



Neutral Citation Number: [2023] EWHC 2126 (TCC)

Case No: HT-2022-000304

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 July 2023

Before :

Mrs Justice O'Farrell

Between :

Município de Mariana & Others	<u>Claimants</u>
- and -	
BHP Group (UK) Ltd and BHP Group Limited	<u>Defendants</u>

Alain Choo-Choy KC, Russell Hopkins, Pippa Manby and Anisa Kassamali (instructed by
PGMBM LAW LTD t/a Pogust Goodhead) for the **Claimants**
Victoria Windle KC, Nicholas Sloboda and Oliver Butler (instructed by **Slaughter and**
May) for the **Defendants**

Hearing dates: **28th July 2023**

APPROVED JUDGMENT

Mrs Justice O'Farrell
(15:04 pm)

Friday, 28 July 2023

Judgment by **MRS JUSTICE O'FARRELL**

1. This is the claimants' application dated 15 June 2023 for an extension of time for:
 - (1) service of the additional particulars of claim (the 'APOCs') to be extended until 8 September 2023;
 - (2) service of a revised new claim form by 8 September 2023 which includes the addresses of those new claimants for whom there is either no address or an incomplete address; and
 - (3) service of the updated version of the master schedule until 6 October 2023.
2. In addition, there is an application for a dispensation in respect of the requirement for the indigenous and Quilombola claimants, named on the new claim form, to provide individual addresses, but, instead, to provide generic community addresses. That application is consented to by the defendants.
3. Finally, there is a further application dated 23 June 2023 for permission for the new claimants to file all APOCs that have been served and/or will be served via FileZilla, a secure file transfer protocol server. The defendants do not object to that application.
4. Therefore, the court's consideration is focussed on the applications for extensions of time for (i) service of the final signed APOCs; (ii) the new claim form with missing addresses included; and (iii) the updated master schedule.
5. The evidence that has been filed in respect of the applications are the 24th witness statement of Thomas Goodhead, the 20th witness statement of Mr Michael and the 25th statement of Mr Goodhead. In addition, this morning I received an updating letter from Pogust Goodhead, setting out the up to date figures in terms of documents that have currently been served.
6. The outstanding three applications are opposed by the defendants on the grounds that the claimants have had sufficient opportunity to comply with the previous orders.
7. I start by considering where we are in terms of directions given by the court. Following the directions hearing held in December 2022, an order for directions was issued by this court dated 13 January 2023 which provided for:
 - a. the outstanding APOCs in respect of any new claimants to be served by 16 June 2023;
 - b. the new claim form to be filed by 17 February 2023; and
 - c. the master schedule to be filed by 17 February 2023.
8. There have been some agreed extensions of time and a further order by the court on 27 June 2023 following the case management conference held in March and April of this year, whereby the court ordered that the new claim form with up to date details should be filed by 16 June 2023 and the updated master schedule should be filed by 14 July 2023.
9. From that brief recitation it can be seen that all of the relevant dates have now passed and therefore the claimants seek extensions of time in relation to the outstanding tasks.

Claimants' submissions

10. The claimants' position is that the task that they thought they would have to undertake when the original directions were given at the end of last year, set out in the order of 13 January 2023 has expanded by an unforeseen and challenging extent. When the order was made, there were about 200,000 claimants; they anticipated an increase in numbers but not the increase that in fact transpired; currently, there are about 732,000 claimants, more than a threefold increase. As a result, the directions that were made by the court on the

proposals of the claimants have simply proved to be too steep a task, given the sheer numbers of claimants that their legal representatives have had to deal with.

11. It is against that background that Mr Choo-Choy KC, leading counsel for the claimants, submits that a relatively modest and inconsequential delay to August/September should be permitted by the court now in order for the APOCs, the missing addresses and the updated schedule to be completed.
12. The evidence that has been filed by the claimants through Mr Goodhead describes the difficulties that have been encountered despite the best endeavours of the legal representatives. He explains that they have devoted significant resources and made enormous efforts to meet the current deadline of 16 June 2023.
13. He explains that instructions from the new claimants have been obtained predominantly through the completion of a client questionnaire, which is then processed by AI in order to generate the APOCs in both Portuguese and English. Call centres have been sent up in Brazil to take instructions by telephone. There are walk-in centres operated by agents in order to have meetings with clients in person. But the difficulties that they have faced include the fact that, in addition to the sheer number of new claimants, many of them are unable to complete the questionnaires without assistance; they are hampered by illiteracy or technological illiteracy. A number of the claimants live in very remote areas over a vast geographical area. Those areas, in some cases, have very limited connectivity, which presents very serious logistical difficulties. This is particularly the case regarding the indigenous and Quilombola claimants, where journeys need to be taken, over great distances, in order to meet with the relevant individuals and to engage with them so as to identify the relevant particulars for the APOCs.
14. A further difficulty that has been encountered is the fact that the solicitors for the claimants have developed their own in-house technological solution to turn questionnaires into the APOCs. That was previously carried out by a third party provider; but, following difficulties encountered, it was decided that it would be dealt with in-house. However, that has taken longer than expected to get up and running so as to provide a satisfactory outcome.
15. Additionally, the difficulties include getting the claimants to sign the computer generated APOCs and approve them with or without any corrections. That process has been hampered by technology difficulties and the access difficulties to the new claimants, including difficulties caused by the poverty and illiteracy suffered by a number of the new claimants.
16. All of those matters, it is said, have caused great difficulty for the claimants in endeavouring to meet the deadlines set by the court.
17. Mr Choo-Choy emphasises to the court that this application is necessary to ensure that the very many new claimants who have not yet served completed or signed APOCs should not be denied access to justice. It is likely that if they are not permitted to participate in these proceedings that they will have either limited or no prospects of redress in Brazil.
18. Against that background, it is urged upon me that it would be appropriate for the court to grant the relatively modest extensions of time that are sought today.
19. It is further said by the claimants that no real prejudice that will be caused to the defendants. The extensions of time that have been asked for will not have any material adverse impact on the hearing of the threshold liability issues that has been ordered for October 2024 or by causing any prejudice to the defendants who do not need all of these details in order to continue preparation for the threshold liability issues trial and who, in any event, already have much information that they might need in order to assess the merits of the claims made against them.

Defendants' submissions

20. The defendants oppose the application in general for extensions of time. Their position is that there has been inadequate explanation given by the claimants or any proper evidence to support the application.
21. It is said that the claimants were the ones who proposed the current timetable and by March of this year, when the court held the first CMC, they must have known whether or not they were in difficulty in complying with that timetable. Despite that, the application was not made to this court until 15 June, the day before the deadline for service of the relevant documents.
22. The defendants understand from the claimants' evidence that the questionnaires exercise was started some time last year but there has been no information provided as to the level of returns of the questionnaires, the rate at which those questionnaires have been converted to APOCs or as to the numbers of absent or incomplete questionnaires that the claimants currently have.
23. Ms Windle KC, leading counsel for the defendants, urges the court to consider making different orders in relation to different groups of claimants. In particular she draws a distinction between those draft APOCs that are unsigned and simply need to be confirmed, completed and signed, as against those claimants for whom there is currently no APOC, because she submits that that indicates a failure of engagement, whether on the part of the relevant claimants or the legal representatives.
24. In particular, she complains that the claimants have failed to provide any proper explanation as to what is holding up the completion and signing of the remaining draft or absent APOCs. She further submits that there has been no proper explanation for the court as to the date by which the claimants are proposing to provide the outstanding APOCs, namely by 8 September 2023. She submits, in those circumstances, it appears to be an arbitrary date; an extension of time, in those circumstances, may serve no useful purpose.
25. In response to the suggestion that the court's refusal of the extension would deprive the claimants of access to justice, she makes a valid point that these proceedings have been afoot for many years. They were started in 2019. And access to justice is not an absolute right.
26. It is also submitted on behalf of the defendants that they will suffer significant and substantial prejudice if the claimants are permitted to continue to serve these documents in a piecemeal fashion. It is essential for the defendants to understand who is suing them and on what basis and for how much. It is not just the quantum of the claims. The APOCs will demonstrate or not that the new claimants have a valid cause of action and will identify the heads of claim. Those matters are significant in terms of the allocation of resources to different strands of the case and also, in particular, with regard to identifying samples or examples for the purpose of the trial of the limitation issues which will be heard in October 2024.

Applicable principles

27. In considering this application, there is no material dispute as to the principles that are to be applied.
28. I start by referring to the overriding objective. CPR 1.1 provides that the overriding objective of the rules, which should be taken into account when deciding an application such as this one, is to enable the court to deal with cases justly and at proportionate cost.
29. Dealing with a case justly and at proportionate cost includes, so far as is practicable:

- a. ensuring that the parties are on an equal footing and can participate fully in proceedings and that parties and witnesses can give their best evidence;
 - b. saving expense;
 - c. dealing with the case in ways which are proportionate to the amount of money involved, the importance of case, the complexity of the issues and the financial position of each party;
 - d. ensuring it is dealt with expeditiously and fairly;
 - e. allotting it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
 - f. enforcing compliance with rules, practice directions and orders.
30. I bear in mind all of those factors when considering the applications in this case.
31. Ms Windle has drawn to the court's attention the Court of Appeal decision in *Jalla v Shell International Trading and Shipping Co Limited* [2021] EWCA Civ 1559, a case on very different facts, in which the Court of Appeal set out the applicable legal principles when considering extensions of time, which can be summarised as follows:
- a. The court will grant a reasonable extension if it does not impact on hearing dates or other disrupt proceedings.
 - b. The fact that a refusal to extend time would in practice mean the end of a claim is a factor to be weighed in the balance but it cannot of itself warrant the grant of relief.
 - c. The need to comply with court orders is of paramount importance. A claimant's entitlement to sue a defendant is not an absolute right and does not permit that claimant to fail to comply with court orders or delay or disrupt the administration of justice.
32. The parties have agreed that the principles set out in the case of *Hallam Estates Limited v Baker* [2014] EWCA Civ 661 are applicable, namely that:
- "In general, the court should not refuse to grant a prospective application for a reasonable extension of time where the extension sought does not imperil any future hearing dates or otherwise disrupt the proceedings".

Extension of time for APOCs

33. I accept in this case that the task faced by the claimants is very challenging indeed. It is not just the sheer numbers of claimants that presents a challenge, but also the fact that each separate claim by a claimant is based on that claimant's different status, location, age, situation, loss and quantum. It is clear to this court that the claimants to date have made a very significant effort to fulfil their obligations in serving the completed and signed APOCs so as to comply with the court orders.
34. The fact that they have not yet completed the task is not for want of trying. I accept that the logistical difficulties that they face, particularly given the very large numbers of new claimants that have joined the proceedings this year, has caused them more difficulty than they could possibly have anticipated when the framework timetable was agreed to at the directions hearing back in September.
35. The update that has been provided shows that to date about 348,446 APOCs from new claimants have been obtained, either signed or as yet unsigned. If the court then includes c 200,000 claimants already in the proceedings, it is clear that there are APOCs either completed, signed and served or in that process in excess of 500,000 individuals. It is estimated by the claimants that there are about 170,000 APOCs outstanding and of that number about 100,000 are in draft but unsigned.

36. The claimants make a valid point that the current extension of time that they are seeking is not lengthy; although I accept Ms Windle's point that this is not the first extension that they have had.
37. I consider that it is significant that for many of these new claimants, in practical terms, it will be the only opportunity that they have to seek access to this court for what they see is compensation to which they are entitled.
38. Balanced against that, the court has to consider overall case management of these proceedings. The claimants have, for very legitimate reasons, sought and obtained a relatively early trial date, given the size and complexity of the case. Also, for very valid reasons, the claimants have pressed the court for a timetable that the defendants have suggested is rather too tight for comfort. Against that background, the court must consider how to manage the case so that it can be proceeded with in an efficient and cost effective manner and so that it does not take up a disproportionate amount of court time which, of course, delays or deprives other court users of access to justice.
39. There cannot be an indefinite trickle of new claims produced through the APOCs, which are the vehicle by which the claimants, both new and old, establish their cause of action and the basis on which they seek compensation. Throughout these proceedings there has to come a time at which the court says enough is enough. In particular, the court is concerned that there is prejudice to the defendants whenever there is a delay to the service of pleadings that indicate to them how many claimants have genuine claims, and how many claimants have an intention to pursue their claims. They are entitled to know who is pursuing them, on what factual basis, how many there are and the approximate value of the claims.
40. It is all very well for the claimants to say: "Well, it is hundreds of thousands; you do not need to know precisely how many." But for the defendants, who are attempting to carry out assessments as to how to allocate resources, where to concentrate their efforts and how to manage the case moving forwards, they need to be able to identify how many claimants there are, in what capacity they claim and how they might be affected by the decisions, with the various potential outcomes, following the threshold liability trial.
41. Although a quantum trial, as Mr Choo-Choy submitted, is likely to be at least two years away, it would be a hazardous approach and an unrealistic one to suggest that the claimants and defendants do not have an eye on what that quantum might be if they ever got there. It is important that parties have an overview of the nature and extent of the claims so that they can take a view on merits and also carry out a strategic cost/benefit analysis.
42. Having regard to all of those factors, I consider that the application for the extension of time for service of the APOCs is one that is reasonable and should be granted, that is an extension of time through to 8 September 2023.
43. I am not going to make it a final or unless order. However, the claimants should be in no doubt that further extensions of time could well be refused. If not refused, any further delay in getting to this stage, that is, in completing the final cohort of claimants who are pursuing their claims, could result in a postponement of the threshold liability issue trial. Alternatively, the court would have to consider whether any late particularised claims should be stayed or dealt with in a separate sub-trial.
44. Therefore, I will grant the extension of time as sought. I am not going to make it a final or unless order but it does not follow from that that the court is taking a relaxed approach to the service of the completed and signed APOCs.

Missing addresses from new claim form

45. Turning then to the missing addresses from the new claim form, as both parties have recognised, this raises a slightly different issue in that the court has already granted an indulgence to the claimants in the order made following the CMC.
46. It is a requirement of a claim form that there should be an address for each claimant. Practice Direction 16 paragraph 2.1 provides :
 - “The claim form must include an address (including the postcode) at which the claimant lives or carries on business, even if the claimant’s address for service is the business address of their solicitor.”
47. The new claim form did not include the addresses of all the claimants named in the appendix to it. The court granted an extension of time by ordering that:
 - “The claimants may, if so advised, and by 4 pm on 16 June 2023, serve an amended new claim form which gives an address for all claimants named on the new claim form. Thereafter, any claimant named on the new claim form for whom no address has been provided shall be removed from the master schedule pending any successful application for permission to include them.”
48. As recognised by the parties, that engages the test set out in *Denton v TH White Ltd* [2014] EWCA Civ 906:
 - a. Identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages CPR 3.9(1).
 - b. Consider any explanation for the default.
 - c. Evaluate all the circumstances of the case, so as to enable the court to deal justly with the application, including CPR 3.9(1)(a): the need for litigation to be conducted efficiently and at proportionate cost; and CPR 3.9(b): to enforce compliance with rules, practice directions and orders.
49. The defendants' position is that the addresses were ordered to be provided for the new claim form by 16 June 2023. That was pursuant to the claimant seeking an indulgence of the court, having already failed to provide those addresses in the new claim form. The claimants have now failed to comply with the extended date.
50. It is also said by the defendants that there has been a failure to provide a full and proper explanation for the failure to comply with the order. The defendants do not know which claimants' addresses have been amended or included in the current schedules, because the amended schedules have not been marked up. It has been asserted by the claimants, in Mr Goodhead's witness statement, that about 138,000 addresses that were missing or incomplete would be contained on amended schedules served on 16 June 2023. It is unclear how many new claimants are still missing addresses. The claimants' number is 11,000, but the defendants have no means of checking that and, therefore, they submit that there has not been an adequate explanation to the court so as to justify the grant of a further indulgence.
51. First of all, I consider that the failure is significant and serious. The addresses should have been on the new claim form when it was issued in February 2023. Following the extension of time granted by this court, these addresses should have been provided by 16 June 2023.
52. As to whether or not there has been an adequate explanation, I consider that there has been. The claimants have provided full and detailed evidence explaining the difficulties that they have encountered in processing all of the new claimants, as referred to above. I accept that the claimants have satisfied the court that they have taken all the steps that they were able to take in order to comply with the court order.
53. I then consider whether or not, in all the circumstances, it would be appropriate to grant a further extension of time for the missing addresses to be supplied. Those circumstances

include the difficulties incurred by the claimants in providing the addresses; the fact that, at least on the claimants' figures, it appears to be a relatively small number -- this is all relative to the overall claimant cohort -- that require a further short extension of time.

54. Against that, I consider that the defendants need to have an opportunity to check whether the claimants exist and to receive the addresses of the new claimants so that they can see for themselves that they are legitimate claimants who intend to pursue the claims; and to see where they fit into any pattern of claimants, which may affect the factors used to assess the merits of individual claims. However, the defendants do have a vast amount of information about most of the claimant cohort. Therefore, although I accept that the defendants will be adversely impacted by the late receipt of this information, it is not such a significant adverse impact so as to justify refusing the claimants a further opportunity to finalise this exercise.
55. Therefore, I will grant the extension of time sought. However, because the claimants have already had the indulgence of the court in an extension of time for this task, I will make it an unless order, so that it will read:

"Unless the claimants by 4 pm on 8 September 2023 serve an amended new claim which gives an address for all claimants named on the new claim form, any such claimant named on the new claim form for whom no address has been provided shall be removed from the master schedule and their names shall be struck through on the new claim form".

Master Schedule

56. I turn to consider the final part of the application, the master schedule. Ms Windle very pragmatically recognised that the appropriate date for service of the master schedule should be about four weeks after the other steps had been taken. That makes sense because the master schedule can only properly be updated once all the other information is in place.
57. If the final APOCs and addresses are provided by 8 September, it then makes sense for the claimants to have until 6 October 2023 for an updated version of the master schedule; and that is the order that I will make.