Neutral Citation Number: [2020] EWHC 2006 (QB)

Case No: QB-2018-001912

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2020

Before:

HIS HONOUR JUDGE ALLAN GORE QC SITTING AS A JUDGE OF THE HIGH COURT

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Between:

Shiji SIVAJI (Executrix on behalf of the estate and dependants of Bhanu SIVAJI deceased)	**Claimant**
- and -	
Ministry of Defence	**Defendant**

- -
- -

Mr Andrew Young (instructed by **Hodge Jones and Allen**) for the **Claimant**
Mr Tim Johnston, Mr Niazi Fetto, and Ms Lucinda Spearman (instructed by **GLD**) for the **Defendant**

Hearing dates: 8th July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ ALLAN GORE QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 27 July 2020.

HIS HONOUR JUDGE ALLAN GORE QC**:**

1. The Claimant as executrix of the estate and representative of the dependants of Bhanu Sivaji (hereafter 'the deceased') claims damages for his death due to mesothelioma, a malignant disease overwhelmingly associated with exposure to asbestos. It is alleged that the only significant or known exposure was while working at the Sembawang naval dockyard in Singapore between 1953 and 1968. The claimant claims that the deceased was an employee of the Defendant, and that exposure occurred in breach of both implied terms in his contract of employment relating to his health and safety and in breach of common law and statutory tortious duties of care they owed to him.

2. To the contrary, the Defendant denies employment, pleading that at all material times the deceased was a Crown servant and as such not the beneficiary of either implied contractual terms nor of the protection of the alleged tortious duties of care. However, he admits that during the material period, the deceased worked at the dockyard and that it was operated by the Defendant. As regards exposure to asbestos however, he pleads no positive case, simply putting the claimant to proof.

3. Superficially, the issues for determination in this case therefore are simple, namely:

    a) Was the deceased an employee or a Crown servant?
    b) Does it in fact make no difference in law which was the case?
    c) Whether as an employee or Crown servant, was he owed the alleged or any contractual or tortious duties of care?
    d) Was he exposed to asbestos in breach of such duties?
    e) Did that cause or make a material contribution to the risk of development of his terminal illness?
    f) If all of those questions are answered in the affirmative, what is a proper assessment of damages?

4. Superficiality however hides layers of complexity that have complicated this case. While there is no issue that the English court has jurisdiction to hear this claim, issues have surfaced to complicate matters, namely:

    a) whether English law or the law of Singapore is the proper law to determine the issue of liability
    b) whether English law or the law of Singapore is the proper law to determine whether the claims have been brought in time or are statute barred by relevant limitation law.

5. It is right to state that the Claim Form specifically alleges in the general endorsement, that English law is the applicable law for all purposes. That is repeated and amplified in the Particulars of Claim. It remains the Claimant's primary case.

6. Those layers of complexity have been compounded by a particularly unfortunate procedural litigation history that I am afraid to say only serves to illustrate the perils of leaving litigation to the last minute and also of leaving it to the parties to regulate litigation rather than enabling the court to actively and robustly case manage the litigation.

7. The deceased developed symptoms that with the benefit of hindsight can now be attributed to his terminal illness in early 2015 and he died on 3rd November 2015. The claim form was issued on 12th October 2018 just days before what would have been the expiry of the primary limitation period if the proper law to determination limitation issues was English law. In circumstances that I will explain later in this judgment, it now emerges that there is no dispute between experts in the law of Singapore, that by the date of death, if Singapore law applied to determine limitation issues, the claims on behalf of the estate had become statute barred by section 24B of the Singapore Limitation Act as amended, which imposed an end point of 15 years from the date of the alleged breach of duty, whether or not the cause of action had become complete by that date by damage having been suffered. In other words, the same protections against latent damage that exist in English limitation law are not the same as those in Singapore which are less benevolent.

8. Those same experts however agree that the same may not be true in relation to the claims for loss of dependency which are governed by section 20 of the Civil Law Act of Singapore. The experts agree that there is a moot undecided point, but agree that it is more likely that the courts of Singapore would decide that the limitation period for such claims was 3 years from the date of death and therefore that the dependency claims in this case were brought in time, if time is to be measured from the date of issue of the Claim Form in this court. Since determination of foreign law when it is to be applied in English courts is a question of fact, in the sense that the court makes a 'determination' of what the foreign law is, under the Civil Evidence Act 1972, the English court would be bound to accept that agreed expert position.

9. What then occurred in the litigation does not flatter those who have conduct of it. The Claim Form was served together with Particulars of Claim on 13th November 2018. The Defendant sought and the claimant consented to extension of time to serve the Defence which was not in fact served until 19th February 2019, late, in breach of Rule and Order, but retrospectively validated by Master Thornett in paragraph 3 of his Order dated 27th March 2019. No question of sanction arose probably because the application for extension had been made before the last extension had expired, and also because no application for judgment in default had been made or actioned.

10. The Defence denied that the relevant applicable law was English law, and asserted that liability fell to be determined according to laws of Singapore different from those relied upon by the claimant as the justification for the averment that English law applied. It also pleaded that by the law of Singapore, the claim was statute barred. Finally, it is averred that for the Claimant to succeed, she must demonstrate that her claim is actionable both under the law of Singapore and under English law (described in the written advocacy and in relevant authorities as the 'doctrine of double actionability').

11. An unseemly and serious dispute has arisen now about the order dated 27 March 2019. and an awful lot of time energy and research has been devoted to it. That again in my judgment does not flatter the legal representatives or the court. It arises in this way.

12. The Claimant submits that Master Thornett granted permission to Amend the Particulars of Claim so as to advance an alternative case that the claimant retains a valid cause of action under the law of Singapore enforceable by proceedings in the

English court. That is disputed by the Defendant despite the clear wording of paragraph 3 of the Order and the Defendant also submits that the Particulars of Claim cannot be amended to raise this new cause of action without also amending the Claim Form, and neither was there an application nor an Order so to permit. So it is that in response, the Claimant applies to amend the Claim Form, which application is for me to determine today, and also the parties expect me to determine whether the Claimant still requires permission to amend the Particulars of Claim.

13. So much industry has been devoted to these procedural issues that I have before me a hearing bundle and various iterations of skeleton arguments and supplementary skeleton arguments and supporting evidence and authorities that extends to over 1200 pages, and tens of thousands of pounds have been expended in costs in bringing this matter to this hearing. The principle beneficiaries therefore are the lawyers and I regard that as unseemly. I have not seen any Schedule of Loss, but my experience of asbestos claims and their valuation now extending over more than 40 years entitles to me question whether the costs of this procedural wrangle bear any proportionate relationship to the value of this claim.

14. With the greatest respect to the industry and learning of counsel, the product in this case is mostly irrelevant to the determination of the issue before me, which, simply stated, is whether the Claimant should be granted permission to amend her case. The principles in this regard are straightforward.

15. CPR Part 17 provides a framework for the grant of permission to amend. Rules differ however depending on when in the history of the litigation a party seeks to amend, and whether at that time it is arguable that a relevant limitation period has expired. The entitlement to apply to amend is granted in relation to a 'statement of case' (CPR Part 17.1 heading refers) and that is defined in CPR Part 2.3(1) as including the Claim Form. There is therefore nothing in the point taken by the Defendant who complains that amendment is required of both the Claim Form and the Particulars of Claim. Both are permitted in principle and it is frankly bizarre to suggest that if the Claimant is correct in her submission that amendment of the Particulars of Claim has been permitted, she should nonetheless be refused permission to amend the Claim Form and that that would have the effect of irremediably preventing her from arguing he permitted pleaded alternative case. It seems to me that the 2 applications, to amend Claim Form and to amend Particulars of Claim stand or fall together.

16. What it seems to me the industry of counsel has failed to grasp is the question of how that is to be achieved, and with the greatest of respect to the Master, it seems to me that so did he. That is the case because although it is the fact that no draft pleading was produced for consideration by the Master, what he ordered was expressed in the following terms:

> "3. The Claimant has permission to file and serve amended Particulars of Claim by 4pm on 31 May 2019.
>
> 4. The Defendant has permission to file an amended Defence by 4pm on 12 July 2019.
>
> …

> 7. The Claimant has permission to file and serve a Reply by 4pm on 9 August 2019.
>
> 8. The parties each have permission to instruct an expert in Singaporean law, on the issues of:
>
> > a. Whether the claim is actionable under Singaporean law; and, if so,
> >
> > b. Whether each head of damage sought by the Claimant is actionable under Singaporean law.
>
> 9. The Claimant's expert report is to be served in support of and with her amended Particulars of Claim.
>
> 10. The Defendant's expert report is to be served in support of and with its amended Defence."

17. The Claimant's primary submission advanced by Mr Young, counsel who appears for the Claimant, is that this Order amends the Particulars of Claim pursuant to CPR Part 17.1 either because it is with the written consent of the Defendant (because it is verbatim the draft minute of order suggested by the Defendant and agreed by the Claimant after the hearing before the Master), or alternatively because it was with the permission of the court on the face of the Order itself.

18. Mr Johnston, counsel who appears for the Defendant, to the contrary submits that this order was infelicitous (his word) in its wording and that all that the Defendant was agreeing to or suggesting was a timetable for the making of an application to amend based on a fully formulated draft, to which the Defendant was neither consenting (because no such draft had been seen) nor was the Defendant waiving rights to object to the formulation of the draft when it became available. So it is that the Defendant now says that because the Claimant's claims are, or might arguably be statute barred under the law of Singapore, thereby offending the doctrine of double actionability, so these are amendments or proposed amendments outside relevant limitation periods so that any application to amend falls to be considered under CPR part 17.4. This provision severely limits the availability of amendment in such cases so as to avoid the potential injustice to defendants of the doctrine of relation back that has the effect of treating the amended case as taking effect as from the date of the original claim. That would have the effect of treating a claim as having been brought in time for limitation purposes even though as a matter of historical fact it had been commenced out of time.

19. The editors of the White Book 2020 in the narrative in Volume 1 at paragraph 17.3.2 say this:

> "On an application under r.17.3 a copy of the proposed amended statement of case should be filed with the application notice (as to which, see r.23.6 and PD 23A para.2.1 (para.23APD.2)). Applications for permission in respect of an amendment yet to be identified are unlikely to succeed unless

> the proposed amendment is agreed by the parties as self-evident and uncontroversial."

True it is that the following observations can be made:

- No authority or decided example is given to support the proposition;
- It is made in relation to applications under CPR Part 17.3(1) but Part 17.3(2)(c) subordinates such applications to the provisions of CPR Part 17.4 to which I will come shortly;
- However, it seems to me to be a point of general application as apposite to amendment under Part 17.1 and Part 17.4 as it would be to amendment under Part 17.3;
- Moreover, CPR 17 PD paragraph 1.2 specifically provides that:

> "When making an application to amend a statement of case, the applicant should file with the court:
>
> (1) the application notice, and
>
> (2) a copy of the statement of case with the proposed amendments."

20. The Master clearly had the thrust of this in mind at the hearing on 27th March 2019 as is evident from observations he made during the course of argument, which included saying:

> "So I think there needs to be a proper draft with either agreement, in which case consequential direction for amendments and (inaudible) or in the event of disagreement, permission to restore on the issue of permission." (internal page 5 letter B of the transcript of the hearing)

and

> "I will deal with it on exactly the same basis as I was contemplating last time which is permission in principle but there is an issue, come back, so liberty to reply on that issue today and to come back to the court if there is an issue about the nature or the scope (inaudible) but otherwise permission to amend the claim, defence, through to reply." (internal page 18 letter D of the transcript of the hearing).

21. Unfortunately, neither did he carry that thrust through into his judgment nor did he reflect it in the terms of the order he made. Instead, he approved the form of order suggested by the Defendant and in the terms of the sealed Order which I have already recited. Neither party has sought either to correct that Order nor sought permission to appeal against it. Moreover, since it was drawn, neither has the Claimant applied to amend the Particulars of Claim in the form now drafted, which form was filed and served on 28th June 2019, nor has the Defendant applied to strike out that purported

amended pleading. In fact, the Defendant has responded to it by filing and serving a purported amended Defence dated 10th September 2019 and the Claimant has responded to that by filing and serving a Reply dated 30th September 2019. Between those 2 dates, the experts in the laws of Singapore provided a joint statement dated 27th September 2019.

22. The first issue I have to decide therefore is when is an amendment not an amendment, an unenviable decision to require of a judge other than in an appellate capacity. What makes it particularly unenviable in this case is that this state of affairs was of the Defendant's making because the Defendant suggested the form of order. What should have happened was, the point having either been taken positively by the Defendant, or at least the Defendant reserving his position in this regard, the application to amend should have been adjourned, pending the obtaining of expert evidence as to which directions were given.

23. In fact, I venture to suggest that had the Defendant correctly advised the court of its intentions at this stage, even before expert evidence was obtained, the claimant would have realised the urgent need to draft an amendment and would have asked for a short adjournment to deal with that matter promptly, in which event it would have been determined by the Master, probably more than a year ago, and would not be left for determination by me at this hearing.

24. What then makes the Defendant's position even more unattractive is that on the one hand he submits that there was no permission to amend, and none should be granted now, yet he also stands and continues to stand on the terms of his amended Defence served in response to a pleading that he submits to have no formal or essential validity.

25. Mr Young submits both in writing (paragraph 26 of his Skeleton Argument) and orally that the Particulars of Claim have been amended validly and effectively for 7 reasons, namely:

> "(1) Paragraph 11 of the Defence and counsel for the Defendant skeleton argument required the Claimant to plead a case under Singaporean law;
>
> (2) this is undoubtedly what Master Thornett was discussing during the hearing, as clarified in the transcript that became available only on 5th June 2020;
>
> (3) this is what the Order drawn up by the Defendant's counsel and approved by Master Thornett actually says;
>
> (4) this is the only reasonable explanation for the direction that the expert's report is to be served 'in support of and with' the relevant pleading;
>
> (5) no other possible construction has been offered for the amendment direction, if it is not intended to provide for pleading alternative Singaporean claims;

> (6) the wide ambit of the discussion about suitable preliminary issues does not make sense unless permission had been granted for the Singaporean claims;
>
> (7) the Defendant' solicitor, John Bolton, at no point suggests in either of his two lengthy witness statements made on 10th July 2019 and 29th August 2019 that the Amended Particulars of Claim, which were served on 28th June 2019, contained amendments for which permission had not been granted by the court."

26. Mr Johnston in his written submissions (skeleton argument paragraph 19) and his oral submissions, refutes these arguments, submitting that the Order did not effect amendment, that the Master did not conduct the relevant analysis of the procedural requirements, and did no more than set a timetable for consideration of amendment.

27. Both arguments are circular. The claimant's argument is circular because I ask, not rhetorically, how can you validly and effectively amend a statement of case in a respect that is neither self-evident, nor on the face of it, uncontroversial, without having a draft document to consider. The issue was known to be controversial ever since the Defendant repudiated the claim by protocol response in a detailed fully argued email dated 8th January 2018, approaching a year before the Claim Form was issued. Moreover, it is not correct to say that the Defendant 'required' the Claimant to plead. He only pointed out that according to his view of the law, it was necessary for the Claimant to raise this issue. Whether and if so, what matters were in the mind of the Master are neither here nor there. It is the order made that is relevant.

28. The defendant's argument is circular, because if correct, then paragraphs 3, 4, 7, 9, and 10 of the Order as drawn were valueless, pointless and of no effect, and all that was necessary was the set of directions concerning the obtaining of expert evidence as to foreign law and discussion of it, yet the Defendant not only advocated the form of order, but then acted upon it in advancing his own pleading.

29. And so, unassisted by that circularity, I simply have to decide. In my judgment, irrespective of the form of words adopted in the Order, it did not effect, and could not have effected amendment. I am fortified in my view by the comment of the editors of the White Book, which is consistent with CPR 17 PD paragraph 1.2 and my experience of civil litigation for over 4 decades. It is one thing to permit without a draft a proposed amendment that is self-evident and uncontroversial such as an erroneously pleaded date or reference to the wrong document or even sometimes as to a name. It is quite another thing to amend upon an issue known to be controversial and going to the very core question of whether a liability in law arises. The language of the order was not merely and permissibly infelicitous. It neither reflected practice nor rule and was impermissible in the way now relied upon by the claimant. What she needs therefore is permission to amend both the Claim Form and the Particulars of Claim and as I have already indicated, those applications seem to me to stand or fall together.

30. In ***Hyde v Nygate*** [2019] EWHC 1516, which was an insolvency case, Mr John Kimbell QC sitting as a Judge of the High Court, said this:

> "[25] CPR 17.4 provides in relevant part:
>
> "(1) This rule applies where
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under
>
> (i) the Limitation Act 1980 …
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."
>
> [26] It was common ground that there was a four-stage test for the Court to apply when determining whether to grant permission for the disputed amendments. This is derived from *Ballinger v Mercer* [2014] 1 WLR 3597 at [15] and *Diamandis v Willis* [2015] EWHC 312 (Ch):
>
> Q1. Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? If the answer is yes, go to Q2. If the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b) (Stage 1).
>
> Q2. Do the proposed amendments seek to add or substitute a new cause of action? If the answer is yes, go to Q3; if the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b) (Stage 2).
>
> Q3. Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If not, the Court has no discretion to permit the amendment (Stage 3).
>
> Q4. If the answer to Q3 is yes, the Court has a discretion to allow the amendment. (Stage 4)."

31. This decision is cited with approval by the editors of the White Book 2020 in the narrative in Volume 1 at paragraph 17.4.4.3 and I detect no disagreement between Counsel as to its correctness or applicability to this case. What this passage serves to identify is that different and more stringent requirements have to be satisfied by an applicant to amend if it is reasonably arguable that the proposed amendments are outside the applicable limitation period.

32. As I have already referred to, the joint statement of the experts in the law of Singapore dated 27th September 2019 at paragraph 5(g) agree that the claims on

behalf of the estate are statute barred (not as question 1 poses, merely arguably so) and at paragraph 5(h) they further agree that the claims of the dependants may also be.

33. It is therefore undeniable that questions 1 and 2 are answered in the affirmative. Mr Johnston concedes and accepts that question 3 is satisfied. Therefore, the only remaining live issue is whether I am persuaded as a matter of discretion to grant the applications.

34. Discretion has two aspects in this context. First, there are clear and well-established principles that apply to the specific issue of the exercise of discretion when the court is asked to permit amendment to add a new cause of action arguably outside the relevant limitation period. Mr Johnston summarises them in his skeleton argument at paragraphs 11 to 18 and I do not detect any disagreement as to those principles on the part of Mr Young. In summary Mr Johnston submits that:

a) She who seeks the exercise of discretion has the burden of satisfying the court that it is appropriate for the discretion to be exercised, and so it is that the claimant must satisfy the court in this case (per David Richards J as he then was in ***HMRC v Begum*** [2010] EWHC 1799 paragraph [115]). Mr Johnston however does not draw attention to the other principles enunciated by the judge in that case, namely that the court must be satisfied that the amended claims have a real, as opposed to a fanciful prospect of success (paragraph [117]), and that late timing of proposed amendments is a relevant factor (paragraph [118] implies that by adding a requirement that late amendments must be fully pleaded);

b) The purpose of the special rules limiting the circumstances in which amendment outside the limitation period may be granted is to protect the defendant against the injustice of being deprived of the limitation defence that would otherwise be available (per Jackson J as he then was in ***Charles Church Developments Ltd v Stent Foundations*** [2006] EWHC 3158 at paragraph [41]).

c) Jackson J however, was at pains in the same passage to emphasise that the exercise of discretion must depend on all of the circumstances of the case, which means that although some limits are placed on its exercise, the discretion nonetheless is a wide one;

d) What Mr Johnston did not draw attention to, but in my judgment is material, is what Jackson J said in the preceding paragraph of his judgment in the following terms:

> "It is not open to me as a first instance judge to put a gloss on the Court of Appeal's formulation, or to insert words which will narrow its effect. (ii) Section 35(5)(a) of the 1980 provides an exception to the limitation principle. The rationale of this exception is that once particular facts have been put in issue in litigation, and therefore fall to be investigated, the claimant should be entitled to claim any appropriate remedy upon the basis of those facts. This policy justification is equally valid

> irrespective of whether those facts have been put in issue by D1 or by D2 or by both defendants. (iii) The three policy considerations identified by Mr Sears apply with much less force to new claims based upon facts which the court is bound to investigate in any event. (iv) Mr Friedman's interpretation of the expanded rule seems to me to be in line with the reasoning and the general approach of the Court of Appeal in *Lloyds Bank plc v Rogers* The Times, 24 March 1997, *Goode v Martin* [2002] 1 WLR 1828 and *Hemmingway v Smith Roddam* [2003] EWCA Civ 1342. (v) Section 35(5) of the 1980, CPR r 17.4(2) and the expanded rule merely give the court a discretionary power to allow the pleading of new claims after expiry of the limitation period, if the threshold condition is met. Whether the court will in fact allow such amendments after expiry of the limitation period must depend upon the circumstances of each case."

e) Reliance is to be placed upon a dictum of Lewison J (as he then was) in ***Fattal v Wallbrook Trustees (Jersey) Ltd*** [2010] EWHC 2767 at [41], interestingly citing with approval to the dictum of Jackson J to which I have just referred, Lewison J saying that

> "Unless an amendment falls within the scope of CPR 17.4 the court has no power to permit it. But it does not follow that if an amendment does fall within CPR 17.4 the court must permit it. In my judgment the discretion to allow an amendment after the expiry of a limitation period should not lightly or routinely be exercised in a way that would deprive a defendant of a limitation defence."

It is material however to compare the factual background of each of these 2 cases, because, as was observed by Lewison J in ***Fattal***, the new cause of action in that case would have necessitated non-parties to investigate and litigate matters that up to that point they had no need to investigate at all. In other words, they would have to meet allegations that were no part of anything they had to meet as the litigation was constituted before the proposed amendment. This case is therefore an example of a negative answer to Mr Kimbell's third question in ***Hyde***. ***Charles Church*** however, was different because the imminence of issue of timely Part 20 claims meant that the persons affected by the proposed amendments were going to have to investigate and deal with the pleaded facts in any event in those Part 20 proceedings whether the amendment was permitted or not.

f) Relying upon ***Goode v Martin*** [2002] 1 WLR 1828 at paragraph [44], the decision on the facts in ***Fattal***, and certain obiter dicta of Andrew Baker J in ***PJSC Tatneft v Bogolyubov*** [2018] EWHC 2499, permission should not be granted if the court decides that the applicant has delayed unreasonably in putting forward the new case that is the subject of the amendment application.

35. I bear all of that guidance relating to the specific discretion in mind, but I indicated that there is also a general aspect to the discretion, and counsel do not disagree with that, and that is that it must be exercised compliantly with the overriding objective in CPR Part 1. As so, it seems to me that although a proposed amendment would fail if what I have called the specific discretion guidance is not satisfied, once a proposed amendment has satisfied that guidance, it might still fail under the overriding objective. I must therefore retain in mind proportionality, ensuring that the parties are on an equal footing, saving of expense, the importance of the case to the parties and the complexity of the issues, and dealing with the case fairly and expeditiously.

36. Having described the parameters for the exercise of discretion, I must return to the history of this claim. The letter before action was dated 25th August 2015 before the deceased died. Despite 4 chaser letters and one complaint, the first substantive but incomplete response was dated 14th March 2017. Thereafter the Defendant sought further extensions of time to complete research and investigation. True it is that in the response dated 14th March 2017, the Defendant did raise as an issue the doctrine of double actionability, but it was not until 8th January 2018 that a full substantive response is forthcoming from the Defendant to the letter of claim and that is a reasoned repudiation of the claim. In that response, liability is denied for a whole raft of reasons including but not limited to asserting that the English duties relied upon by the Claimant had no extraterritorial effect, that in any event the doctrine of double actionability applied and the facts gave rise to no claim according to the law of Singapore, and even if they did, any cause of action was statute barred under the law of Singapore, and finally, even if all of that were wrong, sovereign immunity protected the Defendant. True it is that it then took the Claimant 9 months to issue the Claim Form and there is no adequate explanation of why it took so long. That as I have indicated takes us very close to the expiry of the English limitation period. Service took place on 13th November 2018, and Acknowledgement of Service was filed on 26th November 2018. The original Particulars of Claim were served with the Claim Form. The Defence was due on 11th December 2018. The Defendant sought and obtained either by consent or pursuant to court order, 5 extensions of time and did not serve the original Defence until 19th February 2019. I have already detailed how the matter then came for first costs and case management hearing before Master Thornett on 27th March 2019, initially as a 'show cause' hearing under the Mesothelioma Practice Direction in CPR 3 PDD. Thereafter, everyone is overtaken by the Covid 19 health emergency, including, of particular relevance, the closing of the National Archive.

37. This history does not reflect well on the parties but contrary to the submissions of Mr Johnston, it reflects particularly badly on the Defendant. I do not accept his submission that the Defendant has behaved like an exemplary opponent drawing to the attention of the Claimant her failings in failing to formulate the claim under the law of Singapore. It took the Defendant 17 months to even begin to raise the issue (preliminary response dated 14th March 2017), and in fact it took him 27 months to detail why the claim was repudiated in the formal response letter (8th January 2018).

38. I also reject Mr Johnston's submission that this is excusable because this is an important test case that requires detailed investigation and response because of potential impact on other cases. There can now be very few people alive who were

exposed to asbestos in the naval dockyard in Singapore before independence or before 1968 when the deceased ceased working there.

39. I also reject Mr Johnston's submission that any delay there may have been on the part of the Defendant can be excused by the need to undertake further research as regards the constitutional position and the arrangements concerning the control and administration of the naval dockyard in Singapore that require access to the National Archive. The Defendant had 3½ years in which to undertake those researches before the health emergency closed the National Archive, and the whole structure of CPR 3 PDD required that it do so and produce the necessary evidence to show cause why judgment should not be entered before the hearing on 27th March 2019 which was a year before lockdown.

40. In my judgment, the following conclusions are justified on the history that I have now set out in detail.

a) The amended claims if permitted, have a real as opposed to a fanciful prospect of success. If the applicable substantive law is as asserted in the Amended Particulars of Claim, and given that the Defendant has no evidence to refute the assertion made by the deceased in his witness statement from his own personal knowledge that he was exposed to substantial quantities of asbestos dust as described, liability would be established;

b) Given that save to cover the investigation of foreign law, no case management directions have even been given let alone complied with in this case, and that no trial date has ever been set, this is not a late, let alone a very late amendment;

c) While the effect of granting permission would be to deny the Defendant the benefit of the limitation defence under Singapore law due to the doctrine of relation back in relation to the dependency claims (and might even do so in relation also to the estate claims because in the Reply, the Claimant seeks a declaration pursuant to section 2 of the Foreign Limitation Periods Act 1984 that application of Singaporean limitation law would cause undue hardship), it would not necessitate the Defendant to investigate and deal with new matters. To the contrary, the Defendant would still have to investigate evidence and demonstrate its case on all of these matters in order to seek to defeat the Claimant's case by virtue of the positive averments made in the original Defence;

d) The relevant facts in issue are those relating to the issues I identified in paragraph 3 of this judgment, and as was observed by Jackson J in ***Charles Church***, it seems to me that a claimant who establishes those facts should be entitled to any appropriate remedy upon the basis of those facts, therefore whether that is because English law alone applies (the Claimant's primary case) or because that would be true under the law of Singapore too, satisfying the double actionability doctrine (the

Claimant's alternative claim sought to be introduced by the proposed amendments);

e) The proposed amendments fall squarely within the scope of CPR Part 17.4 subject only to the question of discretion, which I am now considering, because the first 3 questions posed in ***Hyde*** are answered in the affirmative;

f) The Claimant has not delayed unreasonably. Delay until the full reasoned repudiation dated 8th January 2018 was justified because until that point, still within the English limitation period, the Claimant might have been criticised for prematurity if the Claim Form was issued before the Protocol response. If there is any proper criticism of the Claimant, it was for permitting that degree of indulgence to the Defendant in the first place. The delay that counts then is from January 2018 until the Amended Particulars of Claim are first purportedly served on 28th June 2019. In my judgment it ill-behoves a Defendant to criticise claimant delay during that period for failing to plead the alternative case that the Defendant has identified and introduced into the dispute. It is after all an alternative case that the Defendant has identified and is aware of;

g) The proposed amendments do not in my judgment offend the overriding objective. Quite the contrary. Were I to refuse the application, the Defendant who filibustered the response to this claim for 3½ years before taking this point would thereby secure the potential benefit of a limitation defence that would not have been available to him had he made a timely response to the letter of claim in the first place. That is deeply unattractive. It would not place the parties on an equal footing but would secure for the Defendant an unfair advantage. The only thing that is disproportionate and has offended the requirement to save expense and avoid delay, has been the taking of this amendment point in this way at this time, that has caused an outlay of an estimated £60,000 in costs in relation to a claim the estimated value of which is in the region of £200,000. The issues raised by the proposed amendment are in fact positively raised by the original Defence and therefore will be litigated whether the amendments are allowed or not, and therefore the amendments do not otherwise cause either expense, or delay, there having been no case management yet and no trial date having been set.

41. For all of these reasons as a matter of discretion, I accede to the Claimant's applications and grant permission to amend both the Particulars of Claim and the Claim Form in the form of the drafts that have been circulated.