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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No. : 1370/5/7/20 (T)

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9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

13 Monday 28<sup>th</sup> June 2021

14  
15 Before:  
16 The Honourable Mrs Justice Joanna Smith  
17 (Sitting as a Tribunal in England and Wales)

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20 BETWEEN:

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22 Vattenfall AB & Others

23  
24 v

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26 Prysman S.P.A & Others  
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29 **A P P E A R A N C E S**

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31 Sarah Abram and Khatija Hafesji (On behalf of Vattenfall AB & Others)  
32 Anneli Howard QC (On behalf of Prysman)

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Monday, 28 June 2021

**Ruling on disclosure costs**

MRS JUSTICE JOANNA SMITH: I will deal first with the question of budgeting in relation to disclosure. However, some overarching points about budgeting have been made on both sides and I should first briefly set out my views on those points. On the issue of proportionality, Ms Howard QC on behalf of the Defendants submits that whilst this case is complex, the Defendants do not consider that its total value is the £37 million identified by the Claimants, but rather (if it is worth anything at all) a more modest figure of between £6-12 million. Against this figure she points to combined costs budgets of over £12 million. Ms Howard accepts that the Claimants have a greater burden in proving their case at trial and she also accepts an asymmetry of information between the Claimants and the Defendants which will inevitably increase the Claimants' costs of the proceedings, but she submits that this disparity does not justify the costs in respect of which objection is made today. Amongst other things, she points out (i) that the Defendants have sought to streamline the disclosure process by giving access to the Defendants to key documents straight away, (ii) that at least two of the experts on the Defendants' team have been involved in other parallel proceedings and so should already have a regression model in place or at least developed an appropriate methodology and (iii) that although there are obviously restrictions on the use to which the Defendants' experts can put material obtained in different proceedings, some of those restrictions have "broken down" owing to the fact that one of the parallel sets of proceedings has been heard in open court.

Ms Abram, on behalf of the Claimants responds that £37 million is not in fact the maximum value of the case, that there are two claims relating to wind farms

1 that have not yet been quantified and that this case dates back to 1999 and  
2 that interest, whether calculated on a simple or compound basis, will be  
3 substantial. On the question of the involvement of her clients' experts in  
4 parallel proceedings she points out that the obligations under CPR 31.22 are  
5 binding and must be respected.

6 On the question of the value of the claim, I cannot determine at this early stage  
7 whether it is presently over-valued by the Claimants. Accordingly, by  
8 reference to the notes at CPR 3.15.3, it seems to me that I must err on the  
9 side of accepting the Claimants' position. As against a value of £37 million  
10 plus interest (and in circumstances where there appear to be two claims that  
11 have not yet been quantified), I cannot see that the present cost budgets are  
12 disproportionate. I note, however, that if the claim succeeds, but it transpires  
13 that the Defendants' assertion as to the real value of the claim has been  
14 correct, then it will be open to the Defendants to argue that this amounts to a  
15 good reason to depart from the last approved budget.

16 I shall return to the involvement of the Claimants' experts in other proceedings when  
17 I come on to deal with the Claimants' Estimated Costs in relation to Experts.

18 Against that background and bearing firmly in mind that there is no basis to find that  
19 the costs estimated on either side are disproportionate to the overall value of  
20 the claim, I now turn to deal specifically with the questions that arise on the  
21 Claimants' proposed Cost Budget for the Disclosure stage in relation, first to  
22 incurred costs, and second to estimated costs going forward.

23 Insofar as the incurred costs are concerned, approximately £1.3 million has already  
24 been incurred by the Claimants in relation to disclosure. This has involved the  
25 review of something in the region of 51,000 documents, with disclosure being  
26 given of approximately 15,000 of these documents. By comparison, the

1 Defendants have spent approximately £460,000 and have disclosed 19,000  
2 documents. I am invited by Ms Howard QC, on behalf of the Defendants, to  
3 record my comments in relation to these costs and to take them into account  
4 when considering the reasonableness and proportionality of the budgeted  
5 costs (see CPR 3.17(3)(b)).

6 On the face of it, the costs that have already been incurred appear to be very  
7 substantial. However, I do not consider, in light of the arguments that  
8 Ms Abram, on behalf of the Claimants, has rehearsed before me today, that  
9 I am in a position to assess with any degree of confidence whether those  
10 costs have been properly incurred. In particular, I note that (i) much of the  
11 disclosure provided by the Defendants has been “re-packaged” from  
12 disclosure given in other proceedings; (ii) given the Defendants’ involvement  
13 in other parallel proceedings they are likely to have conducted many similar  
14 disclosure exercises and to know where documents (not otherwise disclosed  
15 in previous proceedings) would be located. This contrasts sharply with the  
16 fact that the Claimant has had to start from scratch with a disclosure exercise  
17 spanning five jurisdictions and dating back over 20 years. Ms Howard very  
18 reasonably accepted that, in the circumstances, there could be no expectation  
19 of parity between the Claimants’ costs and the Defendants’ costs.

20 Having said that, I certainly accept from Ms Howard that there does appear to be, if  
21 I can put it in this way, at least some uncertainty around the very substantial  
22 costs that have been incurred at partner and senior associate level in relation  
23 to disclosure to date. On the face of things, these costs seem to me to  
24 exceed the costs that one might expect to be incurred in simply providing  
25 direction and instruction to an eDisclosure provider so as to facilitate and  
26 inform the contracting out of the disclosure to a different firm of solicitors, in

1 the way that Ms Abram has described.

2 However, I have no evidence about that, just as I have no evidence about the costs  
3 incurred by the experts in relation to disclosure (which Ms Howard suggests  
4 may be duplicated elsewhere in the budget). Accordingly I am not in a  
5 position, it seems to me, to judge whether there has been, or will be, a  
6 duplication of costs in relation to the experts, or indeed whether there has  
7 already been inappropriate and disproportionate time spent by solicitors at a  
8 senior level in relation to disclosure.

9 Therefore, whilst I make those comments, I am not going to take the incurred costs  
10 into account when considering the reasonableness and proportionality going  
11 forward, because I don't think it's appropriate that I should do so where I am  
12 simply not in a position to judge one way or the other the reasonableness of  
13 those incurred costs.

14 Looking then at the question of the estimated costs going forward, and having regard  
15 to the offers made by the Defendants in relation to those costs, I am bound to  
16 say that the difference between the parties does not appear to me to be  
17 terribly great.

18 I am grateful to the Defendants for indicating their agreement to the costs of the  
19 eDisclosure provider, and so I accept the budget of £65,000 presented by the  
20 Claimants in relation to that.

21 That leaves only two items in dispute, namely (i) the time costs of £290,000, which  
22 for practical purposes now concerns the review by the Claimants' legal team  
23 of the Defendants' and the Third Parties' disclosure going forward, and (ii) the  
24 expert costs of £190,000 in relation to the experts' review of that disclosure.

25 Dealing first with the time costs, the Defendant has offered £200,000 and I am bound  
26 to say that, in light of the extent of the disclosure that the Claimants will now

1 need to review (and having regard to the comparison suggested by Ms Abram  
2 between the likely cost per document for the Claimants and the Defendants in  
3 carrying out their respective reviews), it doesn't seem to me that £290,000 is  
4 either unreasonable or disproportionate.

5 The Claimants have substantially more documents to review than the Defendants,  
6 something in the region of 22,000 (as opposed to 15,000 to be reviewed by  
7 the Defendants) and doing the best I can and taking a relatively broad brush  
8 approach, the £290,000 it suggests for completing this exercise doesn't seem  
9 to me to be out of kilter.

10 In my judgment, the same applies to the proposed expert costs of reviewing the  
11 disclosure; the Defendants are offering £125,000, and again I do not at the  
12 moment see that £190,000 is disproportionate or unreasonable, in light of the  
13 extent of the review that will be necessary. I see no basis for inferring that  
14 there is any duplication between these costs and the costs of preparation of  
15 the expert report.

16 So, I am going to approve the claimants' budgeted costs for the disclosure stage.  
17 And insofar as I've made comments about the incurred costs they can no  
18 doubt be raised in future should that be appropriate or necessary.

### 20 **Ruling on experts' costs**

21 I am now called upon to assess the costs in relation to the expert reports stage of the  
22 Claimants' budget. The Claimants' incurred costs in relation to this stage are  
23 approximately £370,633, and their estimated costs going forward are just shy  
24 of £1.7 million, which would make a total of just over £2 million if I were to  
25 permit that.

26 The Defendants have offered circa £477,000 for the estimated costs stage going

1 forward, and the Defendants themselves are looking at a spend on experts of  
2 £674,700, so roughly a third of the total that the Claimants anticipate spending  
3 on their experts.

4 I am afraid that I have considerable sympathy with Ms Howard's submissions as to  
5 the costs of this stage. It does seem to me that the amount that the Claimants  
6 are proposing to spend (whilst an amount that they are entitled to spend with  
7 a view to ensuring a 'Rolls Royce' service) is not one that should be visited on  
8 the Defendants in this case.

9 I hear Ms Abram's submissions that the Claimants are required to deal with two sets  
10 of Defences, that they have to go first in the sequential exchanges of experts'  
11 reports and that they have to reply, and further that they have no visibility over  
12 the evidence that is going to be served by the Third Party, Nexans. But taking  
13 all of that into account, and whilst I do not consider that there should be parity  
14 with the Defendants' costs, I consider that the current proposed estimated  
15 costs are not reasonable or proportionate. I accept that two of the Claimants'  
16 expert team have had an involvement in the parallel proceedings and whilst  
17 they cannot breach their obligations in relation to those proceedings, they will  
18 have gained an understanding of the infringement and the market which will  
19 no doubt be of assistance here.

20 Accordingly I am going to reduce those costs. It is inevitable that I must take a broad  
21 brush approach, and doing the best I can I am going to allow the Claimants a  
22 further £1 million in total to deal with the expert stage going forward (to  
23 include experts' fees, solicitors' fees and counsels' fees). In my judgment this  
24 should provide them with a reasonable and proportionate amount having  
25 regard to the factors that Ms Abram has identified. That the Claimants'  
26 recoverable spend will then be a little over twice what the Defendants will

1 spend appears to me fairly to reflect the asymmetry of information between  
2 the parties.

#### 4 **Ruling on trial costs**

5 MRS JUSTICE JOANNA SMITH: I can deal with the Claimants' estimated Trial  
6 Costs quite briefly.

7 The Claimants are seeking solicitors fees for the trial stage of roughly £487,000 and  
8 expert fees of £61,000 which Ms Abram tells me equate to roughly eight or  
9 nine days of the experts attending the trial. The offers made by the  
10 Defendants as against that are £307,000 in relation to the solicitors' fees and  
11 £50,000 in relation to the experts' fees. I don't know what that £50,000 is  
12 based on in terms of attendance by the experts at trial.

13 Doing the best I can, I consider that the figure as it currently stands for solicitors' fees  
14 is disproportionate and unreasonable in circumstances where it includes  
15 10 hours a day for a partner for the full five weeks of the trial. It does not  
16 seem to me that that is reasonable or proportionate. Of course, the Claimants  
17 are fully entitled to instruct and pay a partner to do ten hours work a day for  
18 that period of time, but it doesn't seem to me to be appropriate for the  
19 Defendants to pay for that.

20 So, again taking a broad brush approach, I am going to allow solicitors' fees at  
21 £400,000 for the trial stage. I am going to allow the whole amount of £61,000  
22 in relation to the experts because I have been told by Ms Abram that it is likely  
23 that the expert evidence may take two weeks of the trial. Ms Howard has not  
24 dissented from that and in the circumstances, it seems to me that £61,000 is  
25 likely to be a realistic and proportionate estimate.

## Ruling on counsels' fees

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2 MRS JUSTICE JOANNA SMITH: I can deal with the Defendant's estimated counsel  
3 fees for trial quite briefly.

4 I was taken to an authority, *Deutsche Bank AG v Sebastian Holdings Inc* [2020]  
5 EWHC B24 (costs), in particular paragraphs [57] and [59], as to the question  
6 of what a reasonable brief fee may be in any given case and in particular at  
7 paragraph 57 a citation from a well-known passage in the judgment of  
8 Mr Justice Pennycuik in *Simpsons Motor Sales (London) Ltd v Hendon*  
9 *Corporation* [1964] 3 ALL ER 833, to the effect that the reasonable brief fee  
10 that should be allowed is the fee that "a hypothetical counsel, capable of  
11 conducting the case effectively, but unable or unwilling to insist on the higher  
12 fees sometimes demanded of counsel of pre-eminent reputation, would be  
13 content to take on the brief: but there is no precise standard of the  
14 measurement and the judge must, using his or her knowledge and  
15 experience, determine the proper figure".

16 The Defendants seek approval for £1,540,000 in relation to their leading counsel and  
17 £311,250 in relation to their junior counsel, together with refreshers of  
18 £309,000, a total for their counsel at the trial stage of circa £1.8 million,  
19 excluding refreshers. By comparison, the Claimants, who have a counsel  
20 team of three, are seeking a total of £875,000 together with refreshers of  
21 £282,000) for that stage; their leading counsel, who is also a leading counsel  
22 in this field, seeks a brief fee of £412,500.

23 In my judgment, the Defendants are perfectly entitled to instruct whoever they wish  
24 to instruct with a view to obtaining a Rolls Royce service, but it is  
25 unreasonable and disproportionate for the Claimants to be required to pay for  
26 that in the event of a costs order against them at the end of the trial. In this

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situation, I have a very good comparator by way of the Claimants' fees, which I consider provide me with a realistic indication of the price of obtaining a counsel team to conduct this case effectively. Accordingly I am going to limit the Defendants' counsel fees for the purposes of the costs budget to the same level as the Claimants' fees (both in respect of brief fees and refreshers).

### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?