Neutral Citation Number: [2020] EWCA Civ 144

Case No: B3/2019/0682

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE QUEENS BENCH DIVISION
MR JUSTICE TURNER
[2018] EWHC 3506

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2020

Before:

PRESIDENT OF THE QUEEN'S BENCH DIVISION
(The Rt. Hon. Dame Victoria Sharp)
LORD JUSTICE IRWIN
and
LORD JUSTICE COULSON

- -

Between:

KADIE KALMA & OTHERS	**Appellants**
- and -	
(1) AFRICAN MINERALS LTD	**Respondents**
- and -	
(2) AFRICAN MINERALS (SL) LTD	
- and -	
(3) TONKOLILI IRON ORE (SL) LTD	

- -
- -

Richard Hermer QC, Chris Buttler & Eleanor Mitchell
(instructed by **Leigh Day**) for the **Appellants**
Neil Moody QC, Robert Cumming & Andrew Bershadski
(instructed by **Lipman Karas LLP**) for the **Respondents**

Hearing dates: 10th and 11th December 2019

- -

Approved Judgment

LORD JUSTICE COULSON:

1. INTRODUCTION

1. All references in square brackets are to the first-instance judgment of Turner J ("the judge") [2018] EWHC 3506 (QB).

2. The appellants are a group of inhabitants of Tonkolili, a remote and inaccessible district in the north of Sierra Leone in West Africa. The respondents were the owners and operators of what was at the relevant time the largest iron ore mine in that region. It is unnecessary for the purposes of this appeal to differentiate between the different companies. The impact of the mine on the inhabitants of the region led to unrest and, in November 2010 ("the 2010 incident") and April 2012 ("the 2012 incident") local disturbances prompted a significant overreaction from some members of the Sierra Leone Police ("SLP"[1]). This led on both occasions to what the judge described as "violent chaos during the course of which many villagers were variously beaten, shot, gassed, robbed, sexually assaulted, squalidly incarcerated and, in one case, killed" [4].

3. The appellants brought proceedings against the respondents alleging that the respondents were liable to them for the wrongful acts of the SLP on seven different legal grounds, summarised by the judge at [11] and explained in greater detail at [12]-[60]. These were: (i) vicarious liability for torts alleged to have been directly committed by the respondents' employees and officials; (ii) vicarious liability for torts committed by the SLP; (iii) accessory liability of the respondents acting in furtherance of a common tortious design with the SLP; (iv) liability for the tortious acts of the SLP as a result of "some direction or procuring or direct request or encouragement" on the part of the respondents; (v) malicious prosecution; (vi) breach of the respondents' direct duty in failing to take adequate steps to prevent the SLP from committing torts; and (vii) breach of a non-delegable duty in respect of an extra hazardous activity carried out negligently by the SLP and an independent contractor.

4. Of these seven ways in which the claim was pleaded, (i) and (iv) comprised the main thrust of the claimants' case at trial, because they were said to arise out of the direct involvement of the respondents' employees in the tortious acts (trespass to the person) committed by the SLP. Following a long trial and a detailed judgment, all the claims were rejected by the judge. The arguments on appeal have been limited, not to the main claims advanced at trial, but to the claims at (iii) above, namely the alleged common tortious design, and (vi) above, the alleged duty owed by the respondents directly to the appellants. This second element of the appeal also seeks to open up one of the judge's findings as to breach and takes a further, narrow point about his findings on causation.

2. THE FACTUAL BACKGROUND

2.1 General Observations

5. It is impossible in a judgment of this kind to do anything other than outline the factual background against which the claims are said to arise. I take the chronology from the

[1] We were told that the SLP is not armed and that its armed response unit was the OSD. It was the SLP who called in the OSD when and where they deemed it necessary. For ease of reference, I do not generally differentiate between the two in this judgment, but it is an important part of the background.

judge's judgment and would wish at the outset to pay tribute to its clarity and organisation.

2.2 The Context

6. This was dealt with by the judge at [86] – [88].

7. Sierra Leone is a relatively small country in West Africa where poverty is endemic. It has the lowest average life expectancy of any nation in the world. But it is rich in material resources, including diamonds and iron ore.

8. The vast reserves of iron ore in Tonkolili in the north east of the country were discovered at the beginning of this century. The respondents constructed the large opencast mine at the centre of this case and built the necessary infrastructure to transport the ore to the coast. This necessitated the refurbishment of 31 miles of existing railway and the construction of 51 miles of new railway. We were told that, even in the dry season, the unpaved tracks which comprise the bulk of the road system in Sierra Leone meant that it takes five hours to drive from Freetown, the capital on the coast, to the mine.

9. The nearest town to the mine was Bumbuna, to the north west. Many of those employed at the mine lived in Bumbuna and travelled to the mine for work. There were three villages closer to the mine: New Ferengbeya (the new site of the village of Old Ferengbeya which was subsumed by the area of the mine itself), to the west; Kegbema to the north; and Kemedugu to the north east.

10. The mine employed approximately 7,000 people at the time of the 2012 incident. It has since closed.

2.3 The 2010 Incident

11. There were several causes of contention in 2010, summarised by the judge at [89] – [92]. As the judge noted at [93], in order to maintain smooth relations with the surrounding villages, the respondents employed locally recruited Community Liaison Officers ("CLOs") to act as go-betweens. The judge identified one particular CLO, known as "Yallan", because he was at the centre of the claimants' allegations that the respondents were directly involved in the overreaction by the SLP during the 2010 incident. The judge was to reject all of those allegations as a matter of fact.

12. The developing unrest in the area of the mine in 2010 was sufficiently serious to attract the attention of the Government of Sierra Leone which then became directly involved in the attempts to prevent the situation running out of control [95]. In one incident in August 2010 [96], it was felt that the presence of the SLP had calmed the situation. At about the same time the respondents agreed to make modest monthly payments to the SLP on the coast: as the judge said at [97]:

> "The defendant relied on the police to provide support not only at the mine but at key transport locations. Police posts were set up in strategic positions across the project with the particular aim of deterring fuel theft which was a chronic and pressing problem."

13. Dissatisfaction in the local communities continued, even though the Paramount Chief warned the villagers not to disrupt the operations of the respondents and, in particular, not to set up roadblocks by way of protest [98]. Despite this, there were continuing and serious disputes, and the local inhabitants blocked various roads in and around Bumbuna. The roadblocks led to at least one fight between employees of one of the respondents' contractors and local youths [100]. At some point (it is not clear precisely when) the SLP called in the armed response unit, the OSD. Any subsequent decision to shoot was the responsibility of the OSD.

14. Despite the involvement of the Local Unit Commander ("LUC") and his express warnings about the construction of roadblocks, the situation continued to degenerate. At [107] – [113] the judge dealt with a lengthy meeting in the village of Kemedugu and the sad fact that, despite the fact that the meeting went on for five hours and appeared to have ended in agreement, it was to transpire that the respondents and the community left with completely different and irreconcilable views as to what that agreement entailed.

15. On 25 November 2010, local youths erected a roadblock at Yutinela Junction. This was a junction of two tracks in an area in which the respondents were interested as the potential location of a dam necessary for their future operation of the mine [114]. In the area was a team of 4 expatriate geotechnical personnel with their drivers and a CLO. They stopped and parked up but were threatened by a group of local youths and went on to a second destination [116]. The two vehicles were halted by the youths at the junction of the lane to Yutinela where Yallan and his driver were also being held [118]. The youths barricaded the three vehicles in place and detained the 4 expatriates, the 3 drivers, and the two CLOs (including Yallan), against their will [118].

16. Negotiations eventually led to the release of the 4 expatriates, but the youths refused to release the vehicles, the drivers or the two CLOs. The negotiations were conducted by Mr Kim Gordon, the Health, Safety and Security manager at the mine. As he returned to the scene of the unrest for a second time, he met about 25 members of the SLP. They began to make arrests. The protesters started pelting the vehicles with rocks and the OSD responded by firing live rounds into the air and discharging tear gas [124]. There was a good deal of evidence about the manner of the subsequent arrests ([129] – [146]).

17. The SLP transported a number of those whom they had arrested to the respondents' mine camp. It seems clear that, both during the arrests and in particular at the camp, there was some violence. The judge expressly rejected the allegations that Yallan was involved in beating the detainees at the mine [148] – [153].

18. In the meantime, the unrest continued. A group of youths congregated, intending to attack the mine and damage property [154]. Some gathered at the perimeter and pelted the mine with rocks. The mine was locked down. Later that evening protesters set light to and destroyed a drilling rig worth £500,000. As these events unfolded, the SLP asked (and were permitted) to use some of the respondents' vehicles. Mr Ramunno, the mine manager, gave evidence that it was at his instigation that the police went on to check the surrounding areas [155].

19. Several of the claimants and their witnesses gave accounts of the police using excessive force in carrying out further arrests in New Ferengbeya that evening [156]. The police also descended upon the village of Kegbema, and there was evidence of police violence

and random breaking into homes there, followed by arbitrary arrests [158]. The judge found that there was no evidence that Yallan or any other member of the respondents' staff directly participated in the Kegbema abuses.

20. The judge dealt with the aftermath of the 2010 incident at [162] – [165] and the respondents' role in the subsequent prosecution of offenders at [166] – [173].

21. The judge's central findings with respect to the 2010 incident were at [174] – [177]. His findings at [174] were to the effect that Yallan did not direct the police to arrest suspects nor did he participate in or condone violent attacks on his accusers. Further support for those findings was at [175]. At [176] the judge found that members of the respondent's management staff knew some police officers were using excessive force. He found that, in particular, "Kim Gordon saw abuse and physical violence inflicted on the detainees at the mine camp including the infliction of a blow to the head from a rifle butt". The judge then went on at [177] to find that "it was not the intention of any member of the senior management team of the [respondents] that the police should use unlawful means to respond to the 2010 incident". I will return to this paragraph when dealing with the question of intention in Section 5 below.

22. After the 2010 incident, in early December, the respondents drew up plans to provide additional logistical support for the police which included the establishment of a permanent police post near the mine [178]. The respondents also provided several vehicles to the police to help them in the investigation. As the judge noted, the contemporaneous evidence of the respondent was to the effect that: 'the police have no transport capability, if we do not supply and/or maintain it it will not happen'. Despite this, problems between the respondents and the local community persisted. Roadblocks continued to be the obvious manifestation of the dissatisfaction of the local community.

2.4 The 2012 Incident

23. The 2012 incident occurred over three days in April 2012.

24. Day 1, 16 April 2012, saw the respondents' workforce go on strike. In response to the situation, the respondents requested an enhanced police presence in Bumbuna, and substantial police reinforcements arrived from Makeni and other areas to bolster local numbers. A contemporaneous payment (worth around £500) from the respondents to the SLP was made and recorded at the request of the SLP's Assistant Inspector-General ("AIG"). We were told that he was the second-most senior police officer in the whole of Sierra Leone, and he was present and directing the SLP throughout the three days of the 2012 incident.

25. On Day 2, 17 April 2012, some of the strikers attended at the local meeting place in Bumbuna in the expectation that there would be a meeting with representatives of both the respondents and the Government. There was no such meeting. In the meantime, around 200 additional police officers arrived from areas as far away as Freetown.

26. On the morning of Day 2, the protesters erected a roadblock on the road to the respondents' fuel farm [182]. In the afternoon, the SLP arrived to remove the roadblock and used tear gas and live rounds. The judge found at [182] that, other than the mere erection of the roadblock itself, "there was no evidence that the violent response of the police had been a catalyst by any provocation from the protesters".

27. Later that same afternoon, the SLP moved into Bumbuna. It was found by the subsequent Human Rights Commission report into these events that they "went on the rampage, shooting and beating people up, kicking doors and hurling insults at market women" [183]. Tear gas was again used. The lead claimant, Kadie Kalma, was beaten up in front of her son and bundled into the back of one of the police vehicles. The judge found that the SLP in Bumbuna that afternoon were guilty of perpetrating "entirely unwarranted violence upon random members of the population". There was no suggestion of any direct involvement by the respondents in any of the violence and, although they received updates throughout the day, there was no reference to the use of excessive violence [183]. By the end of the day rumours were circulating that the protesters were threatening to burn one of the respondents' trains, which was then about 18 miles from the mine [184].

28. Day 3, 18 April 2012, centred on the local radio station and a phone-in hosted by the Reverend Bangura. The judge found that, on his radio programme, the reverend called for unity and not for conflict, but it was asserted by Mr Dumbuya, a police liaison officer ("PLO") employed by the respondents, that the programme was inciting violence. It was in consequence of this belief that the SLP resolved to intervene. The judge found that the police were hoping to shut down "this platform for the expression and dissemination of grievances" [186].

29. The police arrived at the radio station to arrest Reverend Bangura. We have seen this event at the start of the 25-minute police video on which the appellants relied at the appeal hearing ("the video"). The Reverend Bangura was arrested but was then released by the threat of force by local villagers. He was carried away from the radio station on the shoulders of the crowd.

30. In the judge's words, the situation then went "completely out of control" [187]. There followed a violent clash between the villagers of Bumbuna and the SLP and live rounds were fired. As the judge noted "the actions of the protesters and police alike were chaotic. Video footage reveals a complete lack of discipline and co-ordination within the ranks of the police which were soon to have tragic consequences".

31. A group of women attempted to bring the violence to an end and began a traditional Shekereh dance to bring peace and harmony in place of conflict [188]. But the police opened fire with live rounds and one of the performers, Musu Conteh, was shot dead. Eight other villagers received gunshot wounds. Others were arrested and beaten [189]. There was also some violence directed at the police:

> "191. The video footage also reveals that some of the villagers were throwing rocks and stones at the police which, although far less lethal than the array of firepower which the latter had at their disposal, doubtless acted as a provocation to the continued and wholly disproportionate use of force by the police."

32. At [192] the judge introduced a lengthy section of his judgment in which he dealt with the appellants' specific allegations at trial concerning the events of the 2012 incident. He made it clear that, despite the appellants' promptings, this was not a case where the only options were to accept the evidence of either one side or the other. As to the evidence about payments to the police and the lending of vehicles, the judge also pointed out that the differences in the evidence were small and, in any event, only matters of degree. He said that there was no doubt that some money was paid, and some

vehicles lent, and that conflicting evidence about the scale of these acts of facilitation "were more likely to be attributable to the fallibility of human memory than any overarching conspiracy on either side".

33. Thereafter, the judge addressed the 11 central allegations raised by the appellants in respect of the 2012 incident. Although at one point in his oral submissions to this court, Mr Hermer QC endeavoured to suggest that these allegations were of peripheral importance to the appellants' case at trial, I do not accept that. It is quite clear from the papers that these 11 allegations were at the heart of the appellants' case about what had happened during the 2012 incident. That is why the judge dealt with them in such detail.

34. It is unsurprising that most of these allegations centre on the alleged direct involvement of the respondents' employees in the violent events on Days 2 and 3. This is because, as I have already noted, the appellants' principal case at trial, putting it at its highest, was that the appellants had become indistinguishable from the SLP. Those allegations concerned with the respondents' direction or involvement in the violence were repeatedly rejected in this part of the judge's judgment, running from [194] – [274]. It is unnecessary to set out the judge's findings on those many factual allegations which failed, because they are not relevant to this appeal.

35. Concentrating on the allegations of involvement in other aspects of these events (which as noted were not significantly in issue), the principal link centred on the payment of money on Days 2 and 3. The judge dealt with this in the following way:

> "195. I am satisfied that, on one or more occasions, members of the SLP attended at the mine during the course of the 2012 incident and that they were given cash payments. Indeed, both Mr Jansen (the general manager of the mine succeeding Mr Ramunno) and Mr Gordon recalled that the police had attended during this period. I am also satisfied, despite Mr Dumbuya's protestations to the contrary, that he made at least some of the payments to the SLP.
>
> 196. I would have been surprised if such payments had not been made. After all, there was an established history of the defendant making cash payments to the police for the provision of their services. The police presence in the location of the mine specifically in April 2012 was on a considerable scale and had involved the re-deployment of many men from far distant locations. I am satisfied that, but for the provision of cash, the police response would have been considerably less robust. The significance of this is that it cannot be assumed that the payment of money is, in itself, a compelling factor supporting the conclusion that the defendant had thereby assumed a greater than appropriate level of control over the SLP. It would be understandable, against the background of a more tightly regulated and stringent police organisation than that which then operated in Sierra Leone, that a darker purpose might be inferred from such payments but, not for the first time in this case, the fact-finding exercise must not be performed without regard to the prevailing social and political context in which it falls to be carried out.
>
> 197. Several witnesses gave evidence of what they allege was said by employees of the defendant to the officers to whom money was being distributed. I readily accept that the cash was not given out in silence and that the donors made no secret of the fact that they were looking for some return on their investment.

> However, there is a distinction to be drawn between, on the one hand, encouragement to do a proper job with proportionate enthusiasm and, on the other, giving instructions to deploy unlawful means. In this regard it is to be noted that the evidence of the claimant's witnesses on the point is, by and large, distinctly bland."

36. As to any wider coordination between the respondents and the SLP, the judge rejected that at [207] and in detail at [211] – [215].

37. The judge noted that it was uncontested that the respondents were soon made aware of the violence in Bumbuna on 17 April [217]. He also noted there was no dispute that the respondents provided their own vehicles for the use of the SLP during the 2012 incident [218]. In addition, he found that members of the OSD, distinguishable in the video by their light blue fatigues as well as their weapons, were accommodated at the respondents' guest house [219]. He found that the respondents supplied water to the SLP ([221] and [227]), although he was not satisfied that this was of any particular significance [229]. He rejected the evidence that suggested that the respondents' logistics manager Mr Musa Bangura was directing and encouraging the police to act unlawfully [222].

38. At [231] – [233] the judge found that Mr Navo, a public relations manager employed by the respondents, made a further cash payment on the afternoon of 17 April (Day 2). He went on to find at [233] that this payment did not support the proposition that Mr Navo was encouraging the police to act unlawfully.

39. Thereafter the judge addressed a number of allegations involving Mr Dumbuya, the PLO, and rejected his complicity in police lawlessness [244] – [249]. His conclusions at [256] were in the following terms:

> "256. In all the circumstances, I am satisfied that Mr Dumbuya was out and about with the SLP during the 2012 incident and sometimes driving them in the HAWK vehicle. I am not, however, satisfied that he was encouraging or intending them to act unlawfully or condoning the use of excessive violence against victims of the police abuses."

40. The most damaging allegation of all those made by the claimants was that Mr Kim Gordon had instructed the police to use live rounds on protesters if this was considered necessary in order to get the situation under control. The judge rejected this allegation in unequivocal terms:

> "265. Furthermore, and perhaps more importantly, AW8's evidence was inherently implausible. He was, as he said under cross-examination, under the command of the AIG and took orders from him. There would have been no need for Mr Gordon to take the risky course of encouraging unlawful violence in the open air and in the unnecessary presence of several potential witnesses. He need only have instructed the AIG in private to give the orders to shoot without taking the risk that every officer at the fuel depot was aware that he, personally, was responsible for the instruction. Such barefaced conduct would show a reckless disregard for his own reputation and threaten to expose the conciliatory approach evidenced in the minutes of the IMT meeting at which he was in attendance as a hypocritical sham.

266. Mr Gordon was unable to recollect giving money to the police or the details of what he had said to them on any given occasion. In his position as the defendant's Health, Safety and Security Manager, I consider that it is probable that he did meet with members of the SLP on one or more occasions in order to brief the officers, many of whom may have been unfamiliar with the layout of the mine. In particular, it was only to be expected that the police should be informed of the potential flash points and targets of criminal damage and theft. In this context, I would expect Mr Gordon to emphasise the importance of taking steps to protect the fuel farm. I do not accept, however, that he would have taken it upon himself to give any orders or advice as to when, if at all, it might become operationally appropriate to use tear gas or to open fire. Neither do I accept that any such orders or advice would have made any difference to the way in which matters developed during the 2012 incident. This applies to all of the occasions when the police acted unlawfully and, in particular, opened fire using live rounds. However, the particular fact that certain members of the SLP were so undisciplined, unrestrained and violently anarchic as to open fire in the vicinity of women performing a peace dance at a location far away from the mine provides a strong indication that "standing orders" had nothing to do with the tragedy which unfolded. I reject the suggestion that the women were shot at because they had earlier been in the vicinity of the fuel farm or that the SLP could have thought that by firing live ammunition they might thus get the strike under control. I consider that the catalyst to the shooting was a mixture of fear, ill-discipline, anger and testosterone."

2.5 Other Matters

41. The judge dealt comprehensively with the relationship between the respondents and the SLP at [275] – [306]. His findings dealt with:

a) The ubiquity of the sort of payments that were made. He said at [281]:

"281. The SLP was relatively poorly financed. Its resources were never likely to be such as to fund the additional extra numbers required effectively to police the expanding population in the locality of the mine. The defendant could rely upon the substantial deployment of officers in the locality of the mine only by making repeated financial contributions to the SLP. The evidence that it was quite usual for individuals or companies in Sierra Leone to pay the police for their services went unchallenged."

b) The necessity of such payments. He said at [293]:

"293. I do not find this line of authorities to be of particular assistance in the instant case. I am in little doubt that, save perhaps for payments made by the defendant in respect of the billeting of police officers at the mine itself, the SLP were not entitled to require, or permitted to accept, payment for the services it provided when seeking to maintain law and order in the locality of the mine. However, in reality, if the defendant had not paid for these services they would either not have been provided or, at best, would have been woefully inadequate. The SLP raised unlawful charges for services which they should have rendered free of charge but this did not give rise to any consequences of direct legal significance in the instant case. I say "direct" because it remains open to the

claimants to argue that the making of such payments impacted on the nature of the factual relationship between the defendant and the police in ways which are material to the resolution of this case."

c) The foreseeability of SLP abuses. He said at [297] – [300]:

"297. I am satisfied that, even prior to the incident in 2010, senior management of the defendant were aware that the SLP had a general reputation for the occasional deployment of disproportionate violence but had had no direct experience of it. Indeed, such was the evidence of Mr Ramunno. Mr Hallahan was far more circumspect about what knowledge he was prepared to admit to but he conceded that he had been aware of newspaper reports alleging corruption and violence and the only issue was as to the extent to which he did or ought to have afforded them credibility…

299. After the incident in 2010, the defendant could have been in no doubt that the SLP were capable of overreacting to protest and lawlessness with a level of violence disproportionate to what was reasonably necessary and were capable of acts of random collective retaliation.

300. Of course, there is a danger that "hindsight bias" will distort any judgement as to the extent to which, in retrospect, the violence of the SLP in 2010 (and 2012, for that matter) could have been foreseen but, on the whole of the evidence, I am left in no doubt at all that senior management of the defendant was aware of at least some risk that the police might go too far and use excessive force on protestors. Prior to the 2010 incident, however, the police had not resorted to violence in dealing with matters reported to them by the defendant and, save for the two incidents which are at the centre of these claims, the defendant was able to demonstrate that on all other occasions, the police had acted proportionately and with restraint."

d) The respondents' influence over the SLP. The judge said at [302]:

"302. I am not satisfied that the evidence in this case reveals that the defendant could or did exercise an improper or decisive degree of control over the actions of the police with respect to the handling of the 2010 and 2012 incidents. The following points fall to be considered:

(i) There is ample evidence that the Government of Sierra Leone publicly, consistently and strongly supported the activities of the defendant and repeatedly warned the local population against the consequences of undermining the defendant's operations. Nevertheless, these exhortations fell very far short of providing the SLP or the defendant with carte blanche to use disproportionate violence in response to unrest. Nor did they indicate or imply that the police should show undue deference to the defendant in deciding what means to deploy in maintaining the peace.

(ii) Naturally, the post of PLO was created to facilitate co-operation between the defendant and the SLP. I am satisfied, however, that the holders of these posts were neither intended nor encouraged to provide the defendant with an inappropriate degree of control over the police. On the contrary, the defendant

> might well have been criticised if it had failed to establish such go-betweens as might promote the free exchange of mutually beneficial information and support. The same applies to the relatively easy access the defendant no doubt enjoyed to very senior officers of the SLP. Again, I am satisfied that such access was not a means by which the defendant sought to exercise improper influence.
>
> (iii) Furthermore, there are examples of particular occasions upon which the police would appear to have been unduly deferential to the wishes of the defendant with respect to the making of arrests, the granting of bail and the like. These are fully set out in the claimant's closing submissions. These examples, however, fall far short of demonstrating that the defendant had or exercised a power to direct the police to deploy unlawful and disproportionate means to respond to protest.
>
> (iv) There are documented occasions upon which the defendant called for police support or reinforcements in response to specific incidents. However, bearing in mind the ever present risk of unlawful protest, it was only to be expected that the defendant called upon the police to respond and that the police would do so.
>
> (v) There was a high degree of contact between the defendant's employees and the SLP during the course of the incidents. This, however, is hardly surprising. There was a very real risk that the local unrest could, at any time, escalate into a full scale assault on the mine. In 2012, for example, rumours were circulating of a plan by local youths to board a train to invade the mine and the option to evacuate the mine was under constant review. I accept the evidence of Mr Janson that the priority was always safety."

42. The judge's summary of the relationship between the respondents and the SLP was at [303] in these terms:

> "The local police were seriously under-resourced in personnel, equipment and finance. There were only ten officers operating out of Bumbuna and they had no, or virtually no, access to vehicles. The defendant loaned their own vehicles to the SLP and funded the provision of food and drink. In my view, they had little choice other than to run the risk that the unlawful protests would otherwise continue unchecked and could well deteriorate into action imperilling both the safety of the mine and those who worked there. The evidence of how many vehicles the defendant loaned to the SLP and what payments were made, when and by whom is confused".

43. There were additional findings as to intention in relation to the 2012 incident at [306] and [328]. I deal with those when I address the issue of Common Design in Section 5 below.

3 THE TRIAL AND THE JUDGMENT

44. The trial began on 29 January 2018. It lasted 24 days, until 14 March. This included 19 days of evidence, of which 7 took place in Freetown. A total of 67 witnesses gave evidence, some anonymously. There were detailed opening submissions and voluminous closing submissions, which were provided after the close of the trial in

early March. The judge himself noted that these closing submissions ran to a total of 401 pages and that the appellants' closings were "garnished" with 1,521 footnotes.

45. Although such a 'kitchen-sink' approach is all too common in this sort of case, it did not make the judge's task any easier. As he himself said at [61], "The sheer volume of evidential material in this case presented a considerable challenge in achieving a proportionate and coherent analysis". Further, at [63] he noted that, inevitably, and for the sake of proportionality, he had had to leave a very considerable number of points "on the cutting room floor". That did not mean that he had not considered them, but he wanted to stress that the inclusion of their analysis or resolution in an already lengthy judgment would not have had a material impact on the determination of the central issues. Other particular obstacles to the fact-finding exercise in this case were set out by the judge at [66] – [85]. Each of these factors mean that this court must treat with extreme caution any submissions (and the appellants made many) which criticise or challenge the judge's findings of fact, no matter how obliquely.

46. The judgment, to which I have already made copious reference, is lengthy, despite the judge's best efforts to keep it concise. It runs to 396 paragraphs and 92 pages. In less skilled hands, I am confident it could have been twice that length.

47. Although the appellants were anxious to say that the points that they now raise on this appeal were matters of law, and they stressed how much they relied on the factual findings of the judge, they were driven to say at various times during the hearing that a number of the judge's critical findings of fact were "plainly wrong". At least one factual finding was described by Mr Hermer as "perverse".[2] However, with one very limited exception, these assertions were not made on the basis that the judge had failed to have regard to any particular part of the evidence.

48. In my view, the appellants repeatedly came close to, and often crossed, the clear boundary as to what can and cannot be argued on an appeal of this sort. It is unnecessary to set out in detail the proper approach of an appellate court to appeals that raise issues about the first instance judge's findings of fact. The Supreme Court has regularly explained that, unless a critical finding of fact has no basis in the evidence, or is based on a demonstrable misunderstanding of relevant evidence, or a failure to consider such evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified: see *Henderson v Foxworth Investments Limited* [2014] UK SC 41, Lord Reid at paragraph 67; *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2018] UKSC 61, Lord Sumption. This applies equally to findings of primary fact and any inferences to be drawn from them: see *Staechelin v ACLBDD Holdings & Others* [2019] All ER 429.

49. Moreover, in the cases summarised by Lewison LJ in *Farge UK Limited and Another v Chobani and Another* [2014] EWCA Civ 5, various practical reasons are set out for why this should be so. Amongst other things, Lewison LJ noted that, whilst the trial judge will have regard to the whole of the sea of evidence presented to him, an appellate court would only ever be "island-hopping". In his memorable words, "The trial is not a dress rehearsal. It is the first and last night of the show."

[2] As is apparent from Section 7 below, the challenge to this particular finding was not made in the appellants' skeleton argument and was first articulated at the appeal hearing itself.

50. In my view, the submissions of both sides in this appeal embraced some fairly frantic island-hopping. Moreover, in view of the plethora of issues, witnesses, bundles and submissions (not excluding footnotes) considered by the judge, I am in no doubt that this case is emphatically one where the curtain came down on the first and last night of the show, when judgment was handed down in December 2018. So what, if anything, can legitimately be raised in any appeal?

4 THE ISSUES ON APPEAL

51. The first two Grounds of Appeal are concerned with the appellants' case in respect of common design. They focus on the question of intention. The appellants say in summary that, particularly in view of the money, vehicles and accommodation provided by the appellants to the SLP, the judge should have inferred an intention on the part of the respondents "to quash protest, if need be by the use of excessive violence" (Ground 1).[3] Additionally, the appellants say that this intention is to be inferred from the activities of those of the respondents' employees who were involved in the detailed events, and that it matters not whether they were representative of the senior management of the respondents' respective companies, or not (Ground 2).

52. I address the Common Design issues in Section 5 below.

53. The next two Grounds of Appeal concern the alleged existence of a duty of care owed directly by the respondents to the appellants. The appellants say that the judge wrongly approached this case as a case of "pure omissions" and that, instead, he should have considered the existence of the duty by reference to first principles and, in particular, the three elements identified in *Caparo v Dickman,* namely foreseeability, proximity and whether or not such a duty was fair, just and reasonable (Ground 3). The appellants also have an alternative case that, if this was a case of pure omissions, the judge should have found that it was one of the recognised exceptions to the rule, namely that it involved the creation of the danger by the respondents themselves (Ground 4).

54. I address the duty of care issues in Section 6 below.

55. The fifth and final Ground of Appeal asserts that, although the judge addressed the question of causation by reference to each of the 4 (out of the 15 alleged) breaches that he had found[4], and concluded that each did not cause the loss complained of, he ought to have dealt with causation by reference to all of the breaches cumulatively. The appellants say that, if he had done so, the judge would have reached a different result on causation. However, as the respondents have pointed out, it is not suggested that the judge's individual findings on causation were wrong. I note that this part of the case was slightly complicated by the fact that, on the morning of the first day of the appeal, the appellants sought to raise, for the first time, an additional ground of appeal, to the effect that the judge was wrong to find that the supply of money, vehicles and accommodation was not a breach of the alleged duty of care.

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[3] That was how the relevant intent was articulated by Mr Hermer in answer to a direct question from the President on the first morning of the appeal. Because, as we shall see, this issue was never at the forefront of the appellants' case, this formulation cannot be found in the pleadings.

[4] The judge reached these conclusions by assuming that, for this purpose only (and contrary to his primary finding), a duty of care was owed.

56. I address the causation arguments, including this belated complaint about the judge's finding of breach, in Section 7 below.

5. COMMON DESIGN

5.1 The Law

57. For present purposes, the law on common design can be encapsulated by reference to three authorities.

58. In *Monsanto Plc v Tilly and Others* [1999] Env.L.R.313, this court rejected the proposition that there was an arguable defence to the claim of being a joint tortfeasor, in circumstances where the named defendant was aware of the planned environmental protest (which involved trespass to land and goods), had reconnoitred the site the day before, and was organising a press conference to deal with the protest on the day of the incursion. At [45], Stuart-Smith LJ cited his own observation in *Credit Lyonnais v E.C.G.D.* [1998] 1 Lloyd's Rep 19 at 35 in the following terms:

> "It seems to me to be well-established that a person who acts with another to commit a tort in furtherance of a common design will be liable as a joint tortfeasor. It is not enough that he merely facilitates the commission of the tort unless his assistance is given in pursuance and furtherance of the common design"

In the same passage, Stuart-Smith LJ cited with approval the description of a joint tortfeasor by Scrutton LJ in *Koursk* [1924] P.140 at page 155, in circumstances where "there is one tort committed by one of them on behalf of and in concert with another".

59. In *Shah v Gale* [2005] EWHC 1087 (QB), the defendant, Ms Gale, had pointed out the address of a man who she knew would be beaten up by those she was directing. Unhappily, she pointed out the wrong house, and Mr Shah was beaten so badly that he died. The claim in tort against Ms Gale was upheld. Paragraph 42 of the judgment of Leveson J (as he then was) summarised her liability as follows:

> "42. That is not, however, this case for Miss Gale's act of assistance cannot be considered in isolation. Understanding that the object of the exercise was to find Mr Ismaili and "beat him up" (as she put it), she agreed to assist by pointing out the address at which she believed he lived and, in so doing, expressly or by the clearest implication, became part of the common design. It was not suggested that the fact that Mr Shah (as opposed to Mr Ismaili) was attacked makes any difference and that she was not present when the men returned to the house that she had identified is irrelevant. I have no doubt that in relation to an assault on the occupier of 41 Hibernia Road, Miss Gale was a joint tortfeasor. In this regard, I deal with Mr Clark's submission that the wrong defendant has been chosen because the Claimant would have been bound to succeed against some or all of the Part 20 Defendants: Mrs Shah has not chosen the only defendant that she could pursue but she has chosen one who is liable and against whom she was entitled to bring proceedings."

60. In *Fish & Fish Limited v Sea Shepherd UK and Others* [2015] UKSC 10, [2015] AC 1229, the claimant's vessel was attacked by a vessel commanded by the third defendant, who was both the founder of the second defendant and a director of the first defendant (SSUK, an English conservation charity which was the registered owner of the vessel). The attack was part of a protest against tuna fishing. The claimant brought proceedings in trespass and conversion against all three defendants, contending that the attack had taken place pursuant to a common design between the three defendants to commit such acts, making them all joint tortfeasors. On the trial of a preliminary issue the judge found that, although SSUK had provided some assistance, its extent had been of minimal importance and had played no effective part in the commission of the alleged tort. The claim had therefore failed.

61. The Court of Appeal allowed the appeal ([2013] EWCA Civ 544; [2013] 1 WLR 3700). The main judgment, given by Beatson LJ, noted at [61] that an appellate court can hardly ever overturn primary findings of fact by a trial judge who had seen witnesses, and where their credibility was in issue. But the judge's finding that the assistance was *de minimis* did not rely on any oral evidence; instead, as Beatson LJ explained, the evidence of the assistance provided by SSCS was set out in various documents. Beatson LJ concluded that the documents made plain that the campaign against tuna fishing might encompass violent intervention, and that this was sufficient to establish SSUK's liability. He said:

> "66. I am conscious that, as Thorpe LJ stated in *Credit Lyonnais v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19, 48, it is dangerous to draw confident inferences from equivocal facts when assessing motives and intentions. I do not, however, consider that the documents in this case are equivocal. SSCS may have considered the cutting of nets and freeing of fish in international waters not to be tortious because in their view the fishing was illegal. But, it is to be recalled that in *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583 Mustill LJ stated that there was no need for the common design to be to commit the tort. It suffices that the parties have combined to secure the doing of acts which in the event prove to be tortious. I have concluded that in inferring from the documents before him that the purpose of the campaign was investigation, documentation, and exposing illegal activities but that it did not, notwithstanding the contents of these documents, encompass violent intervention, the judge fell into error."

62. In an earlier passage in his judgment, Beatson LJ was anxious to stress the limited nature of joint responsibility in the law of tort and that there was no liability for 'knowing assistance'. He said:

> "42. Although other commentators (e.g. Davies [2011] CLJ 353 and Dietrich (2011) 31 *Legal Studies* 231) have continued to argue that the rejection of tortious liability for knowing assistance is mistaken, the position is that joint responsibility in the law of tort is more restricted than it is in the criminal law. In this context, the law of tort does not recognise true accessory liability, only joint liability where the person who can be termed the actual perpetrator is the agent of another person. Taking Devlin J's well-known example in *NCB v Gamble* [1959] 1 QB 11 at 23, the consequence is that selling a person a gun knowing that person will use it to kill someone else will make the seller an accessory to the murder but will not in itself make him liable in tort. Joint

> responsibility in the law of tort is also more restricted than it is in equity where knowingly to assist a person to commit a breach of trust amounts to an equitable wrong."

The same point, as to how and why 'knowing assistance' was not enough to establish tortious liability, was made in *Credit Lyonnais* by Hobhouse LJ.

63. The Supreme Court, by a majority of 3 to 2, allowed the appeal, on the basis that it was properly open to the judge to conclude that the role played by SSUK in the commission of the alleged tort had been of minimal importance. Although the determinative issue was therefore a particular matter of fact (namely, the extent and effect of the assistance provided), the judgments are helpful because they identify the basic principles required for accessory liability in tort. Thus, Lord Toulson said:

> "21. To establish accessory liability in tort it is not enough to show that D did acts which facilitated P's commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further.
>
> 22. The principle was expressed crisply in the statement in Clerk and Lindsell on Torts, 7th ed, p 59, that "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design", which was cited by all the members of the Court of Appeal in The Koursk [1924] P 140, 151, 156, 159…
>
> 27. If I had considered that Hamblen J was wrong not to find that the first element of accessory liability was established, that is, that the appellant assisted SSCS in the commission of acts which may prove to have been tortious, I would have held that the second element was also established, that is, that the acts were done in pursuance of a common design shared by SSCS and the appellant. It would be sufficient for this purpose that the acts were done in pursuit of a campaign of which the appellant approved with the knowledge that the campaign involved a preparedness, if need be, to use violent intervention. Hamblen J observed that it was not necessarily the case that such action would take place, but a plan can include a conditional element. If D organises with P the doing of acts on V's land, whether V consents or not, it would be no answer to a claim in trespass against D that it was possible that V would consent. But Hamblen J examined the role actually played by the appellant and judged it minimal. On that basis the conduct element of accessory liability was not established."

64. Lord Sumption dealt with the question of intent at paragraph 44:

> "44. Intent in the law of tort is commonly relevant as a control mechanism limiting the ambit of a person's obligation to safeguard the rights of others, where this would constrict his freedom to engage in activities which are otherwise lawful. The economic torts are a classic illustration of this. The cases on joint torts have had to grapple with the same problem, and intent performs

> the same role. What the authorities, taken as a whole, demonstrate is that the additional element which is required to establish liability, over and above mere knowledge that an otherwise lawful act will assist the tort, is a shared intention that it should do so. The required limitation on the scope of liability is achieved by the combination of active co-operation and commonality of intention. It is encapsulated in Scrutton LJ's distinction between concerted action to a common end and independent action to a similar end, and between either of these things and mere knowledge of the consequences of one's acts."

65. Finally, Lord Neuberger of Abbotsbury confirmed that, in order for liability to be established, the assistance provided by the defendant must be substantial in the sense of not being *de minimis* or trivial (paragraph 57); that facilitation on its own will not do and there must be a common design between the defendant and the primary tortfeasor that the tortious act be carried out (paragraph 58); that a common design will normally be expressly communicated between the defendant and the other person, but it can be inferred (paragraph 59); and that it was unnecessary for a claimant to show that the defendant appreciated that the act which he assisted pursuant to a common design constituted, or gave rise to, a tort or that he intended that the claimant be harmed (paragraph 60).

66. However, on that last point, Lord Neuberger went on to make what I consider to be an extremely important qualification. He said:

> "60 … But the defendant must have assisted in, and been party to a common design to commit, the act that constituted, or gave rise to, the tort. It is not enough for a claimant to show merely that the activity, which the defendant assisted and was the subject of the common design, was carried out tortiously if it could also perfectly well be carried out without committing any tort. However, the claimant need not go so far as to show that the defendant knew that a specific act harming a specific defendant was intended."

5.2 The Appellants' Pleaded Case

67. To understand the judge's approach to common design, it is necessary to identify the appellants' pleaded case.

68. In relation to the 2010 incident, at paragraph 113 of the Re-Amended Particulars of Claim, the appellants' case on common design was that the respondents "instigated, directed, counselled or procured the use of excessive and/or unlawful and/or deadly force against the [appellants] and their unlawful detention, pursuant to a common design to quell and/or suppress protest and/or disruption in the area around the Mine."

69. Similarly, in respect of the 2012 incident, it is alleged at paragraph 120 of the Re-Amended Particulars of Claim that the respondents "instigated, directed, counselled or procured the use of excessive and/or unlawful and/or deadly force against [the appellants] and their unlawful detention, pursuant to a common design to quell and/or suppress protest and/or disruption by their own employees and their supporters in the Bumbuna area and around the Mine."

70. That was the case which the judge was addressing in the relevant parts of his judgment concerned with common design.

5.3 The Judge's Findings of Fact

71. I have already set out the judge's detailed findings of fact in relation to the involvement of the respondents' employees in the 2010 and 2012 incidents. In short, he found that they committed no unlawful acts themselves, whether directly or indirectly: that there was no 'instigation, direction, counselling or procuring' by the respondents. Accordingly, the judge found that there was no 'assistance' of the kind identified in the authorities and pleaded by the appellants in their Particulars of Claim.

72. The judge also dealt with the respondents' intention, because he recognised that the case on common design also required the appellants to prove the necessary intention on the part of the respondents. As to the 2010 incident, the judge found that there was no intention on the part of the respondents that there should be any unlawful actions on the part of the SLP. That can be seen in the following paragraphs:

> "113. Regardless of the range of opinions which they held, I am not satisfied on the evidence that, before the events of the first incident of major violence, it had been the intention of any senior member of the defendant's staff that unlawful means should, if occasion required, be deployed to resolve the recurrent disputes...
>
> 177. However, I am further satisfied that, despite what they witnessed and what they already knew of the reputation of the SLP, it was not the intention of any member of the senior management team of the defendant that the police should use unlawful means to respond to the 2010 incident. I note that:
>
>> (i) The contemporaneous documentation falls short of revealing expressly, or by implication, that senior members of the defendant's staff intended that the police should deploy unlawful measures in responding to unrest on the part of the villagers.
>>
>> (ii) It was against the economic interests of the defendant for the police, for example, to use excessive force against the local population. Of course, it was to be expected that the defendant would wish there to be a firm response to the illegal blockading of the roads, stone throwing and criminal damage of company property. However, a disproportionate response, particularly one which was, in part, randomly directed against wholly innocent villagers was very likely to breed future resentment, hostility and mistrust none of which would be in the long term business interests of the defendant.
>>
>> (iii) The efforts of the defendant to reach a compromise with the protesters in the period leading up to the outbreak of violence by, for example, engaging in prolonged discussions in the Court Barray, are difficult to reconcile with a sudden strategic shift towards complicity in unlawful violence and abuse shortly thereafter.
>>
>> (iv) The volatility of the police response can readily be accounted for without concluding that the defendant had a hand in it or supported it. Levels of discipline and self-control in the SLP were undoubtedly variable and, when confronted with hostility and rock throwing, some

> officers are unlikely to have needed any further encouragement to respond in a disproportionate manner. Many may well have thought that their more extreme actions were, in any event, likely to be cloaked in state approval rather than to be exposed and punished."

73. As to the 2012 incident, the judge made the following findings as to intention:

> " 306. Furthermore, I am not satisfied that those in positions of power in the defendant's organisation were pursuing a policy intending that the SLP should deploy excessive force against the local population. The person in overall charge of the Tonkolili project was Gibril Bangura, now deceased. He was generally well-liked and was instrumental in pursuing the strategy of appeasement in the aftermath of the 2012 incident. Frank Timis was the Executive Chairman of the defendant. There is some evidence to support the suggestion that, at one stage, he attempted to mislead the market in respect of the financial position of the defendant. However, in the absence of any evidence of his involvement in the relationship between the defendant and the SLP, no purpose would be served by making any findings with respect to his character or credibility and I decline to do so. Mr Jansen impressed me as a genuine witness striving to do his honest best to assist the court. He is no longer employed by the defendant and so the risk of loyalty distorting accuracy was much diluted. On 17 April 2012, he chaired an Incident Management Team meeting the notes to which reveal that he identified the defendant's priorities to be "1. Human life 2. Company assets 3. Environment". Mr Jansen went on to ask the team to identify the top five actions which would help to defuse the situation. I am satisfied that this was an accurate note of what was discussed and that it reflected Mr Jansen's strategy and principles...
>
> 328. In the case of Mr Dumbuya, despite the fact that he lied to give himself a false alibi, the allegations that he exercised control over the police and used this control either to direct them to act unlawfully or encourage them so to do are not made out. I find that he was with the police on the third day of the 2012 incident and that he assisted them by driving them round. It was not his intention that the claimants should be the victim of tortious acts committed by members of the SLP. In any event, such assistance as he gave to the police was not causative of the loss sustained by the claimants."

74. In my view, these various findings of fact dealt comprehensively with the necessary second ingredient of common design, namely intention, certainly in relation to the case as pleaded by the appellants. The judge found that there was no relevant intention on the part of the respondents. The common design case therefore failed on both its required ingredients: assistance and intention.

75. It is convenient to deal here with the one element of the evidence relating to common design which, on appeal, the appellants say the judge failed to consider. That was the video filmed by the police on Day 3 of the 2010 incident, covering the failed arrest of Reverend Bangura, and the subsequent stone throwing and firing of tear gas rounds[5]. It

[5] I have referred to this video at paragraph 29 above.

is said that this was important evidence which the judge failed to consider, and which therefore vitiated at least some of his factual findings on this part of the claim.

76. I reject that submission for three reasons. The video does demonstrate the firing of tear gas rounds, but in my view, there is no positive evidence of any firing of live rounds from or around the vehicle during this sequence. Nor is there any evidence from the video of injuries being caused at the time of the sequence. Moreover, everything that can be seen on the video was also the subject of oral evidence which the judge accepted in any event. The video adds nothing of substance.

77. Secondly, it is not accurate to say that the judge paid no regard to the video. He was clearly aware of it and made express reference to it at [187] and [191]. He drew little or nothing of substance from the footage: see for example the passages set out at paragraphs 30 and 31 above. He concluded that Mr Dumbuya was out and about in Bumbuna driving the police (and it was from the back of his vehicle that the video was filmed): [194], [241], [256] and [328]. But that finding was ultimately of little assistance to the appellants on this aspect of the case because he went on to find at [328] that Mr Dumbuya "did not intend that the claimants should be the victim of tortious acts committed by members of the SLP".

78. Thirdly, and to the extent that it makes any difference, I conclude that, far from the video showing Mr Dumbuya somehow controlling or organising the SLP, the opposite was in fact the case. Somebody shouted "follow them" and that is what Mr Dumbuya did.

79. Accordingly, the judge rejected the appellants' pleaded case on both the relevant activities/assistance and the relevant intention and, in so doing, he had regard to all the relevant evidence, including the video. How therefore does the appeal on common design come about?

5.4 The New Case on Inferred Intention

80. At the appeal hearing, the appellants advanced a new case on inferred intention ("the new case"). It was not pleaded. It may have been somewhere within the dense closing submissions (or their footnotes) that were provided by the appellants, but it was never at the forefront of the appellants' case advanced before the judge at trial.

81. The new case works in this way. The appellants say that, even if (contrary to their pleaded case) the respondents did not instigate/direct/counsel/procure the tortious actions of the SLP, a case in common design can still be made out by reference simply to the provision of money, vehicles and accommodation (the assistance), and on what Mr Hermer called "an intent to quash protest, if need be by the use of excessive violence" (the intent). This argument necessarily emphasised that, in relation to the law of common design, the required intent can be conditional so that, to use the well-worn example, an intention to rob a bank *if the coast is clear* is a conditional intent, but an intent nonetheless.

82. In exposition of the new case, Mr Hermer said that the respondents could foresee that the SLP might use excessive force and that, by providing them with money, vehicles, and accommodation, they intended that the protests should be quashed, if need be by the use of unlawful force. In this way, he sought to *infer* the necessary intent,

presumably as a way round the judge's express findings that there was no *actual* intent on the part of the respondents. In addition, the appellants also suggested that the judge's findings confused intent with desire: they argued that, although the respondents may not have wanted violence to be used, their intent could still be conditional ("to quash protest *if need be* by violent means").

83. For a variety of reasons, explained in paragraphs 84-107 below, I consider that the new case is unsustainable. It takes what were, on the judge's findings, neutral acts of assistance to the SLP – the provision of money, vehicles and accommodation – and uses the foreseeability that (regardless of that assistance) the SLP *might* over-react to the unrest, in order to disregard the judge's findings as to actual intent and found an entire case based on inferred, conditional intent.

a) New Case Not Pleaded

84. The starting point is that the new case is not pleaded. That is not a dry, technical point. The focus of the trial was on the allegations that the respondents' employees were directly involved in and responsible for the over-reaction of the SLP. That case was emphatically rejected by the judge on the facts. The new case, based on what the judge treated as neutral acts of assistance (and which, as he made clear, were not the subject of any real dispute) and inferences as to intent never previously suggested, is far removed from the main areas of debate at the trial. It is not appropriate to criticise the judge because he failed to address such a case, and this court should be very wary of allowing the new case to be developed to such an extent that it starts to run counter to the judge's myriad findings of fact.

b) Foreseeability Is Not Intent

85. Assuming for these purposes that the new case is even open to the appellants on appeal, it is based squarely on foreseeability: the argument is that the respondents should have foreseen that the SLP might use excessive force. But contrary to Mr Hermer's submissions, I consider that foresight is a very different thing from intent, even conditional intent[6]. The mere fact that X can foresee that an event might happen in the future does not mean that X intended that possibility to eventuate. Using the well-worn example previously noted, if you intend to rob the bank if the coast is clear, you still intend to commit the underlying crime, and so are liable as a joint tortfeasor. By contrast, you may foresee that your friend, who is in such dire financial straits that you have lent him your car, might be desperate enough to rob a bank, but you do not intend him to use your car as a getaway vehicle. Foreseeability is never enough on its own to create a legal liability: see also paragraph 139 below.

86. So, in order to establish tortious liability for common design, there needs to be something more than the foreseeability that, in certain circumstances, a tort might be committed by a third party. In this case that means something more than the foreseeability that the SLP might over-react and use excessive force when endeavouring

[6] I note that the appellants' failure to distinguish between the two was one of the reasons why the judge refused permission to appeal on this issue.

to restore law and order in and around the mine. The annexures to the appellants' skeleton argument, and the timelines they handed in during the hearing, demonstrate foresight of possible consequences, but no more than that. In any event, the focus must be on what those who were involved in the relevant events actually intended to happen.

c) Actual Intention

87. In my judgment it is not open to the appellants to say that the necessary conditional intention can be inferred from the acts of certain employees of the respondents. That is because the judge has already found that there was no actual intent on their part that the SLP would or should use excessive force. That was the case that was being put forward by the appellants at trial, and that case was roundly rejected by the judge. Those findings cannot now be ignored or avoided.

88. Take as an example of this fundamental difficulty the judge's findings in respect of Mr Dumbuya's role in the 2012 incident. On appeal, at paragraph 37 of their skeleton argument, the appellants said that "the inescapable inference is that Mr Dumbuya *tacitly agreed* to the use of excessive force if and when the police saw fit." Leaving aside the appellants' repeated elision of a tacit agreement on the one hand, and inferred intent on the other, that submission is simply not open to them in the light of the judge's findings of fact. The judge made repeated findings in respect of Mr Dumbuya that he was not encouraging or intending the police to act unlawfully, and that it was not his intention that the appellants should be the victims of tortious acts committed by members of the SLP: see for example [244], [254], [256], [258] and [328].

89. There are plenty of other examples of this complete misalignment between the new case and the judge's findings. So, at [222] the judge found that Mr Musa Bangura was not directing/encouraging the SLP to act unlawfully, and at [233], that Mr Navo was not encouraging the police to act unlawfully and the cash payment that he made on Day 2 did not support the contrary proposition. These are findings that those involved cannot have intended the police to act unlawfully, again contrary to the inference which the appellants now ask this court to draw. Similarly, there are the judge's findings in relation to Mr Gordon's intent at [265] and [266]. The judge found that the fear, ill-discipline, anger and testosterone which caused the 2012 incident was the responsibility of the SLP, and that none of that had been intended by Mr Gordon. The point about the SLP's responsibility is important for another reason: because he had concluded that the failures were solely the responsibility of SLP, the judge went on, later in his judgment, to find that, from a causation perspective, the absence of risk assessments and the like did not cause or contribute to the 2012 incident.

90. For completeness, I should say that, in relation to the 2010 incident, the new case faces precisely the same difficulties. They are dealt with at paragraphs 62-66 of the respondents' skeleton argument, with which I agree.

91. Mr Hermer submitted orally that the judge's findings did not support his conclusion that there was no intent on the part of the respondents' employees involved in the events in 2010 and 2012. I do not consider that he made good that submission. It seems to me that, on the contrary, the judge's findings on intent, which I have set out at paragraphs 72-73 above, were supported by his close analysis of the evidence. They provide an insuperable barrier to the appeal in respect of common design.

92. On a related issue, Mr Hermer also suggested that the judge had conflated a desire on the part of Messrs Dumbuya, Bangura, Navo and Gordon that the police should not use violence, with a lack of intent. He said that, as a result, the judge had failed to have proper regard to the qualification provided by the words "*if need be*".

93. I do not consider that that is a legitimate criticism of the judge. The emphasis now given to those words is part and parcel of the appellants' new case; it was not something on which they asked the judge to focus, and it is therefore unsurprising that he did not do so. But in any event, I consider that that is too nice a distinction to be meaningful on the facts of this case. The judge found in terms that those involved in these events on behalf of the respondents did not intend the SLP to use violence. In my view, in all the circumstances, that is sufficient to negate any contrary inferred intent in this case, whether actual or conditional.

d) The Particular Activities and Timelines During The 2012 Incident

94. As I have said, the new case relied very heavily on the payment of money and the supply of vehicles and accommodation during the 2012 incident. It was said that these were the activities from which the necessary intent could be inferred. Mr Hermer argued that the judge's conclusions did not withstand an analysis of what money, vehicles and accommodation were provided and when. On the first day of the appeal hearing, he handed in freshly prepared timelines dealing principally with how the provision of vehicles, money and accommodation during Days 2 and 3 in particular were, on the appellants' case, enough to demonstrate intention.

95. I do not accept that submission. The timelines simply set out the assistance (about which there was little debate) and the foreseeability of possible consequences. As to the assistance, the judge's analysis makes plain that the money, vehicles and accommodation were provided as part of both the general circumstances of the SLP in Sierra Leone, and the particular circumstances that existed in Tonkolili. The judge found that the making of cash payments was normal and that, without them, the police would not have provided the necessary services (see the passages set out in paragraphs 41-42 above). It was unsurprising that there were more payments at the height of the unrest during the 2012 incident because there were large additional numbers of police present. Similarly, vehicles and accommodation were required, given the large numbers of additional police called in on Day 1 of the 2012 incident to protect the mine and the employees from civil unrest.

96. The judge expressly found that none of these acts of assistance could be said to amount to supporting the police in acting unlawfully. In my view, given the escalating situation, the interaction between SLP and the respondents necessarily increased over Days 2 and 3. All of that is a long way from a common design to commit trespass to the person.

97. As to intention, I have set out at paragraph 73 above the judge's findings in relation to the 2012 incident (which expressly covered the provision of money, vehicles and accommodation). In my view, those findings show that the judge had these matters (and when they were provided) very much in mind when considering intention, but they did not lead him to reach the conclusions now urged by the appellants. That was a matter for the judge. It is not a matter that can now be relitigated.

98. For all these reasons, therefore I consider that the new case on inferred conditional intent must fail on the facts. However, notwithstanding that conclusion, it is also instructive to consider the new case as a matter of principle.

e) The Established Boundaries of Common Design

99. I consider that the new case goes some way beyond the established boundaries of the law on common design. In some ways it is much closer to Beatson LJ's description in *Fish & Fish* of claims based on 'knowing assistance', for which there is no liability in tort, as opposed to a case of common design, where there might be[7]. Whilst there is no doubt that the authorities show that inferred intent can be sufficient to give rise to a common design, the cases in which such intent has been inferred are, on that issue at least, much more straightforward than the present case.

100. Thus, Ms Gale's pointing to the house of the man she wanted to see beaten up in *Shah v Gale* "expressly or by the clearest implication became part of the common design". And the unequivocal aim expressly set out in the documents in *Fish & Fish* that unlawful means might be used to stop the fishing gave rise to a clear inference of intent. Neither of those were cases where the question of intent was seriously in issue (indeed, there was not even a trial in *Fish & Fish*, the debate about assistance arising by way of a preliminary issue). Moreover, those cases arose where there was undoubtedly an unlawful purpose, and the issue was whether the defendant was a party to it or not. Here there was, on the judge's findings, no such unlawful purpose.

101. In the present case, there was no single act, and no unequivocal documents setting out an intent to act tortiously. Instead there was a swirling mass of conflicting evidence through which the judge was required to steer a difficult course. In so doing, he made express findings relating to the actual intent on the part of those most directly involved. The authorities on common design do not suggest that, in these circumstances, it would be appropriate to infer any contrary intent (whether conditional or otherwise) on the part of those whom the judge found did not expressly intend for the SLP to use excessive force. This is a long way from a situation where the respondents were acting "on behalf of or in concert with" the SLP: see the test noted in paragraph 58 above.

f) General Principles, Common Sense and Causation

102. It is also important to stand back and consider the common design alleged by the appellants in the present case by reference to general principles and common sense. As the judge made plain, the mine was a flagship project for Sierra Leone. The respondents needed and were entitled to rely on the services of the SLP to protect their employees and their property. Just like anyone else who calls on the assistance of the police, the respondents were entitled to seek their protection. The respondents had their own duties, to their employees and their shareholders, and they required the assistance of the police in fulfilling those duties. Seeking that protection and assistance from the SLP cannot lead to an inference that the respondents intended that the police "should quash protest, if need be by violent means".

103. I consider this to be the most fundamental flaw in the new case on common design. A party who calls on the services of the police to restore law and order cannot be liable in

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[7] A point made at paragraph 63 of the respondents' skeleton argument.

tort for the actions of the police simply because it is foreseeable that the police might use excessive force to achieve that result. If it were otherwise, anyone who called the police in a tense situation where over-reaction is foreseeable (which would be the sort of situation in which the police's assistance would be of paramount importance in the first place)[8] would be liable for the actions of the police once they arrived at the scene. That is not the law.

104. The appellant's basic case, reduced to a minimum, is that the provision of money, vehicles and accommodation, particularly at the height of the second incident in 2012, demonstrated an intent on the part of the respondents to quash protest, if need be by the use of excessive violence. But in my view, it was and is impossible to draw that inference, because it is just as likely – indeed, on the judge's findings, much more likely – that the provision of money, vehicles and accommodation was intended by the respondents to assist in the restoration of order in the locality and to reduce the risk of violence to everyone, be they employees of the respondents or the local inhabitants themselves. The provision of these facilities is just as consistent with the prudent exercise of the respondents' duties to their employees and, more widely, to do all they could to ensure that the peace was kept.

105. I consider that this inescapable reality chimes with paragraph 60 of the judgment of Lord Neuberger in *Fish & Fish* (see paragraph 66 above). The activity in this case could fairly be described as supporting the SLP to restore and keep the peace by providing money, vehicles and accommodation. The restoration of law and order was perfectly capable of being carried out without the commission of any tort by the SLP. Certainly, the provision of money, vehicles and accommodation were not of themselves tortious activities and cannot give rise to the inferred intent required for the new case on common design.

106. Finally, I consider that the judge's findings in respect of the SLP and its relationship with the respondents, which I have summarised at paragraphs 41 and 42 above, gives rise to a separate obstacle of causation which the new case cannot surmount.

107. The SLP was severely under-resourced. If the respondents had not provided them with additional resources, the SLP would either not have been there at all or in much lesser numbers. In that event, on the judge's findings, the unlawful unrest would have continued, and the safety of the respondents' employees would have been further imperilled. Law and order needed to be restored in both 2010 and 2012. The respondents had no sensible option but to act as they did. It is true that the respondents could have foreseen at least some risk that the SLP would use excessive force (see [297] and [299]), but the reality was that, but for the SLP (and the respondents' assistance) the situation was likely to have been much worse.

g) Summary

108. For all these reasons, therefore, I do not consider that the appellants' new case on appeal is tenable. Even if it had been pleaded, and even if it had been at the forefront of the arguments at trial, I consider that it wrongly equates foresight with intent; it ignores the judge's express findings on actual intention; and it ignores the fact that the police could and should have done their job without using unlawful force. This case is far removed

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[8] Such as a football club playing its local rivals.

from the much more straightforward situations in *Shah v Gale* and *Fish & Fish*. For all those reasons, I would reject Ground 1 of the appeal.

109. My views on Ground 1 mean that (if my Lady and my Lord agree) Ground 2, which is concerned with the question of attribution (namely, in whose mind the necessary intent would have to be inferred or found) does not arise. The judge concluded that the necessary intent would have to be in the mind of the senior management of the respondents, because this was a primary and not a vicarious liability. That may well be right. But given that the necessary intent cannot be inferred here in the minds of anyone (whether involved in the 2010 and 2012 incidents or not), this subsidiary element of the appeal simply does not arise, and it is not appropriate to deal with it further.

6 THE DUTY OF CARE

6.1 General Observations

110. The existence of a direct duty of care in this case was never at the forefront of the appellants' pleaded case, nor was it during the trial. Indeed, as Mr Moody QC has noted, the appellants' written opening at the trial accepted that the establishment of a duty in these sorts of circumstances was an "ambitious proposition" although, for the particular reasons relied on, this was qualified by Mr Hermer's submission that, on the facts, such a duty did arise here.

111. The difficulty that the appellants faced was that, on their case, this was not a situation which easily fitted into the established authorities in this area. Accordingly, they were obliged to argue a duty from first principles. For the reasons set out below, I respectfully agree that such an undertaking was indeed "ambitious".

6.2 The Judge's Conclusions

112. The judge's analysis of the duty of care begins at [340]. He noted at [342] that the respondents' primary defence to this part of the case was their reliance upon the general rule that there is no liability in negligence for the criminal acts of third parties. This led the judge on to a consideration of the decision of the House of Lords in *Mitchell v Glasgow City Council* [2009] 1 AC 874 and Lord Hope's analysis of the relevant cases. At [347] the judge referred to the recent analysis, on similar lines, by Lord Reed in *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595.

113. Thereafter, beginning at [350] the judge dealt with the potentially different approaches to negligent acts and negligent omissions. His conclusions begin at [353] as follows:

> "353. In many of the relevant authorities, the alleged negligence of the defendant has been confined to one central issue. In *Mitchell*, for example, it was a failure to warn. In *Hartwell* it was the provision of access to a firearm. In contrast, the Re-Amended Particulars in the present case identify no fewer than fifteen particulars of negligence. Most of these relate to allegations falling very clearly on the omissions side of the "imprecise boundary" to which Lord Nicholls was referring in *Hartwell*. They include, for example, failures to have engaged in "any meaningful conflict resolution with protesters" and to have "sufficient and properly trained private security". The categorisation of the provisions of vehicles and facilities as "acts" does not, however, equip the

> claimants with a Trojan horse in which otherwise bare and distinct omissions can be accommodated and brought wholesale within the parameters of a duty of care. For example, if the defendants owed no duty of care to the claimants in respect of its omission to resolve the dispute with the protesters then such a duty could not arise parasitically upon the defendant's distinct acts in providing the police with vehicles and other support.
>
> 354. Upon analysis, the "acts" relied upon by the claimants can all be analysed by the application of the test as to whether they were "capable of creating a source of danger" within Lord Hope's formulation in *Mitchell* upon which the overarching superimposition of a distinct "act and omissions" dichotomy of *Hartwell* would add nothing of value in the circumstances of this case. Accordingly, I am satisfied that it is proper to focus on Lord Hope's approach as that which provides the most appropriately coherent and useful framework for the consideration of the duty of care issue in this case. The approach of Lord Nicholls in *Hartwell* is thus rendered superfluous by the application of Occam's razor and, even if followed, would lead to no different jurisprudential outcome."

It was by reference to these paragraphs of the judgment that Mr Hermer submitted that the judge treated this as a 'pure omissions' case (ie one where the defendant was in breach of duty for failing to warn against or otherwise take steps to protect a person from harm by a third party).

114. The judge then went on to deal with Lord Hope's exceptions, and in particular the situation where the defendant has created the source of danger. He concluded at [356] – [359] that, contrary to the appellants' submissions, that exception did not arise in the present case. Although in this part of the judgment the judge also explained why other exceptions did not arise either, no issue now arises on those findings in this appeal. Thereafter at [364] – [367], the judge explained why his earlier findings meant that there was no basis on which a new kind of freestanding duty could be established.

6.3 The Correct Approach

115. Mr Hermer submitted that the correct approach to the question of the duty of care was as follows. The first question was to ask whether this was a case of pure omissions. He argued that it was not, and therefore the judge's analysis by reference to *Mitchell* was incorrect. As a fall-back he argued that, if he was wrong about that, then this case fell within the 'creation of danger' exception.

116. Mr Hermer said that, if this was not a case of pure omissions, then the judge next needed to see whether this was a case which fell into one of the established areas where a duty has been found to exist. He accepted that the facts of the case were unusual and that he could not point to any established authority for that purpose. Thus, he said, the court had to move on to the third stage and to consider whether, on the application of first principles, there was a freestanding duty of care in this case. It therefore followed that he said the judge's analysis of this issue at [364] – [367] was erroneous.

117. I agree with Mr Hermer that this is the correct approach to the issue of whether or not there was a direct duty of care in this case. The real issue is whether his criticisms of the judge's analysis can be sustained.

6.4 Is This A Case Of Pure Omissions?

118. At no stage does the judge ever expressly say that this was a case of pure omissions. The judge's focus was on those cases dealing with the liability of a defendant for the wrongful acts of a third party: hence his recitation of and reliance upon Lord Hope's analysis in *Mitchell.*

119. *Mitchell* was a case in which M and D were local authority tenants. D was the aggressor. The local authority kept M informed of the steps it was taking against D but in July 2001, without telling M, they summoned D to a meeting where he was warned that continued anti-social behaviour could result in his eviction from his home. About an hour after leaving that meeting, D attacked M with such violence that M sustained injuries from which he subsequently died. M's widow and daughter brought proceedings against the local authority in negligence. The House of Lords rejected the claim which was based principally on an allegation that the local authority had been under a duty to warn M that the meeting with D was to take place so that M would have known to take steps to avoid D afterwards.

120. Lord Hope's analysis can be found at paragraphs 14 and 15 of his judgment as follows:

> "14. The issue of principle on which the defenders challenge the pursuers' common law case was put into sharp focus by Mr McEachran at the outset of his argument. He said that there had been an operational failure by the defenders in circumstances where it was reasonably foreseeable that harm would flow to the deceased if they did not warn him about their meeting with [D]. He stressed that his case was presented on a very narrow front. All he was saying was that there was a duty to warn, and that this duty arose because harm to the deceased was reasonably foreseeable. Beguilingly simple though this submission was, it raises fundamental issues about the scope of the duty that is owed to third parties by landlords, whether in the public or the private sector, whose tenants are abusive or violent to their neighbours.
>
> 15. Three points must be made at the outset to put the submission into its proper context. The first is that foreseeability of harm is not of itself enough for the imposition of a duty of care: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1037 - 1038, per Lord Morris of Borth-y-Gest; *Smith v Littlewoods Organisation Ltd* (reported in the Session Cases as *Maloco v Littlewoods Organisation Ltd*) 1987 SC (HL) 37, 59, per Lord Griffiths; *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 60, per Lord Keith of Kinkel. Otherwise, to adopt Lord Keith of Kinkel's dramatic illustration in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175,192, there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning. The second, which flows from the first, is that the law does not normally impose a positive duty on a person to protect others. As Lord Goff of Chieveley explained in *Smith v Littlewoods Organisation Ltd*, 76, the common law does not impose liability for what, without more, may be called pure omissions. The third, which is a development of the second, is that the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability: *Smith v Littlewoods Organisation Ltd*, 77- 83, per Lord Goff."

It was this analysis which the judge adopted in the present case.

121. I agree with the judge that a court has to be very careful in over-analysing the potential difference between acts and omissions and the tortious liability that arises from each. I also agree with the judge that, merely because something can be presented as an act does not mean that what are, on a proper analysis, omissions can be, as the judge put it, "brought wholesale within the parameters of a duty of care".

122. When the judge was considering the alleged breaches of duty in the present case, he noted that five were positive acts and ten were omissions. He concluded that, in the round, the case could properly be analysed by reference to omissions, because the respondents had failed to protect the appellants from harm by the SLP. Mr Hermer criticises that conclusion, principally because he said that the provision of money, vehicles and accommodation, on which the appellants now rely so heavily, were positive acts and could not on any view be regarded as omissions.

123. There are two difficulties with that submission: the first relating to the breaches as pleaded, and the second to the breaches as found by the judge. As to the first, it seems to me that, regardless of how the breaches were pleaded by the appellants, this was a case where the underlying complaint was an omission: that the respondents had failed to protect the claimants from the harm caused by the SLP. That can be tested by reference to Lord Hoffman's judgment in *Stovin v Wise* [1996] AC 923 at 945C-E when he said that:

> "One must have regard to the purpose of the distinction [between acts and omissions] as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity…. To hold the defendant liable for an act, rather than an omission, it is therefore necessary to say, according to common sense principles of causation, that the damage was caused by something that the defendant did."

124. On that basis, the conclusion must be that the respondents were not carrying out any relevant activity, and the damage was not caused by anything which the respondents did. Nor is that position changed by the appellants' belated attempt to seek permission to appeal against the judge's finding that the provision of money, vehicles and accommodation was not a breach of duty. I deal with that late application in paragraphs 158-162 below. In my view, the application is flawed, but even if it was allowed, I am in no doubt that, for the reasons explained by the judge, the provision of money, vehicles and accommodation, in these circumstances, was not a breach of any duty. Such assistance was, as the judge found, common in Sierra Leone.

125. I also note the judge's express finding at [370(xiii)] that this assistance was not causative of the loss (a conclusion which is not challenged and, given the confines of the appeal, could not be in any event) and his conclusion at [246] that the cause was instead "fear, ill-discipline, anger and testosterone" on the part of the SLP. Accordingly, applying Lord Hoffman's test, this was not a case where the respondents carried out a relevant activity or did anything to cause the loss. It remains a case of pure omissions.

126. As to the second difficulty, it seems to me that, whatever the position facing the judge, we should approach this issue by reference to the breaches which the judge actually

found (if, contrary to his primary findings there was any duty of care in the first place). Had there been such a duty, the judge found just four breaches (identified in greater detail in paragraph 154 below). Those four breaches were all omissions: failures to carry out a risk assessment and a crisis management plan, and failures to engage and liaise more with the SLP. In my view, because those were the only potential breaches found by the judge, and they were all failures to act in a particular way or undertake a specific act, that too means that this was a case of pure omissions.

127. I do not therefore accept the appellant's criticism of the judge's analysis. Moreover, if the judge was right to treat this as a case of pure omissions then, subject to the exception argument considered in Section 6.5 below, the case in negligence must fail.

128. I should add this. In my view, Lord Hope's analysis in *Mitchell*, as adopted by Lord Reed in *Robinson*, is a wide-ranging dissection of one party's liability for the wrongs of another. Although it is right that paragraph 15 of Lord Hope's judgment suggests that this analysis stems from the principle (as explained by Lord Goff in *Smith v Littlewoods Organisation Limited* [1987] AC 241 at 270 – 271), that the common law does not impose liability for what, without more, may be called pure omissions, I consider that it applies *prima facie* to any case where X seeks to make Y liable for harm caused by Z, where Y's actual involvement in the relevant events was negligible or non-existent.

129. On any view, therefore, the judge's analysis and application of the principles, cannot be criticised.

6.5 The 'Creation Of Danger' Exception

130. Mr Hermer argued that, if this was a case of pure omissions, then it fell within the exception, to be derived from the first example used by Lord Hope in *Mitchell* at paragraph 23 of his judgment, where it is the defendant (in this case the respondents) who has itself created the source of danger. One example of this exception given by Lord Hope was *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273 in which the police authorities had entrusted a gun to an officer who was still on probation and had shown signs of instability and unreliability.

131. The judge rejected this submission in the passages cited in paragraph 113 above. He said in terms [356] that the respondents had not created the danger. On appeal, Mr Hermer suggested that this was wrong, principally because the provision of money, vehicles and accommodation was akin to the provision of the gun in *Hartwell.* In my view, that submission is untenable for a number of reasons.

132. First, I consider that that submission is contrary to the judge's primary findings. As I have said, the judge found that it was the SLP who had created the danger: the over-reaction was the result of "fear, ill-discipline, anger and testosterone" amongst the SLP on the ground and had not been created by the respondents. Mr Moody rightly urged the court to have regard to practical reality: on that basis, taking the appellants' case at its highest, the provision of overnight accommodation to the SLP did not lead to or even indirectly cause the physical injuries suffered by Kadie Kalma at the hands of the SLP. So this was not a case in which, on the facts, the respondents could be said to have created the danger that eventuated.

133. Secondly, not only did the provision of the money, vehicles, and accommodation not create a danger but, on the judge's findings, without them, the situation might well have been worse. It was nothing like the provision of a loaded gun to an unstable man, as in *Hartwell*. As Lord Nicholls said in that case, loaded handguns are dangerous weapons and the serious risks if a gun is handled carefully are obvious. The same cannot be said of the provision of money, vehicles and accommodation to the police during a lengthy bout of civil unrest.

134. Thirdly, the respondents could not be said to have created the danger or assumed any liability simply because they had called in the SLP: paragraphs 104-105 above are repeated.

135. Accordingly, I conclude that there was no duty of care because this was a pure omissions case and/or one that was susceptible to the analysis in *Mitchell*, and the exception relied on by the appellants did not apply. That is therefore the end of the claim in negligence. However, assuming for this purpose that that analysis is wrong, and this is not a case of pure omissions, I go on to consider whether, in accordance with Mr Hermer's submissions, there was a freestanding duty in all the circumstances.

6.6 Was There A Freestanding Duty In These Circumstances?

136. In my view, looked at as a matter of first principles, there was no duty of care of the kind alleged by the appellants in this case. Again, there are a number of reasons for that conclusion.

137. The first is that the judge analysed this way of putting the case at [364] – [367]. Although it was apparent from Mr Hermer's submissions that he considered that analysis to be wrong, he did not really articulate why it was erroneous. In my view it was a short and simple explanation of how and why a duty did not arise in this case.

138. The second is that, on an application of the familiar three stage criteria from *Caparo*, no freestanding duty arose.

139. The first ingredient, namely foreseeability, is not in issue, but it is trite law that foreseeability does not alone create a duty of care: see Lord Goff in *Smith v Littlewoods* at 272 – 279; Lord Hope in *Mitchell* at paragraph 15; and Lady Hale in the same case at paragraph 76.

140. The second ingredient is proximity. In my view, the necessary proximity between the respondents and the appellants has not been made out. The appellants are or could be all the residents living in a large and remote geographical area. There are no apparent limits on the physical boundaries of that area; or precisely where an appellant might have to live in order to be owed the alleged duty by the respondents. Even if the duty was somehow confined to the residents of Bumbuna and the villages of New Ferengbeya, Kegbema and Kemedugu, that would still encompass a large number of people.

141. Most of the appellants would have no direct connection with the respondents at all. Only some would be employees, and in any event that tie is irrelevant to the duty contended for. As Mr Moody correctly submitted, the appellants were not said to be at

an enhanced or special risk, so there was nothing to differentiate one inhabitant from his neighbour: on the appellants' case, they were all owed this duty of care.

142. In addition, I consider that it is very difficult to establish proximity in circumstances where all the relevant events took place in public, particularly when the claimants were always present, but the respondents were largely absent.

143. Mr Hermer suggested that the proximity arose because this was "a very unique set of facts". I disagree with that: this was a case in which a large commercial concern called in the police of the host country to restore law and order in degenerating circumstances of lawlessness and unrest. The police overreacted but sadly that is not uncommon in cases of this sort. There are no unique factors here which would justify a finding of proximity.

144. Mr Hermer also suggested that there was a close relationship between the respondents and the SLP, and that this was also a factor which pointed to proximity as between the appellants and the respondents. In my view, that submission does not follow as a matter of logic. Moreover, the submission itself is contrary to the judge's findings as to the relationship between the SLP and the respondent (paragraphs 41-42 above). It was not a close relationship: it was a relationship based on necessity because, as noted above, if the respondents had not provided additional resources, the SLP would not have functioned in this remote region at all. The SLP were operationally independent [266] and, during the 2012 incident, were under the command and control, not of the respondents, but the second-most important police officer in Sierra Leone.

145. For these reasons, I consider that the claimants are not a determined or clearly-identifiable class or group: on the contrary, a finding of a duty in these circumstances would, I think, result in the respondents owing an indeterminate liability to an indeterminate class of people. The alleged proximity of the relationship between the appellants and the respondents has not therefore been made out.

146. Finally, I am simply not persuaded that it would be fair, just or reasonable to impose the alleged duty of care in this case. Again, the starting point for that must be the judge's findings of fact. Contrary to the appellants' principal claims, he expressly found that the respondents' employees were not involved in the unlawful acts and did not encourage or incite those unlawful acts. The assistance they provided was reasonable and proportionate in all the circumstances and did not cause the alleged or any loss.

147. In the circumstances, it would not be fair, just or reasonable to impose this potentially wide duty upon the respondents, in order to protect a large group of inhabitants of Sierra Leone from their own police force. As I have said elsewhere, it was for the police to protect both the appellants and the respondents, and there could be nothing unfair, unjust or unreasonable in concluding that, on the facts of this case, the respondents did not somehow take over the liability and responsibility of the SLP.

148. Furthermore, it is important to note that any consideration of the fairness and justice of the alleged freestanding duty of care in this case falls to be considered against the background of the failure of both the old case (instigation/procurement) and the new case (inferred, conditional intent) in common design. If there was no liability on the part of the respondents on the basis of common design, then it would plainly be unfair to fix the respondents with a liability in tort as if there was such a liability.

149. During his oral submissions, Mr Hermer referred to the Voluntary Principles on Security and Human Rights produced by the United Nations. This deals with matters such as the need for risk assessments and liaison with the police. Mr Hermer particularly relied on the section headed 'Interactions Between Companies and Public Security' which read:

> "Although governments have the primary role of maintaining law and order, security and respect for human rights, Companies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights. In cases where there is a need to supplement security provided by host governments, Companies may be required or expected to contribute to, or otherwise reimburse, the costs of protecting Company facilities and personnel borne by public security. While public security is expected to act in a manner consistent with local and national laws as well as with human rights standards and international humanitarian law, within this context abuses may nevertheless occur."

The passage then went on to identify various voluntary principles in respect of security arrangements, deployment and conduct, consultation and advice, and responses to human rights abuses.

150. Mr Hermer submitted that it would be consistent with these Voluntary Principles if a duty of care of the type for which he was contending was imposed on the respondents. Again, I disagree. Those standards are general in nature and are primarily concerned with the need for liaison with the local community and the like; they cover many of the initiatives which the respondents in this case deliberately endeavoured to set up. The system of CLOs was just one example of that.

151. More significantly, there is nothing in the Voluntary Principles which make companies operating abroad generally liable for the unlawful acts of the police forces of the host countries in which they are operating: on the contrary, the Voluntary Principles are drafted on the basis that, whilst companies operating abroad may properly help to facilitate the law and order expected to be provided by host countries, it is the governments of those countries (and not the companies) who have "the primary responsibility to promote and protect human rights."

6.6 Summary

152. Accordingly, for these reasons, I consider that the judge was not wrong to treat this as if it were a case of 'pure omissions'; but even if he was wrong on that issue, he was right to conclude that there was no duty of care owed to the appellants in the circumstances of this case. That therefore means that, if my Lady and my Lord agree, Grounds 3 and 4 of the Grounds of Appeal will be dismissed.

7. BREACH AND CAUSATION

7.1 General Observations

153. In his analysis at [370], the judge worked through the 15 alleged breaches of duty setting out his conclusions as to whether, if he was wrong and there was a direct duty

of care in tort, the alleged breaches had been proved on the facts. The judge identified four breaches that he was prepared to uphold.

154. The four breaches were, in short:

(i) The failure to carry out a risk assessment;

(ii) The failure to have a crisis management plan;

(iv) The failure to do more to engage with the SLP; and

(xiv) The failure to do enough to liaise with the SLP in an effort to reduce the risk of excessive force and mistreatment.

155. In each case, the judge went on to say that, if the respondents had been in breach of duty in the way alleged, it would have made no difference to what happened. He found that each failure would not have prevented the injury, loss and damage sustained by the appellants in the case.

156. Although the appellants suggested in their skeleton argument that these were somehow "provisional" findings, made by the judge "in passing", that submission was not made orally and, to the extent that it is still relied on, I reject it. These passages demonstrate that the judge was properly dealing with the contingent case that, if he was wrong about the existence of the duty of care, there were only a handful of breaches that he was prepared to find, and that even then, those breaches had no causative effect in any event. These, therefore, were his conclusive findings as to breach and causation and the appellants need to overturn them if the claims in negligence are to succeed.

157. The only substantive point raised by the appellants in their notice of appeal in relation to this aspect of the case is the suggestion that the judge erred because he dealt with the causation attributable to these allegations separately, and failed to consider them altogether. Before I go on to address that argument, however, I should deal with the application to amend the Grounds of Appeal foreshadowed in paragraph 124 of this judgment, pursuant to which the appellants sought to argue that the judge should have found an additional, fifth breach of duty.

7.2 The Application to Amend

158. The application relates to the alleged breach (xiii) and the judge's conclusions about it, which I set out in full:

> "370 (xiii) Continued to supply logistical and/or financial and/or material support to police after it was apparent that they were causing mistreatment including personal injury, unlawful detention and/or fatal injury to the Claimants.
>
> I am satisfied that the supply of vehicles was a reasonable response taking into account the fact that the police had inadequate means of transport of their own. Refusal to provide vehicles may well have escalated rather than mitigated the violence. The same number of police would have been present and armed at both incidents."

159. The appellants now seek to amend their grounds of appeal so as to argue that the judge was "perverse" to find that the supply of money, vehicles and accommodation was not a breach of duty. They seek to argue that, in the circumstances, the provision of these things constituted a breach of the duty of care which they allege.

160. Dealing with the application to amend the grounds of appeal, I am not persuaded that this court should allow it. At no time until immediately before the appeal hearing itself did the appellants suggest that they wished to challenge any of the judge's findings on breach. Until then, the causation appeal was advanced solely by reference to the four breaches found by the judge. Furthermore, this cannot have been an oversight, since the respondents' skeleton argument (originally provided in October 2019), expressly made the point at paragraph 117 that there was no challenge to the judge's finding that the supply of money, vehicles and accommodation was not a breach of duty. There was no explanation in the material provided to this court as to why this complaint had not been included in the original application for permission to appeal, and why the appellants failed to wake up to the potential importance of the point until some time after it had been pointed out by the respondents.

161. However, even if (contrary to my views) this amendment to the grounds of appeal should be permitted so as to allow the point to be argued on appeal, I would reject the new allegation as a matter of substance. That is because I consider that the judge was plainly right to find that the provision of money, vehicles and accommodation was not a breach of any duty. The reasons for that are the same as those noted by the judge. The provision of money, vehicles and accommodation were part and parcel of the regular relationship between the respondents and the SLP. They did not themselves cause or contribute to the unlawful acts. They were equally consistent with the peaceful resolution of the incident. They were therefore not (and could not be) a breach of duty.

162. Accordingly, the failure of this amended allegation (both procedurally and substantively) means that the case in tort can only be based on the four breaches found by the judge.

7.3 The Cumulative Effect

163. The judge explained at [370] why the breaches that he found were of no causative effect. Thus, in relation to the risk assessment, he concluded that he was not satisfied that compliance with the standards would have prevented the injury, loss and damage. He made the same point about the failure to produce a crisis management plan. As to the failure to engage more fully with the SLP, he said he was not satisfied that such engagement would have prevented the episodes of unrest in 2010 or 2012, or the injuries, loss and damage sustained. He made the same finding in relation to the failure to liaise more closely.

164. The complaint on appeal is that, standing back from these allegations and considering them together, the judge should have concluded that the cumulative effect of these breaches did cause the loss, damage and injury sustained. But in my view, there are two fundamental problems with that submission.

165. First, it was not explained how four omissions, each of which had been found to have no causative potency could, when added together, give rise to the necessary causation. As the President of the Queen's Bench Division indicated during argument, nought plus

nought plus nought plus nought usually equals nought. I do not see how those four omissions, even treated cumulatively, could have led the judge to revise his views as to their causative effect.

166. The second difficulty is, once again, that this criticism of the judge inevitably constitutes an attack on his findings of fact. The judge carefully laid a trail through the judgment of how and why he thought these breaches (if there was a duty) could not be causatively linked to what happened when the SLP overreacted in 2010 and again in 2012. The only basis on which this court could say that somehow the cumulative effect of these matters did acquire a causative potency would be to undo those findings of fact and replace them with others. There is no basis on which this court could undertake such a task.

167. In addressing causation, I have not forgotten particular (xiii) and the application to amend. I have rejected that application and, if I am wrong about that, I have also considered and dismissed the allegation of breach on its merits. But it is to be noted that, even if – contrary to the judge's views and my own assessment - that had been a breach of duty, the judge went on to reject the claim that it had had any causative effect. He said in terms that a refusal to provide this support may well have escalated rather than mitigated the violence and that the same number of police would have been there in any event. Again, those findings of fact are inviolable; again, they demonstrate that the appeal on causation (even if there had been a duty) is unsustainable.

168. At the close of his submissions, Mr Hermer submitted that, without the provision of money, vehicles and accommodation, "the police would have gone home, and we would have been left with a peaceful protest". There is absolutely no basis for such a submission. It runs counter to the judge's analysis and, in particular, his conclusions at [266], set out in paragraph 40 above. As the judge himself noted, if the money, vehicles and accommodation had not been provided, the situation may well have been considerably worse. The "fear, ill-discipline, anger and testosterone" which the judge concluded were the cause of the violent response may well have been exacerbated if this assistance had not been provided.

169. For these reasons, I conclude that there is nothing in Ground 5 of the Appeal.

8. CONCLUSIONS

170. For the reasons set out above, I would dismiss this appeal. But I would not wish to conclude this judgment without paying tribute to the judge and the hard work and analytical skill that can be discerned from his judgment, from which I have quoted so liberally in the preceding paragraphs.

LORD JUSTICE IRWIN:

171. I agree.

DAME VICTORIA SHARP P.:

172. I also agree.