



Neutral Citation Number: [2019] EWHC 143 (QB)

Case No: HQ15A05254

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

Manchester Civil Justice Centre  
1, Bridge Street West, Manchester, M60 9DJ

Date: 01/02/2019

**Before :**

**THE HON. MR JUSTICE TURNER**

**Between :**

**THE PERSONAL REPRESENTATIVES OF THE Claimant**  
**ESTATE OF**  
**MAURICE HUTSON & OTHER**  
**- and -**  
**(TATA STEEL UK LIMITED Defendant**  
**(formerly Corus UK Ltd,**  
**successors in title and holders**  
**of the liabilities of British Steel Corporation and**  
**predecessor companies)**

**Ivan Bowley** (instructed by **Irwin Mitchell LLP**) for the **Claimant**  
**Peter Houghton** (instructed by **BLM LLP**) for the **Defendant**

Hearing dates: 15 and 24 January 2019

**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.

.....  
**THE HON. MR JUSTICE TURNER**

**The Hon Mr Justice Turner :**

## INTRODUCTION

1. The claimants in this case seek compensation from the defendant in respect of injuries, loss and damage alleged to have been sustained by employees in the steel industry as a result of the inhalation of harmful dust and fumes at work. Where such employees are still living, claims have been brought by them directly. However, in the time which has elapsed since the periods over which such exposure is alleged to have taken place, some of the employees have died and claims are now advanced on behalf of their estates. The defendant is responsible in law for any liabilities established against its predecessor employers.
2. The nature and scale of the various claims have been found to have been such as to justify the making of a Group Litigation Order under the terms of which the court has already made orders imposing time limits by which any given notified claim must be entered on the register in order to fall within the scope of the Group. It was a condition of registration that those seeking to bring claims in respect of deceased employees should first have obtained grants of probate or letters of administration. For the sake of convenience I will henceforth refer to these steps generically as “the requisite formalities”.
3. The cut-off date for registration was originally set (under “Order No 3”) for 21 September 2018 but then extended, by consent, in respect of certain identified potential claims (under “Order No 9”) to 16 November 2018 with liberty to apply for a further extension.
4. By the time the extended deadline had passed, a number of claims had not been entered on the register because, for various reasons, the requisite formalities had not yet been satisfied at the material time.
5. Two applications have now been made seeking the Court’s indulgence in making further orders extending the existing deadline to permit the procedurally blemished cases to proceed in any event. Application 1, dated 15 November 2018, relates to claims which were incorporated within Order No 3 but which failed to satisfy the requisite formalities before the expiry of the extended deadline. Application 2, dated 20 November 2018, relates to unregistered claims which had not been identified as qualifying for the further extension granted under Order No 9.

## APPLICATION 1

6. Application No 1 covers, in all, twelve claims of which ten have now satisfied, albeit too late, the requisite formalities and two of which still have not.

7. The individual circumstances in which each of these claims has fallen foul of the timetable are different. There is no “one size fits all” explanation. There are, however, some broader considerations of more general application upon which the parties place overarching but competing reliance. Out of an abundance of caution, I ought to record that throughout the process of weighing the various factors to which my attention has been drawn I have kept the overriding objective firmly in mind.

*The Law*

8. The parties agree that the legal position is as set out in the case of *Pearce v Secretary of State for Energy and Climate Change and ors* [2015] EWHC 3775 in which the Court observed:

“2. By way of preliminary observation I say that cut off dates are essential in GLOs to secure the good case management of the claims falling within its scope. The parties depend upon some level of certainty as to the cut-off date in order to decide how to deploy their resources and when. Accordingly extensions of the cut-off date should not come to be regarded as the norm.

3. The balancing factor to that is that, if a mechanistic approach were taken whereby the cut-off date were to be regarded as sacrosanct, there is a risk that unexpected developments may give rise to the situation which is identified here on behalf of the claimants, namely, the accumulation of residual applications on behalf of claimants who have not met the cut-off date. This would have the strong potential even further to disrupt the progress of the GLO while the claims already within its scope are being formulated and subsequently resolved.”

9. I note in passing, however, that in *Pearce* there was no requirement for the claims to meet the requisite formalities before they could be entered on the register and so the hurdles presented in the instant case did not fall to be considered as part of the balancing process.

*Prejudice to the defendant*

10. The days when prejudice to the other side, where not readily redressed by an order in respect of costs, was regarded as little short of the touchstone of procedural indulgence have long since expired. Nevertheless, it remains the case that, where such prejudice can be established, the challenge to the defaulting party is even greater.
11. Accordingly, the defendant has sought to persuade the court that extending time would cause it real prejudice. In particular, it is asserted that:
  - (i) It has been prevented from placing accurate reserves against the potential values of the unregistered claims;

- (ii) It has not been able to judge the extent of the likely expanded disclosure exercise; and
- (iii) It has not been able to consider whether any of the late cases ought to be selected as lead cases.

12. The claimants respond by relying on the following factors:

- (i) The number of claims falling within the scope of this application are modest in comparison with those which have already been registered in compliance with the directions timetable. There are 222 registered claims compared with just twelve which have not made it onto the register because of delays in satisfying the procedural formalities. There has been little or no impact on the progress of the defendant's solicitors' work on the case as a whole;
- (ii) The defendant's expressed fears that the process of reserving is significantly prejudiced is mitigated by the assurance that none of the twelve claims relate to the condition of lung cancer which is a condition likely to give rise to significantly higher levels of awards than the other pathologies falling within the scope of the GLO;
- (iii) The defendant's disclosure obligations will not be significantly broadened by the granting of the application because the claims involved all relate to exposure alleged to have taken place in workplace premises which are already covered by registered claims;
- (iv) The defendant makes the point that it has deliberately refrained from investigating claims before they have been registered so as not to waste time and money on claims which are later simply discontinued. I regard this to be a sensible approach against the background circumstances of this case. Both sides make a virtue of the fact that a high proportion of notified claims have been weeded out for lack of merit. By email of 7 August 2017, one of the claimants' lead solicitors, Hugh James, volunteered to provide to the defendant CDs (one for each claim) each containing, in encrypted form, the relevant employee's GP and hospital notes. It was not until 27 November 2018 that the defendant took up the offer in respect of the 115 claims in which Hugh James were acting. The deliberate postponement of analysis of the medical records does, however, dilute any fears that this application, if successful, would slow down the progress of the GLO;
- (v) In any event, the next phase of the litigation, which will involve the selection of lead cases and disclosure, will not be delayed by the granting of this application. The relatively low number of claims covered by this application, about 5% of the whole, means that there

will be plenty of other claims from which the lead cases can be selected in the event, which is disputed, that the late registered claims will, as a matter of practicability, not be eligible for selection. A curious dispute has arisen between the parties as to the number of claims in which medical records have already been disclosed. But one thing is clear, the defendant's legal team still have much work to do regardless of their postponed consideration of the stray claims falling within the scope of Application 1.

13. The claimants further point out that the consequences for the individual claimants would be very serious in respect of any claims prevented from being entered on the register in the event that this application were to be refused. In effect, they would be precluded from having access to any remedy. Any attempt to proceed outside the scope of the GLO would be unlikely to get off the ground.
14. Indeed, the defendant concedes that some claimants would thus lose meritorious claims but emphasises that the overriding objective includes, so far as is practicable, ensuring that cases are dealt with expeditiously and fairly and so as to enforce compliance with rules, practice directions and orders. Having agreed to the original timetable and thereafter obtaining an agreed extension, no further indulgence should, it says, be permitted.
15. The circumstances arising in each of the twelve claims can most conveniently be set out in schedule form and can be found in the appendix to this judgment.
16. It is certainly the case that delays in most if not all of these cases could have been avoided and the extended deadline could have been complied with but for lack of progress caused, at least in part, by tardiness on the part of the individual claimants and/or their legal advisors. Nevertheless, even in those instances in which the length of the delays have been the longest and the reasons given the least satisfactory, I am entirely satisfied that the correct approach is to permit them to proceed. The factors which are the most important in this regard are that:
  - (i) The timetable for the future progress of the GLO has not been jeopardised by the failures to meet the extended deadline;
  - (ii) No discernible saving of expense would be achieved by refusing to extend the deadline further;
  - (iii) Real prejudice to the defendant has not been made out but the individual claimants would be very likely to lose their prospects of achieving substantive justice in the event that the Court's indulgence were not granted.

Against these matters, I recognise that the requirement to enforce compliance with orders of the court is a relevant factor but not one which, in my view, is sufficient to offset the countervailing considerations which I have identified.

17. In the cases of Allen and Pawlyszyn, the requisite formalities had not yet been observed by the time the matter was argued before me. I extend time for compliance in these two cases to 4:00pm on 28 February 2019 but reinforce the need for strict compliance with an unless order in each of their cases. In respect of the remaining cases, all requisite formalities having now been satisfied, I extend time for registration to 7 February 2019.

## APPLICATION 2

18. The eight claims which form the subject matter of this application were not identified within Order No 9 and thus do not fall within the parameters of Application 1 the purpose of which is to seek further to extend the deadline imposed by that order.
19. In respect of five of these cases, the claims were purportedly registered before the requisite formalities had been observed but were not technically eligible for registration at the time. Nevertheless, such formalities had been satisfied before the original cut-off date and the defendant realistically concedes that, subject to the payment of costs, these cases should be allowed to proceed by granting the necessary extension of time. I endorse this approach and no further consideration of these claims is called for.
20. This leaves three cases in which the claim had purportedly been entered on the register but the requisite formalities had not, in fact, been complied with before the deadline imposed by Order No 3 had passed.
21. The details of the individual circumstances of these claims are set out in the appendix to this judgment.
22. One overarching point was raised by the defendant in respect of each of these claims. This was to the effect that, as a matter of law, any claim purportedly commenced by a deceased party is a nullity which is incapable of subsequent rectification. In this regard, I was referred to the case of ***Kimathi v Foreign and Commonwealth Office (No 2)*** [2016] EWHC 3005.
23. In that case, the defendant successfully applied to have a claim struck off the GLO register on the ground that the claimant had died before his claim had been registered. The application was resisted on two grounds:
  - (i) the claim had been commenced when the claim form was issued and the deceased was at that stage still alive; and

- (ii) even if the claim had been commenced on the date of registration, this was an irregularity which could and should be cured by the exercise of the Court's wide-ranging powers under CPR 3.
24. The Court rejected both of these arguments finding that the wording of the GLO made it clear that:
- (i) a claimant only became a party to the litigation on the date of entry of a claim onto the register and not before; and
- (ii) CPR 3 afforded no discretion to the Court to rectify a purported claim which was, in law, a nullity.
25. The claimants do not seek to challenge the soundness of these conclusions but contend that the fact that one claim is a nullity does not preclude the commencement of a subsequent claim which is not. Of course, there may be circumstances in which such subsequent claim could be struck out as an abuse of the process of the court but unless and until this happens the second claim is procedurally valid.
26. I agree. Otherwise, to take an extreme example, where an action was commenced on behalf of a claimant who had, unbeknown, died on the previous day it would be an extraordinary suggestion that his estate was thereby precluded from starting a fresh action properly constituted thereafter.
27. Accordingly, I approach this issue on the basis that this Court does indeed have a discretion to extend the time within which these three claims may be entered on the register. Of course, that is not an end of the matter and the defendant is entitled to seek to persuade me that I should exercise that discretion against the claimants.
28. In this regard, an issue arises as to the basis upon which such discretion falls to be exercised. The defendant argues, on the strength of recent authority, that the Court should proceed on the basis that the same level of stringency should be applied as if the case fell squarely within the parameters of the tests laid down in *Denton v TH White Ltd* [2014] 1 W.L.R. 3926 because the court's indulgence is being sought in an application made after the time for compliance has already passed. I do not express any final view on the validity of this argument but note, in passing, that both Orders Nos 3 and 9 expressly provided for liberty to apply for an extension of time.
29. In any event, if the claimants were able to succeed in satisfying the *Denton* tests then, a fortiori, it must follow that they would also have been able to prevail by the broader and less stringent application of the overriding objective. I will therefore assume, without deciding the issue, that

Application 2 should be approached as if it were an application for relief from sanctions.

30. The *Denton* approach is, for the purposes of adjudication on these applications, adequately summarised in the headnote which, in so far as is relevant, provides:

“A judge should address an application for relief from sanctions under CPR r 3.9(1) 1 in three stages: (i) identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.9(1) ; (ii) consider why the default occurred; (iii) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the factors in sub-paragraphs (a) and (b) . The focus of the inquiry at the first stage should be not on whether the breach has been trivial but on whether it has been serious or significant. The assessment of seriousness or significance should not, initially at least, involve a consideration of other unrelated failures which may have occurred in the past. If a judge concludes that a breach is not serious or significant, relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If the court decides that the breach is serious or significant, the second and third stages assume greater importance. Although the second stage cannot be derived from the express wording of the rule, it is important particularly where the breach is serious or significant.

Sub-paragraphs (a) and (b) of rule 3.9(1) are of particular importance and so particular weight should be given at the third stage, when all the circumstances of the case are considered, to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders. If the breach has prevented the court or the parties from conducting litigation efficiently and at proportionate cost, that will weigh in favour of refusing relief. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated. In giving particular weight to those two factors, the court will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach relief is likely to be granted. The factors which are relevant will vary from case to case. Relevant circumstances, to be weighed in the balance along with all the circumstances, will include the promptness of the application



and other past or current breaches by the parties of the rules, practice directions and court orders.”

31. In respect of all three claims to be considered within the scope of Application 2, the claimants realistically concede that their defaults were serious and significant. The reasons for the defaults in each case involve culpable oversight. I give particular weight to these factors. Nevertheless, I am satisfied that these breaches have not prevented to any significant degree the court or the parties from conducting these claims or the litigation as a whole efficiently and at proportionate cost. This is not a case in which there has been a history of non-compliance. Even bearing in mind the important need for compliance with orders of the Court, I am satisfied that the factors which persuaded me to grant an indulgence in respect of the claims falling within Application 1 apply, for the most part, with similar (and, ultimately, decisive) force to the application of the third Denton test relating to all the circumstances of the case.
32. I thus conclude that Application 2 should be granted and that the time for entering these claims should be extended to 7 February 2019.

### COSTS

33. The claimants have realistically accepted that they must bear the costs of these applications on the standard basis and I so order.

## APPENDIX

### Claims falling within the scope of Application 1

#### **George Gosby:**

Instructions were first received in February 2018 from the late Mr Gosby's daughter whose father had died intestate many years earlier. By May, it was concluded that the claim had sufficient prospects of success to be allowed to proceed. There followed a three-month delay in obtaining a schedule of employment from HMRC caused, for the most part, by delays on the part of the claimant. Medical records were not requested until August but, in the event, were found to have been destroyed. There were further delays on the part of the claimant in the provision of the relevant information to obtain the grants. In the event, the relevant grants were issued on 18 December and the extended deadline for registration was thus not met.

#### **John Holmes:**

Instructions were first received in February 2018 from the late Mr Holmes' daughter. There were delays in obtaining instructions from the claimant which, at least in part, were attributable to a debilitating illness. These were compounded by probate complications arising from the fact that Mr Holmes' widow had not, herself, taken out a grant of letters of administration upon the death of her husband. Thus, upon her death, there was no chain of representation yet established to the estate of Mr Holmes. In the event the grant was not applied for until 3 December 2018 and thereafter issued on 10 December 2018.

#### **Brian James:**

Instructions were first received from Mr James in October 2012. He died in January 2014 but for reasons not fully detailed, the claimant's solicitors had not obtained a copy of the will and Grant of Probate in time for the extended deadline for compliance with the requisite formalities. The Grant was finally provided to the defendant on 4 January 2019.

#### **Terence Jones:**

Instructions were first received from Mr Jones in October 2012. He died in October 2013. Letters of Administration were obtained in 2016 but in circumstances not fully detailed a further copy was requested and this was eventually provided to the defendant on 4 January 2019.

#### **Steven Roberts:**

Instructions were first received in February 2018 from the late Mr Roberts' daughter whose father had died intestate many years earlier. Despite the fact

that the claim had been positively screened in May 2018, there followed delays attributable to a combination of factors including repeated attempts to obtain the post mortem report from the coroner and, it would appear, a failure on the part of the claimant promptly to respond to the request to provide the sworn documents necessary to obtain the grant. The grant was eventually provided to the defendant on 2 January 2019.

**Derek Simmonite:**

Instructions were first received in February 2018. Progress was delayed by the claimant's solicitors' decision to review this case in the light of a decision of this Court in respect of two claims in the parallel GLO comprising the British Coal Coke Oven Workers Litigation ("BCCOWL"). I do not doubt the genuineness of this explanation for one moment but there is, in my view, some force in the defendant's contention that the delay was not justified. One of the two BCCOWL claims was successful on the issue of limitation and would be unlikely to generate any fears that more intense scrutiny of other claims would be necessary. The second was determined very much on its own facts in so far as they related to the credibility of the claimant. This delay was later exacerbated by the passage of time between the beginning of September 2018 when instructions were first given to obtain the Grant and the middle of November 2018 when the Grant was actually applied for. The defendant was eventually provided with the Grant on 11 December 2018.

**Brian Stanley:**

Instructions were first received from Mr Stanley in June 2015. He died in August 2017. Between May and November 2018, the claimant delayed in signing the terms of business which had been sent to him by solicitors. No explanation has been tendered for this delay. Eventually, the Grant was obtained and sent to the defendant on 4 January 2019.

**Norman Trueman:**

Instructions were first received from Mr Trueman in November 2012. He died in May 2013. Once again, there was some delay while the claim was risk assessed in the light of the BCCOWL judgment followed by further delays in signing the solicitors' terms of business and arranging for a power of attorney to appoint Mr Truman's stepson. The defendant was eventually provided with the grant on 11 December 2018.

**Edmund Willey:**

Instructions were first received in February 2018. There were delays in obtaining employment and medical records. The time taken for the obtaining of the Grant was prolonged because Mr Willey had been through two divorces. The defendant was eventually provided with the Grant on 9 January 2019.

**Edward Wing:**

Instructions were first received in November 2012. Steps to obtain the grant were not put in motion until late August 2019. There were delays thereafter in obtaining the oath from the claimant which were compounded by the existence of a deed of gift which mandated the obtaining of a redrafted oath. A copy of the grant was eventually sent to the defendant on 4 January 2019.

**Colin Allen**

Instructions were first received in November 2012. The first efforts to obtain the Grant were not made until August 2018. The delays which followed were attributable, at least in part, to confusion in identifying the executor of Mr Allen's will and tracing the will itself. By 18 January 2019 all enquiries had been exhausted and matters now proceed on the basis that the will is likely to be presumed revoked by destruction. The requisite formalities are now expected to have been completed within three weeks or so.

**Mychaljo Pawlyszyn:**

Instructions were first received in October 2017. Steps were first taken to obtain the Grant in late August 2018. The delays thereafter were caused by the claimant's failure to agree to the solicitors' terms of business. Eventually, the claimant, Mr Pawlyszyn's widow, asked for a power of attorney to be put in place to equip her son to deal with the claim on her behalf. The Grant was expected to be made and served on the defendant before the end of January 2019.

## Claims falling within the scope of Application 2

### **Henry Smith:**

The claim was notified in accordance with Order No 3 and was entered on the register on 21 September 2018. The deceased had died on 14 July 2018 but the claimant's solicitors only discovered this fact as a result of enquiries relating to another claim on 25 September 2018. The claim was therefore a nullity at the date of purported registration. The Claimant seeks an extension to the cut-off date in this case to allow the claim to be validly entered on the register.

### **Robert Commins:**

The claim was entered on the register on 31 January 2017 but at that date the requisite formalities had not been complied with. The Grant was issued on 19 October 2018. The Claimant seeks an extension to the cut-off date in this case to allow the claim to be validly entered on the register.

### **Jack Uppington:**

The claim was entered on the register on 18 September 2018 but at that date the requisite formalities had not been complied with. The Grant was issued on 3 January 2019. The Claimant seeks an extension to the cut-off date in this case to allow the claim to be validly entered on the register.