary to bear in mind that the claimants have already been awarded their costs of defending the limitation application itself therefore the "developments" relied upon must largely relate to the collateral impact of the delay.

15. Upon closer examination, it can be seen that the consequences of the procedural delay would be expected to be relatively modest economically. A CMC listed for 24 January 2019 had to be aborted as did the CCMC listed in May 2019. A further delay was caused by my own unavailability arising from the demands of other professional commitments. As a result, the CMC was relisted to be heard on November 2019.

16. As Picken J observed in ***Churchill v Boot*** [2016] EWHC 1322 (QB), a lengthy adjournment (in that case, one of between six to nine months) does not necessarily amount to a significant development.

17. I agree with the defendant that the claimants have failed to produce adequate evidence justifying the categorisation of the delay as being a significant development. Their approach to calculating the figures is based on the assumption that the costs of group co-ordination will have increased pro rata over time. However, as the defendant points out, the heavy lifting of group-co-ordination is already covered by budgeted costs and, upon closer examination, the additional costs of the delay are likely to prove to be modest. Similarly, the increased costs of the CMC/CCMC are based on the assumption that the entirety of the work which would have been done in the adjourned hearing was duplicated. Again, I consider that this is pitching the case significantly too high.

18. Furthermore, I must observe in passing the extent to which some elements of the claimants' proposed budgets in this litigation have often very significantly exceeded what the court has been prepared to allow.

19. I recognise that the costs budgeting process must be much broader than that which is involved in an assessment. Nevertheless, in this case, I am unable to take the leap of faith which would be required to categorise the delay caused by the determination of the limitation issue as being a development which was significant.

20. In any event, the court has a discretion as to whether or not to allow a variation even where there have been significant developments.

21. In this context, the court must remain mindful of the provisions of CPR 3.18 which provide, in so far as is material:

> "**Assessing costs on the standard basis where a costs management order has been made**

> 3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –
>
> (a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;
>
> (b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so;…"

22. The defendant argues that the proper time for consideration of any deviation from the phase 1 budget is at the time of assessing costs under CPR 3.18.

23. In the particular circumstances of this case, I agree.

24. The sums in respect of which the variation is sought are very considerable indeed and the justification for pitching them at the levels proposed is painted with such a broad brush as to preclude proportionate scrutiny. In ***Sharp***, the budget had been set in a conventional way with a complete budget through to trial. In contrast, in this case, the procedural structure is and was always intended to result in a compartmentalisation of budget considerations into separate phases. It is less easy to justify the variation of a budget with respect to a phase which has been entirely concluded and in respect of which all costs have already been incurred.

25. It follows that I decline to vary the phase 1 budget. If the claimants wish to justify expenditure which exceeds that which has already been budgeted for then the way forward is for them to demonstrate "good reason" at the assessment stage. The claimants must therefore pay the defendant's costs of the variation application before us and arising from the hearing of 5th November 2019.

PHASE 2

26. The disputes with respect to phase 2 relate entirely to the claimants' costs. The defendant's cost budget has been agreed. There are five controversial items.

CMC/CCMC

27. In respect of phase 2, the claimants estimate the budgeted costs at £340,000, which is the same figure as that which was approved by the Court in respect of phase 1. It is anticipated, as with phase 1, that there will be one case management conference and one costs and case management conference. Neither is expected to last longer than a day. The defendant suggests £125,000 to be the appropriate figure.

28. The claimants' breakdown anticipates the deployment of 1,052 hours of fee-earner time, of which only 47 hours represents costs lawyers' time, which seems oddly low as a proportion of the total. Counsel's fees account for £65,550 of the total.

29. Presently, it seems unlikely that the directions required at the third CMC will be particularly controversial and counsel's fees should be lower than the budget predicts. The hourly rates, upon which the budgets are based, for the grade B, C and D fee earners and for the costs lawyers seem higher than would probably be allowed on detailed assessment. The predicted number of fee earner hours appears obviously excessive for the work necessary for two interlocutory hearings. Paragraph 7.4 of Practice Direction 3E requires the court to take incurred costs "into account when considering the reasonableness and proportionality of all subsequent budgeted costs". Given that the claimants have incurred £876,926 so far, that is an important factor and an indication of an over-generous approach to the time anticipated for the next phase. In all the circumstances £150,000 is a reasonable and proportionate figure for phase 2.

Group co-ordination

30. The claimants incurred £1,111,962 before the commencement of phase 1 and £474,659 during phase 1. The budgeted figure for phase 1 was £250,000 and the difference was the subject of the failed application to vary the budget. The claimants anticipate spending a further £437,493 in phase 2, giving a total to the end of that phase of £2,024,114. This is redolent of a degree of financial incontinence. The claimants' breakdown anticipates 1,659 hours of fee earner time and £24,300 in counsel's fees.

31. The defendant offers £30,000.

32. The register of claimants has now closed and it is unlikely that much work will be required to maintain it. The work likely to be done in this phase will involve keeping the claimants informed of developments and communications between their solicitors in relation to what is happening in this period, namely: disclosure, selection of the lead claimants and pleadings. The cost of doing that will doubtless exceed the figure suggested by the defendant. However, the number of hours which the claimants' solicitors anticipate is clearly too high.

33. Again the relevant factors are: the hourly rates, the number of hours anticipated and the substantial amount already incurred. A reasonable and proportionate figure for the budgeted work would be £200,000.

Disclosure

34. The claimants incurred £616,111 on disclosure before the commencement of phase 1 and £761,842 during phase 1. Disclosure was not subject to

budgeting in phase 1. In addition to the costs incurred to date of £1,377,953, the Claimants anticipate further costs of £1,754,042, giving a total for disclosure to the end of phase 2 of £3,131,998. The claimants' breakdown for phase 2 predicts the expenditure of 8,110 hours of fee earner time.

35. The claimants' estimate was based on a prediction that the defendant's disclosure would consist of about 12,000 documents. In fact the defendant now expects to make disclosure of between 4,500 and 7,500 documents. On behalf of the claimants, Mr Williams QC realistically accepted that this should lead to a reduction in the work required and a corresponding reduction to the budgeted costs.

36. In relation to the claimants' own disclosure, given the amount of costs already incurred, much work must already have been done. 624 documents have been disclosed so far. The nature of the claims means that it is likely that the claimants' disclosure will be significantly less than the defendant's disclosure. Indeed, by comparison with other group litigation, this is not a very heavy documented case.

37. The defendant suggests £560,000 which is a similar sum to that in its own budget.

38. While the claimants' disclosure is likely to be less than that of the defendant, the documents they disclose will be coming from a wider range of sources and will require more work to unearth. Further, because the claimants are not represented by a single firm of solicitors, more fee earners will be involved. That said, the amount of fee earner time predicted, in addition to the costs already incurred, seems far too high. In all the circumstances, £750,000 would be a reasonable and proportionate sum for phase 2.

Lead Claimant selection

39. The claimants incurred £4,047 before the commencement of phase 1 and £182,075 in phase 1 (against an approved budget figure of £275,000). They anticipate incurring £670,350 in phase 2. Their breakdown postulates 2,201 hours of fee earner time and counsel's fees of £100,310.

40. The selection of the ten lead claimants and eight reserves will be an important exercise for both parties. However, if it is dealt with efficiently it is difficult to see how the amount of time anticipated could reasonably be spent. At this stage of the proceedings, the claimants' solicitors should be relatively familiar with their clients and have a reasonably clear idea of the criteria that they are likely to use in the selection. While some involvement of counsel would be expected, that is likely to be at a fairly high level of oversight and the predicted 319 hours of counsel's time is surprising.

41. The Defendant suggests £300,000. Taking into account the costs already incurred, but also the underspend in phase 1, more than that would not seem to be either reasonable or proportionate.

Lead claimants' statements of case

42. In phase 1, the claimants incurred £3,706. No figure had been budgeted. For phase 2 they look for £588,805. Their breakdown predicts a need for 1,788 hours of fee earner time and counsel's fees of £196,300.

43. It was accepted in the course of oral submissions that this work will relate only to the ten lead claimants and not their reserves. Accordingly the work will encompass drafting particulars of claim, drafting responses to requests for further information, if made, considering the defences and, if appropriate, drafting replies. While the drafting will require care, inevitably there will be some degree of duplication between the pleadings. Divided by ten, the claimants' solicitors are pitching for about £58,000 for the pleadings for each claimant. That seems surprisingly high even for industrial disease claims.

44. A reasonable and proportionate total for this work would be £200,000.

COSTS OF THE NOVEMBER CMC

45. The statements of costs filed on behalf of Hugh James and Irwin Mitchell cover the hearing on 5th November 2019 (at which the costs of the Defendant's limitation application were summarily assessed at £132,270) and the costs of that part of the hearing on 20th March 2020 which addressed the summary assessment of the costs of that summary assessment. Counsel's fees for the hearing on 5th November are apportioned at 70% of the total, which seems a realistic assessment of the time spent on this aspect.

46. The costs now claimed are £38,652 and £16,776; a total of £55,428. Excluding value added tax, that is obviously disproportionate to the summary assessment of costs allowed at about £132,000.

47. In the course of oral submissions it was accepted that the hourly rates should be limited to those allowed at the hearing on 5th November, namely: Grade A £315; Grade B £250; Grade C £195; Grade D and costs lawyers £147.

48. The statement filed by Hugh James claims 84.2 hours of solicitors' time and £6,148 (excluding value added tax) in respect of counsel's fees. This does not include drafting the bills which were the subject of assessment. As its name suggests, the summary assessment of costs should be relatively straightforward. It should not require 44 hours spent considering and drafting documents. Time travelling to and attending court and

travelling expenses should be allowed as claimed (provided that it has been apportioned at 70%). The remainder of the solicitors' time should be reduced by one half (at the revised rates) to get to a reasonable and proportionate figure. There is scope for the instruction of only one counsel but it is reasonable that leading counsel should attend given his general involvement and total fees of £3,500 for the relevant parts of the 2 hearings would seem reasonable.

49. The statement filed by Irwin Mitchell claims profit costs of £7,597. The attendances seem appropriate but the time on documents at the Grade A rate appears high. The Grade A time should be reduced by 50% but the time for the other fee earners allowed as claimed at the revised rates. Counsel's fees should be allowed at £3,500 in total.

CONCLUSION

50. We trust that our findings are sufficient to equip the parties to formulate an order reflecting the relevant costs consequences.