IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

2013 EWHC 4045 (QB)

No. HQ13X02118

Royal Courts of Justice

Tuesday, 3rd December 2013

Before:

MR. JUSTICE GREEN

B E T W E E N :

MAGIGE GHATI KESABO & Ors. — Claimants

- and -

AFRICAN BARRICK GOLD PLC & Anor. — Defendants

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*Transcribed by **BEVERLEY F. NUNNERY & CO***
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

MR. H. DAVIES QC (instructed by Leigh Day & Co.) appeared on behalf of the Claimants.

MR. B. THANKI QC and MR. S. ATRILL (instructed by Quinn Emanuel Urquhart & Sullivan, UK LLP) appeared on behalf of the Defendants.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE GREEN:

The issue

1 There is before me an application by certain Claimants for costs arising out of an application made by them for an anti-suit injunction to restrain the Defendants from continuing with proceedings brought in Tanzania on facts arising out of those relied upon in the proceedings extant in England and Wales. The issues before me today are essentially as follows: (1) whether I should order costs in favour of the Claimants; (2) if so, whether I should order them summarily and, if so, as to what sum; (3) in the alternative, whether I should order the payment of a sum on account of the Claimants' costs, and (4) whether, if I award costs, I should do so on an indemnity basis.

2 The core basis of the application is that the Defendants, having commenced proceedings in Tanzania at a point in time when it knew that English proceedings had been issued, abandoned these proceedings within a few months. In the interim, a without notice anti-suit injunction has been made against the Defendants. This order was made on 21st August 2013 by Turner J, and was in relatively orthodox terms which, in essence, restrained the Defendants from (a) pursuing or taking further steps in the Tanzanian proceedings; (b) bringing further proceedings against the Claimants in Tanzania in relation to the same facts, or (c) bringing any proceedings in Tanzania which sought to restrain the Claimants to the English proceedings from pursuing those English proceedings.

3 I note that certain Claimants are no longer represented by Leigh Day, the Claimants' solicitors, and they may have compromised their claims with the Defendants. I have no knowledge of this. I make clear that the ruling I give today has no bearing upon the costs position as between individuals who were hitherto Claimants and the Defendants.

The facts

4 I start by providing a summary of the competing factual contentions of the parties in the litigation. The case concerns events occurring at the North Mara mine ("the mine") in Tanzania between 2nd July 2010 and 7th May 2012. The Claimants say that during that period a large number of workers were killed or injured as a consequence of violence perpetrated by security guards at the mine. A witness statement of Mr. Richard Meeran, a partner at Leigh Day, dated 20th August 2013, provides a succinct account of the Claimants' version of events. I cite paragraphs 8 to 16:

"8. The Claimants are 12 impoverished members of the Kuria people who live in the Tarime district of the Mara region, a remote north-eastern part of Tanzania some 20 km south of the Kenyan border, 100 km east of Lake Victoria and approximately 1200 kilometres from Dar es Salaam.

9. The Claimants are pursuing claims for loss and damage against an English incorporated gold mining company (the First Defendant, **African Barrick Gold Plc ('ABG**')) and its 100% owned and wholly controlled Tanzanian subsidiary (the Second Defendant, **North Mara Gold Mine Limited, ('NMGML**')). These claims arise out of the death of family members and/or personal injuries that occurred as a consequence of breaches of duty and/or human rights violations allegedly committed by the Defendants and/or their servants or agents at or near an open pit gold mine operated by the Defendants at North Mara, Tanzania ('**the Mine**').

10. The Mine is situated in the midst of seven local villages. The land immediately next to the Mine's operational areas is used for village dwellings, village roads and for common rural activities, such as collecting water and driving cattle. Leigh Day has been informed by Claimants, witnesses and journalists and I verily believe that in some areas, operational activities such as the dumping of waste-rock occur so close to village areas that debris falls on and near people's homes. [I omit some text.]

11. Six of the Claimants represent the dependants and/or estates of individuals who were killed there. The injuries and deaths for which Claimants 1, 2, 3, 4, 6 and 7 bring these proceedings all relate to a shooting at the Mine on 16 May 2011. Claimants 10 and 11 were injured at the same time on 28 November 2011 allegedly as a result of the Defendants' Mine security pushing rocks down onto people in the open pit. The remaining four claims relate to shooting incidents involving police and/or Mine security on different dates, including one fatal shooting on 7 May 2012.
.....

12. The Kuria people, who live in villages in the area of the Mine, are primarily pastoralists and agriculturalists. Prior to the establishment of the Mine, local villagers engaged in small-scale gold mining. Some continue to do so on land that is not within the Mine's operational areas. However, many continue to engage in such activities within the area occupied by the Mine. It is a daily occurrence for both men and woman to enter the Mine's operational areas to identify and collect rocks that they hope contain gold. Often, police demand that local villagers pay them in order to enter and remain on the Mine. The rocks gathered on the Mine are taken and later

crushed to reveal trace amounts of gold. Almost all of the injured and deceased individuals who are the subject of the English proceedings made some of their income from this prospecting activity.

13. The Second Defendant holds the licence to operate the Mine because Tanzanian law requires such licences to be held by a Tanzanian company. But it is alleged on the basis of the First Defendant's own published corporate documentation... that at all material times the First and Second Defendants operated for all intents and purposes as one entity, and/or that ABG: (i) controlled the operations of NMGML, or (ii) exercised control over certain functions in respect of the Mine operations, in particular the establishment and oversight of implementation of security policies, practices and procedures, and provision of advice on maintenance of security.

14. The Claimants contend that the Defendants, and/or each of them, were responsible for the security arrangements on the Mine, including the retention of mine security personnel and the use of Tanzanian police as an integral part of the Mine's security. The Tanzanian Police were operating under a Memorandum of Understanding ('MOU'), which saw the Defendants providing, *inter alia*, 'monetary support' to the Police. .....

15. The Claimants further contend that the Defendants or each of them owed a duty of care to the Claimants and that the Claimants have suffered injury and/or loss as a result of the negligent manner in which the security services are arranged and carried out at the mine.

16. The eight Claimants who are the subject of the Tanzanian Proceedings have brought their claims in the English Proceedings based on injuries or deaths allegedly resulting from gunshots fired by police officers providing security at the Mine. ....."

5 The Defendants, for their part, take issue with this version of accounts. As yet, the Defendants have not served a defence. However, lest there be any doubt, the challenge to the Claimants' case occurs not just at the level of the primary facts but also at the level of the principles on which the claims are based. In a witness statement of 19th September 2013, Ms. Susan Prevezer QC, a partner in Quinn Emanuel Urquhart & Sullivan ("Quinn Emanuel"), lawyers for the Defendants, sets out a different version of the events. I cite from paragraphs 11 to 14 of her statement:

"11. The Mine consists of approximately 42 square kilometres of land, including four open-air pits. It is located in the Tarime District of the Mara Region of Tanzania.

12. The Mara Region is a remote area located at the northernmost tip of Tanzania, which has extensive problems caused by violence, organised crime and other illegal activity.

13. As is the case with many other operating mines in Africa, trespassing and theft have taken place at the Mine for many years. This began long before Barrick and ABG had any involvement in the Mine. Every day, villagers residing in the communities surrounding the Mine trespass onto the Mine to steal gold-bearing materials and other property. By way of example, between January 2012 and July 2013 more than 325,000 intruders were recorded as trespassing on the Mine (based on visual inspection by the Mine security personnel). ..... I am informed by the Defendants that the majority of intruders very often target the highest-grade ore possible by either climbing into active mining pits or accessing the 'run-of-mine pad' (the 'Rom Pad') where high-grade ore is stockpiled before processing. In addition to incursions by small groups of intruders there are also co-ordinated, mass-scale invasions where intruders are armed with weapons such as pangas (a form of machete), hammers, rocks, spears, bows and arrows.

14. NMGML employs approximately 200 security guards who are tasked with protecting the NMGML employees and property, including by keeping intruders from invading the Mine. The security personnel are provided with extensive training, including training as to the use of force procedures, and much of this training is repeated on an annual basis... They are trained to deal with intruders by warning them not to enter the Mine and instructing them to leave the Mine if they ignore those warnings. When conducting patrols of the operational areas of Mine, security personnel are equipped with non-lethal ammunition only (primarily bean bag rounds and tear gas) and are only permitted to use reasonable and non-lethal force where necessary to defend themselves, their colleagues or Mine property."

6 More generally, Ms. Prevezer says that the deployment of police and security at the mine is in response to coordinated invasions by armed locals intent on theft and upon causing violence to mine employees and police, and it is said that the presence and conduct of the security and police was necessary and proportionate.

7 Although I have set out the competing contentions in a little depth, I express no view whatsoever on the merits of the rival claims, which will of course need to be resolved at trial.

The procedural history leading to the anti-suit injunction

8 I turn now to consider the convoluted procedural history relevant to the issues before me. On 28th March 2013 the Claimants issued the claim form in the Queen's Bench Division. The gist of the claim was that the Defendants were liable in tort, namely negligence, trespass to the person, conspiracy and/or as occupiers, or on the basis of what were said to be "equivalent wrongs". It is right to describe the claim as cast in terms which were lacking in detail, to put it mildly. There was, in addition, an assertion of vicarious liability.

9 By 19th April 2013, Freshfields Bruckhaus Deringer ("Freshfields"), then acting for the Defendants, had come to be aware of the existence of the claim. The Claimants' solicitors had issued a letter before claim to the Defendants on 12th January 2012. This was a 14-page letter which set out at length the basis of the claim. The letter identifies causes of action under Tanzanian law which were said to be "essentially the same as under English law". The causes of action identified were negligence, trespass to the person and occupiers' liability. In relation to negligence, the causes of actions were based upon alleged failures by the Defendants. Vicarious liability was not referred to in relation to negligence. In relation to intentional trespass, this was said to create liability because the police were said to operate under the authority of services they were "engaged" to perform. It was said, in paragraph 30, that they were vicariously liable for these actions. The letter indicated an intention to issue legal proceedings but suggested that negotiations might be sensible. Freshfields wrote to Leigh Day on 3rd February 2012, explaining that they had been retained and would revert. It is clear that the Defendants were aware of a threat of litigation, by solicitors experienced in the pursuit of multi-party claims, from January 2012. It is also clear that whilst vicarious liability was raised in respect of certain causes of action, it was certainly not at the forefront of the Claimants' allegations.

10 There followed an exchange of correspondence between solicitors from February 2012 until April 2013, a period of 14 months. This exchange concerned, *inter alia*, pre-action disclosure and a range of factual and evidential disputes. By letter of 28th March 2013, Leigh Day notified Freshfields of a notice of funding in relation to 13 Claimants, who had entered conditional fee agreements with Leigh Day. On 19th April 2013, Freshfields wrote to Leigh Day as follows in terms making it clear that they knew that a claim had been issued. The letter started thus:

"We refer to your letter dated 11 April 2013.

We understand from the Queen's Bench Division Registry at the High Court that a claim form has been issued against our client African Barrick Gold plc (and another) on behalf of the Claimants identified in your notice of funding dated 28 March. In advance of any further steps you may take regarding the service of proceedings, we take this opportunity to make the following points in relation to certain of these Claimants.

For the avoidance of doubt, should you serve formal proceedings in relation to these Claimants, our client reserves its right to take all steps to bring these matters to the attention of the court at the earliest opportunity and to seek appropriate costs orders.

To the extent that we do not directly address any of the statements in your letter, this should in no way be deemed to be acceptance of your position."

11 On 3rd July 2013, the Defendants' present lawyers, Quinn Emanuel, advised Leigh Day that they had been instructed in the place of Freshfields. On 4th and 11th July 2013 Leigh Day sought express confirmation as to whether Quinn Emanuel was authorised to accept service on behalf of both Defendants. By a letter of 11th July 2013, Quinn Emanuel confirmed that they were so authorised. It is not in dispute that the legal effect of this is that the Defendants indicated their submission to jurisdiction of the English courts, though with a number of limited caveats.

12 In the case of the First Defendant, it is incorporated in England and Wales and, pursuant to the Brussels Regulation 44/2001, is domiciled here, so that the courts of England and Wales in any event have jurisdiction. It is, to use the term frequently expressed, the anchor Defendant. So far as the Second Defendant is concerned, where an overseas Defendant instructs his lawyers to accept service and those instructions are communicated to the Claimant, that Defendant is regarded as having submitted to jurisdiction: see *Manta Line Incorporated v. Seraphim Sofianites and Midland Bank plc* [1984] 1 Lloyd's Rep 14, p.20, per Sir John Donaldson MR. I should add that by a letter of 28th August 2013, Quinn Emanuel confirmed that the Second Defendant "does not intend to challenge the territorial jurisdiction of the English court in the existing proceedings". This was, however, said to be subject to the condition that the proceedings were validly commenced, which the Second Defendant did not accept. Further, in that letter the Defendant opined that the Court of Appeal authority of *Manta Line* was out of date and did not bind the English courts, notwithstanding, as I have observed, the Defendants' position which was that there was no material dispute as to jurisdiction.

13 On the same day, namely 11th July 2013, Quinn Emanuel issued a Plaint in the Dar Es Salaam District Registry, registered as Civil Case Number 13 of 2013. The Plaint named eight of the Claimants in the English proceedings as Defendants. The relief sought was for a negative declaration that, under the law of Tanzania, the Plaintiff (namely the Second Defendant in the English proceedings) could not be liable for the acts and omissions of the Tanzanian police force. The claim was brought only by the Second Defendant to the English proceedings. The gist of the claim for a declaration was that the Second Defendant was not, nor could be, in control of the Tanzanian police. It is, I think, relevant to set out the entirety of paragraphs 11 to 15 of the Plaint. These are in the following terms:

> "11. From time to time, the Tanzanian Police Force (together with the Regional Police Commander... an organ of the United Republic of Tanzania vested with the responsibility of, among others, ensuring public security, safety and protection of both life and property of all inhabitants, to reduce the impact of crime on the inhabitants of community through investigation, apprehension, and adjudication of persons involved in criminal offences, and involving the community within the policing processes required to prevent crime, to solve crime, and to create an environment that builds an effective working relationship between the community and the Tanzanian Police Force) provides the Plaintiff with assistance in community policing and maintenance of law and order in and around the Mine so as to ensure the security of the Mine, and to protect the safety of people who are employed at the Mine.
>
> 12. The Tanzanian Police Force operates at all times under its own command and direction in accordance with the Police General Orders and other relevant laws of Tanzania, and the officers of the Police posted to the Mine act at all times under the orders and supervision of their hierarchical Police officers. The general working principles underpinning the relationship between the Mine and the Tanzanian Police Force are set out in a Memorandum of Understanding ('MOU'), a copy of which is annexed... and forming part of this Plaint.
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> 13. On 28 March 2013, a claim was issued by the Defendants (amongst others) in the English High Court of Justice against the Plaintiff, in respect of security-related incidents alleged to have occurred at or in the vicinity of the Mine in 2011. A copy of the Claim Form is annexed hereto and marked '**NMG2**' and forming part of this Plaint.
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> 14. It is alleged in the Claim Form referred to at paragraph 13 above that injuries or deaths occurred as a result, *inter alia*, of the use of unlawful

and/or excessive force by the Tanzanian Police Force and that the Plaintiff is liable in negligence, trespass to person, conspiracy and/or as occupiers and/or for equivalent torts for these injuries or deaths. Accordingly, these allegations raise a fundamental and discrete question of Tanzanian law, namely whether a private person, and in particular the Plaintiff, can ever be held liable for the actions and/or omissions of the Tanzanian Police Force acting in discharge of its duties whose code of conduct is regulated by the Police Force and Auxiliary Services Act, Cap.322. That question falls properly to be determined by this Honourable Court.

15. The cause of action arose in Mara Region, Tanzania and this Honourable Court therefore has jurisdiction to hear and determine the suit."

14 As for the relief sought in Tanzanian Plaint, the Plaintiff sought a declaration in the following terms:

> "A declaration that, as a matter of Tanzanian law, a private person, and in particular the Plaintiff, cannot be held liable for the actions and/or omissions of the Tanzanian Police Force acting in discharge of its duties whose code of conduct is regulated by the Police Force and Auxiliary Services Act, Cap.322."

15 There is alleged by the Claimants in this case to be an ambiguity as to the scope of the Plaint in that, read broadly, it could be said to raise all issues as to the Defendants' liability which arise in the English proceedings. Mr. Davies QC relies upon an observation in Ms. Prevezer's witness statement in which she refers to vicarious liability as an issue which was "subsidiary", thereby intimating, so it is said, that the Plaint was of wider compass. In my view, the Plaint was understood by the Claimants to raise a question of vicarious liability and that, notwithstanding its somewhat gnomic language, it was the issue of vicarious liability which was sought to be determined by the Tanzanian High Court. I do accept that this was the essence of Ms. Prevezer's evidence in her witness statement when read in its totality.

16 I return now to the basic chronology. On 26th July 2013 the claim form was served on Quinn Emanuel, and a skeletal Particulars of Claim was served on 30th July 2013. The Particulars of Claim echoed the earlier letter of January 2012. It predicated liability primarily upon breaches of duty by the Defendants, but in paragraph 14 threw in vicarious liability.

17 An issue arose as to whether the Particulars of Claim was served in time and, if it was not, whether permission should be granted for it to be served out of time. This matter came before Simon J. on 9th and 10th October 2013. In his ruling of 23rd

October 2013 the judge was critical of the pleading. He said that it had been served out of time, but he nonetheless granted an extension until 4.00 p.m. on 12th November 2013 for a new Particulars of Claim to be served which addressed the criticisms the judge made in his judgment.

18 Once again, I need to backtrack a little in order to complete the chronology. On 5th August a summons was issued in the Tanzanian proceedings directing the Defendants in those proceedings to file a defence within 21 days, in default of which the Claimants in Tanzania could seek a default judgment. It directed the hearing of a mention to be held at 8.30 a.m. on 27th August 2013. The summons was served on certain English Claimants on 12th August 2013. This was the first occasion upon which Leigh Day for the Claimants was made aware of the Tanzanian proceedings.

19 On 20th August 2013, the Claimants in the English proceedings sought, without notice, the anti-suit injunction that I have referred to, and the order was made on 21st August 2013. There remained outstanding the continuation of the anti-suit order made by the judge. Simon J. had directed that it be listed for hearing in the near future. The more detailed Particulars of Claim was then served on 12th November 2013. In paragraph 158 of this pleading it is made clear that the only basis upon which vicarious liability is relied upon is in respect of the Defendants' liability for their own security personnel. In relation to the intentional tort of trespass to the person, the claim is now put in terms of the Defendants' liability *qua* joint tortfeasor, based upon alleged acts of procuring, encouraging or endorsing.

The discontinuance of the Tanzanian proceedings

20 On 21st November 2013, Quinn Emanuel wrote to Leigh Day agreeing to undertake to the court to discontinue the Tanzanian proceedings as soon as practicable and, further, that both Defendants would undertake not to initiate further proceedings outside the jurisdiction of the courts of England and Wales without permission. It is important to set out the points made by Quinn Emanuel in this letter since they directly impact upon the costs issues arising. The points made and reasons given for this change of position were, in summary, as follows.

21 First, as explained in the first witness statement of Ms. Prevezer QC, the issue sought to be determined was one of complexity, and an adverse finding by the English courts against the Defendants in respect of the actions of the police might prejudice the Defendants' right to seek an indemnity from the Tanzanian Government in relation to that liability. I should elaborate a little upon this particular issue. Under the Tanzanian Government Proceedings Act 1967 it appears to be provided that the Government can only be liable for civil wrongs in the High Court of Tanzania. Section 7 of the said Act includes the following:

> "... no civil proceedings against the Government may be instituted in any court other than the High Court."

The Defendants' Tanzanian lawyer's advice was that an adverse finding against the Defendants in the English courts, even under Tanzanian law, based upon vicarious liability for the actions of the state, could not be relied upon (or at least arguably so) by the Defendants in indemnity or contribution proceedings against the Tanzanian state in Tanzania, because the ultimate liability of the Government would have been determined otherwise than in the Tanzanian High Court. This would be because a critical component of the contribution or indemnity proceedings would be the findings and rulings of the High Court in England and Wales. I am not in a position to assess the correctness of this. However, I do accept that a serious issue arose of some complexity which would flow out of the inclusion of any allegation of vicarious liability in the proceedings in England and Wales.

22 The second point in the letter was that upon receipt of the new pleading on 12th November 2013 the Defendants took the view that the basis of the Claimants' case had fundamentally altered, and in particular the allegation that the Defendants were vicariously liable for the acts and omissions of the Tanzanian police was now absent. With this clarification, no utility would any longer be served by continuing the Tanzanian proceedings.

23 The third point is that it is said that the anti-suit injunction should not have been without notice and, had they been sought, the Defendants would have given written undertakings to the court in relation to the Tanzanian proceedings. In any event, the Defendants had good reason to seise the Tanzanian courts on an issue which was "discrete, nuanced and constitutionally sensitive".

24 Finally, the Defendants referred to a failure on the part of the Claimants to give full and frank disclosure to Turner J. on 21st August 2013, in relation to four discrete matters which were as follows: (1) the Claimants' impecuniosity; (2) allegations of harassment and intimidation; (3) the characterisation of certain grievance procedures, and (4), as to the comprehensiveness of the references made to the District Commissioner of Tarim's report into five of the deaths at the mine. In oral argument before me today, Mr. Bankim Thanki QC, for the Defendants, focused upon the test in law for the grant or refusal of an anti-suit order, and highlighted what he said was the exceptional nature of the circumstances which ordinarily would justify the grant of relief. He referred to the judgment of the Court of Appeal in *Highland Crusader Offshore Partners v. Deutsche Bank* [2009] EWCA (Civ) 725. It is strongly submitted that there was a culpable failure to draw the judge's

attention to the relevant criteria and that when they are applied, no injunction could ever have been granted.

Should I order costs in favour of the Claimants?

25 Having set out at some length both the facts and the chronology, I turn now to consider the issues arising. The first question is whether I should order the Defendants to pay the Claimants' costs or whether the costs should be in the cause. With regard to this threshold question, I have decided that the Claimants should have their costs of and occasioned by the Tanzanian proceedings for the following reasons, all of which are, to a degree, interrelated and concern quintessentially matters of case management.

26 First, on my analysis of the way in which the claim was formulated between January 2012 and July 2013, vicarious liability was by no means a fundamental part of the claim. It has every appearance of being something of an afterthought. The Claimants' case focuses upon acts and omissions of the Defendants themselves in relation to the Tanzanian police. For example: failure to prevent police abuse; failure to put in place safe systems of work; failure to supervise; failure to provide medical facilities; failure to investigate; and failure to review or supervise police conduct. Whilst I accept that vicarious liability was explicitly referred to, it was not, in my view, the fundamental issue.

27 Secondly, the Defendants commenced the Tanzanian proceedings at an early stage before even the claim form was served on 26th July 2013 or the skeleton Particulars of Claim were served on 30th July 2013. At that point in time the Defendants were fully aware that a claim form had been issued in the Queen's Bench Division Registry because the Freshfields' letter of 19th April 2013, to which I have already made reference, referred to Freshfields having been in contact with the Queen's Bench Division Registry. The decision to launch the Tanzanian proceedings occurred on 11th July 2012, that is to say 15 days before the service of the claim form, and 19 days before the Defendants had sight of the skeletal pleading. The decision to launch these proceedings inevitably predated, at least to some degree, the issuance of the actual Plaint and was part of a pre-emptive strategy in relation to the English proceedings. It was, to use the vernacular, a Tanzanian torpedo. In these circumstances, the submission that it was the *volte-face* on the part of the Claimant between two versions of a pleading (of which the Defendants were unaware at the point in time when the decision to launch the Tanzanian proceedings was taken) that caused the Defendants to decide not to pursue the Tanzanian proceedings, does not, in my view, have real substance to it.

28 Thirdly, there was no need for haste in the bringing of the Tanzanian proceedings. The Defendants had been aware since the letter before action in January 2012 that proceedings in the High Court were a real possibility. If the Defendants had a serious concern about vicarious liability, then it would have arisen upon a reading of the letter from Leigh Day in January 2012, which set out the basis of the claim. Yet in the intervening 18 months before service of either the claim form or the skeletal pleading, the issue of vicarious liability and the possibility of bringing proceedings in Tanzania to address this as a discrete point was not canvassed in correspondence. If the Defendants' objection was that they had to launch proceedings to overcome uncertainty, then there was no reason to commence proceedings when they did and there was ample opportunity in the course of the English proceedings for the issue to be thrashed out. In their skeleton argument of 7th October 2013, at paragraph 88, in preparation for the hearing before Simon J, the Defendants explained that there were numerous essentially case management-related reasons why the Tanzanian proceedings would not subvert the English proceedings, and indeed could materially assist those proceedings. But if this was so, there was no reason why those proceedings had to be launched without prior notice at a point in time when the claim form and pleadings had not even been served. Mr. Thanki QC, for the Defendants, candidly accepted that it would have been far better had the Defendants given prior notice to the Claimants of their intention to bring proceedings in Tanzania. I agree. I consider also, even assuming (as I do) that the Defendants had a serious point in relation to the impact of the Government Proceedings Act 1967, that this was an issue which cried out to be aired not only with the Claimants but also with the court. I consider that at the very least the High Court would have given anxious consideration to the management of this complex litigation in the light of this particular point. I, of course, cannot express a view on what the outcome might have been, but it is, in my view, a germane consideration which could and should have been raised. But instead the Defendants launched a pre-emptive strike in the Tanzanian courts. The torpedo might have been wholly unnecessary had the Defendants' concerns been aired. For instance, the Claimants might have confirmed much earlier than in fact they did that there was no reliance to be placed upon vicarious liability, or the court might itself have hived vicarious liability off, or some other solution might have been found. It seems to me that the nigh on inevitable response of the Claimants to the abrupt and unheralded launch of the Tanzanian torpedo was the anti-suit injunction application, yet this could well have been wholly avoided.

29 Fourthly, the Defendants say that costs should not be awarded to fund claims that are vexatious, fabricated and based upon embellished accounts. I do not accept that this is relevant. For the purpose of costs, neither party even remotely suggests that I can or should attempt to resolve complex evidential issues on this costs application. These are for the trial judge. The issue here concerns the costs of an

application for injunctive relief which the Defendants have now in substance succumbed to. In my view, the underlying merits are not materially relevant to this assessment. I agree with the submission of Mr. Davies QC that an allegation by the Defendants that the claim is very weak cannot in and of itself be a ground for not addressing the costs of a discrete matter. Were it to be otherwise, this would prevent a court from awarding costs in almost every case.

30 Fifthly, I deal now with a point of some wider significance. Mr. Thanki QC submits that, in effect, I must, in the context of a costs application, consider the counterfactual world in which this hearing had concerned the merits or demerits of the continuation of the anti-suit injunction. He submits that this is necessary because the Claimants submit that, on any view, the case for continuation of relief was overwhelming and this is a factor that is relevant to costs. As to this, I would make the following observations. First, my decision is based not on the merits of an anti-suit injunction at the culmination of a with notice fully-contested hearing. My decision is based upon the procedural disproportionality of the Defendants' pre-emptive commencement of proceedings in Tanzania which could have been avoided. Secondly, whilst I have some sympathy with Mr. Thanki QC's submissions about the fact that the Claimants proceeded without notice, and the apparent non-citing to the judge of certain authorities, including those relating to the threshold tests, I am not, on this occasion, in a position to conduct a full-blown merits assessment of an entirely academic nature. I do not know what ultimate conclusion I would have arrived at had I engaged in this exercise. By way of illustration, the Quinn Emanuel letter of 17th November 2013 identifies four incidents of alleged non-disclosure, but these were not canvassed in Mr. Thanki QC's skeleton argument, and they were not, in any detail, pursued orally. Mr. Thanki QC said that it was not necessary to go into these matters unless I was minded to order against his client. There is, with respect, an element of having one's cake and eating it about this submission. If I am, as a critical component of an already complex costs case, to decide a hypothetical application, then I would need full argument and coverage of the points relied upon which might have been raised in the substantive hearing. The fact that this is impracticable in the present circumstance supports my view that it is inappropriate, in this case at least, to engage in this sort of exercise. Nor do I consider that, save perhaps exceptionally or in a very simple case, it will be normally proportionate to seek to determine an otherwise hypothetical application with a view to determining costs. In this case the Defendants say that had the Claimants asked, they would have voluntarily proffered undertakings, but that is not, in my view, a fair reflection of what happened. The reality is that the Defendants fired the torpedo for strategic reasons, which might ultimately have been good reasons, but may very well also have been entirely unnecessary. In these circumstances, I do not consider it necessary to engage in an academic parallel "what if?" exercise.

31 Sixthly and finally, in my view the issue of the Tanzanian proceedings is a sufficiently discrete issue to make it appropriate to address the costs separately. This is so irrespective of the degree of overlap between the Tanzanian and domestic proceedings.

Should costs be paid on an indemnity basis?

32 I turn now to consider the second question, whether the costs should be paid on an indemnity basis. For a court to order costs on an indemnity basis, there must be conduct on the part of the paying party that is abnormal and which makes the party's conduct unreasonable to a high degree. See, for example, *Simmons & Simmons v. Hickox* [2013] EWHC 2141 (QB) per Coulson J. The Claimants submit that the Defendants' conduct was irregular and amounted to a clear abuse of process. I have decided that it is not appropriate to order costs on an indemnity basis for essentially the following reasons.

33 First, the Claimant has now clarified its pleadings and removed references to vicarious liability and this is a relevant consideration. I consider the Defendants' point about vicarious liability, at least *prima facie*, to be a serious one and not fanciful.

34 Secondly, the fact that the Claimants survive today by virtue of the exercise of discretion by Simon J, following a series of procedural errors on the part of the Claimants, is something I can also take account of.

35 Thirdly, there is some merit in the Defendants' criticisms of the way in which the hearing proceeded in front of Turner J. is something I can take account of, and in this regard I am particularly referring to the fact that the proceedings were without notice.

36 Fourthly, whilst I am of the view that there was a material element of tactical manoeuvring in the bringing of the Tanzanian proceedings, for the reasons I have also given, I do not consider those proceedings to constitute an abuse of process, because I think there is a serious issue which might lurk below those proceedings. For these reasons, I would not order costs on an indemnity basis.

Summary assessment or payment on account

37 I turn now to consider whether I should conduct a summary assessment or make an order for payment on account. The Claimants' served form N260 on 29th November 2013. A supplementary form N260 was provided to me today. The total claimed is

£232,626.66. The following submissions were made to me about the schedule. The Claimants submitted that the application for the continuation of the anti-suit injunction was set down for a one-day hearing, and it was therefore appropriate to deal with it on a summary basis. It was submitted that the figures encompassed the costs of the October hearing before Simon J, because it was then contemplated that the issue of the continuation of the anti-suit injunction would be dealt with at that hearing because the issue of continuation was contingent upon the judge's ruling on whether to grant an extension of time for the Particulars of Claim. Therefore it was necessary for counsel and solicitors dealing with the question of the anti-suit injunction to attend at that hearing. The Claimants submit that in the alternative, if it is inappropriate to conduct a summary assessment, they seek a payment on account of between 40% and 50%.

38 The Defendants submit that it is completely inappropriate to conduct a summary assessment. They refer to the fact that Practice Direction 9.2 says that a summary assessment is appropriate "unless there is good reason not to do so". It is submitted that here there are good reasons not to conduct a summary assessment. They are as follows. First, that the work extends over a number of months and involves multiple hearings. Secondly, that careful analysis would need to be undertaken in the assessment of costs to avoid overlaps where costs were ordered in favour of the Defendants. Thirdly, the position of Claimant number 10, who is no longer represented by Leigh Day, also needs to be considered and there is insufficient evidence for this issue to be resolved. Fourthly, Mr. Thanki QC also refers to the scale of the Claimants' costs which he submits are "chunky".

39 I accept that it is difficult to conduct a proper summary assessment. This is not just for the reasons given by Mr. Thanki QC but also because of the lack of detail set out in the schedule, which makes it difficult to assess the level of costs which should properly be awarded. I therefore decline to make a summary assessment of the costs.

40 I consider now the question of interim payment. In relation to this, Mr. Thanki QC says that the Claimants opposed the payment of an interim sum when they were before Simon J. because it was contended that their insurer would not pay awards of costs until the conclusion of the case. This meant that any order against the Claimants would have to be paid in the interim by the Claimants themselves. In the event, Simon J. ordered the Claimants to pay the Defendants' costs but made no order for interim payment. Mr. Thanki QC submits that the same should apply in the present case.

41 I should consider this application on its own merits. I am entitled to take account of the fact that the Claimants include those who may be impecunious. I consider,

having looked at this matter in the round, that I will make an order that the Defendants are to pay 45% of the costs set out in the Claimants' latest costs schedule, that is to say 45% of £232,626.66.

MR. DAVIES: My Lord, I am grateful. In terms of timing, the usual order would be 21 days, but I will obviously hear what Mr. Thanki says on that. Can I just clarify one point? Your Lordship said that we should have the costs of the Tanzanian proceedings "for the following reasons". Can I just clarify that what you are saying, my Lord, is that we should have the costs of and occasioned by the Tanzanian proceedings and our anti-suit application?

MR. JUSTICE GREEN: Yes.

MR. DAVIES: Just to clarify that.

MR. JUSTICE GREEN: Yes, all costs including the anti-suit injunction.

MR. DAVIES: I am grateful.

MR. THANKI: Could your Lordship give me just a moment to take instructions?

MR. JUSTICE GREEN: Yes, of course. (After a pause):

MR. THANKI: My Lord, I apologise for that.

MR. JUSTICE GREEN: Not at all.

MR. THANKI: I am obliged for the opportunity. What I would ask for is that the timing of payment be deferred until the assessment has taken place in relation to the costs that Simon J. ordered in my clients' favour in October, because if we do better in relation to that, it would be ----

MR. JUSTICE GREEN: A *de facto* set off.

MR. THANKI: Exactly, a *de facto* set off. That is exactly what I am asking for.

MR. JUSTICE GREEN: Mr. Davies?

MR. DAVIES: Well, my Lord, I would just say that that really negates the point you have already made, that you can decide this point on its own merits and should treat this as a separate issue. I have no idea when the assessment of the other costs is going to take place, and essentially it would mean, if it does not take place for

another year or two, for whatever reason, the payment could be delayed. It would mean that there was no force in what your Lordship has just ordered.

MR. THANKI: Well, the insurers do not have anything to do with this particular order that your Lordship has made today. We could be ordered to pay interim costs in the amount your Lordship has specified. It would go to the Claimants directly. There is no prospect of us ever getting that back if we do better on the detailed assessment in relation to the costs which have already been ordered in our favour. In my submission, that could lead to a serious injustice for my clients.

MR. JUSTICE GREEN: A good try. Sorry, 21 days.

MR. DAVIES: I am grateful, my Lord. We will draw up an order and submit it to your Lordship. I am very grateful to your Lordship.

MR. JUSTICE GREEN: Can I thank everyone very much for their help, including solicitors, and for the very well-prepared skeleton arguments and very helpful bundles. Thank you all very much indeed.

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