Neutral Citation Number [2023] EWHC 731 (SCCO)

Case No: KB-2019-003694
SC-2022-BTP-000739

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building,
Royal Courts of Justice, Strand,
London WC2A 2LL

Date: 30 March 2023

Before :

DEPUTY COSTS JUDGE JOSEPH

- -

Between :

Simon Coram
(Executor of the Estate of Margaret Jean Coram
(deceased) **Claimant**

- and -

D R Dunthorn & Son Ltd **Defendant**

- -
- -

Benjamin Williams KC (instructed by **Humphrys & Co**) for the **Claimant**
Kevin Latham (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing Date: 13 March 2023

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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.

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DEPUTY COSTS JUDGE JOSEPH

Deputy Costs Judge Joseph :

Introduction

1. There comes a time in the life of every Deputy Costs Judge when he has to produce his first written judgment. Whether this one will make its way into the annals of legal history is, mercifully, for others to decide.

2. The Claimant is a person with whom one can only have the most enormous sympathy. Having very sadly lost his father to the awful disease of mesothelioma, some years later he also lost his mother to the same disease. Whilst his father had direct contact with asbestos, in his capacity as a labourer working in a factory, his mother did not do so. Instead, it was alleged that she died as a result of developing mesothelioma through secondary exposure to asbestos through washing her husband's overalls.

3. The Claimant made a claim in respect of his father's death against the Defendant in this action, which was his father's employer and which I am told was settled for approximately £215,000. In July 2017, the Claimant's mother instructed solicitors to advise as to whether a further claim could be made against the Defendant in respect of her mesothelioma. On 17 October 2017, she died and the Claimant pursued a claim in his capacity as Executor of her estate.

4. Proceedings were issued on 17 October 2019. They were accompanied by relatively brief Particulars of Claim and a Schedule of Loss which claimed approximately £112,000, which sum included £90,000 for general damages. There was no dependency claim.

5. The claim was defended and on 12 and 20 May 2020, a CMC took place before Master Davison who was (and is) the specialist asbestos judge in the King's Bench Division. The Master directed that the trial of the claim should be heard by a category C Judge, with a time estimate of three days.

6. The matter was set down for a trial to take place in a 5 day window commencing on 2 March 2022. On 28 January 2022, the Claimant's solicitors delivered briefs to Leading Counsel, Mr Harry Steinberg KC, and junior Counsel, Ms Gemma Scott, instructing them both to do two things. First, to advise in Conference on 3 February 2022 and second, to appear at the trial. Ms Scott had been instructed in the matter some time before then. The Bill records at item 489 that on 1 July 2021, she charged £4,900 for 14 hours' work which included reading 557 pages of expert evidence and statements. Mr Steinberg had read papers relating to the case before his formal instruction on 28 January 2022, but he did not make any separate charge for that work.

7. After offers and counter-offers, the claim settled on 7 February 2022 for the sum of £75,000 gross (£57,971 net of CRU) with the Defendant agreeing to pay the Claimant's costs of the action, to be assessed if not agreed. The trial date was vacated and the settlement was recorded in a consent order dated 18 March 2022.

8. The Claimant presented a Bill of Costs which claimed costs in respect of the brief fees of both Leading and Junior Counsel. The Claimant stated that Mr Steinberg's brief fee (item 703 in the Bill) was £50,000 and that it had been abated to £25,000 to reflect

the settlement and the diary commitment for the trial. Similarly, Ms Scott's brief fee (item 626 in the Bill) was stated to be £25,000. It had been abated to £12,500 for the same reasons. The Claimant had thereby incurred costs of £75,000 for the trial alone, had it gone ahead, albeit that when the detailed assessment proceedings were commenced, half of that sum was claimed to be recoverable from the Defendant. Neither Counsel appeared to charge separately for the conference on 3 February 2022.

The provisional assessment

9. The parties were able to agree all items in the Claimant's Bill except those which I have just mentioned. As the amount in dispute was less than £75,000, the Bill was subject to the provisional assessment regime contained in CPR Part 47.15. As well as stating that the Defendant had not instructed a QC and quoting comments from the website of Ms Scott's Chambers about her expertise and experience, the Defendant's Points of Dispute in relation to these two items stated as follows:

> "Gemma Scott would have been more than qualified to conduct this three day trial on her own. The instruction of both Gemma Scott and Leading Counsel is unreasonable and Junior Counsel fees alone are offered….
>
> On the basis of no fee for a QC, the Defendant will agree the fee for the Junior Counsel – item 626 – at £10,000 plus VAT and success fee."

10. The Claimant served Replies to the Points of Dispute. It was asserted that it would have been the first occasion on which obiter comments made in *Bannister -v- Freemans Plc* [2020] EWHC 1256 (QB) (a secondary exposure case) were to be tested at trial. It was also asserted that this case was much more difficult than *Bannister* and that there was a high chance that, regardless as to which party succeeded at trial, the case would have been appealed to the Court of Appeal and possibly to the Supreme Court. It was said that the Defendant had chosen to advance novel arguments and that it had obtained detailed medical and engineering evidence to support them when it could have fought the case in a more straightforward way. The case was therefore novel and had some public importance.

11. With all of that, the essence of the Claimant's Reply to this Point of Dispute was that it was reasonable to brief a Leader. It was also said that Counsel (i.e. junior Counsel, Ms Scott) had advised that a Leader should be instructed. No explanation was provided in the Replies as to precisely why and when Ms Scott might have given that advice.

12. On 4 October 2022, I carried out a provisional assessment. I disallowed Leading Counsel's fees altogether and I allowed £10,000 for Junior Counsel's fees. In relation to the instruction of Leading Counsel, in my brief reasons, I identified that the correct question to ask was not whether the case was well within the capabilities of junior Counsel (as per part of the Point of Dispute) but whether it was reasonable and proportionate to instruct Leading Counsel. I referred to the note at 47.14.13 of Vol 1 of the 2022 Edition of the White Book (page 1669) and *R -v- Dudley Magistrates Court ex p Power City Stores Ltd* [1990] 140 NLJ 361. The note in the White Book also referred to the case of *Juby -v- London Fire and Civil Defence Authority* (24 April 1990 unreported) in which Evans J (as he then was) set out the most likely factors relevant to the decision. I further commented that as this was a standard basis

assessment, any doubt as to whether costs are reasonable or proportionate, or whether they were reasonably and proportionately incurred, must be resolved in favour of the Defendant.

The oral review

13. The Claimant exercised his right pursuant to CPR Part 47.15(7) to challenge the provisional assessment by means of an oral review. At that oral review the Claimant was represented by Mr Benjamin Williams KC and the Defendant by Mr Kevin Latham. Both Counsel provided skeleton arguments which they amplified at the hearing. I am grateful to both for the helpful way in which they dealt with the matter.

The first issue – whether a new statement could be adduced at the oral review

14. Prior to the oral review and after the provisional assessment had been sent to the parties, the Claimant filed a witness statement signed by Mr Steinberg on 1 March 2023 in which, amongst other things, he gave some explanation as to his expertise in the area of asbestos litigation and his involvement in this particular matter. He also gave some evidence in paras 37–39 of his statement to the effect that it was common in all mesothelioma claims, whether or not there was an issue of principle, for the parties to instruct Leading Counsel and that this was not usually challenged by either side simply because the financial value of the claim was modest. He further asserted that where, as in this case, there was an issue of principle at stake, it would be exceptional for the parties not to use Leading Counsel in industrial disease litigation. Mr Steinberg finished this part of his evidence by asserting, "*Accordingly, it is the norm to use Leading Counsel even where the individual value of the claim is modest*." He gave some specific examples of cases in which he had been instructed where the financial values had been low.

15. Mr Latham objected to Mr Steinberg's statement being adduced at this stage of the proceedings. Mr Latham submitted that the Claimant should have made an application under CPR Part 23 for permission to adduce the new statement and relied in that respect on para 13.7 of the Practice Direction to CPR Part 47. He also relied on para 13.2 of the same Practice Direction which set out the papers which the receiving party was required to file. His submission was that the court could consider at the oral review evidence which had come into existence prior to the provisional assessment, and additional evidence for which permission had been granted. As no permission had been granted for Mr Steinberg's statement, and because it was made after the provisional assessment, it should not be allowed in.

16. Mr Williams submitted that following *Pamplin -v- Express Newspapers Limited* [1984] 1 WLR 689 the court had power to consider new evidence and no prior permission was required. In any event, he told me that he would not be pursuing to any serious degree the contentions in paras 37–39 of Mr Steinberg's statement.

17. The starting point in relation to this is the rule which relates to provisional assessment. The relevant parts of CPR Part 47.15 state as follows:

> (7) When a provisional assessment has been carried out, the court will send a copy of the bill, as provisionally assessed, to each party with a notice stating that any party who wishes to challenge any aspect of the

> provisional assessment must, within 21 days of receipt of the notice, file and serve on all other parties a written request for an oral hearing. If no such request is filed and served within that period, the provisional assessment shall be binding upon the parties, save in exceptional circumstances.
>
> (8) The written request referred to in paragraph (7) must –
>
> (a) identify the item or items in the court's provisional assessment which are sought to be reviewed at the hearing; and
>
> (b) provide a time estimate for the hearing.
>
> (9) The court will then fix a date for the hearing and give at least 14 days' notice of the time and place of the hearing to all parties.

18. It follows that a provisional assessment is exactly that: a *provisional* assessment. It only becomes a final assessment if both parties do not file and serve any written request which complies with CPR Part 47.15(7) and (8), or at the conclusion of the oral review which is fixed because either or both of them has filed and served a written request.

19. Mr Steinberg's witness statement amounted to an amendment to the Claimant's Replies. It contained evidence and/or submissions which could, and probably should, have been set out in the Replies to the Defendant's Point of Dispute relating to items 626 and 703 of the Claimant's Bill and it could have been served with them. The fact that this information was set out in a formal witness statement is largely immaterial. It is not uncommon for solicitors to produce witness statements in detailed assessments which are served with the Points of Dispute or Replies, as the case may be. The admissibility and relevance of material from Counsel in support of their fees was considered in *Armitage -v- Nurse* [2000] 2 Costs LR 231 by Lloyd J who has this to say at page 234:

> "It would certainly be helpful to the court and wise from the point of view of counsel to furnish at least some substantial additional material at the stage of the detailed assessment as to why the substantial fees ought to be regarded as proper. It may, for example, be a useful practice for counsel to prepare a short note in the course of, or at the conclusion of the case, to be submitted to the solicitors with fee notes for purposes of the legal aid taxation."

20. In *Ross -v- Stonewood Securities Ltd* [2004] EWHC 2235 (Ch) at [39] Lewison J pointed out that Lloyd J's comments in *Armitage* were not intended to create a legal duty to supply a note. Instead, Lloyd J was merely highlighting the fact that if Counsel does not supply a note, their fees may be at risk. See also Friston on Costs 3rd Edition para 53.48. At para 53.49, there is set out the guidance issued by the General Council of the Bar in March 2000 as to the matters which that note might usefully address.

21. Amendments to Replies are dealt with by para 13.10 of the Practice Direction to CPR Part 47 which states as follows:

i) If a party wishes to vary that party's bill of costs, points of dispute or a reply, an amended or supplementary document must be filed with the court and copies of it must be served on all relevant parties.

ii) Permission is not required to vary that party's bill of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation.

22. It follows that a party is entitled to amend its Replies without first obtaining the permission of the court. I consider that the scope of para 13.10 is such that amendments can be made between receipt of a provisional assessment and an oral review of that provisional assessment because the assessment is not complete at the time the court sends out the provisional assessment. The more pertinent question is whether the power contained in para 13.10(2) should be utilised to disallow the amendments or to permit them only on terms, particularly as to costs.

23. I ultimately concluded that I should not exercise my discretion to disallow the amendment to the Replies in the form of Mr Steinberg's statement. If there was any prejudice to the Defendant it was minimal. The expertise of Mr Steinberg in this area of litigation, and his pre-eminence in the field, are not matters which are disputed by the Defendant, nor by this court. Most of the statement amounted to submissions which could have been made by Mr Williams. Once Mr Williams had explained that he did not intend to pursue the assertion that Leaders were normally instructed in cases of this nature it seemed to me that the Defendant would be able adequately to respond and deal with the statement at the oral review. I indicated that I would hear any arguments as to costs at the conclusion of this oral review.

The second issue – the instruction of Leading Counsel

24. At the oral review, there was no difference between the parties as to the correct test to be applied in considering whether to allow Leading Counsel's fees. It was as set out in *Juby* which was cited with approval by the Privy Council in *Seepersad v Persad* [2004] UKPC 19. The following factors were identified:

i) the nature of the case;

ii) the claim's importance for the client;

iii) the amount of damages likely to be recovered;

iv) the general importance of the case, that is to say the extent to which it might affect other cases;

v) any particular requirements of the case, e.g. the need for legal advice, or for special expertise, e.g. in examining or cross examining witnesses; and

vi) any other reason why an experienced and senior advocate may be required.

25. In addition, CPR Parts 44.3 and 44.4 apply to this standard basis assessment. The relevant parts are as follows:

> 44.3 - (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
>
> (a) on the standard basis; or
>
> (b) on the indemnity basis,
>
> but the court will not in either case allow costs which have been unreasonably incurred or which are unreasonable in amount.
>
> …
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.
>
> ….
>
> (5) Costs incurred are proportionate if they bear a reasonable relationship to –
>
> (a) the sums in issue in the proceedings;
> (b) the value of any non-monetary relief in issue in the proceedings;
> (c) the complexity of the litigation;
> (d) any additional work generated by the conduct of the paying party;
> (e) any wider factors involved in the proceedings, such as reputation or public importance; and
> (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.
>
> …
>
> 44.4 – (1) The court will have regard to all the circumstances in deciding whether costs were –
>
> (a) if it is assessing costs on the standard basis –
> (i) proportionately and reasonably incurred; or
>
> (ii) proportionate and reasonable in amount….
>
> (2) In particular, the court will give effect to any orders which have already been made.
>
> (3) The court will also have regard to –
>
> (a) the conduct of all the parties, including in particular –
> (i) conduct before, as well as during, the proceedings; and
>
> (ii) the efforts made, if any before and during the proceedings in order to try to resolve the dispute;

> (b) the amount or value of any money or property involved;
>
> (c) the importance of the matter to all the parties;
> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
> (e) the skill, effort, specialised knowledge and responsibility involved;
> (f) the time spent on the case;
> (g) the place where and the circumstances in which work or any part of it was done….

26. It would be inappropriate to recite each and every submission which Mr Williams and Mr Latham made. Their respective submissions were clearly set out in their skeleton arguments, which I have read, and in their oral submissions.

The Claimant's submissions

27. Mr Williams contended that I had applied the correct test on the provisional assessment but reached the wrong conclusion.

28. This was a complicated and difficult case. It would have required considerable skill and expertise to present it appropriately, had it gone to trial, and would have required careful cross examination of expert witnesses. It was novel and would have had an impact on other cases. Mr Williams referred to the case of *Bannister -v- Freemans* [2020] EWHC 265*,* in which both Mr Steinberg and Ms Scott had been instructed for the claimant, and in which the claimant had lost on the facts. The Judge, an experienced personal injury specialist, in *obiter dicta,* came to conclusions on the statistical evidence which were highly damaging to this Claimant's case theory. *Bannister* would have needed to have been discredited by the Claimant.

29. This case therefore raised very difficult issues and was felt by Mr Steinberg to be more difficult than *Bannister* had been. It was not merely a case of secondary exposure to asbestos, but was also a case of so-called ultra-low exposure, raising complex epidemiolocal and statistical issues as to the extent to which the exposure could in fact be said to have caused a risk of mesothelioma materially greater than that faced by any member of the general population. As it was a secondary exposure case, unlike most mesothelioma cases, it was a public liability claim, as opposed to an employer's liability claim, which itself made it more difficult.

30. Mr Williams made much of an expert report (running to approximately 4 pages) from a medical statistics expert which, although not disclosed to the Defendant, had been prepared urgently at the request of Mr Steinberg after an offer of settlement had been made. The specialist skill and experience which Mr Steinberg brought to the case was then shown vividly by the extremely rapid way in which Mr Steinberg was able to digest the report and apply its conclusions to the Defendant's own expert evidence. Within about 70 minutes Mr Steinberg was able to deliver clear and cogent settlement advice informed by his previous experience in a similar ultra-low exposure case. This advice led directly to the Claimant indicating a willingness to settle for £75,000 that same afternoon and to the Defendant agreeing to make such an offer, which was accepted one working day later.

31. Whereas liability had been admitted in relation to the Claimant's father, it had been denied in respect of his mother's claim. The matter could not have been more important or harrowing to the Claimant. As Mr Steinberg had said in his evidence, this was a case which could easily have found its way not just to the Court of Appeal, but possibly to the Supreme Court.

32. The case also involved an issue as to the scope of the House of Lords' difficult, and much disputed decision in *Fairchild v Glenhaven* [2003] 1 AC 32 to apply a special rule of causation in mesothelioma cases. There was a threshold question of whether the *Fairchild* approach to causation should be applied at all in circumstances where there was no clear evidence that mesothelioma had resulted from negligent asbestos exposure.

33. The value of the claim was not particularly high but the value of a claim is not a factor which is given any special precedence over any other. The claim was low because it could not comprise any element for dependency. The Defendant should not be entitled to receive any benefit from the negligence which had caused Mrs Coram's death. Ms Scott had advised the Claimant that he should instruct a Leader.

34. Mr Williams, in reply to Mr Latham, rejected the suggestion that the appropriate time for instructing Leading Counsel would have been on any appeal to the Court of Appeal. He submitted that the need for skilful cross examination of expert witnesses, in particular, was something which it was reasonable and proportionate to deploy at the trial. Instructing a Leader at the appeal stage would have been too late, in that context.

The Defendant's submissions

35. Mr Latham accepted that this case was not just about money. He pointed to the guidance given by the Court of Appeal in *West & Demouilpied v Stockport NHS Foundation Trust* [2019] 1 WLR 6157 at [88] that if it is possible, appropriate and convenient when undertaking an item by item assessment, the court should also address the proportionality of any particular item at the same time.

36. The amount for which the case settled was a significant issue. When it was case managed by Master Davison, it was given only a three day time estimate and a category C judge assignment. Category A is assigned to cases with great importance or of public importance, category B to those with some substance or difficulty and category C is for other cases.

37. This was a largely unremarkable case which was not straightforward, had some complexity, and which justified specialist asbestos litigation experienced Counsel, but not a Leader. Unlike in *Bannister*, where the length of time in which there had been exposure to asbestos was very short, in this case, the primary exposure was significantly greater.

38. Secondary exposure itself is not unusual, as could be seen from *Maguire -v- Harland & Wolff PLC* [2005] EWCA Civ 01, a case in which the exposure occurred between approximately 1961–1965 (see paras [3]–[5]), and in which the secondary exposure occurred through contaminated overalls being brought into the matrimonial home. Mr Latham also referred to the Scottish case of *Gibson -v- Babcock International*

Limited [2018] CSOH 78 and *Carey -v- Vauxhall Motors Limited* [2019] EWHC 238 (QB), both of which concerned secondary exposure. In short, there was nothing new about cases involving secondary exposure to asbestos.

39. There was no evidence before the court as to why Ms Scott had advised the Claimant that he should instruct a Leader. It was surprising that at the listing questionnaire stage there had been no attempt by the Claimant's solicitors to flag up to the court that this case was no longer suitable for a category C judge assignment (if that might have been their view). Ms Scott is a senior junior Counsel, specialising in asbestosis and mesothelioma cases (she is a contributor with Mr Steinberg to a leading textbook on the subject).

40. Mr Latham disputed the assertion that in all mesothelioma cases, Leaders were instructed. The case was important to the Claimant but the fact that it involved death did not mean, of itself, that the instruction of a Leader was justified. The measure of damages was relatively low because there was no claim for ongoing treatment or care and there was no claim for provisional damages. The value was put at approximately £115,000 and it settled for £75,000. The assignment to a category C judge meant that the court (at that time) did not consider that the case was one of great importance or public importance or indeed that it was one with some substance or difficulty.

41. There was nothing in this case to make it reasonable and proportionate for a Leader to be instructed, particularly at an initial cost of £50,000. If there is a doubt in my mind, I had to resolve that doubt in favour of the Defendant.

42. At the conclusion of the arguments concerning the instruction of Leading Counsel, I reserved judgment.

Discussion and conclusion

43. The decision as to whether to instruct Counsel, whether a Leader or junior, when to instruct, and whom to instruct is, of course, a decision for the client. He reaches a decision based on the advice, principally of the solicitor whom he has instructed to advise and act for him in the case. The conducting solicitor is required to use his skill, expertise, experience and judgment in giving advice to his client. He is entitled, if he wishes, to take advice from others, such as junior Counsel whom he has already instructed. That conducting solicitor may, as is clearly the case here, be a specialist in the particular discipline concerned.

44. Some decisions made in the course of litigation are likely to be uncontroversial. An example might be a decision to incur the costs of issuing proceedings because the expiry of the applicable limitation period is imminent. Others might be contentious because they might have significant consequences for the client. An example of that might be the decision to instruct a Leader, particularly where a competent junior and specialist in the particular area concerning the case in hand has already been instructed, and for some time. Everyone knows, or ought to know, that the instruction of a Leader, quite properly, inevitably results in a significant, additional financial liability being placed upon the client, in the first instance. Sometimes, the solicitor will be able to advise with certainty that the financial liability which the client will incur, if he accepts the solicitor's advice, is more than likely to be recovered from his opponent, if the client wins and obtains an order for the payment of his costs. On

other occasions, there will be less certainty such that there might be a significant risk that the client will not be held entitled to recover all or part of the additional financial liability he is being advised to incur.

45. The Defendant put in issue in the Points of Dispute the two items (626 and 703) which concerned Leading and junior Counsels' brief fees, both incurred at the same time (28 January 2022) and both for the trial which was due to commence approximately one month later. Mr Steinberg's brief fee was £50,000 and Ms Scott's £25,000 thereby resulting in a total liability of £75,000, for the cost of Counsel alone, for the trial. It can fairly be said that by challenging those items, and particularly Mr Steinberg's fees, those fees were "*at risk*", as contemplated by Lloyd J in *Armitage*. At the time the briefs were delivered, no one could have said with any certainty that the case would settle prior to trial, let alone precisely when it might have settled.

46. The substance of the Point of Dispute was clear (although the wrong test was stated in them) and Replies were served which were later supplemented by Mr Steinberg's witness statement of 1 March 2023, made after the provisional assessment. The Replies did not explain the conducting solicitor's thought process or his reasons for instructing Mr Steinberg at the time he was instructed. There was no witness statement from the conducting solicitor, and he did not attend the oral review. There was no evidence from Ms Scott or, indeed, any information placed before the court, as to precisely why and when she apparently advised that a Leader should be instructed in this case. The fact that the instructed junior Counsel had advised to that effect was a point which was relied on by Mr Williams to a considerable extent. Having spent 14 hours on the case on 1 July 2022, the Bill records at item 584 that on 30 November 2022, Ms Scott spent a further 1.5 hours, "*Advising on further expert evidence from the engineer and the need for an additional expert*".

47. I observed in argument that in the Senior Courts Costs Office the procedure is usually informal. Formal witness statements tend not be required and solicitors often give informal evidence at hearings about issues under challenge. Similarly, the court will consider and take into account contemporaneous attendance notes recording what might have happened and why they decided to go down a particular route. The solicitors will often charge for that work and seek to recover it from the paying party. My attention was not drawn to any specific attendance note which might have been prepared by the solicitor at the time he advised his client to instruct a Leader.

48. The result is that I have nothing from either the conducting solicitor or from junior Counsel to help me understand the thought process which might have justified the instruction of a Leader. That, of itself, ought not to be fatal to the Claimant's claim to recover Mr Steinberg's brief fee but it is a factor which I consider I must take into account. I take into account Mr Steinberg's evidence, but I do not consider that it helps me to any significant degree in deciding whether it was reasonable and proportionate for him to be instructed. In particular, the characterisation of the claim as a public liability claim, as opposed to an employer's liability claim, seemed to me to take the matter on no further. The fact remained that the Claimant would have had the burden of proof to establish the necessary ingredients of a tortious claim which involved secondary exposure to asbestos. It ought to have been a relatively simple exercise for the conducting solicitor to have furnished both the court and the Defendant with his own explanation for advising his client to incur an additional liability of £50,000 about a month before the trial was due to commence.

49. I do find it surprising, given the considerable significance and importance which the Claimant seeks to place on the case (in terms of it being novel, difficult, having complex medical and statistical evidence, the need for skilful cross examination and so on) that the Claimant's solicitors appear to have been content, at the listing questionnaire stage, not to invite the court to change the category to which the case had been assigned by Master Davison. I remind myself that Master Davison is the specialist asbestos judge in the King's Bench Division and of his decision to assign it to a category C Judge with a relatively short listing of three days. Whilst I do not consider that this is fatal to the Claimant's position, again, I do consider that it is a factor which I must take into account.

50. This case raised some issues which will have been difficult and which will have had some complexity. Claims arising from alleged secondary exposure to asbestos are by their nature likely to involve some complex issues and some difficulty. I accept Mr Latham's submission that liability for secondary exposure to asbestos is not a new phenomenon. In paras [119–120] of the decision in *Bannister,* the Judge found as fact that Mr Bannister had not been exposed to asbestos dust and that on the evidence he had been exposed to other dust for a very short time. The claim therefore failed on the facts. The Judge went on, out of an abundance of caution, to address other matters raised, "*albeit somewhat more briefly than might otherwise have been the case*". Although it was not strictly necessary for him to do so, because he had already dismissed the claim, the Judge considered the evidence of the two experts and set out why he preferred the evidence of Mr Stear (see paras [158] and [161]). Ultimately, he concluded (para [196]) that the claimant had not established on the balance of probabilities that any exposure suffered caused a material increase in the risk of him developing mesothelioma. That was a question of fact.

51. It is possible, probably likely, that had this matter gone to trial, there would have been some argument or discussion about what is conceded by Mr Williams to be *obiter dicta* in *Bannister* in paras [121] onwards in the judgment. However, *obiter dicta* is precisely that and ought not to be elevated to something more significant or difficult to deal with. I also accept that there would have been a need for competent and probably detailed cross examination of the various witnesses, but that, of itself, does not justify the instruction of Leading Counsel.

52. I am not persuaded that the speed with which Mr Steinberg assessed the matter following receipt of the expert medical statistics report demonstrated that it was reasonable and proportionate for a Leader to be instructed. Whilst the report is clearly technical and detailed in its nature, it was not lengthy, and I do not think it would have taken a great deal of time to evaluate it or to apply it. Whilst there was obvious benefit to the Claimant in instructing someone who was able to evaluate and apply it in about 70 minutes, I question whether the speed factor was really key to this. If the evaluation and/or application had taken say, a working day, i.e. approximately 5-6 times longer, it is difficult to see how the Claimant would be prejudiced by such "delay" or what material advantage he gained by having the answer in 70 minutes. I reject any contention that only a Leader could have assimilated, applied and advised on that information.

53. I also take into account that from about three months after solicitors were first instructed, this was a claim which had a value of approximately £115,000. The original schedule of loss was later updated but the value did not change materially.

The result is that at the time Mr Steinberg was instructed, the Claimant and his solicitors knew that the maximum sum which the Claimant could hope to recover at trial would be about £115,000, a significant sum of money for him, but not a huge sum in the general scheme of things. Mr Williams is correct in submitting that the Defendant should not be allowed to benefit from any "advantage" it might have gained through the timing of Mrs Coram's death.

54. I have no doubt of the importance of this claim to the Claimant, he having suffered the double tragedy of losing both of his parents to mesothelioma. The circumstances in which he lost his mother, in particular, must have been, to say the least, harrowing and devastating.

55. Against all of the relevant background, I have to decide whether the briefing of Mr Steinberg on 28 January 2022, for the trial at the beginning of March 2022, at an additional cost of £50,000, was reasonable and proportionate, based on the *Juby* criteria (some of which clearly overlap with each other) and the relevant parts of the CPR. I remind myself, and forcefully so, that I must not fall into the trap (contained in the Points of Dispute) that I should disallow Leading Counsel's fees because I might find that the case was well within the capabilities of a junior Counsel. I have no doubt that it was within the capabilities of the junior Counsel instructed in this case but that is not the test I have to apply. If there is a doubt in my mind, I have to resolve that doubt in favour of the Defendant.

56. The days in which litigants could deploy almost unlimited resources to fight cases and expect to recover those costs from the losing party (absent an indemnity costs order) have long since gone with the advent of the Woolf and Jackson reforms. Costs which have been reasonably and necessarily incurred may still be reduced if they are considered to be disproportionate.

57. Ultimately, after considering all of the relevant factors, including those I have set out above and weighing them all up together, I have not been persuaded that it was reasonable and proportionate for Leading Counsel to have been instructed. Whilst no single issue has had any precedence over any other, I remain troubled by the absence of any first hand explanation as to why advice was given to the Claimant which had such a significant financial impact so close to trial. In any event, there remains, having heard and read all the arguments, a doubt in my mind which I must resolve in favour of the Defendant.

58. The provisional assessment will therefore not be disturbed.