Neutral Citation Number: [2017] EWHC 2096 (QB)

Case No: HQ13X02561 & HQ14X02107

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2017

Before :

MR JUSTICE STUART-SMITH

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Between :

DANIEL ALFREDO CONDORI VILCA & OTHERS	**Claimant**
- and -	
(1) XSTRATA LIMITED	
(2) COMPANIA MINERA ANTAPACCAY S.A. (FORMERLY XSTRATA TINTAYA S.A.)	
	Defendants

- -
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Ms Phillipa Kaufmann QC and Ms Kate Boakes (instructed by **Leigh Day**) for the **Claimant**
Ms Shaheed Fatima QC and Ms Isabel Buchanan (instructed by **Linklaters LLP**) for the **Defendants**

Hearing dates: 7th August 2017

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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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MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith :

Introduction

1. This is the Defendants' application to amend their Defence to plead a limitation defence to the claims being brought under Peruvian law by the Claimants. The claims arise out of a protest that took place at or near the Tintaya mine in Peru in 2012. The First Defendant is a company registered in England and Wales. The Second Defendant is a Peruvian company which operated the mine at the relevant time. The Second Defendant is an indirect subsidiary of the First Defendant.

2. The factual basis of most of the claims is an allegation that unidentified officers of the Peruvian National Police ["the PNP"] or other public and private security forces mistreated the Claimants, causing them to suffer personal injuries and consequential losses. Two of the claims are brought by relatives of deceased persons who are alleged to have been shot and killed in the course of the incident.

3. In the sections below, I trace:

   i) The chronology of the development of the pleaded cases on both sides;

   ii) The principles to be applied when dealing with contested applications to amend;

   iii) The parties' submissions;

   iv) Striking the balance; and

   v) My conclusions.

The Development of the Pleaded Case on Both Sides

4. The Claim Form for twenty-one Claimants was issued on 30 April 2013. A further Claim Form was issued for one further Claimant on 22 May 2014. No distinction falls to be made because of the existence of the two Claim Forms.

5. The original Particulars of Claim were served on 14 August 2013. Under the heading "Causes of Action", the Claimants pleaded that:

> "4.1 It is premature for the Court to determine the applicable law in respect of the liability of the Defendants. It is the Claimants' case that pursuant to section 11 and/or section 12 of the Private International Law (Miscellaneous Provisions) Act 1995 liability in respect of risk management and auditing undertaken by the First Defendant fall to be governed by the law of England and Wales. It is averred that the appropriate juncture for the determination of the applicable law in respect of the actions of the First Defendant must await completion of disclosure, whereupon proper assessment can be made of the

> corporate structure of the First Defendant, its control and relevant actions.
>
> 4.2 To the extent that Peruvian law applies, the Claimants' case is that Peruvian law is to be presumed to be identical to that of England & Wales unless and until the Defendants prove it otherwise."

6. Consistently with the Claimants' assertion that Peruvian law should be presumed to be identical to that of England and Wales unless the Defendants proved otherwise, the Particulars of Claim went on to allege causes of action under the headings of vicarious liability, common design to injure and/or commit trespass to and/or unlawfully detain the Claimants, conspiracy to injure, false imprisonment, and negligence. The claim in negligence was particularised in 18 respects ["the Original Allegations"], which provided a wide-ranging sheaf of allegations covering the Defendants' alleged failure to identify or plan for the risks that eventuated and, by failures of planning, control and supervision, failing to control or supervise the response to the protest.

7. The Defence of the First Defendant was served on 9 December 2013. It took issue with the Claimants' approach to the applicable law and correctly averred that it was to be determined by reference to the Rome II Regulation.

8. By April 2015 the Claimants had reassessed the legal position. They served Amended Particulars of Claim dated 9 April 2015 which differed materially from the original Particulars of Claim. In particular:

   i) The Claimants now accepted and pleaded that the law applicable to the Defendants' non-contractual obligations is to be determined by the Rome II Regulation. In consequence they now pleaded that:

      a) The Claimants' primary case is that English law applies to the First Defendant's non-contractual obligations arising from the pleaded torts; but that if English law does not apply to its non-contractual obligations arising from the pleaded torts, then Peruvian law applies and causes of action as pleaded arose against the First Defendant in any case;

      b) Peruvian law applies to the Second Defendant's non-contractual obligations arising from the pleaded torts;

   ii) The Original Allegations of negligence were retained (as they still are) as the formulation of the Claimants' primary case against the First Defendant under English law;

   iii) New causes of action were pleaded at [4.6]ff against the First Defendant (in the alternative to the case under English law) and the Second Defendant under Peruvian law ["the 2015 Peruvian law allegations"]:

      a) The pleading of those causes of action started by identifying five articles of the Peruvian Civil Code of 1984 ["the PCC"], which I set out at [9] below;

b) The pleading then identified acts committed against the Claimants by public and/or private security forces, in respect of which they (the security forces) were alleged to be liable to the Claimants pursuant to Articles 1969 and/or 1970 of the PCC;

c) The pleading then set out a set of allegations closely modelled on the Original Allegations which were alleged to give rise to direct liability on the part of each of the Defendants to the Claimants pursuant to Article 1969 of the PCC;

d) The pleading then alleged direct liability on the part of both Defendants to the Claimants pursuant to Article 1978 of the PCC for aiding, abetting and inciting the behaviour of the security forces;

e) The pleading then alleged direct liability on the part of both Defendants to the Claimants under Article 1970 of the PCC on the basis that (i) their organisation, direction or facilitation of the security operation and (ii) the security operation itself amounted to a risky or dangerous activity and caused harm to the Claimants;

f) The pleading went on to allege liability on the part of both Defendants to the Claimants pursuant to Article 1981 of the PCC for the tortious acts of the security services because of their control and supervision of the acts that the security services committed;

g) Finally, the pleading then alleged that, pursuant to Article 1981 of the PCC, the First Defendant is indirectly liable as principal for the acts of the Second Defendant on the basis of the First Defendant's control of the organisation including the Second Defendant.

9. The Articles of the PCC cited by the Claimants were:

> "Article 1969
>
> He who through negligence or wilful misconduct causes harm to another is required to compensate it. The defence for lack of negligence or wilful misconduct is in the hands of the perpetrator.
>
> Article 1970
>
> He who through risky or dangerous goods, or through the exercise of a risky or dangerous activity, causes harm to another, is required to make good such harm.
>
> Article 1978
>
> He who incites or aids and abets in causing harm is also liable for it. The extent of the liability shall be determined by the judge in accordance with the circumstances.
>
> Article 1981

> He who has others under his orders is held liable for the harm caused by the latter if the harm is carried out in the exercise of the duties or fulfilment of the respective service. The direct perpetrator and the indirect perpetrator are held jointly and severally liable.
>
> Article 1983
>
> If several people are liable for the harm, they shall be held jointly and severally liable. However, he who paid the totality of the compensation may then repeat the claim against the others, with the judge setting the proportion according to the seriousness of the fault of each of the participants. When it is not possible to discern the extent of each participant's liability, the share shall be calculated equally."

10. On 1 May 2015 the Defendants served their Re-amended Defence, which responded to the Amended Particulars of Claim. It admitted and averred that the relevant legal framework is contained in the Rome II Regulation; it denied that the Defendants have any responsibility for the alleged actions of the PNP; and, without prejudice to the generality of that denial, it pleaded a detailed response to the 2015 Peruvian law allegations. The Re-amended Defence did not plead limitation as a defence to the 2015 Peruvian law allegations.

11. In November 2016 the Claimants served Re-amended Particulars of Claim. This did not alter the fundamental thrust of the claims pleaded in the Amended Particulars of Claim; but it provided some further particularisation, re-numbering and tidying up.

12. The Defendants responded with a Re-re-amended Defence dated 13 January 2017. The Defendants took the opportunity to refine and amplify the pleading of their case in response to the section of the Claimants' pleading that dealt with Causes of Action. They did not plead a limitation defence to the 2015 Peruvian law allegations as now pleaded.

13. In April 2017 the Claimants informed the Defendants that they wished to amend their Particulars of Claim again. There were four proposed substantive amendments ["the 2017 Amendments"]:

    i) Where previously it had been alleged that the Second Defendant is directly liable for wilful misconduct pursuant to Article 1969 of the PCC in orchestrating the response to the protest and knowingly or recklessly causing or inciting or permitting harm to be inflicted by the security services, new [4.17] added an allegation of vicarious liability, namely that "the Second Defendant is liable under Article 1981 for the wilful misconduct of its employees, servants or agents under Article 1969";

    ii) Where previously it had been alleged that both Defendants are directly liable in negligence, relying upon a slightly modified version of the Original Allegations, new [4.21] added an allegation of vicarious liability, namely that "the First and/or Second Defendants are liable under Article 1981 for the negligence of their employees, servants or agents under Article 1969";

iii) Where previously it had been alleged that the Second Defendant is directly liable under Article 1970 for harm caused in the carrying out of a dangerous activity, new [4.25] added an allegation of vicarious liability, namely that "the Second Defendant is liable under Article 1981 for the liability of its employees, servants or agents under Article 1970"; and

iv) Where previously it had been alleged that the Second Defendant is directly liable pursuant to Article 1978 for aiding and abetting the PNP, new [4.28] added an allegation of vicarious liability, namely that "the Second Defendant is liable under Article 1981 for the liability of its employees, servants or agents under Article 1978".

14. On 24 April 2017, the Defendants informed the Claimants that they would in principle be willing to consent to the amendments. The consent was hedged by making clear that the Defendants did not accept that the amendments were proper, sufficient or effective to plead any further claim under Peruvian law that could properly be determined at trial; but the Defendants recognised that the amendments could be integrated into the Peruvian law expert evidence that was to be prepared and served in any event. The Defendants said that their consent to the amendments would be without prejudice to their rights to make an application to strike them out; and also said that their consent would be:

> "without prejudice to our clients' right to argue at trial that … any such amendment would have been made after expiry of a relevant limitation period and so was impermissible … . In all these respects, and for the avoidance of doubt, our clients' rights would be fully reserved."

15. Further correspondence led to the making of an order by consent dated 10 May 2017 that the Claimants had permission to serve the Re-re-Amended Particulars of Claim in accordance with the amendments set out in a Schedule, which included the 2017 Amendments. The 10 May 2017 order as supplemented and amended by a subsequent order dated 14 June 2017, provided for service of a Consolidated Re-re-re-amended Defence by 17 July 2017 and established a process for resolving any objections to the amendments proposed by the Consolidated Re-re-re-amended Defence.

16. In the event, only one paragraph of the Consolidated Re-re-re-amended Defence has proved to be contentious, namely [109], which pleads:

> "Any claim advanced against the Defendants under Peruvian law for compensation in respect of extra-contractual liability which was first commenced more than two years after the date on which any damage sustained by the Claimants was known to them is a claim brought after the expiry of the relevant limitation period specified in Article 2001 of the Peruvian Civil Code. It should be dismissed on that basis."

17. It may immediately be noticed that this pleading goes beyond being a response to the 2017 Amendments. If permitted, it will enable the Defendants to argue at trial that all of the Claimants' claims under Peruvian law are barred by limitation, on the basis that

the protests were in May 2012, the limitation period under Peruvian law is 2 years, and that no claim under Peruvian law was introduced until service of the Amended Particulars of Claim were served in mid-2015. For the purposes of the present application the Claimants concede that, without prejudice to their contention that the limitation defence is in fact without merit, the application should proceed on the basis that the defence has a real prospect of success.

18. The parties have now exchanged expert evidence on Peruvian law. It is sufficient to say that Professor Bullard (instructed by the Defendants) supports the applicability of the limitation defence in the circumstances of this case; and that his view is opposed by Professor Fernandez (instructed by the Claimants). It appears from a reading of their reports that their difference of view raises a narrow issue for determination: does the commencement of these proceedings in 2013 interrupt the Peruvian law limitation period even though the claims in Peruvian law upon which reliance is now placed were not pleaded initially and were not identified in the proceedings until more than two years after time first began to run? I do not know whether the experts will refine their positions or even reach agreement in the light of their further discussions before trial. For present purposes, the Claimants' sensible concession that the issue raised by the Defendants will, if allowed, have a real prospect of success is the basis upon which this application has been argued and will be determined.

19. The Claimants have pressed the Defendants in correspondence to explain why the limitation point now taken by [109] was not taken before. By a letter dated 3 August 2017 the Defendants wrote:

> "[Linklaters'] advice to the Defendants and the Defendants' communications with the Peruvian law experts they have instructed are, and remain, privileged. No waiver of that privilege is intended by or made in this letter.
>
> Subject to that reservation, the background to the insertion of para 109 and an explanation of the timing is as follows. The Defendants obtained advice regarding Peruvian law and the 2 year limitation period in 2013. Limitation was re-considered by the Defendants after receipt of the proposed amendments to the Claimants' Peruvian law case that accompanied your letter of 20 April 2017. That re-consideration led to the reservation in our letter of 24 April 2017. This re-consideration preceded the instruction of Professor Bullard but, obviously, this was a matter which he was asked to consider once instructed."

20. The limited nature of this explanation leaves some questions entirely unanswered. However, it is clear in stating that the Defendants considered the 2 year limitation period in 2013. That was, on any view, before the limitation period could have expired in relation to any claims arising out of injuries or death occurring in mid-2012. There is no statement that limitation was or was not considered again between 2013 and April 2017. Specifically, there is no statement that limitation either was or was not considered on receipt of the Amended Particulars of Claim in April 2015. In that sense, there is no explanation of the timing at all save that there was a re-consideration of limitation on receipt of the April 2017 proposed amendments, which led to the sequence of events I have set out above.

21. For completeness, I add that the trial is presently listed to start between 23-27 October 2017 and to last for much of the rest of the year. Final dates and timetables have not been set but it is anticipated that the expert evidence on Peruvian law will he heard at an early stage in the trial. Two days have been allocated for each expert's oral evidence.

The Principles to be Applied

22. There is considerable agreement about the applicable principles, with each side pressing nuances that are to be found in the authorities and may be favourable to that side's position. Both sides acknowledge that the Court's approach to allowing amendments has changed since the introduction of the CPR. That is not in doubt and should barely need to be stated. Equally, both sides recognise that the circumstances in which amendments may be put forward are infinitely variable and that each contested application for permission to amend will require an exercise of the Court's discretion that takes into account the particular facts of the case in hand. There are many authorities directly on the issue of amending before or during trial. To the extent that they provide statements of principle, they are useful for those who come after; and I shall refer to those that were cited to me that appear most useful for that reason. Otherwise, previous decisions are essentially illustrations of exercises of the Court's discretion in different circumstances that may be illustrative but are otherwise seldom compelling. In addition to citation of authorities relating to amendment before or during trial, I was referred to authorities concerning the principles to be applied when considering relief from sanctions under CPR 3.9 (*Denton and others v TH White Ltd* [2014] EWCA Civ 906; *Mitchell v News Group Newspapers Ltd (Practice Note)* [2013] EWCA Civ 1537) and when seeking to amend to plead a new case on appeal (*Crane v Sky In-home Limited and another* [2008] EWCA Civ 978). Apart from general observations to the effect that the procedural landscape has changed with the introduction of the CPR, I do not find it helpful to add these decisions, which address significantly different circumstances, to an already over-crowded field of more directly relevant authority.

23. Both sides referred to *Swain-Mason and others v Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735 as an authoritative starting point. I agree. The issue arose in *Swain-Mason* when the Claimant applied to amend to introduce what the trial judge described as "a completely new case" on the first day of a trial that had already been adjourned once: see [18]-[23], [28]. In reversing the trial judge's decision to allow the amendment, Lloyd LJ (with whom Elias and Patten LJJ agreed) said at [72]:

> "… it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own

> position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

24. The reference to "that case" and pleading a new case being justified on the basis that the existing case cannot succeed and that the new case is the only arguable way of putting forward the claim was a reference back to *Worldwide Corpn Ltd v GPT Ltd* [1998] EWCA Civ 1894, a case in which the Court of Appeal upheld Moore-Bick J's refusal to allow amendments to the claim in the first week or so of trial. It is implicit in the passages I set out below that the effect of granting the amendments would have been to cause the trial to be delayed. In giving the decision of the Court in *Worldwide Corpn*, Waller LJ said:

> "In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) "mucked around" at the last moment. Furthermore, the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales."

And, later on:

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided. We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it."

25. The consistent strands to emerge from both *Worldwide Corpn* and *Swain-Mason* include that:

i) Orders for costs may not adequately compensate the other party, particularly where that other party is "totally 'mucked around'";

ii) The Court is now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have to be brought into the scales;

iii) Accordingly, a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the Court;

iv) The significance of the amendment to a party's position is capable of being brought into the scales, but is not of itself determinative; and

v) It is always a question of striking a balance after weighing all relevant factors.

26. As will be seen below, the term "very late amendment" has subsequently become almost a term of art, meaning an application made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. I shall adopt that meaning. Elsewhere it has been said that "lateness" is a relative concept. I agree, and would add that the natural elasticity of language and its use in the authorities shows that an amendment may be regarded as "late" either because it could have been brought forward earlier or because it is brought forward at a time that is liable to disrupt the efficient conduct of the proceedings or both. The infinite variety of circumstances in which amendments may be brought forward means that there is a broad spectrum of potential impacts if an amendment is allowed, which is not dependent solely on chronological timing, and which may fall anywhere between the negligible and the devastating. In this broader post-CPR approach to amendments, the Court is not limited to considering the effect on the parties and whether any potential prejudice may be satisfactorily compensated in costs, though there is no reason why those may not be relevant considerations in appropriate cases. The Court will also have regard to the impact on the administration of justice in terms of potential disruption to the case in which the amendment is brought forward and in terms of the wider interests of the Court, other litigation and other litigants.

27. Two first instance summaries of principle are frequently referred to and were referred to by the parties on this application. In *Quah Sy-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), the Claimant applied three weeks before trial to amend her Particulars of Claim. The lateness of the application led to the vacation of the trial date. The Claimant's lawyers described the proposed amendments as "very substantial" and said that they "wholly change the nature of the case." It was conceded that the claim as currently formulated was unsustainable. The implication of allowing the amendment was that the trial date would go back by at least 9 months: see [85]. Before "striking the balance" at [94]-[95], Carr J considered the facts in detail and, at [36]-[39], referred to a number of authorities and summarised the relevant principles. At [38] she summarised them as follows:

> "Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the

> applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

28. Two months later, in *CIP Properties (AIPT) v Galliford Try Infrastructure Limited and others* [2015] EWHC 1345 (TCC), Coulson J was confronted by extensive amendments to the Claimant's case that left "absolutely no room for manoeuvre" in the timetable to trial when, as Coulson J concluded, it was imperative for the trial date in January 2016 to be maintained. At [14]-[18] Coulson J reviewed the many

authorities that had been cited to him, and at [19] provided his summary of the relevant principles, as follows:

> "In summary, therefore, I consider that the right approach to amendments is as follows:
>
> (a) The lateness by which an amendment is produced is a relative concept (***Hague Plant***). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (***Swain-Mason***), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (***Brown***).
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (***Brown***; ***Wani***). In essence, there must be a good reason for the delay (***Brown***).
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (***Swain Mason***; ***Hague Plant***; ***Wani***).
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (***Worldwide***), to the disruption of and additional pressure on their lawyers in the run-up to trial (***Bourke***), and the duplication of cost and effort (***Hague Plant***) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (***Swain Mason***).
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (***Swain-Mason***). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (***Archlane***).

29. I respectfully agree with and endorse these summaries of principle, which are similar. Where differences of emphasis or inclusion exist they may be seen to be referable to the facts of the particular case as set out elsewhere in the respective judgments. The only possible note of discord is that I would not agree that there *must* be a good

explanation for delay, as stated by Coulson J at [19(c)]. Coulson J cited *Brown v Innovatorone PLC* [2011] EWHC 3221 (Comm) in support of the proposition. In *Brown* Hamblen J referred to the explanation for why an amendment is made late as being likely to be one of the factors that is relevant to be taken into account in striking a fair balance; he did not suggest that the presence of an explanation was an essential prerequisite to the allowing of an amendment. Henderson J in *Wani v RBS* [2015] EWHC 1181 (Ch) adopted and endorsed the approach of Hamblen J in *Brown*. I do not read his judgment (or any other authority to which I have been referred) as laying down a more draconian rule that the absence of good explanation is fatal to the granting of an amendment. I adopt the approach that the presence or absence of an explanation which justifies the delay is one of the factors to be considered in deciding where to strike a fair balance.

30. To my mind, and in full agreement with Carr J, all of the modern authorities can best be seen as applications of the principles inherent in the Overriding Objective. Put another way, it is essential for the Court to bear in mind the principles inherent in the Overriding Objective when attempting to strike a fair balance as mandated by prior authority.

The Parties' Submissions

31. The Cliaimants' written and oral submissions maintain that this is a "very late" application not only in the sense explained by Carr and Coulson JJ in their respective summaries but also on the basis that it could and should have been made much earlier. No reason has been put forward to suggest that a limitation defence under Peruvian law could not have been raised when the defence to the 2015 Peruvian law allegations was first pleaded in May 2015 or at any time thereafter; nor has any explanation of the delay been given - silence is not an explanation. On the information that is available to the Court on this application, I accept that the [109] amendment could have been raised as a defence to the 2015 Peruvian law allegations when serving the Consolidated Re-amended Defence, and that there is no apparent reason why it should not have been raised earlier. Adopting the distinction between "very late" and "late" amendments that has emerged in the authorities, the proposed amendment is undoubtedly "late" in relation to the 2015 Peruvian law allegations. For obvious reasons, [109] could not be raised as a defence to the 2017 Amendments before the April 2017 iteration of the Particulars of Claim had been served. What the Defendants could do and did was to consent to the 2017 Amendments in principle without prejudice to their right to plead limitation, which they then did promptly in the broad terms of [109].

32. The Claimants submit that allowing the amendment would cause them retrospective prejudice in three respects. In their skeleton argument they submitted that, if the limitation defence had been raised in May 2015 limitation would doubtless have been dealt with as a preliminary issue soon thereafter and that "had the [limitation] argument been raised when it ought to have been, and argued successfully at the preliminary trial, the claims would have been disposed of two years earlier." This submission neglected the fact that the Claimants' primary case against the First Defendant is brought under English law and is unaffected by the proposed limitation defence. Accordingly, even if there had been a preliminary issue of the proposed limitation defence and the Defendants had prevailed, the claims under English law would have remained to be tried. The breadth of the Original Allegations means that

the factual scope of the trial would be either the same or virtually the same as would be the case if the claims under Peruvian law also remained to be tried. The only obvious effect on the substantial trial that is contemplated would have been to do away with the need for expert evidence on Peruvian law. While this would cause some saving of trial costs, that saving would have to be set off against the time spent on the trial of the preliminary issue.

33. In order to counter this reality, the Claimants extended their oral submissions to assert that "without question" the Court would have ordered that there be preliminary trials of the Peruvian law limitation defence *and* the issue whether the Claimants' primary case that English law is the applicable law for the claims against the First Defendant.

34. Two points arise on this expanded submission. The first is whether, as the Claimants submit, the Court would have ordered preliminary trials of both issues. The second is what the outcome would have been if both issues had been tried as preliminary issues. I accept that *if* such an order had been made and *if* the Defendants had succeeded on both issues then, subject to the possibility of appeals, it would have obviated the need for or possibility of a trial with all of its attendant expense. I also accept that such an outcome would have led to a significant saving in costs overall. The precise level of saving is not clear on the information now before the Court, but it gives rise to other considerations to which I will return.

35. However, I do not accept that it is beyond question that the Court would have ordered a preliminary trial of whether English law applies to the non-contractual obligations that are at issue in this trial. Far from it. The Claimants' case on the applicability of English law is set out at [4.2.3] of the current Particulars of Claim. In setting out the matters that "in particular" the Claimants rely upon, it makes plain that determination of this issue requires a wide-ranging factual enquiry encompassing (amongst other things):

    i) The First Defendant's connections with England;

    ii) Whether and to what extent relevant Group policy, including in particular risk management and risk auditing took place in England;

    iii) Whether or to what extent the First Defendant's allegedly negligent failure to comply with its alleged duty to the Claimants to prevent the damage of which the Claimants complain took place in England. I bear in mind the breadth of the Original Allegations, which would require to be considered under this heading; and

    iv) Whether the First Defendant in England knew of the allegedly high level of risk of abuse and/or torture in the announced protests and whether or not it was in the First Defendant's power to prevent such abuse or torture.

    The terms of the Defence make clear that these questions would and will be contested.

36. Despite the Court's objective of saving expense and dealing with the case proportionately using the case management tools at its disposal, the Court is also aware of the potential dangers that may be involved in identifying preliminary points as a possible route to cost savings and expeditious disposal of cases. Set against the

possibility of an overall saving in costs would have to be a reasoned assessment of the potential scale of such a saving and the inevitable prospects of (a) appeals with the consequent delay of any trial that might ultimately happen and (b) duplication and increase in the overall costs burden. The wide-ranging nature of the enquiry that would be required in order to determine whether English law is applicable to the claims against the First Defendant would be a major disincentive to ordering a preliminary trial of the issue.

37. The Claimants identified three main areas of "retrospective prejudice" arising out of the loss of the prospect of a trial of preliminary issues if limitation had been pleaded earlier. They may be relevant to the question whether or not there should have been a trial of preliminary issues and therefore need to be taken into consideration.

38. The first area is the submission that if the preliminary issues had been run in 2015 and the Defendants had been successful the Claimants would have lost the action but with greatly reduced expenditure, particularly in terms of the time costs of the Claimants' legal team who are operating under CFAs. This led to a powerful plea in oral submissions that it is vitally important for the administration of justice that lawyers be prepared to take on the risks inherent in representing clients on a CFA, there being no other means of funding such litigation. I acknowledge both the vital importance of and the risks inherent in lawyers being prepared to act on CFAs. And I am happy to recognise that the prospect of an uplift in fees in the event of success seems like cold comfort in the event of failure, though it is an incentive that is justified as the premium for accepting the risk in the first place. I also accept, as indicated above, that the prospect of saving costs would be a feature that the Court would have considered if asked to order preliminary issues in 2015. What is being identified in this plea is that, if the Claimants will lose and would have lost sooner, their lawyers would have had the opportunity to spend time on other work which might have been more remunerative. So expressed it seems to me to add little to the broader obligation upon the Court to manage cases expeditiously, proportionately and with a view to saving expense.

39. The second area is that the Claimants have ATE adverse costs cover of £3 million, which may have been enough if the litigation had come to an end with the determination of preliminary issues in or shortly after 2015 but is now insufficient to cover the Defendants' fees if the Claimants lose after a trial and are ordered to pay the Defendants' costs. Theoretically, therefore, the Claimants themselves might be exposed to adverse orders for costs that exceed the £3 million ATE cover if they lose after a trial. That is a theoretical risk, but no more. The likelihood of the Defendants ever pursuing the individual Claimants for costs is vanishingly small. The Defendants have confirmed in the course of this application that "they would not pursue individual Claimants for costs if their only resources available to meet any such claim were their personal assets." The risk of bearing defence costs over £3 million is therefore on the Defendants.

40. The third area is the impact on the Claimants personally. I accept that the prolongation of litigation can have an adverse impact on litigants, particularly in personal injury litigation. I also accept that this would be a feature that could and would have been relevant if the Court had been asked to order the trial of preliminary issues in 2015.

41. On the material available to me at present, it appears doubtful that the Court would have been persuaded to take the applicability of English law as a preliminary issue because of the likelihood that determination of the issue would require examination of at least a substantial portion of the evidence that will be adduced at trial. This likelihood is supported by the Claimants' original plea that the appropriate juncture for the determination of the applicable law in relation to the actions of the First Defendant must await completion of disclosure: see [5] above. I do not consider that the prospective savings in costs or the potential shortening of the period of uncertainty for the Claimants would have been sufficient to persuade the Court that preliminary issues should be ordered. Put another way, though I was not involved with the case at the time, I am not persuaded that the Court either would or should have ordered that both issues now identified by the Claimants be tried in advance of the trial.

42. Even if I were persuaded that the Court would have ordered preliminary issues, it is necessary to remember that the outcome of those issues would have been and is uncertain. As things stand, the Claimants' case is that the Peruvian law limitation defence is without merit and that English law is applicable. For all of the obvious reasons that apply on an application to amend pleadings, I am not able to form any view on whether the Claimants' case is well founded; but I cannot assume that it is not. It follows that, at best, the outcome if preliminary issues had been ordered is uncertain. Therefore, in assessing whether prejudice has been suffered that should be placed in the scales, the double uncertainty affecting order and outcome must be factored in.

43. Going hand in hand with the Claimants' submission that, if the Peruvian law limitation defence had been pleaded in 2015 the Court would then have ordered preliminary trials of both issues, is a further submission that the amendment is "very late" because, if allowed, the issues should be tried as preliminary issues and the trial as a whole be adjourned. I reject this contingent submission. My reasons may be shortly stated. First, I repeat what I have said about uncertainty of outcome, risk of appeals, risk of overall delay and risk of consequential increase in the overall costs burden. Second, it is in my view imperative that these proceedings be brought to trial in October 2017. Even then it will be over five years since the incident, and other factual investigations will go back further still. Further delay will inevitably cause further difficulties for accurate recollection in a case which may to a significant degree depend upon the memories of participants. Third, I bear in mind the Claimants' submission that delay may have an adverse medical effect because of the strain and uncertainties of the prolonged wait for judgment. Conversely, the Peruvian law limitation issue can and will be readily accommodated in the current trial timetable; and resolving the issue of the applicable law will be best done with full information at the end of the trial. Though no formal application was made to vacate the trial date in the event that the amendment is allowed, I do not accept that this is a "very late" amendment in the sense used by others and explained above.

44. The Claimants submit that if the amendments are allowed and cause them to lose the trial, they cannot be compensated in costs. If and to the extent that the Claimants themselves suffer an exacerbation or prolongation of their injuries, that is probably true. The time costs incurred by the Claimants' lawyers are not a risk for the Claimants themselves. If those costs are relevant and it is just to do so, the Court will have the power to make appropriate orders at the conclusion of trial. I accept the

submission that, if the amendment is allowed and causes the Defendants to succeed after a trial and the court is then persuaded that there should have been preliminary issues ordered in 2015, the wider interests of the Court itself may be seen to have been adversely affected by the failure to bring the litigation to a conclusion earlier. While I acknowledge that as a risk, I am not at present persuaded that preliminary issues could or should have been ordered in 2015, for the reasons already given.

45. It is not alleged that the Defendants ever represented to the Claimants that they would not take limitation points. No question of any form of estoppel arises. The balance must be struck on conventional principles.

Striking the balance

46. I start by considering whether the Defendants should be allowed to plead [109] in answer to the 2017 Amendments. I can see no reason why not. On this limited basis the pleading is not "late" in any sense of the word, as the Claimants have only just pleaded the 2017 Amendments to which [109] would be responding. As the Claimants accepted during oral submissions, the arguments they advance on the basis of delay, expense and the other forms of prejudice to which I have referred, fall away when considering the 2017 Amendments in isolation. The issue can and will readily be accommodated in the trial process as currently listed. Both experts have already addressed the issue in exchanged reports; and, subject to some refinement or alterations in position when they meet to discuss matters in issue, the issue to be decided appears to be narrow and clearly identified. In my judgment, the balance falls firmly on the side of allowing the amendment to plead Peruvian law limitation as a defence to the 2017 Amendments.

47. In my judgment, the admission of the Peruvian law limitation amendment as a response to the 2017 Amendments affects the balance in relation to the wider question. For the reasons I have given, this is not a "very late" amendment. It is, however, a late amendment: there is no explanation and no apparent reason why the Peruvian law limitation issue could not have been raised in 2015 or at any time thereafter. That said, for the reasons I have given, it does not at present appear that the wider interests of the Court have been adversely affected; or that the need for the trial that will happen can be attributed to the failure to bring forward the limitation defence earlier. It follows that on one side of the balance is the fact of lateness and the absence of explanation, combined with the possibility (but not more) that the Court might have been persuaded (contrary to my view) that Peruvian law limitation and the applicability of English law should be tried as preliminary issues and the possibility (but not more) that, if the Court so ordered, the Claimants might lose on their primary case against the First Defendant and on Peruvian law limitation. If that double contingency were to have come to fruition then the continuation to trial since the determination of those preliminary issues (with the possibility of appeals not being forgotten) would have been wasteful and unnecessary, with some or all of the adverse consequences identified by the Claimants.

48. On the other side of the scales, however, is the fact that the Peruvian law limitation is a real and important issue. Its importance lies in the fact that, if it is well-founded and is admitted, the Court will reach the right and just outcome that no claims under Peruvian law should have been advanced or entertained because they were barred by limitation. Conversely, if it is well-founded but the amendment is excluded (other

than in relation to the 2017 Amendments) the Court will knowingly run the risk of permitting the Claimants to achieve a windfall to which they should not be entitled, which is inherently unjust. What is more, it will be seen to be a windfall to which they should not be entitled because the issue will be determined, though only by reference to the 2017 Amendments. The artificiality of such an outcome should be avoided if reasonably possible. If the limitation defence is ill-founded but the amendment is allowed, it will be rejected without adversely affecting the effectiveness or duration of the trial to any material extent. To my mind, excluding the amendment when it is not shown to have had or that it will have any adverse impact on the wider interests of the Court or that it will cause significant prejudice to the Claimants runs the risk of causing serious injustice by excluding an issue which should be before the Court and can readily be accommodated despite that lateness of the amendment. The weight to be attributed to this factor is reduced because, in the absence of any explanation, it has come about as a result of the Defendants' own inaction, for which there is no apparent justification. It remains, however, significant.

Conclusions

49. The application to amend by introducing [109] in response to the 2017 Amendments should be allowed.

50. The application to amend by introducing [109] in response to the Peruvian law claims more generally is "late" but not "very late". The lateness is unexplained. However, it raises an important issue which is conceded (for the purposes of the application) to have real prospects of success. I am satisfied (the burden being on the Defendants) that the amendment can be accommodated in the trial process without adverse effects for the efficiency of this litigation or for the wider interests of justice. I am also satisfied (the burden again being on the Defendants) that the prospect of prejudice to the Claimants if the amendment is allowed is outweighed by the prospect of injustice to the Defendants if it is excluded, even though they would have brought the injustice upon themselves for no given or apparent reason. No point has been taken on the clarity of the proposed amendment. Allowing the amendment is in the circumstances proportionate and in accordance with the Overriding Objective.

51. The Defendants' application to amend to plead [109] generally is therefore allowed.