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

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

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

13 Monday 28th 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:**

21
22 Vattenfall AB & Others

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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**

30
31 Sarah Abram and Khatija Hafesji (On behalf of Vattenfall AB & Others)
32 Anneli Howard QC (On behalf of Prysman)

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Ruling on disclosure costs

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

25 Ms Abram, on behalf of the Claimants responds that £37 million is not in fact the
26 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?