Neutral Citation Number: [2023] EWHC 1245 (KB)

Case Nos: QB-2021-001160
QB-2021-002007; QB-2021-002079
QB-2021-002346; QB-2022-000592

**IN THE HIGH COURT OF JUSTICE**

**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2023

**Before**:

**MR JUSTICE GARNHAM**

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**Between:**

| | |
|---|---|
| **(1) MR DANCAN MURITHI**<br>**(2) M'MURITHI M'MURIERA**<br>**(3) M'MWARANIA M'MBUI**<br>**(4) JAMES MUGO KIBANDE**<br>**(5) NGUNZI ING'AO**<br>**(6) MARTIN WATENE MUTUA**<br>**(7) MULI MUSOMBA MBUVI**<br>**(8) KASUNI MBIVII**<br>**(9) MR M'KIRIMANIA M'KIRIGIA**<br>**(10) MR M'MURITHI GAKINGO**<br>**(11) MR MAINGI MBUTU RUIRI**<br>**(12) MR MWENDA MATIRI**<br>**(13) GLADYS KARIMI M'MUTHMIA**<br>**(14) HANAH WANJIKU MUROGO** | **Claimant** |
| **- and -** | |
| **(1) AVH LEGAL LLP (t/a Tandem Law)**<br>**(2) SIMON MYERSON KC**<br>**(3) BRYAN COX KC**<br>**(4) ANDREW HASLAM KC**<br>**(5) MARY RUCK**<br>**(6) LORRAINE MENSAH**<br>**(7) SOPHIE MITCHELL**<br>**(8) STEPHEN FLINT**<br>**(9) LOUISE COWEN** | **Defendant** |

**Judgment Approved by the court for handing down.**

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**Patrick Lawrence KC** and **Christopher Greenwood** (instructed by **Reynolds Porter Chamberlain LLP**) for the **First Defendant**
**Graeme McPherson KC** (instructed by **Clyde & Co LLP**) for the **Second Defendant**
**Ben Hubble KC** (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Third to Ninth Defendants**
**Michael Pooles KC** and **Simon Howarth KC** (instructed by **Hugh James LLP**) for the Claimants

Hearing dates: 30 March, 31 March and 4 April 2023

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# Approved Judgment

This Judgment was handed down remotely at 10.30am on 26 May 2023 by circulation to the parties and their representatives by e-mail and by release to the National Archives

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MR JUSTICE GARNHAM

## Garnham J:

1. By an Order dated 21 November 2018, Stewart J brought to an end claims for damages for personal injuries advanced by some 40,000 Kenyan citizens against the Foreign and Commonwealth Office ("the FCO"). Those claims arose out of events that occurred between 20 October 1952 and 12 January 1960 during what was known as the "Kenyan Emergency". The first of those claimants was a man called Kimathi and I shall refer to those proceedings as "the Kimathi proceedings" or "the Kimathi litigation". The first fourteen Claimants in the present proceedings were claimants in the Kimathi litigation.

2. By the present applications, the Defendants seek orders that:

   (i) Summary judgment be awarded in the Defendants' favour in respect of the whole (alternatively parts) of each claim, pursuant to CPR Rule 24.2, on the grounds that the claims stand no real prospect of success, and there is no other compelling reason why the case should be disposed of at a trial; and / or

   (ii) The whole (or parts of) the Claim Forms and the Consolidated Particulars of Claim be struck out pursuant to CPR Rules 3.4(2)(a) or (b), and judgment be entered for the Defendants pursuant to CPR PD3A, para 4.2, on the grounds that the Claim Forms and Particulars of Claim disclose no reasonable grounds for bringing the claims; and/or amount to an abuse of process, being a collateral attack on certain judgments and orders of Stewart J and the Court of Appeal in the Kimathi proceedings.

3. I heard arguments on this application over three days at the end of the Hilary term and reserved judgment. This is that judgment.

4. I had the benefit of detailed and careful written and oral submissions from Patrick Lawrence KC and Christopher Greenwood for the First Defendant; from Graeme McPherson KC for the Second Defendant; from Ben Hubble KC for the Third to Ninth Defendants and from Michael Pooles KC and Simon Howarth KC for the Claimants. I am grateful to all counsel, and those instructing them, for their assistance.

## The History

5. The history of this matter is not significantly in dispute. It was conveniently summarised in the First Defendant's skeleton argument for these proceedings, from which much of the following is taken. The First Defendant's summary of the history was not the subject of challenge by Mr Pooles for the Claimants.

*The Mutua Litigation*

6. In 2009, proceedings were commenced against the FCO by five Kenyan citizens, represented by Leigh Day, solicitors, alleging that they had suffered assaults for which the FCO was liable (the 'Mutua Litigation').

7. In July 2011, McCombe J ordered that the issue arising under section 33 of the Limitation Act 1980 ("s33") be tried as a preliminary issue in the Mutua Litigation. During the trial of that issue, in respect of three of the five claimants, the FCO made certain factual admissions, including that it "*did not dispute that he or she had suffered torture and other mistreatment at the hands of the Colonial Administration*".

8. On 5 October 2012, McCombe J ruled in favour of the three claimants in respect of whom the FCO had made those admissions, but ruled against the fourth claimant, in respect of whom no admissions had been made. The fifth claimant discontinued his claim. (See *Mutua v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) at [15]).

9. The FCO thereafter entered into settlement agreements with those three claimants, and a number of other individuals who had not been claimants in the Mutua Litigation itself. The present claimants were not among those individuals whose claims were settled.

*The Kimathi Litigation*

10. The Kimathi proceedings were commenced by way of a claim form issued on 28 March 2013. As originally framed, 51 claimants advanced claims against the FCO. Thereafter, further individuals instructed AVH Legal LLP ("AVH"), the First Defendant in the present proceedings, and became claimants in the action. By 4 July 2014, AVH had over 20,000 clients who were claimants in the Kimathi proceedings. Other claimants who joined the Kimathi proceedings instructed separate law firms (known as 'Non Lead Firms' or 'NLFs'). By 4 July 2014, the Non Lead Firms together also had more than 20,000 clients who were claimants in the Kimathi proceedings. The identity of some of the Non Lead Firms changed over time, and part-way through those proceedings, a number of claimants instructed a firm trading as 'Hugh James'. Hugh James now represent the Claimants in the present proceedings.

11. On 4 November 2013, Master Whittaker made a Group Litigation Order ('the GLO'), by which (*inter alia*) AVH was appointed as the Lead Solicitor. Stewart J was subsequently appointed as the managing Judge for the Kimathi proceedings.

12. By an Order dated 14 March 2014, Stewart J ordered that:

> "4**. Database of Claimants**
>
> [AVH] *shall by 4pm on 30 June 2014 serve on* [the FCO] *an electronic database, in an agreed format… in respect of 10% of Claimants randomly selected by a method to be agreed, by 30 May 2014, from the total Claimant cohort…*
>
> 12. **Selection of test cases**
>
> *The Defendant and the Claimants shall:*
> *(a) By 4pm on 31 July 2014, have selected, at random, 100 cases from the database of Claimants produced pursuant to paragraph 4 above for assessment as potential test cases, such cases to cover (in their totality rather than individually) the issues set out in Schedule 2 to this order;*
> (b) *By 4pm on 31 October 2014, have agreed which 25 of the 100 randomly selected cases will be test cases for determination at trial, such cases to cover (in their totality rather than individually) the issues set out in Schedule 2 to this order*."

13. Schedule 2 to that Order comprised a 9-page list of issues in the Kimathi proceedings. The factual issues included, as Issue 5a: "*in respect of each* [GLO] *Claimant,* [w]*hat*

*physical or psychiatric injuries did each specific incident of detention or mistreatment cause*".

14. By a further Order dated 23 May 2014, the process was amended, as follows:

> "*Paragraph 12(b) of the order of 14 March 2014 shall be varied such that… the parties shall select a total of 40 of the 100 randomly selected cases as test cases on the understanding that it is envisaged that the court will try 25 test cases with 15 cases standing as reserve test cases*".

15. In order to select randomly 10% of the GLO Claimant cohort, AVH and the Treasury Solicitor ("TSol"), who then acted for the FCO, agreed a process comprising (i) allocating a number to each GLO Claimant; and then (ii) using a website known as the 'Research Randomizer' to generate a random selection of 4,221 numbers, being 10% of the size of the total cohort at the time. The GLO Claimant whose number was generated was thereby selected. The Research Randomizer website was then used again, randomly to select 100 GLO Claimants.

16. AVH and TSol then agreed a five step process to select 40 Test Claimants. Those 40 included one GLO Claimant, TC32, who alleged he had sustained a "castration" injury and five (TC1, TC3, TC7, TC29 and TC30) who alleged they had been raped. (The Claimants use the expression "castration" to cover both removal of the testes and damage to the testes).

17. Pursuant to the Order of 14 March 2014 and subsequent Orders:

    (i) Generic Particulars of Claim were served on behalf of all GLO Claimants by 30 May 2014, and were subsequently amended on multiple occasions;

    (ii) The Generic Particulars attached various Annexes. Annex 7 pleaded various types of injuries alleged by the GLO Claimants, including (a) rape; and (b) that some GLO Claimants had suffered 'castration injuries';

    (iii) The FCO was to serve a Generic Defence by 31 October 2014. This too was subsequently amended on a number of occasions;

    (iv) Individual Particulars of Claim and Schedules of Loss were subsequently served on behalf of each Test Claimant. In the large majority of instances, those statements of case were also amended (and sometimes re-amended);

    (v) A Generic Reply was subsequently served on behalf of the GLO Claimants, and amended, and the FCO served a Generic Rejoinder;

    (vi) Individual Part 18 Requests and Part 18 Responses were also exchanged.

18. In around April 2015, witness statements were served on behalf of those Test Claimants who had remained alive and had retained mental capacity. Subsequently, supplemental witness statements were provided.

19. Other witness statements were also filed in support of the claims, by way of corroborative evidence, including a number of statements from GLO Claimants who had not been selected as Test Claimants. Among these statements were statements of

GLO Claimants who were "Rape Claimants" and "Castration Claimants". Each Test Claimant who was able to be medically examined was also examined by a physician/consultant in Emergency Medicine, and also by a psychiatrist.

20. The FCO served Individual Defences and Counter-Schedules to the Individual Particulars of Claim. The FCO's response to the individual factual allegations of abuse and assault, including those made by the Castration and Rape Claimants, was one of non-admission of the factual allegations, save for limited instances where allegations of injury were denied.

21. The Test Claimants served Individual Replies to the Individual Defences and Counter Schedules. Each of the Individual Replies pleaded reliance on s33, and particularised the relevant Test Claimant's case in respect of the same.

22. By an Order dated 18 March 2016, Stewart J directed the parties to select 27, rather than 25 of the Test Claimant cohort to proceed to trial, to include (i) a Test Claimant who lacked the mental capacity to give oral evidence; and (ii) a Test Claimant who was deceased. This process was completed by 5 April 2016. That cohort included 3 Rape Claimants (TC1, TC29 and TC30) but no Castration Claimant. It is referred to hereafter as "the Cohort of 27".

23. The trial of the Kimathi proceedings commenced on 23 May 2016. The first 18 months proceeded (in summary) as follows:

    (i) Initial oral opening submissions were made by each of the parties;

    (ii) Due to the age and/or health of the Test Claimants, Stewart J heard oral evidence from 25 of the Cohort of 27 (except for TC18 who was deceased) prior to full opening submissions. This took place in June and July 2016;

    (iii) Stewart J also heard oral evidence from a number of the 'corroborative' witnesses (who included Rape and Castration Claimants), and read the statements of other such witnesses who had died since making their statements: (see his judgment in the case of TC34, reported at [2018] EWHC 2066 (QB), [201], [314]-[316], [348(a)]);

    (iv) Detailed written opening submissions were provided on behalf of the Test Claimants on 11 October 2016, and revised on 30 May 2017. Full opening submissions then commenced. In 2017, oral evidence was given by the medical experts; other factual witnesses were called thereafter;

    (v) Between July and November 2017, the FCO presented documents to the Court.

24. Meanwhile, between June 2017 and February 2018, discussions took place, in correspondence and in Court, as to the 'running order' in which the Test Claimants would be the subject of closing submissions and judgments. Discussions also took place as to the timing of submissions, and the timing of any decision by Stewart J in respect of the Test Claimants' reliance on the Limitation Act 1980 s32 and s33.

25. By an Order dated 28 November 2017, incorporating an agreed schedule and timeline, Stewart J ordered as follows:

"*33. The hearing of the Test Case closing submissions be listed in accordance with the timetable attached.*

*34. The parties are to address in their Test Case closing submissions, insofar as is practicable:*

*a) All issues under [s32 and s33] that relate to each individual Test Case; Such generic or common issues under [s32 and s33] as touch upon each individual Test case."*

26. Following further discussions in correspondence and in Court, Stewart J made an Order dated 27 February 2018, which in summary (and insofar as is relevant) provided that:

(i) Oral submissions in respect of s32 would be heard in the week commencing 9 April 2018;

(ii) General Test Case Submissions would commence on 30 April 2018, with a time estimate to be agreed between the parties;

(iii) Oral closing submissions in respect of TC34 would be heard on 11 to 13 June 2018; and

(iv) Oral closing submissions in respect of TC20 would be heard on 20 to 22 June 2018.

27. Pursuant to those Orders:

(i) Written closing submissions on behalf of the Cohort of 27 began to be submitted on a 'rolling' basis, from 1 December 2017 onwards, beginning with TC34. The submissions for TC34 also contained general submissions on s33;

(ii) General Closing Submissions were also served on behalf of the Test Claimants, dated 15 December 2017;

(iii) The FCO served responsive submissions in respect of the Individual and General Closing Submissions.

28. Further written closing submissions were also exchanged and oral submissions made, including:

(i) A Response to the FCO's General Submissions and Submissions Regarding TC34, dated 1 June 2018. Further submissions on s33 were contained at paras 42-105;

(ii) A response to the FCO's Submissions Regarding TC20, dated 18 June 2018;

(iii) Oral closing submissions were made in respect of TC34 in late June 2018.

29. Meanwhile, on 24 May 2018, Stewart J held that the Test Claimants were unable to rely on s32.

30. On 2 August 2018, Stewart J handed down his judgment in respect of TC34, declining to exercise his discretion under s33 in TC34's favour ("the TC34 Judgment"). On 9

October 2018, the Court of Appeal dismissed TC34's application for permission to appeal; that decision was reported at [2018] EWCA Civ 2213.

31. Further oral submissions were then made in respect of TC20, following which the TC20 Judgment was handed down on 21 November 2018; ([2018] EWHC 3144). By that judgment, Stewart J refused to exercise his discretion under s33 in TC20's favour.

32. By the Order of 21 November 2018, the claims of the remaining Test Claimants, and also all other GLO Claimants, were dismissed.

*The Murithi Litigation*

33. In 2021-2022, five actions were commenced against the current Defendants arising out of the conduct of the Kimathi proceedings. Claim number 2021/002346 was commenced by the First to Eight Claimants; 2021/001160 by the Ninth Claimant; 2021/002007 by the Tenth Claimant; 2021/002079 by the Eleventh and Twelfth Claimants; and 2022/000592 by the Thirteenth and Fourteenth Claimants. (A further claim was commenced by the Fifteenth Claimant, which has since been discontinued.)

34. Pursuant to a consent order dated 21 March 2022 those five actions were consolidated. Consolidated Particulars of Claim ("CPC") were filed and served on behalf of all Claimants on the 25 March 2022.

**The Limitation Act 1980 and the Rules**

35. Section 32 of the Limitation Act 1980 provides, as material, as follows:

> "1. Subject to subsection (3) … below, where in the case of any action for which a period of limitation is prescribed by this Act, either…"
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant…
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it…"

36. At the material time, s 33 provided, as material, as follows:

> "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> (a) the provisions of section 11or 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates…
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

37. The applications now brought by each Defendant are governed by CPR Rule 24.2 and CPR Rule 3.4. CPR Rule 24.2 governs applications for summary judgment. It provides that:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if
>
> (a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or…; and
>
> b) there is no other compelling reason why the case or issue should be disposed of at a trial."

38. CPR Rule 3.4(2) governs strike out applications:

> "The court may strike out a statement of case if it appears to the court –

> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; [or]
> (b) that the statement of case is an abuse of the court's process …"

39. The Practice Direction to CPR Rule 3.4, CPR PD3A, provides at para 1.2 examples of cases where the court may conclude that particulars of claim fall within Rule 3.4(2)(a):

> "(1) those which set out no facts indicating what the claim is about, for example 'Money owed £5000',
>
> (2) those which are incoherent and make no sense,
>
> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

40. Mr Lawrence reminds me that para 1.5 provides that:

> "A party may believe they can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the interpretation of a document). In such a case the party concerned may make an application under rule 3.4 or apply for summary judgment under Part 24 (or both) as they think appropriate."

41. Para 4.2 provides that:

> "Where a judge at a hearing strikes out all or part of a party's statement of case he may enter such judgment for the other party as that party appears entitled to."

42. CPR Rule 32.4 provides that:

> "(1) A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally…"

*The Claimants' Pleaded Case*

43. It is necessary first to identify the claims in the present proceedings which are the subject of attack by the Defendants in these applications.

44. In paragraph 12 of the CPC, the Claimants set out the gist of their case as follows:

> "*The Claimants claim damages from the Defendants, who acted for the Test Claimants in the Proceedings pursuant to the GLO, in respect of their lost opportunity to recover substantial damages in the Proceedings. The Claimants lost that opportunity because of the errors and omissions of the Defendants and each of them…which acts and omissions constituted breaches of the Defendants' duties to the Claimants.*"

45. Paragraphs 29 - 37 set out the background to the selection of test cases issue ("the test case selection issue"). It is pleaded, in particular, at paragraph 30 that it was:

> "*The intention of the Court in making* [the Order of 14 March 2014] *(supported by all parties to the Proceedings) that the Test Claimants, as randomly selected and thereafter agreed between the parties to the Proceedings, should comprise a cohort which accurately reflected the range of claims made by the Claimants in the Proceedings. The Claimants rely without limitation on paragraph 426 of the judgment of Stewart J on the case of Test Claimant 34.*"

46. At paragraph 31 it is said to be necessary that the cohort should include castration cases and rape cases, as well as cases alleging less severe injuries. At paragraph 33 it was alleged that the Defendants were under a duty, following the initial random selection of Test Claimants, to scrutinise the claims being advanced by the Test Claimants so as to "secure" that the intent set out at paragraph 30 was satisfied. At paragraph 34 it is alleged that that objective was not achieved. At paragraph 36 it is said that either the FCO would have agreed, or, if not, the Court would have ordered, the substitution of castration or rape cases had the appropriate application been made.

47. Paragraph 44 of the CPC identifies the deficiencies in the evidence advanced on the s33 issue ("the s33 evidence issue"). The first allegation is of particular significance:

> "*Properly prepared evidence on this approach would have included the following matters:*
> *a. The length of and the reasons for the delay. Proper evidence would have relied on the following matters to which the Test Claimants could have spoken:*
>
> *i. The vulnerability of the Test Claimants as aged and the victims of trauma;*
> *ii. The fact that the Test Claimants were unsophisticated, largely illiterate, and were not aware (and could not reasonably be aware) from their own knowledge that a claim might be capable of being brought against FCO until that possibility was brought to their attention by advertisement of the litigation in compliance with the GLO;*
> *iii. The impecuniosity of the Test Claimants and their inability to pay for legal and other expert advice from their own resources;*
> *iv. The proscription of MM under the law of Kenya until 2003 and the cultural factors (including the culture of secrecy imposed by MM and the unwillingness to revisit the effects of the Kenyan Emergency without good reason), which inhibited the Test Claimants from discussing the events of the Kenyan Emergency and/or seeking advice in relation to the possibility of obtaining redress…*"

48. Paragraph 49A sets out the Claimants' case on breach of duty by the Second to Ninth Defendants on the s33 evidence issue; paragraph 49B particularises the allegations on the test case selection issue; and paragraph 50 sets out the allegations against the First Defendant.

49. The allegations of negligence may be summarised for present purposes as follows:

> "(i) The defendants were negligent in permitting the selection of the cohort of 40 Test Claimants. In particular, they allege that this cohort should have included, but did not include, "*Rape claimants*" (claimants who alleged they had been raped) and/or "*Castration Claimants"* (claimants who alleged they had been deliberately caused either a "*testicular removal injury*" or a "*testicular injury causing impotence or structural damage to a testis*")
>
> (ii) They were negligent in causing or permitting the preparation of witness statements for the Test Claimants that were deficient, in that they failed to include evidence relevant to the factors set out in s.33(3)."

50. Paragraphs 52 and 53 set out the Claimants' case as to what would have happened if the s33 evidence had included what they say it should have included.

51. Separately, in paragraph 54F, the Claimants plead that their claims in the Kimathi proceedings were funded by Conditional Fee Agreements ('CFAs') entered into prior to 1 April 2013, so that had they succeeded against the FCO, they would have been entitled to claim recovery of success fees from the FCO by way of costs. The Claimants also benefit from CFAs in the present claim, but even if they succeeded against the Defendants they would not be able to make such recovery from the Defendants in costs. The Claimants therefore claim damages in respect of the success fees instead.

52. In argument, the Claimants also relied on the content of their Reply to the Defence of the First Defendant, where the Claimants expand on their case as to the Test Claimant cohort. At paragraph 12 it is said that the Claimants:

> "do not accept that the number of Castration Claimants and Rape Claimants should have appeared in the Test Claim cohort in the same proportion as they appeared in the whole of the GLO Claimant cohort. It was essential that a sufficient number of such Castration and Rape Claimants be included so as to achieve a position whereby such a Claimant would be amongst the first claimants to be tried."

53. At paragraph 21 it is pleaded that the First Defendant:

> "Could and should have (i) ensured the inclusion of a Castration Claimant in the Test Claimant cohort…"

54. At paragraph 25(c) it is pleaded that:

> "In relation to the selection of Test Claimants, the Claimants rely on the fact that by paragraph 19 of his order dated 18 March 2016, Stewart J varied his order of 14 March 2014 concerning the selection of Test Claimants, and in particular the categories of Test Claimant. The Claimants say that, had the First Defendants acted with proper care and skill, the order of Stewart

> J would have made further variations to the effect pleaded at CPC 37."

55. Similar averments are made in the Replies to the Defences of the Third to Ninth Defendants (see paragraphs 6, 8 and 9) and to some extent the Second Defendant (see paragraphs 12 and 13). The three Replies are not in identical terms in this respect. Further, and in any event, it might be said that these averments are a central part of the Claimants' cases and ought to be pleaded in the CPC, not simply in the Replies. However, I am content to assume that the necessary amendments would be made if these claims survive the present challenges.

56. I note in passing that in neither the Replies nor the CPC is it pleaded that the Defendants or any of them were negligent in not challenging Stewart J's decision that the first two cases to be taken to judgment should be TC34 and TC20. There was no proposal for any such amendment before me; in fact there was not even a suggestion that applying for permission to make such amendment was being contemplated. The highest the case was put was in the Reply to the Defence of the First Defendant where it is said that a claimant alleging castration should have been "*amongst the first claimants to be tried*".

57. In his skeleton argument, and in the course of his submissions in response to these applications, Mr Pooles made detailed submissions in support of his pleaded case. It is convenient to summarise those submissions here. He said the Claimants:

> "*effectively entrusted the fate of their claims to the Defendants who conducted the presentation of the group proceedings, and the Defendants failed entirely to adduce the necessary evidence to support an essential element of their cases (disapplication of the primary limitation period) and failed properly to manage the large cohort of claims within the GLO so as to ensure that the Court was dealing inter alia with relatively strong cases within the test claims*".

58. As to the alleged error in the **selection of test claimants**, Mr Pooles argued that the whole point of trying group litigation by test claims is that the test cases placed before the Court should represent a suitable cross-section of the claims for the disposal of the dispute. Otherwise, he says, the GLO cannot fulfil its purpose, which is to give sufficient guidance, derived from the decisions on those test claims, to enable the balance of the claims to be disposed of at minimal cost and use of court time. He said a randomised selection process such as was employed here is not a proper substitute for the careful selection of appropriate cases.

59. He argued that a key factor differentiating the various cases in the underlying action was the nature of the injury and loss complained of. He says that it is obvious that it was important to include a castration case in the group presented to the Judge for the following reasons: (i) castration is an injury which is unlikely to happen by accident or by other violence unconnected with the acts of colonial officials during the emergency; (ii) the fact that castration has occurred can be proved by straightforward and short medical evidence, which relies on more than simply the account of the victim; (iii) accordingly, a claimant who has suffered castration would be able to establish that he had been injured in a manner which was unlikely to be explicable by any means other than deliberate infliction. The case for the exercise of a s33 discretion in such a claimant's favour would have proceeded from a solid foundation of evidence, beyond

simply the victim's account, establishing a very serious injury; (iv) the extent of the personal injury, the impact upon the victim's life and the value of the potential damages award were of a very different level to many cases of assault and would have a different contribution to the balance of justice.

60. He said that it is obvious that the Defendants ought to have reviewed the test claims as generated by the random process; considered whether the selected cases were an adequate cross-section sufficient to meet the purposes of the GLO; and, as necessary, applied to the Judge for further case management directions so as to secure that a castration case was included in the Test Claimant cohort and tried in early course.

61. On the need for **evidence to support the case on limitation**, he argues that it was always going to be necessary to adduce evidence from the Claimants in order to provide a factual basis upon which the Court could be invited, under s33, to conclude that it was just and equitable to permit all or some of the claims to proceed many years after the events of which complaint is made. He says that the Defendants never properly applied their minds to what evidence might be available in support of general assertions made in the pleadings. In particular, he says a generic point was pleaded that Mau Mau membership was a criminal offence, but no evidence was presented by the individual Test Claimants as to how this impacted on his or her thinking and on pursuing a claim. Likewise "*issues such as physical remoteness, access to news and advice, the availability of funds, the level of education and understanding were never addressed in the evidence presented to the Court*." It is striking, he says, that the potential societal impact of a public declaration of castration was neither pleaded nor addressed in the evidence.

62. He pointed out that the Judge remarked on many occasions in his judgment that he had not been presented with the necessary evidence. As a result, Mr Pooles argues, the Judge did not have the foundation on which he could form a view as to the true nature and explanation for the passage of time. Such explanation might well have led to a conclusion that any prejudice to the FCO would have occurred in any event because relevant periods of delay were not culpable. This could well have led the Judge to exercise his discretion in favour of the Test Claimants so as to allow their claims to proceed.

63. As Mr Pooles pointed out, the Defendants asserted before the Judge that the Test Claimants were entitled to rely on the pleadings as evidence at trial. Mr Pooles said that argument was hopeless given that it was directly contrary to CPR 32.2 and 32.6 and to authority. In any event, he says, reliance on the statements of case would always have been inadequate; the words on the printed page could never have been a substitute for live evidence which the Judge would have been obliged to hear and evaluate.

## The Competing Cases on the Applications

*The Defendants' Arguments*

64. In advancing the First Defendant's applications, **Mr Lawrence** accepted that his client owed a duty of care to those of the Claimants who were its clients in the Kimathi proceedings. For the purposes of these applications only, he also accepted that it was properly arguable that the First Defendant owed a duty of care to those Claimants who

were GLO Claimants but were not clients of the First Defendant. He argued, however, that their claims stood no real prospect of success, and fell to be struck out.

65. On the **test case selection issue**, he submitted that the Claimants' case was bound to fail and was an impermissible collateral attack on decisions of Stewart J. He made six points in particular.

66. First, he said that the premise of the Claimants' case on breach of duty was false on the facts; the Test Claimant cohort did include Rape Claimants, and at least one Castration Claimant (and on the Claimants' definition, two Castration Claimants). He said that the Claimants had no real prospect of proving that the Test Claimant cohort was not one which a reasonably competent solicitor exercising reasonable skill and care could have agreed.

67. Second, he said that, on causation, the case was bound to fail. The Kimathi proceedings were finally determined after the judgments of Stewart J in respect of only two Test Claimants: TC34 and TC20, neither of whom was a Rape or Castration Claimant and the Claimants do not allege that any person other than TC34 and TC20 should or would have been the first subjects of a judgment by Stewart J.

68. Third, he points out that the grounds on which the Court dismissed the claims of TC34 and TC20 applied equally to Rape and Castration Claimants.

69. Fourth, he said that the Claimants' case that Castration or Rape Claimants should have been selected because they stood a better prospect of success under s33, on account of their allegations being more serious or abhorrent than those of some other GLO Claimants, was bound to fail. He points out that Stewart J held that the allegations of the GLO Claimants were, in any event, serious; and that proportionality to the quantum of any particular claim was not a relevant factor.

70. Fifth, he contends that the Claimants' argument that had the Test Claimant cohort included Castration and Rape Claimants, the FCO would have made factual admissions in respect of those Test Claimants, also stands no real prospect of success. The Test Claimant cohort did contain 'Rape Claimants' and at least one 'Castration Claimant', but the FCO made no factual admissions in respect of them, nor in respect of any other GLO Claimants. Instead, the FCO required every GLO Claimant to prove their case.

71. Sixth, he argues that these claims amount to an impermissible collateral attack on the Test Claimant selection process directed by Stewart J in the Kimathi proceedings; on the Order dated 21 November 2018, which recorded that the Court considered there was no material point of distinction between TC34/TC20 and the other Test Claimants; and on the judgment of Stewart J in respect of TC34, where he had held that the allegations of the GLO Claimants were in any event serious, and that proportionality to the quantum of any particular claim was not a relevant factor.

72. Mr Lawrence contends that the Claimants' case on **the s33 evidence issue** is also bound to fail, and amounts to a further impermissible collateral attack on the decisions of Stewart J. He makes four points:

73. First, he says that much of the Claimants' case on breach of duty comprises allegations that the Defendants failed to include content in the Test Claimants' witness statements

which it would have been impermissible to include; or was, in fact, included. These allegations are therefore bound to fail.

74. Second, he says in respect of the remaining allegations, Stewart J expressly held in the TC34 Judgment and TC20 Judgment that even if the Test Claimants' pleadings and submissions in respect of the reasons for their delay in bringing the claim had been evidenced in their witness statements, he would still have reached the same decision in respect of s33 in any event. The case therefore stands no real prospect of success. He argues that the Claimants' claim is also an impermissible collateral attack on those parts of Stewart J's judgments, and on the decision of the Court of Appeal.

75. Third, he says that even if Stewart J had not expressly so held, it is evident from his reasons for declining to exercise the s33 discretion that he would have reached the same decision irrespective of whether the witness statements had contained the additional evidence which the Claimants allege they should have contained. Accordingly, the Test Claimants did not have a real prospect of succeeding against the FCO, irrespective of the content of their witness statements.

76. Fourth, he says that the Claimants' consequent cases on causation and loss must therefore fail. They never had a real or substantial prospect of overcoming the FCO's limitation defence to their claims in the Kimathi proceedings.

77. As to the Fourth Claimant's claim, he says that fails for two further reasons: He was a Test Claimant in the Kimathi proceedings, and he is not a Rape or Castration Claimant. Nothing alleged by the Claimants would change the outcome relating to him. Any contention that Stewart J would have reached a different decision in respect of him therefore stands no real prospect of success, and amounts to a collateral attack on the Order of 21 November 2018.

78. In any event, argues Mr Lawrence, the Claimants' claims for damages in respect of the CFA success fees which they would now have to pay to their present legal team if they were to succeed against the Defendants is bad at law. Instead, *if* the Claimants succeed on their loss of opportunity claim against the Defendants at all, *and if* they would have been entitled to recover success fees from the FCO, then the amount of credit they must now give the Defendants for the irrecoverable costs they would have incurred in the Kimathi proceedings would merely be lower. That does not amount to a separate head of loss.

79. Finally, as to CPR Rule 24.2(b), Mr Lawrence says that there is no other compelling reason for a trial.

80. **Mr McPherson** for the Second Defendant adopted the arguments of Mr Lawrence but supplemented them. He maintained that the Claimants' cases were flawed for a series of reasons.

81. As to the **s33 evidence issue**, he argues first that none of the criticisms of the evidence adduced by the Test Claimants set out in paragraph 44 of the CPC are well founded. He says that even if one supposes there were 'gaps' in the evidence of individual Test Claimants which might have been relevant to the exercise of the s33 discretion, that only assists the Claimants if they are able to demonstrate that the relevant individual Test Claimants – in particular, TC34 and TC20 - would in fact have been willing and able to give evidence in the terms now pleaded by the Claimants in these proceedings;

but there is nothing before the court to suggest they are. Accordingly, he says, the central factual premise for the Section 33 Evidence Claim is without foundation and the Section 33 Evidence Claim falls at the first hurdle.

82. Second, he underlines the point made by Mr Lawrence that the Claimants' case on causation was bound to fail in the light of Stewart J's two judgments. Whilst the Judge pointed out that matters relevant to s33 had not been in evidence before him, he expressly confirmed that, even if they had been, he would still have refused to exercise his s33 discretion in favour of TC34 or TC20 (or it must follow, any GLO Claimant) and that that statement was relied upon and upheld by the Court of Appeal. Accordingly, he says, Stewart J has already answered in the negative the question whether better s33 evidence would have made any difference to the outcome in TC34, TC20 or any other case.

83. In that context Mr McPherson took me to the Court of Appeal decision in *Greene v Davies* [2022] EWCA Civ 414, an appeal against a decision of the Divisional Court (of which I was a member) which had declined to strike out disciplinary proceedings as an abuse of process. The Court dismissed the appeal save in respect of one allegation. Giving the judgment of the court, Newey LJ held that, in circumstances where a district judge had himself said that certain correspondence would have made no difference to his decision, the disciplinary tribunal had correctly found that re-litigation of whether disclosure of that correspondence would have altered the judge's decision would bring the administration of justice into disrepute.

84. Mr McPherson argues that, even if Stewart J had not expressly addressed the issue himself, it is clear from his other primary reasons for declining to exercise his s33 discretion in favour of the GLO Claimants that he would have reached precisely the same decision regardless of whether there had been evidence of the 'missing matters' before him in TC34 and/or TC20.

85. Third, he says that, even if the Kimathi litigation had been handled differently there was no prospect of the FCO making the sort of admissions it had in the Mutua litigation or of settling the Claimants' claims. The FCO knew there were rape and castration cases amongst the GLO Claimants and yet made no such admissions in the Kimathi proceedings. The admissions in Mutua were made on the particular facts of that case.

86. Finally, he supports the submission that the s33 evidence claim amounts to an abusive collateral attack on Stewart J's decision at [483] of his judgment in the TC34 case, the Court of Appeal's holding at [3] and [6-8], and Stewart J's holding at [314-317] of his judgment in TC20's case.

87. As to the **Test Case Selection Claim**, he says that too is seriously flawed. First, he repeats the point that the Claimants are wrong to suggest the Test Claimant cohort did not include Rape Claimants and Castration Claimants. They did.

88. Second, there is, he says, no real prospect of being able to show that it was negligent to agree the Test Claimant cohort as constituted. There were already numerous cases alleging serious and abhorrent injuries corroborated by medical evidence. In any event, the cohort of cases had to comply with Stewart J's Order of 14 March 2014.

89. Third, he argues that the Claimants' case on causation was bound to fail. Even if additional rape and/or castration cases had been included in the cohort, it would have remained the case that TC34 and TC20 would have been the first two cases adjudicated upon and so the present Claimants would have found themselves in the same position as they do now.

90. In any event, Stewart J knew that the GLO Claimants included rape and castration cases, and the grounds on which he dismissed the cases of TC34 and TC20 applied equally to those cases.

91. Finally, Mr McPherson repeats the submission that the Test Case Selection Claim is an abusive attack on Stewart J's case management orders and his two judgments.

92. **Mr Hubble**, for the Third to Ninth Defendants also adopts Mr Lawrence's submissions and supports those of Mr McPherson. He adds the following on the issue whether these claims amount to an abusive collateral attack. He says that applying the legal principles summarised in *Allsop v Banner Jones Ltd* [2022] Ch 55 at [44-45], to permit the present proceedings to proceed would be to bring the administration of justice into disrepute among right thinking people for three reasons.

93. First, Test Case Selection was the subject of a series of express orders by the Judge. Second, after a long trial, both the Judge and the Court of Appeal had expressly and directly considered the main point now raised by the Claimants in these proceedings, namely whether it would have made any difference had evidence in relation to s33 been both set out in the witness statements of the Test Claimant cohort and accepted. The Judge addressed this point twice at length and determined in robust terms that it would have made no difference. The Court of Appeal upheld that finding. Third, the Judge held, by Order dated 21 November 2018, that there was no material point of distinction between TC34/TC20 and the remaining Test Claimants.

94. Accordingly, to relitigate that same point all over again obviously brings the administration of justice into disrepute. The right-thinking observer, he says, would regard it as absurd for the parties to spend millions of pounds and the Court to spend yet more weeks going over that issue all over again.

*The Claimants' Response*

95. In response, **Mr Pooles** made the submissions noted above (at [57] and following) as to the nature of the Claimants' pleaded case.

96. In response to the attack on **the Section 33 Evidence Claim**, he argued that the evidence adduced by the Defendants relevant to s33 was largely generic in nature; it failed to descend to the particular circumstances of individual Test Claimants and failed to offer an explanation for the delay in commencing proceedings in individual cases. In particular, there was no evidence put forward as to the effect on individuals of the proscription of Mau Mau membership, an issue which Mr Pooles said "cried out" for explanation. Proscription was first imposed by the colonial administration in Kenya; it was continued by the Kenyan government after independence and remained in place until 2003. Its effect was to make a membership of the Mau Mau a criminal offence and that would provide a very powerful explanation for a failure to commence proceedings which averred Mau Mau membership.

97. Mr Pooles reminded me of the numerous occasions in his judgments where Stewart J pointed up the shortage of evidence going to explain the delay. He said "it was striking" that it was not until the end of what was a very lengthy judgment that the Judge made his comments about such evidence not making a difference.

98. Mr Pooles pointed out that in [126] of the TC34 Judgment, Stewart J had referred to the observations of Smith LJ in *Cain v Francis* [2008] EWCA Civ 1451. He says that just as in that case, so here "*there may be unfairness to the Defendant due to the delay but the delay may have arisen for so excusable a reason that, looking at the matter in the round, on balance, it is fair and just that the action should proceed*". Here the Judge was not afforded the material necessary to conduct a fair balance. Furthermore, had the FCO been confronted with such evidence to explain the delay they might well have sought to "buy off" the risk of proceedings, just as they had in the Mutua case, as explained by Stewart J at [16] of the TC34 Judgment.

99. He said that Stewart J could not have known the detail of the missing evidence or what effect it would have had on him. Accordingly, this was not a collateral attack on his judgments but an attack on the inadequacy of the representation before him.

100. As to the **test case selection issue**, Mr Pooles submits that the whole point of trying group litigation by test claims is that the test cases placed before the Court should represent a "*suitable cross section of the claims for the disposal of the dispute*". He refers to what the Stewart J said at [426] of the TC34 Judgment; "*In order to proceed in a proportionate way, Test Claimants are selected with a view to being as representative as possible of the cohort as a whole*". Otherwise the GLO cannot fulfil its purpose, which is to give sufficient guidance, derived from the decisions on those test claims, to enable the balance of the claims to be disposed of at minimal cost and use of court time. He says that a randomised selection process such as was employed here is without precedent and is not a proper substitute for the careful selection of appropriate cases (both strong and weak, from the perspective of the opposing sides). He says this complaint does not amount to a collateral attack on the Judge's decisions because the parties were obliged to consider for themselves, and if necessary re-address the question whether the Test Claimant cohort was properly representative.

101. Mr Pooles argues that a key factor differentiating the various cases in the underlying action was the nature of the injury and loss complained of. He says it was necessary that the cohort of 25 included castration victims. He acknowledged that there had been pleadings to the effect that the Mau Mau themselves had carried out castration but he relied on the fact that there was evidence from historians about the use of castration by the colonial administration. Castration is an injury which is unlikely to happen by accident or by other violence (e.g. a brawl) unconnected with the acts of the original officials during the emergency. The fact that castration has occurred can be proved by straightforward and short medical evidence, which relies on more than simply the account of the victim. Accordingly, a claimant who has suffered castration would be able to establish that he had been injured in a manner which was unlikely to be explicable by any means other than deliberate infliction. The case for the exercise of a s33 discretion in such a claimant's favour would thus have proceeded from a solid foundation of evidence, beyond simply the victim's account, establishing a very serious injury. In addition, he says, the extent of the personal injury, the impact upon the victim's life and the value of the potential damages award were of a very different level

to many cases of assault and would have a different contribution to the balance of justice.

102. In those circumstances, Mr Pooles argues that it is obvious that the Defendants ought to have reviewed the test claims as generated by the random process; considered whether the selected cases were an adequate cross section sufficient to meet the purposes of the GLO; and, as necessary, applied to the Judge for further case management directions so as to secure that a castration case was included in the Test Claimant cohort and tried in early course.

103. Mr Pooles argues that the complaint that these proceedings amount to collateral attacks on the decisions of the Judge and are accordingly an abuse of process, mischaracterises the Claimants' case. The Claimants do not contend that the Judge went wrong, in his judgments, on the material placed before him. Nor do they contend that he erred in his case management on the applications made to him or the submissions advanced. Their case instead is that the Judge would have reached a different decision on s33 had proper evidence been adduced before him (or, which suffices for the Claimants' purposes, that there is a substantial chance that he would have done so, or that the FCO would have sought a settlement in the light thereof).

104. Similarly, the Claimants say that, had an appropriate application been made in relation to the unsatisfactory nature of the test claims as randomly selected, the Judge would have ordered the early trial of a castration claim, with a favourable result or settlement, alternatively that there was a substantial chance that this would have occurred. It was the s33 failure which was the total bar to success for these Claimants and the successful resolution of that issue, or a significant prospect thereof would have afforded them a real chance of significant recovery of damages by judgment or, more likely, prior settlement.

105. It follows that, in relation to each way in which the Claimants put their case, there is no suggestion that the Judge was wrong in the decisions he in fact made in the circumstances which existed. Thus, there is no question of the administration of justice being brought into disrepute.

106. Finally, Mr Pooles submits that the Claimants were entitled to be fully compensated. If fully compensated by the judgment in the GLO they would have recovered damages without deduction of the success fee due under the CFA, because the success fee would have been fully recoverable from the FCO. Now, however, if they were successful in the present proceedings they would be liable to discharge the success fee from their own damages.

**Discussion**

*The Approach to CPR 3.4*

107. CPR 3.4(2)(a) was subject to little comment during the hearing and both parties appeared to proceed on the assumption that no different outcome was likely depending on whether CPR 24.2 or CPR 3.4(2)(a) was applied. In my view, however, the better view is that it is CPR 24.2, rather than CPR 3.4(2)(a), which is the appropriate route where what is asserted is that the statement of case discloses no reasonable grounds of

claim; CPR 3.4(2)(a) should be reserved for cases where what is argued is that the case pleaded is not legally coherent.

108. In *Dellal v Dellal* [2015] EWHC 907 (Fam) Mostyn J referred to what was then CPR PD3A para 1.7 and observed:

> "This language appears to suggest that a strike-out application under CPR 3.4 may be made where a party believes that his opponent's case has no real prospect of success on the facts. This is, to put it mildly, very odd as a dismissal of a case in such circumstances is precisely what CPR 24.2 is for, as will be seen. The Family Procedure Rules contain similar provisions (but no provision for summary judgment). FPR 4.4(1) contains very similar strike out provisions to those in CPR 3.4(2). FPR PD4A paras 2.1 – 2.3 are near replications of CPR PD3A paras 1.4 – 1.6. Para 2.4 is very similar to CPR PD3A para 1.7…These family rules and practice directions were very recently considered by the Supreme Court in *Wyatt v Vince* [2015] UKSC 14. At para 27 Lord Wilson JSC described FPR PD4A para 2.4 as "an unhelpful curiosity". He stated:
>
> > "I suggest that Rule 4.4(1) of the family rules has to be construed without reference to real prospects of success. The three sets of facts set out in paragraph 2.1 of Practice Direction 4A exemplify the limited reach of rule 4.4(1)(a), valuable though no doubt it sometimes is. The touchstone is, in the words of paragraph 2.1(c) of the Practice Direction, whether the application is legally recognisable. Applications made after the applicant had remarried or after an identical application had been dismissed or otherwise finally determined would be examples of applications not legally recognisable. Since the greater includes the lesser, it is no doubt possible to describe applications which fall foul of Rule 4.4(1) as having no real prospect of success. Nevertheless paragraph 2.4 of the Practice Direction remains in my view an unhelpful curiosity which cannot override the inevitable omission from the family rules of a power to give summary judgment."
>
> By parity of reasoning I reach the same conclusion concerning CPR PD3A para 1.7 inasmuch as it suggests that CPR 3.4(2)(a) can be construed to encompass serious arguments about real prospect of success. Such arguments should be reserved for applications under CPR 24.2. Under CPR 3.4(2)(a) arguments about real prospect of success can only arise in a literal sense, as described by Lord Wilson i.e. a claim which is legally unrecognisable has no prospects of success."

109. I respectfully agree. Certainly, I can foresee no circumstances, on facts such as the present, where an application to strike out under CPR 3.4(2)(a) could succeed when an application for summary judgment had failed. Accordingly, though little turns on the point, the test I propose applying as regards the strike out application is that set out in CPR 3.4(2)(b).

110. The Defendants contend that the Claimants' case should be struck out as an abuse of the process of the court as amounting to a collateral attack on decisions made by the

Court in the Kimathi litigation. The principles applicable to such a strike out application in professional negligence claims were considered in *Allsop v Banner Jones Ltd* [2022] Ch 55. In that case, the claimant had instructed the first defendant solicitors, who in turn retained the second defendant counsel, for the purposes of a financial remedies hearing in matrimonial proceedings. Not being satisfied with the resulting judgment, the claimant brought a claim against the defendants, alleging that they had acted in breach of contract and/or negligently in advising and/or acting for him in the course of the matrimonial proceedings. The defendants each applied to strike out the claim on the basis that it was a collateral attack on the financial remedies judgment which constituted an abuse of the court's process under CPR 3.4(2)(b). The judge struck out some of the allegations pleaded, applying the so-called *Phosphate Sewage* test, namely that only new evidence which entirely changed the aspect of the case could justify relitigation. The claimant appealed on the ground, *inter alia*, that the judge had erred in finding that the *Phosphate Sewage* test applied when considering the applications and that appeal was, in part, successful.

111. Marcus Smith J, with whom Lewison and Arnold LJJ agreed, said this, at [27], about the nature of collateral challenges:

> "Collateral challenges to prior decisions ex hypothesi do not give rise to res judicata estoppel. For the purposes of this judgment, a collateral challenge is one where no matter how similar the issue in question the parties to the later dispute are different from the parties to the earlier dispute that is the subject of the collateral challenge."

112. He referred to the judgment of Sir Andrew Morritt VC in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 where at [38] the following statement of principle is found:

> "(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court…
> (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
> (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such re-litigation would bring the administration of justice into disrepute."

113. Having also considered the House of Lords decisions in *Phosphate Sewage Co Ltd v Molleson* 4 App Cas 801, *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 and *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, and the Court of Appeal judgments in *Walpole v Partridge & Wilson* [1994] QB 10, and *Laing v Taylor Walton*

[2008] PNLR 11, Ch 1, Marcus Smith J said at [45] that the doctrine of abuse of process in the context of a collateral attack on a prior civil decision could best be framed by reference to the test expounded by Lord Diplock in *Hunter* and Morritt V-C in *Bairstow*:

> "If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if (a) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (b) to permit such re-litigation would bring the administration of justice into disrepute."

114. *Allsop* was followed in *Percy v Merriman White* [2022] PNLR 20 (see [92]).

115. The Defendants in the present proceedings were not parties in the Kimathi litigation, nor their privies. It follows, in my view, that the central question on the strike out application is whether the claims would "*bring the administration of justice into disrepute*".

*Principles Applicable to CPR 24.2*

116. The principles applicable to applications for summary judgment were summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch). That summary has been approved and applied in subsequent cases, and is set out in *The White Book*, at para 24.2.3. Lewison J said this at [15] in *Easyair:*

> "As [counsel] rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91 ;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5*) [2001] EWCA Civ 550;

> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 ;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 ."

117. In *TFL Management Services Ltd v Lloyds TSB Bank plc* [2013] EWCA Civ 1415 at [27] Floyd LJ cited Lewison J's summary with approval before adding:

> "…it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications... Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy."

118. Those are the principles I apply here.

119. I also note the observations of Collins J in *Riley v Sivier* [2021] EWHC 79 (QB) at [14]:

> "A court must hesitate to make final decisions without a trial if there are reasonable grounds to believe a fuller investigation of facts would add to or alter the evidence available to a trial judge and so potentially affect the outcome of a case. At the same time, "there must be something going beyond bare Micawberism … it is not a legitimate tactic to proceed to court on vague allegations of wrongdoing in the hope that cross-examination will elicit some bonus admission" *(Hunt v Times Newspapers* [2012] EWHC 110 (QB) at paragraphs 28-29)."

120. In *King v Stiefel* [2021] EWHC 1045 (Comm) at [22], Cockerill J applied *Riley*, observing "*So when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up*".

*The s33 evidence issue*

121. With those principles in mind, I address the two issues raised by these applications in turn, considering both the summary judgment and strike out applications as they apply to both, but noting that there may be a degree of overlap between the two. It is convenient to consider the s33 evidence issue first.

122. The essence of the case pleaded in the CPC is that the Defendants, individually and collectively, failed to ensure that there was put before Stewart J at trial evidence which met the requirements identified in paragraphs 43-44 of the CPC. It is said that properly prepared witness statements for the Test Claimants would have addressed the following eight topics:

    (i) The length and reasons for the delay in commencing their claims;

    (ii) The effect (of delay) on the cogency of the evidence;

    (iii) The development in historical scholarship in the case of Rape and Castration Claimants;

    (iv) Two decisions of the Supreme Court relevant to vicarious liability;

    (v) The conduct of the FCO after the cause of action arose;

    (vi) The extent to which the Test Claimants acted promptly and reasonably after they knew that the conduct of those for whom the FCO were responsible might give rise to a claim;

    (vii) Steps taken to obtain expert advice;

    (viii) The fact that Castration and Rape Claimants had strong cases.

123. I can say immediately that there is, in my judgment, no merit in the latter seven assertions. In fact, little if any of Mr Pooles' submissions were directed to any of these. As Mr McPherson correctly submitted, items (ii), (iii), (iv), (v) and (viii) could not properly, consistent with CPR 32.4, have been included in the Test Claimants' witness statements at all because they are matters of submission, rather than evidence which could be given by a lay witness. Insofar as item (vi) is directed at matters other than the reasons for delay (which is the subject of item (i)) it was evident from the disclosed documents relied on at trial. Item (vii) was also demonstrated by the trial documentation. In any event, there is no evidence, as opposed to submission, now before the court as to what else any of the Test Claimants, including the Claimants in these proceedings, could say on any of these topics.

124. Mr McPherson submitted in his skeleton that item (i) was also covered in the evidence but he was not able to show me where. To the contrary, as Mr Pooles contended, Stewart J repeatedly made clear in his judgments that there was precious little evidence, as opposed to submissions, on the reasons for the delay on the part of the Test Claimants,

and in particular on the part of TC34 and TC20. So, for example, at [141-142] of the TC34 Judgment the Judge said:

> "141…[A]part from TC34's education and relative lack of sophistication and the admitted fact that Mau Mau was proscribed in Kenya until 2003, none of that evidence has been adduced in the present case. It must be recalled that in *Mutua* section 33 was dealt with as a preliminary issue. Here it is being dealt with after all the evidence has been presented. 142. It is not permissible for me to translate findings in *Mutua* to this case. I do not have any of the evidence that was in *Mutua* to support the findings. There has been no exploration of whether the proscription, viewed subjectively, was or would have been a factor or regarded as a risk, by TC34, or any Claimant who had assisted the Mau Mau during the Emergency, but who had had nothing to do with them since. Even looking at the terms of the proscription as recorded in Mutua [33], I do not know whether, objectively speaking, such a person would (or might) have fallen foul of the proscription."

125. He went on at [144] to address how TC34 first heard about the case. He said:

> "[T]he advertisements and surrounding publicity leading to the GLO probably inform me as to why TC34 has now brought the claim. They do not inform me as to why TC34 did not before bring the claim. The problem with all these submissions is that there is just no evidence from TC34. Clearly there was evidence from the Claimants in Mutua. Why there is not in this case, I do not know. Reasons for delay are not self-proving. It is also unsatisfactory to be asked to draw inferences when Claimants have given written and oral evidence and have said nothing on the reasons for their delay. Indeed, drawing inferences in such circumstances, when the matter could, and on the authorities should, have been addressed, is something which should only be done if the inferences are compelling. It may be the case that the Claimants were in the position for which their lawyers contend, but in the absence of direct evidence it would be wrong to infer that all, or any, were. As the Defendant said, why should the court draw inferences when TC34 did not say what the reasons were and, therefore, his evidence was not tested?"

126. He reached his conclusions on s33(3) delay at [157]:

> "In TC34's case, the length of the delay is up to 56 years. I am not able to find any reasons for the delay, there being no evidence as to such, save for during the period while TC34 remained in detention. It is not permissible to draw any further inferences. Apart from that period, I cannot put into the balance, when exercising my discretion, any good reason excusing the delay. The relevance of that period will have to be explored when I look at cogency of the evidence. I will, however, take into account

> TC34's relative lack of education and sophistication when I carry out the section 33(1) balancing exercise."

127. Similar observations are to be found in the TC20 Judgment. At [274] Stewart J said:

> "Reasons for delay are not self-proving. No express evidence was given by TC 20 about the reason(s) for the delay in her case. It is unsatisfactory to be asked to draw inferences when TC 20 gave written and oral evidence and did not address the matter. Any such reasons were not therefore in evidence so that they were available to be tested in cross-examination."

128. At [306] he said that "TC 20 has not proved in respect of any of her core allegations that her prejudice would outweigh that of the Defendant."

129. Certainly, it seems to me that there is a properly, if not strongly, arguable case that the Defendants did not adduce any, or any, adequate evidence in the Kimathi litigation to explain the length and reasons for the delay in the Test Claimants commencing their actions. However that only takes the Claimants, as respondents to the present applications, so far. There remain three further points of substance.

130. In my judgment, Mr Pooles' first difficulty on this issue is that there still is no evidence of the sort Stewart J said was missing. Despite the fact that this is an action for damages for professional negligence which, on this topic, turns on establishing that the Defendants failed to adduce evidence which could have been produced, the Claimants' advisers have adduced no evidence before me to demonstrate what their clients, (or even what TC34 or TC20 or any other Test Claimant), would have been able to say on the topic in the Kimathi litigation if only they had been asked.

131. Of course, on a summary judgment application, the court must take into account not only the evidence actually placed before it, but also the evidence that can reasonably be expected to be available at trial. But here, as Mr McPherson correctly points out, the Claimants do not even plead in the CPC (or their Replies) what they say could have been said by the Claimants (or any Test Claimant) if only they had been asked. On the pleaded case, there is complaint about what evidence was not adduced in the Kimathi proceedings but no averment at all as to precisely what could or would have been adduced, or what will be adduced in the present proceedings, on the issue. Furthermore, there was not even submission about the detail of what any of the Claimants in the present proceedings could say about the reasons for the delay in their commencing their claim in the Kimathi litigation. And, as *Riley v Sivier* and *King v Stiefel* establish, it is not enough to say, with Mr Micawber, that something may turn up. In fact, Mr Pooles did not even go that far; he made no submissions as to precisely what might be said by his clients on this topic.

132. His second difficulty goes to the issue of causation of loss, the Defendants contending that even if such evidence had been adduced, it is plain it would have made no difference to the outcome before Stewart J.

133. As the extracts from his judgments set out above make very clear, Stewart J was acutely aware of the shortcomings in the evidence in the two test cases he was considering. He drew particular attention to the difference between what was pleaded about the reasons

for the delay in issuing proceedings and the evidence on the topic. At [145] of the TC34 Judgment he noted that in the absence of any evidence to explain the reasons for the delay, TC34 sought to rely on reasons pleaded in the Reply. He noted that the pleadings said:

> "...specifically as to the Section 33 discretion under the Limitation Act 1980, this particular Claimant (TC34) relies on the following in addition:
>
> (a) He is a victim of trauma and is thereby vulnerable;
> (b) The Claimant could reasonably only be said to be aware of a possible claim of merit against the Defendant after the claim was advertised by Order of the Court and aired on Kenyan Radio in November 2013;
> (c) The Claimant is impecunious and was unable to pay for the legal advice in Kenya;
> (d) He is unsophisticated and from a rural area and would not have the means to approach lawyers in England;
>
> (e) He could not reasonably be expected to believe that he could bring a claim against the British government, or that he would be compensated;
> (f) It was illegal to be a part of or speak of Mau Mau in Kenya before 2003 and the Claimant would have faced possible legal consequences or retribution had he attempted to raise his complaints; and
> (g) Had he attempted to do so, he would have faced insuperable difficulties and would have been at such a disadvantage vis a vis the Defendant as to prevent him being in a realistic position to bring a claim. The Claimant will rely upon the Defendant's conduct of this litigation in support of this pleading."

134. He continued at [146]:

> "The Claimants argued that, even if the Reply is not evidence, it is "there" and I should take it into account. I do not know how I can take into account something which does not constitute evidence…"

135. But then, towards the end of the judgment, Stewart J addressed the question as to whether it would have made a difference if he had the evidence on the reasons for delay which had been missing. At [483] he said:

> "I should add that my decision would have been the same even if I had been able to put into the balance <u>all the reasons for delay which had been pleaded in the Reply, and the others which were the subject of the Claimants' submissions</u>. These reasons, and others if evidenced, may well also have had an effect in TC34's favour under section 33(3)(e) and (f). Nevertheless, the unfairness to[483] in the judge's judgment the Defendant in defending TC34's core allegations would have still outweighed

> the prejudice to TC34. Even with those reasons to qualify or temper the prejudice to the Defendant, it would not have been fair and just in all the circumstances to expect the Defendant to meet the claims on the merits." (Emphasis added.)

136. The Claimants in the Kimathi litigation sought permission to appeal that decision of Stewart J. Their first ground of appeal was that the Judge had no, or insufficient, regard to the reasons for the delay in bringing the action. Longmore LJ, with whom Sir Rupert Jackson agreed, referred to [483] in the Judge's judgment and continued:

> "6. …The first ground of appeal apparently therefore raises an academic question only, unless it can be said to be arguable that the judge failed adequately or at all to balance the undoubted delay against the prejudice suffered by the defendant. 7. Mr Myerson QC for TC 34 submitted that the judge had taken an over-technical approach to the question of delay since the matters set out in the Reply "were there verified by a statement of truth" and other claimants (Nos. 1, 10, 19, 22, 24, 25, 26 and 39) had given evidence saying that what they had said in similar terms in their replies was true. There is some force in that submission but if, as the judge said, his decision would have been the same even if he had put into the balance all the reasons for the delay which has been set out in the Reply, that cannot take Mr Myerson far. His main submission was that the judge failed to acknowledge and weigh the strength of the reasons for the delay and the fact that 75,000 Mau Maus had been detained in circumstances in which (as the Government had admitted in the Mutua case) undoubted atrocities had occurred in coming to his conclusions about the balance of prejudice. …
>
> 8. I do not think it arguable that there was any such failure on the part of the judge. He was well aware of the Mutua litigation and the cogent reasons given by the claimants in that case not merely for the delay but for showing that their allegations were true (perpetrators, named camps and times of detention were precisely identified) ... But the judge for the purpose of para 483 expressly assumed that he was "able to put into the balance all the reasons for the delay" and therefore proceeded in the assumption that the reasons showed that the delay was excusable…There is, therefore, nothing in the first proposed ground of appeal."

137. At [314] in the TC20 Judgment Stewart J made observations to similar effect.

138. Mr Pooles argues that none of this assists the Defendants in their summary judgment application. He says, in his skeleton argument, that Stewart J's observation at [483] in the TC34 Judgment was "*an obiter remark at the end of a very lengthy judgment*". He says it is impossible to reconcile that remark with the Judge's repeated reference to the absence of such evidence as a material factor in his detailed analysis as set out above. The detail and quality of this evidence was a "*known unknown*" and it is not possible to see how the Judge could make any meaningful evaluation of the impact of evidence

which he did not hear. He says that "*The law reports are replete with judicial observations that the entire character of a case may change at trial in the light of the evidence, and emphasise the advantage held by a Judge who has had the relevant evidence presented to him by the witnesses*." He says the Defendants seek to place weight on this observation which it simply cannot bear.

139. I reject those submissions. As the Court of Appeal observed at [19], the TC34 Judgment was "a masterly synthesis of the complex web of facts, and absence of facts". The fact that [483] comes towards the end of Stewart J's judgment does not reduce its importance; on the contrary it underlines the fact that the Judge was reaching that view having considered the entirety of the matters before him. It is an obiter observation, but it is significant nonetheless given that what falls for consideration on this application is what conclusion Stewart J *would have* reached if better evidence had been before him, the very issue the Judge was addressing.

140. There is, in my judgment, no difficulty reconciling that remark with the Judge's repeated references to the absence of evidence on the reasons for delay; the Judge was here expressly considering what would have been his attitude to the s33 issue if there had been no such absence. The Judge did not have the benefit of witness evidence on the issues but he was well able to consider, as he did, what would have been the position if the evidence supported a conclusion that the delay was excusable. No more powerful conclusion on reasons for delay could have been reached than that those reasons made the delay excusable and that was the conclusion the Judge assumed when he expressed himself as he did in [483]; (see the observations of Longmore LJ at [8] in his judgment for the Court of Appeal). Having reached that assumption on the reasons for the delay, he was then able properly to conduct the s33 balancing exercise taking account of the prejudice to the FCO occasioned by the delay.

141. The third difficulty facing Mr Pooles in resisting the summary judgment application on the s33 evidence issue is that, even without [483], the Judge's reasoning in the TC34 and TC20 Judgments was very clear. In my judgment, the result of its application to the facts as now advanced is beyond doubt. In essence, it was the Judge's view that whatever the reasons for the delay, its effect on the FCO's ability to defend itself was so profound that no fair trial was possible and that comfortably outweighed the prejudice to the Test Claimants in the Kimathi litigation.

142. I do not suggest that the absence of a possibility of a fair trial is necessarily a complete answer when s33 is in issue. That was a matter of debate before me as it was, it appears, before Stewart J. The critical question under s33 is whether it would be equitable to allow the action to proceed. However, whether a fair trial could take place is a "*very important question*" (see Waller LJ in *McDonnell v Walker* [2009] EWCA Civ 1257) and if it cannot, it is "*very unlikely to be equitable to allow the case to proceed*" (see Lewison J in *RE v GE* [2015] EWCA Civ 287) (both cases discussed by Stewart J at [112] of the TC34 Judgment). If it were the case, for example, that a defendant's own actions had been wholly responsible for a claimant's inability to begin proceedings, then, despite the fact that a fair trial was no longer possible, it might well be equitable to allow the action to proceed. But that was not the case here. The high point of the Claimants' argument on the reasons for the delay was the effect of the proscription of the Mau Mau; but although that had been commenced under the colonial administration it had been continued by the Kenyan Government after independence, an action for which the FCO were not responsible.

143. There was a careful and detailed analysis in the two judgments of Stewart J of the prejudice suffered by the FCO as a result of the delay in commencing the Kimathi proceedings. The Judge considered witness availability, the availability of documentary evidence and the prejudice in proving prejudice. He held, at [463] in the TC34 Judgment, that:

> "the strong probability is that the Defendant would have been in a very substantially better position to defend the core allegations well into the mid-1960s. As time has passed, so the ability to defend has diminished, such that it is now essentially impossible for the Defendant to have any proper opportunity to find documentary or witness evidence with real relevance to the core allegations."

144. At [479] to [481] he concluded:

> "479. The effect of the delay in issuing the claims on the cogency of TC34's evidence and, in particular, on the evidence of the Defendant is very significant. The Defendant has had no fair opportunity to investigate the core allegations. There was probably some additional effect before the expiry of the limitation period. This can be taken into account. My decision would, however, be the same without this additional effect.
> 480. The Defendant's ability to defend has been severely compromised by the delay. Had the claim been brought in time, or even at some stage during the mid-1960s, the evidence available to the Defendant, both documentary and witness, would have been much greater.
> 481. It is difficult, given the loss of witnesses and documents over time, to determine up to when there could have been a fair trial of some or all of TC34's claims. Had the claim been brought in, say, the 1970s or even later, the evidential position then obtaining would have had to be examined in the sort of detail in which it has now been done. What is clear is that there cannot now be a fair trial of any of the core allegations. That is because of the delay."

145. In those circumstances, I accept the submission of Mr Lawrence (supported by Mr McPherson and Mr Hubble) that Stewart J was bound to have reached the same decision irrespective of whether the witness statements had contained the additional evidence which the Claimants allege they should have contained. In my judgment, it is not necessary to conduct a "mini-trial" to reach the conclusion that the Claimants had no realistic prospect of succeeding against the FCO, irrespective of the content of their witness statements on the issue of delay.

146. That is sufficient to decide the first issue; in my view summary judgment should be given in respect of the allegations on the s33 evidence issue.

147. It is not strictly necessary, in those circumstances, for me to determine the strike out application. But in deference to the quality of argument I heard on the topic I address it briefly.

148. The Defendants invited me to treat this issue as equivalent to that raised in *Greene v Davies* referred to above. There the Court of Appeal held that, where a judge had said that certain correspondence would have made no difference to his decision, it would bring the administration of justice into disrepute to permit re-litigation of the question whether disclosure of that correspondence would have altered the judge's decision. Here, the Defendants say it would bring the administration of justice into disrepute to permit the Claimants to re-litigate the question whether better evidence as to the reasons for delay in commencing proceedings when the judge in question had said that it would not.

149. In my view, the two cases are not complete parallels. In *Greene*, the District Judge had explicitly rejected the suggestion that Mr Greene had been untruthful or deliberately misled him and was clear that the correspondence subsequently relied upon would not have affected his decision even if it had been before him. Newey LJ, (with whom Dame Victoria Sharpe PQBD and Thirlwell LJ agreed), held at [56] that when the District Judge said;

> "in plain terms that the emails would have made no difference to him, right-thinking people would, as it seems to me, think it absurd for Mr Davies to invite the SDT to determine that the material would have changed what District Judge Stewart did".

150. Here, the issue is not whether *on identical evidence* Stewart J would have come to the same decision but whether, if evidence had in fact been adduced to the effect assumed for the sake of the argument by Stewart J, he would have come to the same conclusion. The test to be applied is whether the s33 claims would "*bring the administration of justice into disrepute*". In my judgment, it is plain they would.

151. Mr Pooles' central argument is that if only the correct evidence on the s33 issue had been adduced by the present Defendants before Stewart J there is a substantial possibility that he would have found for the Test Claimants on limitation, or that the FCO would have bought off the risk of his doing so. But the former was precisely the issue Stewart J considered in [483]. Mr Pooles has to go further and, in my judgment, in doing so, and despite his protestations to the contrary, he mounts an attack on Stewart J's approach and reasoning. He says, even if the issue addressed in [483] had been "live" before him, it would have been a statement which could not sustain analysis. It amounted, Mr Pooles argued, to the Court dismissing evidence which it had not heard and which, if called, it would have been under a duty to evaluate in the s33 balancing exercise. Since the evidence was not called before the Judge there is no basis on which he could properly find that it would not have altered his decision. But, that is an argument based not on a failure by the Defendants to adduce the necessary evidence; it is an argument that Stewart J was in error.

152. In my judgment, such an argument would plainly bring the administration of justice into disrepute. The right-thinking observer would regard it as absurd for the issue to be re-litigated in the light of Stewart J's carefully considered observations on the central point. Accordingly, it falls to be struck out under CPR 3.4(2)(b).

*The test case selection issue*

153. The essence of Mr Pooles' case on this issue was that the Defendants were in breach of their duty to their clients (and to those GLO Claimants who were not their clients) in failing to ensure that the test cases put before the Judge represented a "*suitable cross section of the claims for the disposal of the dispute*". A randomised selection process was not a proper alternative, and, once it became clear that no rape or castration cases were included, the Defendants should have asked the Judge to reconsider the selection process.

154. In my view, that argument does not fail simply because, in fact, there were rape cases in the Cohort of 27; the suggestion to the contrary was plainly a simple error. What Mr Pooles relied upon, in particular in oral argument, was the absence of a Castration Claimant.

155. There is, and could be, no suggestion that either the Defendants or the Judge were in error in the formulation of the Judge's Order of 14 March 2014 (see [13] above), which set out how the Test Claimant cases should be identified. That was self-evidently a sensible and realistic procedure to manage the enormous task facing the Judge. The aim of that Order was, in the words of Stewart J at [426] of the TC34 Judgment, to select Test Claimants that were "*as representative as possible of the cohort as a whole*". The Defendants in the present proceedings were obliged to comply with that Order. The Claimants' challenge is to the Defendants' conduct thereafter.

156. There was, it seemed to me, an element of deliberate ambiguity about Mr Pooles' case on test case selection. He could not sensibly suggest the Defendants had been in error in not ensuring that there were rape and castration cases in the cohort of 40 test cases, because there were both. He could not suggest there were no rape cases in the final 25 (or 27) because there were, and he could not, as a result, suggest that those two classes of case, castration and rape, were of similar value to his argument. But even the complaint about the absence of castration cases in the Cohort of 27 was not enough, because the Kimathi litigation was determined by the outcome in the first two cases, neither of which was a rape or a castration case.

157. Mr Pooles needed to be able to say that it was arguable that no reasonably competent solicitor or barrister would have permitted the court to proceed with TC34 and TC20, or permitted that to occur without also proceeding with a castration case, and then to go on to make the 21 November ruling ending the entirety of the Kimathi litigation. But that was not pleaded. As noted above, the closest the pleaded case comes to that appears in the Claimants' Replies where it is said that the Defendants ought to have ensured that a castration case was "*amongst the first claimants to be tried*". But it was no part of Mr Pooles' argument that the choice of TC34 and TC20 as the first test cases to be taken to judgment was not legitimate, no explanation of how it might have been submitted that the Judge was not entitled to adopt those as the two first cases without also adopting a castration case, and no argument as to how, once those two cases had been determined, it could have been argued that the Kimathi proceedings should not then come to an end.

158. The reasons Mr Pooles says it was essential that a castration claim was included were three-fold; first; because castration was most unlikely to have been caused by accident and there was evidence it was a technique employed by the colonial authorities; second

because it can be readily proven and third, because its appalling nature and lasting effects would weigh heavily in the Limitation Act balance. None of those seems to me sound arguments.

159. On a proper analysis, castration claims do not have the unique character Mr Pooles ascribed to them. There are two categories of injury that have been suggested as amounting to castration injuries, namely removal of the testes and other injury to the male genitalia. I accept that it is extremely unlikely that the former could be caused accidentally, although that might be the case with the latter. However, there is no evidence that the removal of the testes was a treatment or punishment deployed in the Kenyan Emergency only by the Colonial authorities. Mr Pooles acknowledged in argument that there had been pleadings to the effect that the Mau Mau themselves had carried out castration.

160. Be that as it may, deliberate castration is not the only type of injury which can readily be proven; the Cohort of 27 included a number of serious and abhorrent injuries, including a case of traumatic removal of an eye, in all of which cases the nature of the injuries would be readily apparent and all of which would carry similar weight in the balancing exercise. In any event, Stewart J held at [172] of the TC34 Judgment that the allegations of the Claimants in the Kimathi litigation were serious and that proportionality to the quantum of any particular claim was not a relevant factor.

161. Second, and in any event, there were castration claims included in the original cohort of 40 test claims (although not in the Cohort of 27), and Stewart J had those cases before him at the time he reached his judgments in respect of TC34 and TC20. Accordingly, Stewart J had the facts of those cases before him at the time he reached his judgments in respect of TC34 and TC20 and when making his Order dated 21 November 2018. Submissions were made about such cases and Stewart J was well aware that the GLO Claimants included rape and castration cases. The grounds on which he dismissed the cases of TC34 and TC20 applied equally to those cases.

162. Third, and relatedly, in my judgment the Claimants fall into error by viewing the Kimathi proceedings in retrospect. They seek to apply the benefit of hindsight to the question of which cases should have been decided first. For perfectly sound reasons, Stewart J chose TC34 and TC20, neither of whom was a Rape or Castration Claimant, as the first cases to be the subject of judgments and the Kimathi proceedings as a whole were determined after those judgments. Thereafter, the basis on which the Judge dismissed the claims of TC34 and TC20 applied equally to Rape and Castration Claimants.

163. Furthermore, I see no prospects of success for an argument that had the Test Claimant cohort included Castration and Rape Claimants, the FCO would have made factual admissions in respect of those claimants. As Mr Lawrence correctly argues, the Test Claimant cohort of 40 did contain Rape Claimants and at least one Castration Claimant, but the FCO did not make any factual admissions in respect of them, nor in respect of any other GLO Claimants. Instead, the FCO required every GLO Claimant to prove their case.

164. In those circumstances, in my judgment, there is no realistic prospect of the Claimants establishing that the Cohort of 27 was not one to which a reasonably competent solicitor

or barrister, exercising reasonable skill and care, could have agreed. I would allow the application for summary judgment in respect of the test case selection issue.

165. In case I am wrong about that, I consider briefly the strike out argument on this issue. I accept the Defendants' submissions that these claims amount to a collateral attack on Stewart J's case management orders and, in particular, the Test Claimant selection process he directed in the Kimathi proceedings. As noted above, the choice as to the first two cases that would be heard through to judgment was the Judge's and there is no pleaded case in the CPC, or elsewhere, that the Defendants in the present proceedings were at fault in not challenging that decision. In those circumstances, to mount an attack on that decision now is impermissible. In my judgment, it would bring the administration of justice into disrepute to permit this element of the claim to be pursued.

166. Furthermore, the Order dated 21 November 2018, which recorded that the Court considered there was no material point of distinction between TC34/TC20 and the other Test Claimants, was made expressly on the basis that the Non Lead Firms, which included those acting for the Claimants in the present proceeding, had indicated in a letter to the Court that they did not wish to make representations to contrary effect. To now permit this claim to proceed would further bring the administration of justice into disrepute.

*The Fourth Claimant's case*

167. The points made above would apply equally to the Fourth Claimant. However, as Mr Lawrence submits, the Fourth Claimant was neither a Rape nor a Castration Claimant and nothing argued by Mr Pooles could change the outcome in his case. The suggestion that Stewart J would have reached a different decision in his case because of the points now being advanced is, in my judgment, hopeless. Summary judgment and the striking out of his case would each be appropriate.

*The Success Fee Claim*

168. Given that I have ruled against the Claimants on both the s33 evidence issue and the test case selection issue, the claim based on entitlement to a success fee must fall away too.

169. For completeness I would say that had it remained a live issue, I would have found for the Defendants on this issue. In my judgment, Mr Lawrence was correct when he argued that the Claimants' claims for damages in respect of the CFA success fees which they would now have to pay to their present legal team if they were to succeed against Defendants is bad at law. Had the Claimants succeeded on their loss of opportunity claim and had they been entitled to recover success fees from the FCO, then the amount of credit they would have to give the Defendants for the irrecoverable costs they would have incurred in the Kimathi proceedings would be lower. But that does not amount to a separate head of loss. As Mr Lawrence pithily put it in oral submissions "*you can't claim the success fee because you didn't have to pay it because you weren't successful. So there is no loss*".

## Conclusions

170. In those circumstances I conclude:

(i) There should be summary judgment for the Defendants on both the s33 evidence issue and the test case selection issue.

(ii) Further, or in the alternative, those claims fall to be struck out pursuant to CPR Rule 3.4(2)(b), on the basis that the proceedings in that regard are an abuse of the process of the court.

171. I will hear submissions on the appropriate order.