Neutral Citation Number: [2018] EWHC 1169 (QB)

Case No: HQ13X02162

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2018

Before:

MR JUSTICE STEWART

- -

Between:

Kimathi & ors	**Claimants**
- and -	
Foreign and Commonwealth Office	**Defendant**

- -
- -

Simon Myerson QC, Mary Ruck and Sophie Mitchell (instructed by **Tandem Law, Lead Solicitors**) for the **Claimants**
Guy Mansfield QC, Neil Block QC, Richard Wheeler and Jack Holborn (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 30 April, 1 and 2 May 2018

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Judgment Approved

Mr Justice Stewart:

Introduction – The Issue Under Section 26 of the Limitation Act 1939 and Section 32 of the Limitation Act 1980

1. The Claimants in this Group Litigation case bring claims against the Defendant arising out of alleged atrocities and other abuses during the 1950s, commencing in October 1952 with the Declaration of the State of Emergency in Kenya.

2. The Defendant pleaded a defence of limitation. The Claimants' response to that defence was:

    (a) No cause of action is time-barred because the Defendant is guilty of deliberate concealment under section 32(1)(b) of the Limitation Act 1980.

    (b) Alternatively, in relation to personal injury actions, the Claimants rely upon the Court's discretion under section 33 of the Limitation Act 1980.

3. This judgment deals only with paragraph 2(a) above. Throughout the litigation the pleadings were based on section 32. However, on 21 March 2018 the Court expressed a concern about whether it was the Limitation Act 1939 and/or the 1980 Act which

was applicable. This was then investigated by the parties and the position is as follows:

(1) Section 26 of the Limitation Act 1939 provided:

> "**26. Postponement of Limitation Period of Fraud or Mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this act either…
>
> (a) The action is based upon the fraud of the Defendant or his agent or any person through whom he claims or his agent, or
>
> (b) The right of action is concealed by the fraud of any such person as aforesaid…
>
> The period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it…"

(2) Section 7 of the Limitation Amendment Act 1980 substituted a new section 26 into the 1939 Act with effect from 1 August 1980. The new section 26 then became section 32 of the Limitation Act 1980 (with minor and irrelevant changes of wording). The Limitation Act 1980 was a consolidating statute. Section 32 is set out later in this judgment.

(3) The transitional provisions of the Limitation Amendment Act 1980 were contained in section 12 which stated:

> "12. (1) Nothing in any provision of this Act shall
> (a) enable any action to be brought which was barred by the principal Act before that provision comes into force.
> …..
> (2) Subject to subsection (1) above…, the provisions of this Act shall have effect in relation to causes of action accruing and things taking place before, as well as in relation to causes of action accruing and things taking place after, those provisions respectively come into force."

(4) In the Limitation Act 1980, the transitional position was in Schedule 2 paragraph 9 in these terms:

> "9. (1) Nothing in any provision of this Act shall
> (a) enable any action to be brought which was barred by this Act or (as the case may be) by the Limitation Act 1939 before the relevant date…
> (2) In sub-paragraph (1) above "the relevant date" means
> (a)…
> (b) in relation to any other provision of this Act, 1 August 1980 (being the date of coming into force of the remaining

provisions of the Limitation Amendment Act 1980, apart from section 8)."

(5) All the causes of action in this litigation arose many years before 1 August 1980.

(6) There was a dispute between the parties as to whether section 26 has any relevance. The Claimants' submission was that the Court does not have to determine how it would have applied section 26 before 1 August 1980. The argument was that the 1980 Act was retrospective in application by schedule 2 paragraph 9, subject to any action having been barred by the 1939 Act prior to the 1980 Act coming into force[1]. The Claimants say that the effect of section 26 was to stop time running: the action was not barred as at 1 August 1980, but from 1 August 1980 section 26 could no longer apply because the whole Act was repealed by schedule 4 of the 1980 Act. Therefore, the question the court has to determine is not the hypothetical one as to what would have been decided had the Court been asked to decide the issue prior to the 1980 Act.

4. I do not accept the Claimants' submission. Strictly, I have to decide, in accordance with section 26 of the 1939 Act, whether the conduct of the Defendant prior to 31 July 1974 for non-personal injury claims and 31 July 1977 for personal injury claims postponed the period of limitation beginning to run. If not, then these causes of action were barred prior to 31 August 1980 and the 1980 Act has no effect. In short, I accept the Defendant's submission that there are two stages:

(1) Stage 1 – determine whether the action is barred prior to 1 August 1980 under section 26 of the 1939 Act. If it was then there is nothing in the 1980 Act which is of relevance to lifting the bar[2].

(2) Stage 2 – if claims were not barred under the 1939 Act prior to 1 August 1980, then section 32 of the 1980 Act has to be applied so as to decide whether the claims are barred or not. In so doing the court must consider all matters whether arising before or after 1 August 1980.

5. The brief reasons why I reject the Claimants' submission are:

(1) The plain words of the statutory provisions. Under schedule 2 paragraph 9 I have to determine whether the action was already barred by the 1939 Act, before I consider anything under the 1980 Act.

(2) This is consistent with the way the House of Lords dealt with the matter in Arnold v CEGB[3], where Lord Bridge recited paragraph 9(1) of schedule 2 to the 1980 Act and said that the critical question was whether "anything in the series of statutes dealing with limitation of actions leading up to the 1980

[1] Schedule 2 para 9 is in somewhat different terms than section 12 of the Limitation Amendment Act 1980 in that it does not contain an equivalent to section 12(2). This does not affect my decision.
[2] There is an argument as to whether time could restart, even after the claim had been barred. This is based on the case of Sheldon v Outhwaite [1996] AC 102. I will deal with this argument subsequently.
[3] [1988] AC 228 at page 265.

consolidation…has had the effect of removing retrospectively the bar to the widow's action which accrued… pursuant to section 21 of the Act of 1939."[4]

6. Fortunately, the parties agree that, for the purposes of the present case, there is no material difference between the test under section 26 of the 1939 Act and the test under section 32(1)(b) of the 1980 Act. Also that, in interpreting the 1939 Act, the Court is entitled to rely on decisions made in relation to the 1980 Act. The Court has been referred to authorities under the 1939 Act. I have not undertaken a detailed analysis of them but adopt the parties' consensual position. In support of this are the following materials:

(1) The 1977 Law Reform Committee[5] considered the existing law and noted that the wording of section 26 was not consistent with the authorities which had construed its meaning. The Committee recommended the changes in section 26 in order better to align the wording with the relevant interpretation of the courts[6].

(2) In Current Law Statutes Annotated 1980, in relation to section 32 it was stated:

> "This section replaces s26, LA 1939…the opportunity has been taken to restructure the section to "restate the old law in modern language" as Lord Hailsham put it (H.L. vol.400, Col 1219), and to deal with one or two points of interpretation which had been disclosed by the Court in their efforts to construe the original section 26. Unless otherwise indicated it appears that cases decided on under that section will remain relevant in the construction of this provision…"

(3) In Cave v Robinson, Jarvis and Rolfe[7] Lord Scott, whilst noting that the wording of section 26 was not the same as the wording of section 32, and in particular section 26 had no provision comparable to section 32(2), continued:

> "40…Nonetheless it was generally believed that the broad effect of section 26 had been continued under section 32. Paragraph 31–19 of Clerk & Lindsell on Torts, 17th edition (1995), p1593 (18th edition (2000), p1723, para 33-25) said that section 32(2):
>
> "preserves and confirms the case law on section 26 of the Limitation Act 1939…""[8]

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[4] His Lordship relied upon section 16(1) of the Interpretation Act 1978 and the case of Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553.

[5] Law Reform Committee's 21st Report Cmnd. 6923 (1977), Pt. II, at 2.2.-2.24.

[6] The wording suggested by the Law Reform Committee was somewhat different from section 2, but the analysis of the authorities, in particular King v Victor Parsons [1973] 1WLR 29 is consistent with the law under section 32(1)(b) as subsequently interpreted.

[7] [2003] 1AC 384.

[8] Lord Scott went on to consider the Sheldon case. At paragraph 44 he noted that Sheldon said it was not permissible to construe consolidating Acts in the light of their statutory history unless there is an ambiguity. See also paragraph 46 of Cave v Robinson.

(4) The current edition of Clerk & Lindsell on Torts (22nd Edition, 2018, at paragraph 32-22 states:

> "32-22…Section 32 of the Limitation Act 1980, is a re-draft of s.26 of the Limitation Act 1939, designed not to change the existing law, but to bring the statute more obviously into line with the interpretation which the courts had put upon it."

(5) In Giles v Rhind[9] Arden LJ, when considering the meaning of "Breach of Duty" in section 32(2) of the 1980 Act, said:

> "43. S32(2) did not appear in s26 of the Limitation Act 1939 (as originally enacted), which was the statutory predecessor of s32(1). For present purposes there was no material difference between s26 and s32(1) …It is appropriate to refer to the report of the Law Reform Committee because it sets out the pre-existing law and the mischief to which the amendments to s26 were directed…"[10]

(6) Finally, in the book by Mr McGee[11] it is stated at paragraph 20.015:

> "The wording introduced by the 1980 Act appears to reflect the interpretation which the courts had put upon s.26 of the 1939 Act…"

7. In the circumstances, and for stylistic reasons, I shall refer in the majority of this judgment only to section 32 of the 1980 Act. Nevertheless, throughout I am aware of the two stage test I have set out above and I shall return to it in the conclusion to this judgment.

The Pleadings

8. The pleadings in relation to s32 (now further amended to incorporate reference to s26) are to be found in:-

- Paragraphs 46A-46C of the Re-Re-Re-Amended Generic Particulars of Claim ("RRRAGPC").
- Paragraphs 93-96 of the Re-Re-Amended Generic Defence ("AGD").
- Paragraphs 42-52 of the Re-Re-Amended Generic Reply ("AGR").

In addition, there is an Order dated 19 April 2018 in which it is recited that matters contained in paragraphs 22-25 of a draft Amended Generic Rejoinder "may be argued at the Section 32 Limitation Act hearing… (the Claimants reserving their position whether those matters – or any of them – should have been pleaded in the Generic Defence)".

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[9] [2008] EWCA Civ 118; [2009] Ch 191.

[10] Later at paragraph 54 in that specific context, Arden LJ referred to the case law summarised by Lord Denning MR in King v Victor Parsons and said that there did not seem to be any reason why that case law could not apply to the sort of case before the Court of Appeal in Giles v Rhind.

[11] Limitation Periods 7th Edition Andrew McGee.

9. For the sake of completeness, and because of the complexity of this issue, the relevant pleadings and paragraphs 22-25 of the draft Amended Generic Rejoinder have been reproduced in Appendix A to this judgment.

The Claimants' Case in Outline

10. The claim form was issued on 28 March 2013, naming 20 Claimants. The Defendant's plea of limitation is based on the issue date of 28 March 2013.

11. In relation to section 32 the Claimants' case in summary is:

    (1) The Defendant engaged in an exercise of deliberate destruction of documentation at the end of the Colonial rule in Kenya that, it is inferred, concealed facts relevant to the Claimants' right of action against the Defendant.

    (2) The Defendant deliberately concealed material, at the end of the Colonial rule in Kenya, and withheld it until January 2011. These were the Hanslope documents. The Claimants could not have discovered those documents unless the Defendant had voluntarily disclosed them or had been ordered to disclose them.

    (3) Until the Hanslope documentation came to light it was impossible for the Claimants to assess the extent and relevance of what had been destroyed. Hanslope provided two things that had previously been absent, namely:

        (a) Lists of what had been destroyed

        (b) (By virtue of being an "unweeded" archive) evidence of what must have existed and does not now exist.

12. Therefore, the Claimants say that the time for bringing the action was no earlier than January 2011 and indeed somewhat later because of the need to analyse the Hanslope documentation. Time therefore, according to the Claimants, did not run until that date. Therefore, by virtue of section 32, claims issued in 2013 were in time.

The Defendant's Case in Outline

13. In summary, the Defendant's case on s32 is:-

    (1) The burden of proof in establishing deliberate concealment is upon the Claimants. See Cave v Robinson, Jarvis and Rolf[12] para 60. The Claimants have not discharged the burden.

    (2) The Claimants have not proved that any facts relevant to their causes of action have been (a) concealed, (b) deliberately concealed, (c) deliberately concealed from the Test Claimants (TCs).

[12] [2002] UKHL 18; [2003] 1 A.C. 384. This point is dealt with in the next section of this judgment under the sub-heading "Statutory Provision".

(3) The Claimants' allegations amount to deliberate concealment of documents. Documents may contain facts for the purposes of s32, but in this case the allegedly deliberately concealed documents would have contained evidence, not "any fact relevant to the plaintiff's cause of action".

Statutory Provision

14. Section 32 of the LA 1980 provides, so far as material:-

> **32.— Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.
>
> …….
>
> (4A) Subsection (1) above shall not apply in relation to the time limit prescribed by section 11A(3) of this Act or in relation to that time limit as applied by virtue of section 12(1) of this Act.
>
> (5) Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).
>
> ……..
>
> ["S38 (9) References in Part II of this Act to a right of action shall include references to –
> (a) a cause of action;
> (b) a right to receive money secured by a mortgage or charge on any property;
> (c) a right to recover proceeds of the sale of land; and
> (d) a right to receive a share or interest in the personal estate of a deceased person."]"

15. Fraud or mistake under Section 32(1)(a) or 32(1)(c) are not relied upon by the Claimants. They rely upon deliberate concealment under section 32(1)(b).

16. The burden of proof is upon the Claimants to show deliberate concealment. In Cave v Robinson, Jarvis and Rolf, Lord Scott said:

> "60 … A Claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, nonetheless, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult. Subsection (2), however, provides an alternative route. The Claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the Claimant can show that the Defendant knew he was committing a breach of duty, or intended to commit the breach of duty — I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach — then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for subsection (1)(b) purposes…."

"Any fact relevant to the Plaintiff's Right of Action"

17. By virtue of section 38(9), in the present case, the "right of action" shall include references to the "cause of action"[13].

18. The first authority which I consider concerned a false imprisonment claim. It is the Court of Appeal's decision of Johnson v The Chief Constable of Surrey[14]. Three judgments were given. All contained a consistent approach to the construction of section 32(1)(b).

19. First, Neill LJ said:

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[13] Sir Terence Etherton in Arcadia Group Brands Limited v Visa Inc [2015] EWCA Civ 883 at paragraph 38, when considering wording under section 32A relating to defamation said, "that wording, common to both versions of section 32A, is to all intents and purposes identical to the wording "any fact relevant to the plaintiff's right of action" in section 32(1)(b) of the 1980 Act."

[14] Unreported 19 October 1992.

> "It is submitted…the tort of false imprisonment had two elements (a) Mr Johnson's detention on various dates as set out in the statement of claim, and (b) the absence of any reasonable cause by the police officers concerned to suspect that Miss Richardson was guilty.
>
> …
>
> It is true to say that the tort of false imprisonment has two ingredients; the fact that imprisonment and the absence of lawful authority to justify it…But… the gist of the action of false imprisonment is the mere imprisonment. The Plaintiff need not prove that the imprisonment was unlawful or malicious; he establishes a prima facie case if he proves that he was imprisoned by the Defendant. The onus is then shifted to the Defendant to prove some justification for it. If that be right, one looks at the words in section 32(1)(b), "any fact relevant to the Plaintiff's right of action". It seems to me that those words must mean any fact which the Plaintiff has to prove to establish a prima facie case."

20. Rose LJ said:

> "In construing the words, there is no middle ground between fact and evidence. It may be that the Plaintiff's case following the quashing of the convictions would be evidentially stronger and have a better prospect of success. But I am unable to accept… that the quashing of the convictions adds anything to the Plaintiff's knowledge of facts relevant to his right of action. Facts which improve prospects of success are not… facts relevant to his right of action…
>
> I accept that the construction…is a narrow one, but unless it is correct it is difficult to see what purpose is served by the special provisions with regard to personal injury actions which are contained in section 33 of the Act…"

21. Russell LJ said:

> "I agree. The wording of section 32(1)(b)… is such that a narrow interpretation is necessary. In order to give relief to the Plaintiff any new fact must be relevant to the Plaintiff's "right of action" and is to be contrasted with a fact relevant, for example, to "the Plaintiff's action" or "his case" or "his right to damages". The right of action in this case was complete at the moment of arrest. No other ingredient was necessary to complete the right of action. Accordingly, whilst I acknowledge that the new facts might make the Plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the "right of action" itself. They do not affect the "right of action", which was already complete, and consequently in my judgment are not relevant to it."

22. The next case chronologically is C v Mirror Group Newspapers[15]. This was a defamation case and involved the wording "cause of action" in section 32A. Neill LJ recorded that it was common ground that the difference between "right of action" and "cause of action" was irrelevant for the purposes of the case, the form had been used merely to embrace equitable rights[16]. Having reviewed the Johnson case, Neill LJ rejected the argued distinction in relation to section 32A for defamation cases under section 32(1)(b). He continued at pages 138-139:

> "…the decision in Johnson…must be applied to the relevant expression in section 32A as it applies to the expression in section 32(1)(b). The relevant facts are those which the Plaintiff has to prove to establish a prima facie case….
>
> As well as being bound by it, I respectfully agree with the decision in Johnson. In section 32A Parliament has for actions for libel or slander breached the protection which a period of limitation ordinarily gives to a Defendant. I do not consider that Parliament has intended…to create a breach so wide as to enable facts relevant to possible defences to the action to be a relevant consideration. Given the public interest in finality and the importance of certainty in the law of limitation, I would have expected Parliament to use words different and more general had the broad construction, with the uncertainties it involves, been intended. The facts relevant to the cause of action are confined to the limited class of facts contemplated in Johnson's case…"

Earlier in his judgment at page 137, Neill LJ said, "It is clear that Rose L.J. accepted what in this Court has been described as the statement of claim test, that is knowledge of the facts which should be pleaded in the statement of claim."[17]

23. I now turn to Williams v Fanshaw Porter & Hazelhurst[18]. This was a solicitors' negligence case where the Claimant's original claim based on professional negligence against a doctor had been dismissed pursuant to a consent order agreed at court by the Defendant's solicitors without the Claimant's instructions. The Claimant was unaware of the consent order for some 11 months. In the County Court the Recorder found that the Defendant's employee had not deliberately concealed anything from the Claimant, since up to the time when he explained the situation to her he honestly believed that the situation created by the consent order could be cured; he had only omitted to mention the consent order to avoid embarrassment for himself. The Court of Appeal allowed the appeal on the basis that the employee knew that the making of

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[15] [1997] 1 WLR 131.
[16] *cf* Sir Terence Etherton's judgment in the Arcadia case as footnoted above.
[17] He also referred at page 138, to a previous Court of Appeal decision, namely Frisby v Theodore Goddard and Co, transcript 27 February 1984 where Sir John Donaldson MR stated that "A right of action arose out of a basic set of essential facts. That right could be concealed by the hiding of one or more of those facts, but concealment of evidence was wholly different and related to proving of the case rather than the existence of the right of action." The Master of the Rolls in Frisby also said: If the plaintiff's submissions are correct, there must be vast numbers of factory accident cases in which section 26 of the Limitation Act 1939 or section 32 of the 1980 Act would extend the limitation period indefinitely or until the employer disclosed his accident report book. This has only to be stated to make it obvious that the Plaintiff's submissions are fallacious."
[18] [2004] EWCA Civ 157; [2004] 1 WLR 3185.

the consent order had seriously prejudiced the Claimant's position, and he had deliberately concealed it from the Claimant though he was under a duty to tell her about it. The main judgment was given by Park J.

24. At paragraph 8 he set out the critical question, namely "Whether any fact relevant to Ms Williams's right of action against FP & H was deliberately concealed from her by FP & H." At paragraph 14 he continued:

> "There are four points on the wording of the paragraph which should be noted.
>
> (i) The paragraph does not say that the right of action must have been concealed from the Claimant: it says only that a fact relevant to the right of action should have been concealed from the Claimant.
>
> (ii) Although the concealed fact must have been relevant to the right of action, the paragraph does not say, and in my judgment does not require, that the Defendant must have known that the fact was relevant to the right of action…All that is essential is that the fact must actually have been relevant, whether the Defendant knew that or not. The paragraph does of course require that the fact was one which the Defendant knew, because otherwise he could not have concealed it. But it is not necessary in addition that the Defendant knew that the fact was relevant to the Claimant's right of action.
>
> (iii)The paragraph requires only that any fact relevant to the right of action is concealed. It does not require that all facts relevant to the right of action are concealed.
>
> (iv)The requirement is that the fact must be "deliberately concealed". It is, I think, plain that, for concealment to be deliberate, the Defendant must have considered whether to inform the Claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the Claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it."

At paragraph 15 Park J applied section 32(1)(b) to the case before him and continued:

> "I observe that two facts were the following: that Mr Brown agreed to the consent order, and that the consent order was made. Those two facts are indisputably relevant to Ms Williams's right of action against FP & H. They are the central elements of the negligent breach of duty which she alleges."

25. These passages from Park J therefore clarify:

i) That not all facts relevant to the right of action must have been concealed. Any fact so relevant is sufficient.

ii) The concealment must have been deliberate. This entails that the Defendant knew the facts and must have considered whether to inform the Claimant of the facts and decided not to.

iii) It is not required that the Defendant must have known that the fact was relevant to the right of action.

26. None of this in my judgment has any impact upon the construction of a "fact relevant to the Claimant's right of action" as previously determined in the Johnson case and the Mirror Group Newspapers case. I say this for the following reasons:

a) Those two cases were cited to the Court, but were not referred to in the judgment. This is because that issue was not for consideration: see paragraph 15 of Park J's judgment[19].

b) Nothing in any of the judgment on a proper reading could be said to detract from the authorities of the Johnson and Mirror Group Newspapers cases. There is no consideration of them, because they were not directly relevant to the matter upon which the Court of Appeal had to rule.

c) In any event, as a matter of fact:

(1) There were three judges in the Court of Appeal. Even if anything in Park J's judgment could be said to affect the law on what was meant by "any fact relevant to the Plaintiff's right of action", there is nothing in the judgment of Mance LJ or Brook LJ to support this.

(2) It is inconceivable that the Court of Appeal would have thought that they were changing the law in Johnson or Mirror Group Newspapers without any discussion of those cases.

27. Put simply, and adopting the "statement of claim test" i.e. knowledge of facts which has been pleaded in the statement of claim", Ms Williams could not have pleaded her case against FP & H prior to becoming aware of the 1994 consent order.

28. Cases subsequent to Williams, have reaffirmed the principles in Johnson and Mirror Group Newspapers. In AIC Limited v ITS Testing Services (UK) Limited ("The Kriti Palm")[20] Rix LJ said that it was clear from authority that the words "any fact relevant to a Plaintiff's right of action" are to be given a narrow rather than a wide

[19] See also Mance LJ's judgment at paragraph 28 where he said, "We have to consider what the words "deliberately concealed" require by way of (a) mental element and (b) conduct." Therefore, the issue was what deliberate concealment required. If there had been deliberate concealment then there was no issue that facts relevant to the Plaintiff's right of action had been concealed.

[20] [2006] EWCA Civ 1601.

interpretation and said that the relevant facts are those which the appellant had to prove to establish a prima facie case[21]. Buxton LJ said:

> "453. Second, as Rix LJ emphasises, Johnson stands as authority for the proposition that what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it. The court therefore has to look for the gist of the cause of action that is asserted, to see if that was available to the claimant without knowledge of the concealed material."

29. In Arcadia Group Brands and others v Visa Inc[22] retailers brought claims against credit/debit card scheme operators in relation to fees charged by those operators, allegedly in breach of domestic and EU competition law. They alleged that a number of details of the arrangement had been deliberately concealed by the Defendant. The details of the alleged facts and matters deliberately concealed are set out in paragraph 12 of the judgment of Sir Terence Etherton, Chancellor, (as he then was). At paragraph 17 it was noted that the first instance judge had addressed the proper interpretation of section 32(1) referring, among other cases, to Johnson, the Mirror Group Newspapers case and the "Kriti Palm". The Chancellor himself reviewed those cases in some detail[23] and continued:

> "49. Johnson, the Mirror Group Newspapers case and The Kriti Palm are clear authority, binding on this Court, for the following principles applicable to section 32(1)(b) of the 1980 Act: (1) a "fact relevant to the Plaintiff's right of action" within section 32(1)(b) is a fact without which the cause of action is incomplete; (2) facts which merely improve prospects of success are not facts relevant to the Claimant's right of action; (3) facts bearing on a matter which is not a necessary ingredient of the cause of action but which may provide a defence are not facts relevant to the Claimant's right of action.
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> 50. Mr Fergus Randolph QC…has submitted that those cases and principles do not apply, or in any event do not apply without important modification, to claims for breach of competition law…He submitted that competition claims are far more complex, in terms of what has to be alleged and pleaded, than other claims, such as the claim for damages for false imprisonment in Johnson or for defamation in the Mirror Group Newspapers case…So, Mr Randolph submits, in the

[21] See paragraph 323-325; this was immediately after Rix LJ's discussion of the Williams case at paragraphs 318-321; at paragraph 322 Rix LJ then moved to the question of the meaning of "any fact relevant to a Plaintiff's right of action." He did not suggest that the Williams case had in any way changed the law on that latter issue. Rix LJ was dissenting in the Kriti Palm case but the basis of the dissent is not relevant for the purposes of this part of the judgment. Finally, it should be noted, that doubt was cast by Buxton LJ on Park J's statement in paragraph 14 of Williams under principle (iv), namely from the words "or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the Claimant, but in the case of which he consciously decided to depart from what he would normally have done and keep quiet about it." See Buxton LJ at paragraph 426. As to the authority of the Johnson and Mirror Group Newspapers cases, Buxton LJ agreed with Rix LJ: see paragraphs 452 and 453.

[22] [2015] EWCA Civ 883.

[23] Paragraphs 30-48.

> case of the present proceedings the Claimant has to know and be able to plead the primary facts which inform the economic contentions and assessments which form the basis of the claims under Article 101 and the domestic legislation. Mr Randolph described this as a "multi-layered" position.
>
> 51. I do not agree that, so far as concerns the proper approach under section 32(1)(b), competition claims are to be treated in principle in any different way to other claims. There are many areas of the law where a cause of action is dependent not simply on the primary facts but rather on whether those primary facts give rise to a particular consequence or inference. Furthermore, the policy considerations of finality and certainty in the law of limitation, emphasised by Neill LJ in the Mirror Group Newspapers case, are as important to competition claims as to those under consideration in Johnson, the Mirror Group Newspapers case and The Kriti Palm…"

30. The appeal was therefore dismissed[24] on the basis that, applying the statement of claim test as formulated in Johnson and the Mirror Group Newspapers case and The Kriti Palm, claims in respect of any period prior to the limitation dates were statute barred[25]. Thus, there is clear and consistent Court of Appeal authority for the principles so summarised to apply across the board of potential claims in respect of the interpretation of section 32(1)(b).

31. The Claimants address these authorities on two bases:

> (1) That the authorities cited do not answer the particular issues that arise in this case and should be distinguished; alternatively, if not distinguishable, the Claimants reserve the right to argue in the Supreme Court that the authorities are wrong.
>
> (2) That even on the present narrow interpretation of the authorities the Defendant deliberately concealed facts relevant to the Claimants' right of action.

A Wider Interpretation?

32. Before embarking on the Claimants' legal submissions in this regard, I look first at the causes of action which they plead in tort and the elements of those torts. By Order dated 5 August 2016 para 22:

> "By 23 September 2016, the Claimants to provide a list of facts relevant to the Claimants' causes of action which are alleged to have been deliberately concealed from the Claimants by the Defendant by reference to all pleadings, including test case pleadings."[26]

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[24] Richards and Patten LJJ agreeing.
[25] Paragraph 53.
[26] Because the Claimants said that s32 was a generic issue they have not provided facts relevant to the test case pleadings.

33. A copy of the list served is attached as Appendix B to this judgment entitled "Section 32 Facts". The headings include Double Actionability and Limitation. These are not causes of action.

34. The causes of action in Appendix B are Assaults, False Imprisonment, and Negligence. There is also a heading "Taking of Property". That list has been substantially overtaken by events[27], but it is instructive briefly to set out the essential ingredients of these torts.

> (1) Assault: "An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person. The Defendant's act must be coupled with the capacity of carrying the intention to commit a battery into effect."[28]
>
> (2) Battery: "The least touching of another in anger is a battery. The direct imposition of any unwanted physical contact on another person may constitute the tort of battery."[29]
>
> (3) False Imprisonment[30]: "…the gist of the action false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious; he establishes a prima facie case if he proves he was imprisoned by the Defendant." Neill LJ in Johnson.

In all these causes of action, a prima facie case is made out by the Claimant, against the primary perpetrator, by the Claimant bringing evidence to prove an act which would, absent a Defendant pleading and proving a defence of justification/lawful excuse, be unlawful. In this regard, I make reference to my judgment in this case on 9 February 2017 where I found against the Defendant in relation to pleading and proving potential defences to assault and battery[31].

35. I turn now to the tort of Negligence and allegations of Joint/Vicarious Liability against the Defendant. The constitutional position of Kenya as a British Colony has been public knowledge throughout. Further, the alleged perpetrators of the torts were always considered by the Test Claimants as agents of the Defendant[32]. In paragraph 30(7) of Mr Myerson's skeleton argument he says:

> "Here, Cs almost unanimously believe the UK Government is responsible for the torts of which they were victims. But that could not be pleaded without knowledge of the system that the documents (in Cs' submission) prove."

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[27] Unfortunately, the list has never been pruned. This has made it difficult to discern what the Claimants precisely rely on. Many of the alleged facts are documents, evidence or relate to matters of potential defences.
[28] Clerk & Lindsell on Torts 22nd Edition para 15-12.
[29] Clerk & Lindsell op.cit. para 15-09.
[30] False imprisonment is no longer in issue as a cause of action but it is relevant to the discussion of the ambit of s32(1)(b).
[31] [2017] EWHC 203 (QB) at paras 21-30; 35(i).
[32] The Defendant refers, by way of example, to references in TC20's evidence; also to the Claimants' Supplemental Opening "Destruction of Documents" para 49: "The evidence demonstrates that by and large [the Test Claimants] believed the British were in charge, and responsible for what happened to them.".

36. I do not accept that negligence/joint/vicarious liability could not have been pleaded against the Defendant without access to the allegedly deliberately concealed documents. There is an important distinction which, on all the authorities must be preserved, between "facts without which a cause of action is incomplete" and "facts which merely improve prospects of success." The former are within s32(1)(b); the latter are not[33]. Before I was ever referred to the details of the law on s32, and in a different context, I drew this distinction in the 9 February 2017 judgment[34]. I there set out the pleadings in outline on negligence/joint/vicarious liability[35]; in relation to the Defendant's knowledge, conduct and system relied upon by the Claimants in support of these matters. I said at para 31:

> "… the Claimants must plead and prove such knowledge/ conduct… Whether the Claimants have, as a matter of law, to prove what is alleged in those paragraphs in order to fix joint or vicarious liability on the Defendant is, of course, another matter."[36]

37. The Claimants do not deny that they had the requisite knowledge for the purposes of sections 11 and 14 of the 1980 Act at the time the alleged torts occurred. Therefore, time began to run at that point in respect of all alleged torts involving personal injury. I shall develop this point later in the judgment.

38. As far as "Taking of Property" is a heading on the Appendix B document, this is not a tort. Trespass to goods and conversion are. Trespass requires "the direct, immediate interference with the Claimant's possession of a chattel[37]. Conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it[38]. There may be separate issues as to whether the Claimants have pleaded those torts, but the Claimants have known since the 1950s the relevant facts upon which to found such a cause of action against the primary perpetrator. As regards the Defendant's potential liability, the Claimants have, for the reasons I have just set out, also not had concealed from them any fact relevant to their cause of action.

39. The Claimants' argument in respect of the present authorities rests on a number of interconnected points. In broad terms these are as follows:

- The statement of claim test starts from the assumption that mere assertion by a Claimant is sufficient. That is not a fully considered view and in the present case mere assertion was never enough. Further, the present case has the added complication that the Claimants could only bring this action as a matter of practicality if lawyers felt it had a reasonable chance of success, via a CFA.

- In fact the principle underlying the statement of claim test is to reflect reality. The test is not whether or not a mere assertion could be made. There has to be consideration of the prospects of success. The statement of claim test is a

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[33] Arcadia para 49.
[34] [2017] EWHC 203 (QB).
[35] Paras 11-12.
[36] See also para 35(ii); similarly, in respect of negligence, para 32. I shall deal with this point in some more detail later and also when I consider the Hanslope documents.
[37] Clerk & Lindsell op. cit. para 17-130.
[38] Clerk & Lindsell op. cit para 17-07.

means of describing that rationale and should not be applied mechanistically, as it would produce an absurd result because the concealment was successful in preventing the Claimants from taking action. Properly viewed, the statement of claim test is merely shorthand for the rationale behind section 32, rather than its straightjacket.

- This rationale can be demonstrated by considering the relationship between section 14 and section 32 of the Limitation Act. Facts not relevant for the purposes of section 14 are relevant to the test under section 32 which is deliberately drafted more widely. Support for this position, it is said, is to be found in the extract from Park J's judgment in Williams v Fanshaw, Porter and Hazelhurst (A Firm) (paragraph 14) which I have already quoted.

40. In developing the argument that the authorities start from the assumption that for a Claimant mere assertion is sufficient and that is not a fully considered view, the Claimants say that, in all the authorities cited, there was plentiful documentation which permitted causes of action to be pleaded (the Kriti Palm) and did not touch on the legal basis of liability (Arcadia). The Claimants submit that in the present case mere assertion was never enough because the assertions were not admitted, and the basis for the non-admission is the averment that the documentary record is not admitted to be complete and/or can be interpreted other than as supporting the Claimants' accounts. The response to this is that (as set out above) the Claimants knew from the outset what had happened to them in terms of alleged assault, battery, negligence and destruction of their chattels. That was sufficient as a basis to plead the causes of action. The Claimants also had sufficient to plead a case against the Defendant from the time when the alleged torts occurred.

41. It is in this context instructive to consider in some more detail the Johnson case. It arose out of the Guildford Bombing. The Claimant had given evidence purporting to substantiate the alibi of Carole Richardson, one of the alleged bombers. Despite his evidence she was convicted after a trial in 1985. She had, in 1974, made a number of statements to the police which at face value amounted to confessions of complicity in the bombing. In her trial she told the jury in a statement from the dock that this was because of police brutality and that the police had dictated the statement to her. At the time of the Johnson appeal the Guildford 4 Defendants' convictions had been quashed by the Court of Appeal. Mr Johnson's claim asserted that in December 74/January 75 he was arrested and placed in police cells overnight on two occasions. His claim alleged that the conduct by the officers was to induce him to resile from his statement that he had been with Carole Richardson on the night of the bombing and to encourage him not to give alibi evidence on her behalf. The allegation of deliberate concealment was that Carole Richardson's confession was unreliable. The state of mind of the officers interviewing her and the Claimant was said to be a crucial element in the cause of action, and until 1989 the police allegedly concealed from the Claimant the unreliability of the confession and therefore their lack of reasonable cause to suspect her. That was the context of the quotations from the judgment which I have previously set out.

42. In the Mirror Group Newspapers case the Claimant knew that the Defendants had made a defamatory statement in 1988, but was misled by the Daily Mirror into believing that a claim in defamation would not succeed because the reporter's words had been said in court, when in fact they had been said out of court.

43. Based on the above, I see no reason for distinguishing the Court of Appeal authorities on the ground that in the present case mere assertion was never enough because the assertions were not admitted as the documentary record is not admitted to be complete. There was nothing which prevented the Claimants from pleading their causes of action based on the alleged torts from the time the causes of action accrued in the 1950s.

44. Further, for the purposes of deciding whether "any fact relevant to the plaintiff's right of action" has been deliberately concealed, the stated inability to sue without a CFA cannot in my judgment be a basis of distinction. It was not considered in the authorities. However, nothing in the statutory words permit this point to be a relevant factor. Furthermore, I doubt that for example in Johnson there would have been legal aid funding (which subsequently became available) prior to the quashing of the convictions by the Court of Appeal in 1989 when the Court of Appeal were "uneasy about the confessions of all 4 Appellants".

45. I turn now to the suggestion that the principle underpinning the test is to "reflect reality". Reliance is placed on what Neill LJ said in Mirror Group Newspapers[39] in relation to the Johnson case, namely "It is clear that Rose L.J. accepted what in this court has been described as the statement of claim test, that is knowledge of the facts which should be pleaded in the statement of claim." (The Claimants' emphasis). From this they submit that the test is not one of mere assertion but some consideration of the prospect of success. Neill LJ gave a judgment entirely agreeing with Rose and Russell LJJ in Johnson. There is nothing in this extract to support the Claimants' submission. Indeed, everything is directly to the contrary. It is noteworthy that these words of Neill LJ in Mirror Group Newspapers were immediately followed by his reciting the extract from Russell LJ in Johnson which I have set out above.

46. The Claimants submit further that "The concealment was successful in preventing Cs from taking action." As to this:

(1) This is an assertion not based on any evidence whatsoever[40]. No TC gave any evidence, direct or indirect, to support it.

(2) The alleged deliberate concealment of destroyed documents did not take place on any view until at the earliest May 1961. By that stage any cause of action for personal injury which arose up to and including a date in May 1958 and any other cause of action up to and including a date in May 1955 was already barred by the primary limitation period[41].

(3) As to the Hanslope documents, it is said that they were deliberately concealed until a reasonable time after they were placed in The National Archive (TNA), before which the Claimants could not have access to them. The alleged concealment was from a date in 1962-1963. Therefore, personal injury claims

[39] At page 137B-C.

[40] There is no reference to anything on the (Appendix B) list /in any of the TCs' evidence or individual pleadings, save, on the list, the statement "The issues below apply to each Test Claimant insofar as the particular case pleads events giving rise to the issues.".

[41] Subject to the argument that subsequent concealment would re-start the limitation clock – see below; also subject, in personal injury cases, to s33 discretion. Also, one TC was a minor at the time of the Emergency so that time would not begin to run against him until he reached majority.

before 1959-1960 and non-personal injury claims before 1956-1957 were similarly already barred.

(4) The Claimants say that it is entirely contrary to public policy if a Defendant should be entitled to invoke limitation notwithstanding their concealment of documents that would have changed the position. Assuming that the Defendant did deliberately conceal documents and that the concealment would have changed the position, nevertheless that was essentially the position in Johnson and Mirror Group Newspapers in that the police/Daily Mirror misled the Claimant in each case.

47. Section 14 Limitation Act 1980 must be considered. I now turn to these provisions:-

(i) In respect of personal injury claims sections 11 and 14 of the Limitation Act 1980[42];

(ii) For non-personal injury cases based on negligence section 14A Limitation Act 1980.

48. The Claimants contend that because section 14 (in subsections (1)(a)-(d)) refers to four subsections of specific facts, these must be included in section 32's "any fact relevant to the plaintiff's cause of action."

49. Therefore, say the Claimants, facts which are not relevant for the purposes of section 14, and thus not mentioned by the draftsman, are relevant to the test under section 32, which is deliberately drafted more widely.

50. I do not accept these submissions as correct for the following reasons:

(1) Without detailed, case-specific argument the court has to be cautious about drawing inferences across the various sections of the 1980 Act[43]. There is

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[42] Section 11 applies the 3-year limitation period in personal injury cases from "(a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured."
Date of knowledge is defined by section 14 as:
"(1) …the date on which he first had knowledge of the following facts—
(a) that the injury in question was significant; and
(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
(c) the identity of the defendant; and
(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant….
(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;
but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

undoubtedly substantial overlap between the two sections, but it is possible that there might be factual circumstances where one operates more widely than the other. I will deal with the two provisions on the facts of this case.

(2) There are different provisions for personal injury and non-personal injury negligence cases. The equivalent subsections to section 14(1)-(3) for non-personal injury cases are s14A (5)-(10).

(3) In respect of non-personal injury negligence claims section 14A is subject to (a) a 15 year longstop under section 14B which does not apply to personal injury claims and (b) imposes a 3 year limitation period from the "starting date" if that produces a longer limitation period than the 6 year period under section 2 (s14A(4)).

(4) By section 32(5), section 14A and 14B do not apply to a s32(1)(b) case and so the limitation period is that under s2 i.e. 6 years from accrual of cause of action. Therefore, neither the (lesser) 3-year period from the starting date, nor the 15-year period, apply in a s32(1)(b) non-personal injury case.

This is logical since in s32 the wrongdoer has in addition been guilty of deliberate concealment.

Thus, in the case of a negligent builder who, not guilty of deliberate concealment, covers a defect, sections 14A and 14B apply so as to impose (if longer than 6 years from accrual of the cause of action) a period of only 3 years from the starting date and a long-stop of 15 years. If the builder is guilty of deliberate concealment, then these restrictions do not apply, and the 6-year (section 2) limitation period runs from date of discovery of the concealment of "any fact relevant to the plaintiff's cause of action".

(5) Turning to personal injury cases, there is no need to disapply anything in sections 11/14 since (a) there is no difference in the period from date of knowledge or the underlying period from accrual of cause of action. Both are 3 years (s11(4)); (b) there is no long-stop equivalent to s14B. Hence there is no equivalent to s32(5).

(6) It does not, therefore, necessarily follow, certainly on the facts of the present case, that there is any difference between the s14 facts (or s14A facts) and the facts relevant to the cause of action under s32.

(7) This is entirely consistent with the previously cited Court of Appeal authority cited on s32(1)(b) on this point.

(8) It may also explain why, so far as counsel are aware, there is no reported personal injury case under s32(1)(b)[44]. It is difficult, on the authorised interpretation of "any fact relevant to the plaintiff's cause of action" to conceive of circumstances where any advantage which s32(1)(b) might give to a personal injury claimant is not already provided by s11/s14, and where what

[43] Section 14 in particular, as well as section 32, has been subject to extensive authority.

[44] Apart from Skerratt v Linfax [2003] EWCA Civ 195 where the averment was essentially hopeless as a matter of law.

the claimant has to prove under s32 is more onerous, i.e. not only did they not have the requisite knowledge, but also that a fact relevant to the right of action was deliberately concealed. One possibility, which I cover later, is the constructive knowledge provisions in section 14 and section 32.

(9) This interrelationship of sections 11, 14, 14A, 14B and 32 gains some support from the heading of s14A which reads "Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual."[45] (My underlining).

51. It seems to me that the present authorities on the definition of 'any fact relevant to the [Claimant's] right of action' must be followed. This is not only because they are binding upon this court and cannot be properly distinguished, or explained away so as to give a broader construction, but also for the following reasons:

(a) The Limitation Act 1980 provides a bar whereby stale claims should not be litigated after a fixed period of time. The consequences of harsh results arising from the application for such fixed periods are alleviated by "knowledge" provisions in sections 11-14 for personal injury Claimants and section 14A for Claimants with other rights of action[46].

(b) Section 32 deals with a specific situation, namely postponing the limitation period in cases of fraud, deliberate concealment or an action for relief from the consequences of mistakes.

(c) Personal injury Claimants also have the (albeit discretionary) provision in section 33.

(d) For the purposes of section 32(1)(b), if a Claimant has the knowledge to plead his or her cause of action, then that is sufficient to obviate any adverse consequences of deliberate concealment by the Defendant.

(e) To suggest that there has to be "some consideration of the prospect of success" is not only contrary to authority, it is also something which wholly lacks clarity and would lead to a substantial increase in litigation. Any attempted widening of the appropriate test was expressly outlawed by the Court of Appeal in the Arcadia case in paragraphs 49-51 cited above.

Application of the narrow interpretation of Section 32(1)(b) established by Court of Appeal authority

52. The Claimants' alternative submission is that, even applying the narrow construction in Arcadia and the other authorities, the Defendant concealed facts relevant to the Claimants' right of action in this way:

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[45] Bennion: Statutory Interpretation 7th Edition (2017) para 16.7 "A heading is part of an Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief guide to the material it governs and that it may not be entirely accurate."

[46] There are also other provisions which mitigate the rigour of fixed periods e.g. section 28 for persons under a disability.

(a) The Hanslope documents demonstrate joint liability by common design and vicarious liability for personal injuries committed[47]. In the Re-Re-Re-Amended Generic Particulars of Claim under the heading "D. Responsibility of the United Kingdom Government", paragraph 35 alleges a system of maltreatment perpetrated by the Emergency security forces under the control of the Colonial Administration. Paragraph 36 alleges that the Defendant is directly liable as joint tortfeasor with the Colonial Administration and/or vicariously liable. Paragraph 37 gives particulars of joint liability and paragraph 38 particulars of vicarious liability.

(b) Therefore, the Claimants submit, the Defendant concealed facts that established that it owed a duty of care which is an essential ingredient of the cause of action. On this submission, there was no evidence that the Defendant was the tortfeasor liable for the Kenyan Administration's behaviour until Hanslope was discovered and the scale of the destruction of documents could be then tested.

(c) Further, it is said that the Hanslope documents and the destruction of documents not only established a duty of care, but also that the Defendant did not act in right of Kenya, and was jointly/vicariously liable with the primary tortfeasor.

(d) Therefore, in this regard the Claimants say that they are within the reasoning in Johnson, Mirror Group Newspapers and Arcadia.

53. I reject this for the reasons given earlier in this judgment when I dealt with negligence/joint/vicarious liability. I deal with it again when I later consider the Hanslope documents.

54. Nevertheless, it is right that I mention some important points at this stage:-

(1) Personal Injury Actions: The statutory provision, now in s14(1)(c) and (d) Limitation Act 1980 that the Claimant must know, actually or constructively, the identity of the Defendant before time begins to run has retrospective effect to any cause of action accruing after 4 June 1954[48]. The Claimants say that, by abandoning the argument under s14, they do not abandon the argument under s32. The first reason they give is that the tests are different. Yet, in my judgment, for the purposes of the present case, [and for the purposes of s14(1)(d) "the additional facts supporting the bringing of an action against the Defendant"[49]] if the Claimants are taken to have known the identity of the Defendant in the 1950s, as they must, for the purposes of section 14(1)(c) and (d), then that is effectively an end to the s32 point. If they did not know the identity of the correct Defendant (and "the additional facts") under s14(1)(c) or (d), they had no need to prove, in personal injury claims, any deliberate concealment. They cannot now try to prove that they did not know those facts for any s32 argument. In any event, as a matter of fact, the Claimants have not

[47] See Mutua v FCO [2012] EWHC 2678 paragraphs 21-22.
[48] Arnold v CEGB [1988] AC 228.
[49] It is perhaps noteworthy that s14(1)(d) was never pleaded, only s14(c) [presumably 14(1)(c)]: see the deleted paragraph 46 of the RRRA GPC.

proven that any of the facts relevant to s14 knowledge were unknown to them at the time the causes of action accrued, or became revealed only when the Hanslope documents came to light. This matter was not put in issue by reference to section 11/14, and there was no evidence from any Claimant directed to lack of knowledge, nor, (consequentially), any cross-examination on it. The Claimants say that no inference can be drawn from the Claimants not relying on and proving s14. However, for the reasons given, what can be inferred is that the Claimants' lack of knowledge of the identity of the Defendant was not in issue.

The Claimants submit that, for s14 purposes, the TCs did not have actual, but only constructive, knowledge and that the Defendant deliberately concealed facts relevant to its negligence/joint/liability/vicarious liability. There is no evidence to support this submission. Also, I reject it because:-

(a) In the Claimants' Opening submissions on destruction of documents they said:

"49. The Claimants have taken a pragmatic decision not to advance any argument under s14, based on the proportionality of continuing with that argument in the light of the Test Claimants' answers in evidence. The evidence demonstrates that by and large they believed the British were in charge, and responsible for what happened to them. The Claimants will rely on their answers in cross examination as reflecting the true position – regardless of technical constitutional arguments – likely to be known by both alleged victims and protagonists"

(b) The Defendant points to the Part 18 Responses of, by way of example, TC20, in which on many occasions she says she believes the perpetrators of the alleged torts were employees of the British Government. Also, in the response to paragraph 18 she says: "We were beaten by the police and Home Guards who were given orders by the British. Yes, they were employees of the UK Government as I had stated earlier".

(c) The Claimants say that belief is not knowledge. It is correct that for s14 purposes they are not co-terminous. I was not taken to the authorities for this proposition, but Clerk and Lindsell on Torts (22nd edition) says that there comes a point at which a claimant's belief will turn into knowledge[50] and that a firmly-held belief can constitute knowledge.

(d) The case has at no stage proceeded on the basis that any relevant knowledge for s14 purposes was constructive knowledge only. It has not been explored. No evidence was given by any Claimant to this effect. Nowhere in the pleadings on s32 do the Claimants aver that the alleged deliberate concealment was a concealment of the identity of the Defendant, or additional facts under s14(1)(d), which the Claimants did not know until the Hanslope files were disclosed in 2011[51]. In the s32 list

[50] Paragraph 32-50.
[51] GPOC para 46C(a); AGD para 96(a) (iii) and (iv);

at Appendix B, among all the irrelevant material, there is one mention of joint/vicarious liability. It is this:

> "Particular bases of Liability
>
> The concealment prevented and/or continues to prevent the Claimants knowing who precisely originated each particular policy leading to the unlawful acts committed against them, and who precisely determined that each such policy would be applied. Consequently, facts relevant to the case based on joint and vicarious liability have been concealed."

This is an inadequate basis for the argument which was presented orally on this point.

(e) In the Claimants' Opening[52], the following appears:

> "59. S32(1)(b) refers to facts being deliberately concealed from the claimant. The Claimants' case is that whilst, for example, trespass to the person was plainly not concealed, its unlawfulness was concealed, as was the fact that the defendant was a party to it/responsible for it. It is not necessary for the Claimants to ask for those facts (if it were then the concealment would last up to service of the Defence) but merely for facts to be concealed by not being disclosed.
>
> 60. Nor is it correct that if they (sic) Claimants knew the identity of the Defendant for the purposes of s14, they knew the facts relevant to their cause of action. As s14(1)(d) makes clear… The identity of someone other than the primary tortfeasor needs "additional facts", and the issue of the tort itself is irrelevant".[53]

Nowhere in these somewhat cryptic paragraphs is it said that the Claimants had belief and only constructive knowledge for s14 purposes. The first part of paragraph 60 seems to presuppose that the Claimants had actual knowledge of the identity of the Defendant but not the 'additional facts'. Yet the details of the "additional facts" which were unknown are not here set out. In addition, the picture is further confused because s14(1)(d) requires knowledge of 'the identity of that person and the additional facts supporting the bringing of an action against the defendant'. It is not said that the Claimants had only constructive, rather than actual, knowledge of these additional facts for s14 purposes and that that is the crucial distinction being made so as to rely on s32.

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[52] It must be recalled that, for practical purposes the TCs gave their evidence before the Opening.

[53] There is also, at para 75 of the Opening, the statement: "…without such documents, the Claimants could not establish (my underlining) the Defendant's liability, even though the liability of the individual perpetrators might have been established". The word 'establish' is ambiguous and, in the context of the way the Claimants put their case in writing, suggests lack of evidence rather than lack of material facts or of actual knowledge by the Claimants of the Defendant.

(f) In order to prove deliberate concealment, the Claimants must prove that some fact 'relevant to (their) right of action' was concealed from them i.e. something they did not otherwise know. No TC gave any evidence of this. Everything that was said (e.g. by TC20) suggests precisely the opposite. The distinction between knowledge and belief or constructive and actual knowledge was not previously raised.

(g) It is, in any event, not easy to see how the claimants might have sufficient constructive knowledge for s14 purposes and yet not come within the constructive knowledge provisions of s32[54]. The wording of s32 is different ("…until the plaintiff has discovered the… concealment… or could with reasonable diligence have discovered it") but (i) it is not explained how that difference is significant in this case (ii) the wording in s14/s14A is intended to be, if anything, more beneficial to the Claimant than the more general provision in s32[55].

(1) Non-personal injury actions:-

(a) s14A of the 1980 Act was introduced by the Latent Damage Act 1986. Section 14A applies only to negligence actions. The transitional provisions of the 1986 Act are in section 4. These provide:

> "4. (1) Nothing in section 1 or 2 of this Act shall-
> (a) enable any action to be brought which was barred by the 1980 Act or (as the case may be) by the Limitation Act 1939 before this Act comes into force; or…
> (2) Subject to subsection (1) above, sections 1 and 2 of this Act shall have effect in relation to causes of action accruing before, as well as in relation to causes of action accruing after, this Act comes into force."

(b) The question, therefore, is whether the non-personal injury claims based on negligence were already barred under the 1939 or 1980 Limitation Acts before the 1986 Act came into force on 18 September 1986. In so deciding, no account can be taken of any lack of knowledge of the identity of the Defendant by the Claimants. Therefore, even if factually such lack of knowledge had been pleaded and proven by the Claimants, the non-personal injury claims based on negligence would have been barred before the coming into force of the 1986 Act, subject to s32.

In Arcadia[56] the (then) Chancellor equated the facts "relevant to the plaintiff's right of action" with "a fact without which the cause of action is incomplete". A cause of action may be complete and the claimant may know that and the identity of a primary tortfeasor.

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[54] See below.
[55] See paras 4.5-4.8 of the 24th Report (Latent Damage) November 1984 (Cmnd 9390).
[56] Para 49.

However, the Claimant may not know (actually or constructively) the identity of a vicariously or jointly liable additional tortfeasor, and the essential facts required to plead a claim against that additional tortfeasor. In those circumstances in personal injury claims and (now) latent damage non-personal injury claims in negligence, time does not run until discovery by the claimant of those material facts (s14, s14A). In other claims, if there has been deliberate concealment of the identity etc of the additional defendant by that person, then it may be that the Claimant needs to have actual or constructive knowledge of the material facts enabling him to plead a prima facie claim and those would include knowledge of the identity/responsibility of the additional defendant. This is consistent with the provision in s38(9) that "right of action shall include references to… the cause of action"[57].

However, given that the claimants had sufficient knowledge to plead a claim against the Defendant, such that they cannot rely on s14 for their personal injury claims, it follows on the facts of this case that they had sufficient knowledge also to plead their non-personal injury claims.

(c) My analysis of the interaction between s14, s14A and s32 in general, and the transitional provisions, is supported by reference to the Law Reform Committee's Report which gave rise to the Latent Damage Act 1986[58].

- The report considered latent damage in non-personal injury negligence cases where there had been no fraud/deliberate concealment. It pointed out (para 2.12) that Claimants in such cases "are now in a position in which they may well become barred from action before they know, or would even be in a position to know, that they have suffered damage."

- Various proposals and options were considered. The recommendations, summarised in paragraph 4.1, were adopted in the 1986 Act and, by amendment, into ss14A and 14B of the Limitation Act 1980.

- In considering date of knowledge, essentially two possibilities were considered. First, a fairly general definition (as adapted in s32 of the 1980 Act) or "the very much more precise formulation that is used in the 1980 Act in cases of latent personal injury…" The latter approach was recommended primarily because it was considered to ensure that Claimants were more protected. It avoided the risks that (i) the constructive knowledge provisions in the Scottish latent damage limitation provision[59] did not cover lack of knowledge of causation of

[57] It also seems to accord with the analysis in Sheldon v Outhwaite where the House of Lords considered concealment of material facts subsequent to a cause of action accruing. The allegedly concealed facts in Sheldon are not spelt out, as the matter was dealt with as a preliminary issue. In this regard it may be that the High Court decision in RB Policies at Lloyd's v Butler [1950] I KB 76 is no longer good law, either because it was wrong at the time it was decided, or possibly because of the change in wording in the 1980 Act. I do not need to go into this further.

[58] 24th Report (Latent Damage) November 1984 Cmnd 9390.

[59] S11(3) Prescription and Limitation (Scotland) Act 1973.

damage or the identity of those liable; (ii) the general approach gave "no indication of the severity of the damage required to be within the plaintiff's knowledge before time will run out against him."[60]

- The report dealt with the proposed transitional provisions[61]. It noted the personal injury exception to the general approach "where it has in recent years been accepted that a change in the law of limitation that is beneficial to plaintiffs should apply, notwithstanding both that the relevant cause of action arose before the change of the law and that by then the plaintiff's claim was, under the old law, already statute barred." However, the conclusion was "In the present context of cases of latent damage not involving personal injury, we are of the opinion that the general approach is to be preferred."

    (d) Therefore, non-personal injury claims were barred for the reasons previously given. In fact, if the identity of the Defendant was known for the purposes of personal injury claims, it was also known for the purposes of the non-personal injury claims. The factors allegedly giving rise to the duty of care/joint liability/vicarious liability are the same.

55. Mr Myerson submitted that the above was a wholly erroneous way of looking at section 32. He said that sections 11/14/14A are in Part I of the Act, s32 is in Part II of the Act. By section 1(1), Part I gives the statutory time limits and it is "subject to extension or exclusion in accordance with the Provisions of Part II." The layout of the Act is correct, but there is nothing inconsistent with this in my reasoning.

56. In my judgment the Claimants could have pleaded prima facie cases on all the torts relied on against the Defendant at the time when these torts (allegedly) occurred, or shortly after. Therefore, no fact relevant to the Claimants' causes of action was concealed. Nevertheless, I go on to deal with the other requirements of s32(1)(b).

57. The effect of s32(1)(b) is that, if "any fact relevant to the (claimants') right of action has been concealed from him by the Defendant", time "shall not begin to run until the (claimant) has discovered the… concealment… or could with reasonable diligence have discovered it"[62].

58. Therefore, Mr. Myerson says, it does not matter if a claimant had s14 constructive knowledge. Let me take the hypothetical example of a claimant's cause of action for battery which occurred in 1955. In addition, in 1955, the Claimant had s14 constructive, but not actual, knowledge that the Defendant was responsible. If a claim had been brought in 1959, before the section 33 discretion was available[63] and before any alleged deliberate concealment, then if the Defendant had pleaded limitation and the 3-year period under s11 (4) (a) and (b) had expired, the court would have held the claim to be barred. On Mr Myerson's submission, any subsequent concealment of documents in support of the Defendant's negligence/joint/vicarious liability would, subject to a possible estoppel/res judicata argument, operate so as to enable that

[60] Paragraphs 4.5-4.8.
[61] Paragraphs 4.25-4.26.
[62] See below and the case of Sheldon v Outhwaite [1996] AC 102.
[63] In fact the predecessor of s14 was not enacted at that time, but the principle in the example is still valid.

claimant to be part of the present cohort of claimants and for the claim to be held not to be time barred by reason of s32. If any estoppel/res judicata argument succeeded, such a claimant would, by virtue of bringing the claim in 1959, be worse off for s32 purposes than the rest of the cohort, with exactly the same knowledge but who did not issue till 2013.

59. I reject this outcome because of the facts of the case and also (see later) because of the operation of the constructive knowledge provisions of s32. In addition:-

(i) In argument Mr. Myerson conceded it might be different where a Test Claimant has said that a soldier assaulted him/her [because they may have had actual knowledge of the identity of the Defendant at the time of the assault].

(ii) It might also be different for a Test Claimant who had suffered an assault such as rape or being mercilessly beaten, because that could not possibly be lawful [That confuses what a Claimant must plead and prove, and what a Defendant must plead and prove if an assault is said to be lawful – cf Johnson].

(iii) Yet:

(a) neither of those exceptions had featured before in the lengthy submissions/skeleton argument

(b) the s32 issue has not been prepared by anyone on the basis that some of the claims of some Claimants may not be barred by reason of s32 and others not. They have been presented as a whole.

(c) This sort of exercise demonstrates the confusion which arises if one tries to decide why a Claimant had sufficient knowledge of s14 (or s14A) if that has never been an issue; also in trying to distinguish between constructive knowledge provisions in s14 and s32 in a way which suggests the latter can be more favourable, on the facts of this case, to the Claimants.

60. In short, the Claimants could have pleaded prima facie cases against the Defendant on all the torts relied on at the time when these torts (allegedly) occurred as shortly after. Therefore, no fact relevant to the Claimants' causes of action was concealed. All the evidence in the case is to this effect; the Claimants have not proved their case on s26/s32. Nevertheless, I go on to deal with the other requirements of s32(1)(b).

"Deliberately Concealed"

Legal Framework

61. In the passage I have already cited from Cave v Robinson, Jarvis & Rolf[64] it is clear that the Claimant must prove on the balance of probabilities that some fact relevant to his right of action was concealed from him, either by a positive act of concealment or

[64] [2002] UKHL 18, [2003] 1 AC 384, paragraph 60.

by a withholding of relevant information; in either case with the intention of concealing the fact or facts in question. Proof of intention, particularly where an omission rather than a positive act is relied on, was said to be "often very difficult"[65]. Thus there is a clear mental element in deliberate concealment. This does not, however, extend to a requirement that the Defendant knew that the concealed act was relevant to the right of action[66]. It is also subject to the alternative route provided in section 32(2), if applicable. That sub-section is dealt with below. I now focus on deliberate concealment and the duty to disclose. In The Kriti Palm, Rix LJ reviewed the authorities[67] and concluded:

> "321. It appears therefore that there must be either active and intentional concealment of a fact relevant to a cause of action, or at least the intentional concealment by omission to speak of a fact relevant to a cause of action which the Defendant knew himself to be under a duty to disclose. There is no decision that anything less than a duty to disclose will suffice in the absence of active concealment."[68]

Two first instance decisions refer to the test. The first is the Chagos Islanders case[69] where Ouseley J said that it was clear from Cave's case:

> "That section 32 requires more than a conscious or deliberate decision to withhold information, and more than mere non-disclosure. It requires active concealment, or withholding information which is actively sought, or withholding it when there is some other circumstance which imposes a duty to disclose it. It is possible only to conceal deliberately that which a person knows, not that which he ought to have known. It requires a deliberate breach of duty which is unlikely to be discovered for some time and which is then actively concealed or not disclosed when there was an obligation to disclose."
>
> The second decision endorses the wider formulation. In Parkin v Alba[70] Holroyde J (as he then was) accepted, based on Cave's case,

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[65] See also paragraph 25 (Lord Millett) where he said that to be deprived of a limitation defence a defendant has either to take active steps to conceal his own breach of duty after he has become aware of it; or where he is guilty of deliberate wrongdoing and conceals/fails to disclose it in circumstances where it is unlikely to be discovered for some time. "But it does not deprive a defendant of a limitation defence where he is charged with negligence if, being unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose."

[66] See Williams v Fanshaw, Porter and Hazelhurst, paragraph 14.

[67] Cave v Robinson, Jarvis and Rolf, paragraphs 25 and 60, already cited above and Williams v Fanshaw, Porter and Hazelhurst, Park J, Mance LJ and Brook LJ.

[68] In Williams Mance LJ referred to the tension between the speeches of Lord Millett and Scott in Cave's case where Lord Millett required active concealment in relation to a recognised breach of duty as indispensable (the narrow formulation) whereas Lord Scott regarded a mere omission to be within the sub-section (a wider formulation). In Williams case it was unnecessary to determine which formulation prevailed since the solicitor deliberately concealed what he knew himself under an ongoing duty to disclose and so his concealment fell within either formulation. Rix LJ's statement in The Kriti Palm, paragraph 321 effectively says that at the very least nothing less than the wider formulation will suffice.

[69] [2003] EWHC 2222 (QB) at Paragraph 641.

[70] [2013] EWHC 2036 (QB).

> that "concealment may take the form of non-disclosure as well as active concealment."[71]

62. Finally, in Williams, Mance LJ said at paragraph 29:

> "But in many cases there may be no running relationship, and, even where there is, it may not involve any general legal duty to inform the other party of relevant facts. On the face of it, "concealment" in such a context might seem to require active conduct, rather than a mere decision to remain silent-even in circumstances where it would be normal or moral to speak."

"…Has been deliberately concealed from him (i.e. the Claimant) by the Defendant…"

63. It is clear from the statutory wording that the Defendant must conceal a relevant fact from the Claimant. See also for example Lord Scott in Cave's case (para 60) referring to the construction of section 32(1)(b) where he said that the Claimant can prove the facts necessary for that sub-section "if he can show that some fact relevant to his right of action has been concealed from him…". The statutory wording is fortified by the repeated reference of the Defendant's duty to the Claimant. See again for example Cave's case, Lord Millett at paragraph 25, Lord Scott at paragraph 60 and Park J in the Williams case at paragraph 14; also Mance LJ in Williams at paragraph 29 as cited above.

Section 32(2) "For the purposes of sub-section 1 above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

64. In Cave, the House of Lords clarified that in order for there to be a deliberate breach of duty, the Defendant needed to know not only that he was doing the act in question but that he knew the act was a breach. In paragraph 60 Lord Scott said:

> "Subsection (2), however, provides an alternative route. The Claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the Claimant can show that the Defendant knew he was committing a breach of duty, or intended to commit the breach of duty – I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach – then, if the circumstances are such that the Claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for sub-section (1)(b) purposes…It provides an alternative, and in some cases what may well be an easier, means of establishing the facts necessary to bring the case within section 32(1)(b)."[72]

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[71] Paragraphs 81, 85.

[72] Hence the comment by Warby J in Startwell Limited v Energie Global Brand Management Limited [2015] EWHC 421 (QB) that "the kind of case identified in section 32(2) is a subset of the class of case described in s32(1)(b)." (Paragraph 60).

65. "Breach of duty" in section 32(2) is not confined to tortious or contractual breach of duty or an equitable or fiduciary duty. It includes any legal wrong-doing of a kind which could possibly be raised in an action to which section 32 applied[73].

66. In Giles v Rhind Arden LJ, at paragraph 38, said:

> "I do not consider that the expression "breach of duty" includes any legal wrongdoing whatsoever. In my judgment there must be a legal wrongdoing of a kind that can properly be raised in action to which s32 applies. I will call this the "wider meaning" of "breach of duty". Thus, the expression "breach of duty" would not cover legal wrongs which are not justiciable, for example target duties.[74]"

67. Finally, on the construction of section 32(2) is the decision of the Deputy High Court Judge in Brown v Bird and Lovibond[75] where, in relation to the words "unlikely to be discovered for some time" it was said:

> "…I note that the question is posed by the statute in an objective form. The question is not whether Mr Jackson would think his actions might not be discovered for some time, but whether in fact that was unlikely."

Deliberate concealment – Analysis

68. Prior to the commencement of this action, the Defendant was not under any court obligation to disclose any of the documents said to be concealed (or destroyed). Nor is there any evidence that any claimant, or anybody acting on behalf of the claimants, considered, or would have considered had they known all that is now known, taking any proceedings before they in fact did so. There is no evidence that on examination of the content of the Hanslope documents, any fact was discovered that enabled the Claimants to plead causes of action that were not available to them to plead before.

69. The Claimants submit that this is irrelevant. They put the case in this way on concealment.

- It was apparent to the Defendant at the outset that there were potential victims of torts in Kenya and that the Defendant may be responsible for those torts.

- Although the reason for the concealment/destruction was not to hide the Defendant's potential responsibility, but for reason in the Defendant's letter of 3 May 1961[76], nevertheless the reason is irrelevant.

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[73] See Giles v Rhind [2008] EWCA Civ 118. The action concerned the date of a deed which was thought to be set aside under section 423 of the Insolvency Act 1968, the purpose being to avoid enforcement.

[74] Arden LJ kept open the precise point of breach of duty saying that it may not also cover a breach of duty owed by a public authority which could be the subject of judicial review proceedings at the instance of a person not directly affected thereby but who has sufficient interest for the purposes of standing in public law - Paragraph 38. See also Sedley and Buxton LJJ.

[75] [2002] EWHC 719 (QB).

[76] See later: essentially possible embarrassment to HMG/other Government or to police, military, public servants or others, e.g. informers: or potential comprising of sources of intelligent information; or unethical use by Ministers in the successor government; or documents potentially of no value to the successor government.

- There was a duty to disclose the existence of the documents to the Claimants since the Claimants were all British subjects who had been subject to assaults, detention and forced labour and the Defendant, during the 1950s, had considered whether those matters could be lawfully justified by detention orders and regulations.

- The very act of taking back to the UK documents relevant to negligence/joint liability/vicarious liability was deliberate concealment.

- Therefore, in respect of the cessation of any colonial government, if any such documents were taken back to the UK for any reasons, (e.g. because it was genuinely felt that they might be used unethically by Ministers in a successor government), then that would amount to deliberate concealment by the Defendant from claimants such as these.

- The claimants stated clearly that they rely on active deliberate concealment under s32(1)(b).

70. I asked what the Defendant might have done in such circumstances so as not to conceal the documents from the Claimants. Mr Myerson suggested that it may have been sufficient to advertise, in an organ such as the Kenyan Gazette, the fact that they had been taken back to the UK.

71. I reject the Claimants' submission that the Defendant deliberately concealed relevant facts from the Claimants.

(i) I do not accept there was any duty to disclose the existence of the documents to the Claimants.

(ii) There was no intentional concealment of documents from the Claimants[77].

(iii) There is no unconscionable behaviour towards the Claimants, or at all, proven in relation to Hanslope, or any alleged relevant destroyed, documents. Unconscionable behaviour is not a formal requirement of s32(1)(b) but "it is difficult to think of a case of deliberate concealment for s32(1)(b) purposes that would not involve unconscionable behaviour"[78]. The Claimants submitted that the Defendant privileged its concerns about the documents over the concerns of the Claimants. I do not agree. There is no evidence that shows that potential claimants were in any way in the Defendant's contemplation, or that it deliberately considered its own concerns against any potential claimant's. It brought the Hanslope documents back to the UK for reasons wholly unconnected with any contemplation of potential claimants, according to the facts.

[77] The Kriti Palm para 321.
[78] Lord Scott in Cave's case cited and commented on it in the Kriti Palm para 365.

(iv) Lord Scott said in Cave's case[79], "In many cases the requisite intention might be difficult to prove". In this case the Claimants fall well short of any such proof.

(v) One also may ask rhetorically, as the Defendant did: How could the Test Claimants described by their lawyers as largely illiterate, unsophisticated people, often living simple rural lives a long way from Nairobi, be the victims of a deliberate concealment from them by the Defendant?

(vi) Further, there is no evidence of any fact relevant to the right of action which is said by the Test Claimants (or any of them) which they subsequently discovered, and which enabled them to plead a prima facie case.

72. The Claimants sought to rely on s32(2). However, it has no possible relevance. The Claimants' case is fairly and squarely within s32(1)(b). Mr Myerson says that the Defendant actively and deliberately concealed facts relevant to the right of action. S32(2) is, as Lord Scott said in Cave "an alternative route"[80]. It does not deal with allegedly concealed torts but the commission of the breach of duty. As was said in Giles v Rhind[81], the claimant, to rely on s32(2), did not have to show concealment in the s32(1)(b) sense because, if s32(2) applies, the deliberate commission of the breach of duty is enough. Normally the breach of duty is the tort/breach of contract/equitable duty. In Giles it extended to a claim under s423 of the Insolvency Act 1986. It is not the breach of any duty by deliberately concealing/failing to disclose.

73. Therefore s32(2) has no possible applicability to present claims. The breaches of duty here were the alleged torts which were openly committed on the Claimants at the time and of which they were well aware. As the Judge in Giles said, and the Court of Appeal approved subject to one qualification, "the expression "breach of duty" in s32(2) was merely the "obverse" of the expression "right of action" in s32(1)(b), by which he meant legal wrongdoing of any kind, giving rise to a right of action.

"The period of limitation shall not begin to run until the Plaintiff has discovered the… concealment… or could with reasonable diligence have discovered it."

74. If there has been deliberate concealment by the Defendant from the Claimants of any fact relevant to the Claimant's right of action then the consequence is as set out in this sub heading.

75. In Sheldon v Outhwaite[82] the House of Lords held that these words were wide enough to apply both where the concealment of the relevant fact is contemporaneous with the accrual of the cause of action and when it occurs subsequently. There is no reason to restrict the generality of the words to a contemporaneous concealment. The Defendant in the present case accepted that: "Accordingly, regardless of any time which has begun to run since the cause of action accrued, the limitation clock is

[79] Para 60.
[80] Para 60.
[81] Paras 37-39.
[82] [1996] AC 102.

stopped at the point of concealment, and begins afresh from zero as if it had never run before when the concealment is discovered (actually or constructively)".

76. The Claimants submitted that if s32(1)(b) conditions are fulfilled then, even if the action has become time barred before any concealment, the consequences are that the "period of limitation shall not begin to run" until discovery (actual or constructive) of the concealment. Lord Browne-Wilkinson said in Sheldon[83] "time does not begin to run until the concealment is or should be discovered."

77. It is necessary, however, to examine the premise upon which the Claimants' submission is based. As was clear from Sheldon, on the facts in that case: "The accrual of the cause of action does not, of course, depend on knowledge on the part of the plaintiff. There are special provisions in sections 11 to 14 and 14A (inserted by section 1 of the Latent Damage Act 1986) of the Act under which the date of knowledge is relevant. But your Lordships are not concerned with those provisions in this case."[84]

78. As I have previously stated, the Claimants in the present case have not disputed that they had the requisite knowledge for the purposes of sections 11/14 Limitation Act, in relation to their personal injury claims, at the time when the injuries are said to have occurred i.e. at the time of the Defendant's alleged tortious conduct towards them[85]. Also, if the Claimants had such knowledge, then, on the facts of this case, even if any deliberate concealment by the Defendant had been proven, it was not deliberate concealment of "any fact relevant to the (Claimants') right of action" from the Claimant. Therefore, this further point does not arise. The situation is simply that expressly referred to in Sheldon:-

- (Lord Browne-Wilkinson) "I do not find it absurd that the effect of section 32(1) is to afford to the plaintiff a full six-year period of limitation from the date of the discovery of the concealment. In such a case, the plaintiff must have been ignorant of the relevant facts during the period preceding the concealment: if he knew of them, no subsequent act of the defendant can have concealed them from him"[86].

- (Lord Nicholls) "Of course, if a plaintiff is aware of all facts relevant to his right of action, there cannot be subsequent "concealment" of them from the plaintiff.

79. These considerations reinforce my conclusions that (a) the narrow construction of "any fact relevant to the (Claimant's) right of action" must be correct and (b) if the Claimants had the required s11/s14 knowledge at the time the alleged torts occurred, the Limitation clock could not be re-set by the type of concealment alleged by the

[83] The majority was Lord Keith, Lord Browne-Wilkinson and Lord Nicholls. Lords Mustill and Lloyd dissented.
[84] Lord Lloyd p146.
[85] I have added that, the relevant knowledge for duty of care/joint liability/vicarious liability of the Defendant being the same, then the Claimants also knew these facts in relation to the non-personal injury claims.
[86] See also Ezekiel v Lehrer [2002] EWCA Civ 16 paras 32-35; Bocardo SA v Star Energy [2008] EWHC 1756 (Ch) paras 120-123.

Claimants. If either of these propositions did not stand, the policy considerations referred to in Arcadia[87] would be seriously undermined[88].

80. As to constructive discovery i.e. "or could with reasonable diligence have discovered it", the first point to note is that consideration of constructive knowledge and this provision in section 32(1) does not arise if the Claimant has, or could without the alleged concealment have, pleaded a completed cause of action against the Defendant. This is emphasised by Sir Terence Etherton in the Arcadia case where he said at paragraph 62:

> "…what is sufficient knowledge to constitute discovery within section 32(1) depends on the particular facts. More importantly…the point has no relevance to proceedings such as the present ones where a complete cause of action has been pleaded…and it is accepted that no new facts necessary to complete the cause of action have been discovered during the previous six years. I agree with the Defendants' submission that it is logically inconsistent for the Claimants both to assert that the particulars of claim plead a complete cause of action and cannot be struck out for failing to disclose reasonable grounds for bringing the claim or for otherwise being an abuse of the court's process and yet also to contend that, for the purposes of the 'statement of claim' test, the limitation period has not begun to run because there are concealed relevant facts within section 32(1)(b)….the Claimants' approach makes the most improbable assumption that the intention of Parliament in enacting section 32(1)(b) was that, even though a victim knows sufficient facts to be able to issue proceedings and plead a complete cause of action, the limitation period will nevertheless not commence until the victim discovered or could with reasonable diligence discover further facts."

81. The burden of proof and interpretation of the constructive knowledge provision was dealt with by Millett LJ in Paragon Finance Plc v DB Thakerar and Co[89] where he said:

> "…The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ…suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

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[87] Para 51; see also the hypothetical example in paragraph 58 of this judgment.
[88] I have previously recorded that if the relevant facts were known for the personal injury claims it must follow that they were also known for the non-personal injury claims.
[89] [1999] 1 All ER 400 at page 418.

In Allison v Horner[90] the Court of Appeal repeated the Paragon Finance test and what Neuberger LJ had said in Law Society v Sephton and Co, namely, in the words of Aikens LJ in the Allison case[91] "…that it followed from Millett LJ's construction of section 32(1) that there must be an assumption that the Claimant desires to discover whether or not there had been a fraud committed on him. Not to make such an assumption would rob the word "could" in the section of much of its significance. Moreover, the concept of "reasonable diligence" carried with it the notion of a desire to know and, indeed, to investigate."

82. In the Chagos Islanders case, although Ouseley J comprehensively rejected, for other reasons, reliance upon section 32 by the Claimant islanders, he recited at paragraph 635 the argument in relation to reasonable diligence that the Chagossians were "uneducated, illiterate, poor, unsophisticated, struggling merely to survive" and said at paragraph 670:

> "The contentions in relation to access to legal advice for the ignorant, the struggling, poor, ill-educated and unsophisticated, are in principle relevant. The difficulty is the facts."

I shall return later in this judgment to constructive discovery. I now consider in some more detail the circumstances of the alleged destruction and concealment.

The Documents Allegedly Destroyed

83. Apart from the Hanslope documents, which fall to be considered separately, the Claimants' case is that documents in Appendix B were destroyed by the Defendant. This section deals only with these documents.

84. There are two separate questions to be addressed in relation to these documents:

(i) Have the Claimants proved they were destroyed?

(ii) If so, how does that fit into the scheme of section 32(1)(b)?

85. As to (i):

85.1 The documents in Appendix B are classes of documents, not specific documents.

85.2 It is necessary to determine which records should have been available in 1961. The Claimants give this example[92]:

> (i) Appendix IV of the Prison Standing Orders 1957 are the provisions regarding disposal of obsolete records.
>
> (ii) From that Appendix the following documents should have been available:
>
> - All prisoners' records (destroyed 10 years after discharge)

[90] [2014] EWCA Civ 117.
[91] Paragraph 16.
[92] Test Cases – General closing submissions paragraphs 81-84.

- Admissions registers (permanent)
- Discharge registers (5 years after discharge of last prisoner)
- Ration registers from 1958 (3 years)
- Visiting justices' books from 1956 (5 years after completion)
- Medical Officer's day books from 1958 (3 years)
- Prisoners' punishment book from 1958 (3 years)
- Prisoners' property cash book (permanent)
- Lock-up register from 1958 (3 years)
- Prisoners' death register (10 years)
- Inquests from 1956 (5 years)
- Superintendent's order book (permanent)

85.3 The Claimants say that almost none of the above information now exists.

86. There is no direct evidence of any particular documents having been destroyed; or of any particular classes of documents having been destroyed. The starting point for allegations of document destruction is the document entitled "THE DESIGNATION "WATCH"" dated 13 May 1961[93] which stated as follows:

> "BASIC PRINCIPLES
>
> 3. The aim, which should be clearly understood as fundamental to the whole exercise, is as follows:-
>
> > To ensure that, while leaving as much material as possible for the unimpaired functioning of the succeeding independent Government, and for the proper recording of the past, nothing is made available to individuals now or to that future Government, which may
> >
> > a. prejudice the security of the Commonwealth or any friendly state; or
> >
> > b. embarrass HMG, the present or any future Kenya Government, or any friendly Government; or
> >
> > c. give a political party in power an unfair or improper advantage over an opposition party, by the possession of delicate information liable to be exploited in a party interest; or

[93] Caselines reference 32-72741.

d. endanger a source of intelligence, or render any individual vulnerable to victimisation.

Papers which are inconsistent with this aim are "WATCH" material, and the intention is to segregate and withhold from unauthorised persons whatever cannot without ill effect or impropriety be destroyed."

87. It will be seen that the criteria are very broad and there is nothing on their face necessarily to link them with the documents which the Claimants allege the Defendant destroyed.

88. Therefore the Claimants' case is:

- Documents which should have been kept are missing
- The inference should be that they were destroyed by the Defendant.

89. The Claimants must prove that the documents are in fact missing. The Defendant submits they have not done so.

90. From the Defendant's perspective its duty of disclosure was limited. It was not standard disclosure. The Order of 11 December 2014 provided:

> "32. The Defendant shall provide standard disclosure by list…- limited to the following classes of documents:
>
> (a) Documents that (1) were produced in the period 1 January 1950 to 31 December 1963 and (2) are presently in the possession of the Foreign and Commonwealth Office; and
>
> (b) Any other documents on which the Defendant relies."

The Defendant has made extensive searches of documents and has disclosed the documents in the relevant period at present in its possession. The extensive searches have also gone to any other documents upon which the Defendant relies[94]. In short, the Defendant has searched the disclosure documents in its own possession and in the possession of the MOD and the Cabinet Office. It has also carried out extensive searches of files at The National Archives (TNA), the Kenyan National Archives (KNA), the Baring Family Archive at Durham University, the Imperial War Museum and the Colonial Collections at the Bodleian Library, Oxford. It has also searched legislation in Lincoln's Inn Library and on Google books. Further, the Defendant says that up to the date of its disclosure deadline, "…Counsel have been instructed to obtain documents on an "even handed" basis. Documents have therefore been selected for relevance, not merely on the basis that they are helpful or unhelpful to the Defendant's case."[95]

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[94] For details see the statements of David Chaplin, Ruari Murphy, Samantha Howard, Derek Walton, Kait Smith, Alice Lam, Darrren Stewart, Oliver Richards, Martin Tucker, Robert Deane and Alexander Wilkes.
[95] Second witness statement of Samantha Howard 16 October 2015.

91. Nevertheless, the Defendant says that searches of various public archives, in particular the TNA and KNA, have not been exhaustive nor equivalent to the full standard disclosure exercise. Therefore, the Defendant does not know what material may still be available in these public archives so as to deal with the documents in Appendix B.

92. The Claimants say that the vast majority of the documents in the case are from the UK, either the TNA, Hanslope or private collections or academic or public institutions. The KNA is not computerised or automated. There is no evidence from the Claimants as to the extent or results of their searches. There is no witness statement which gives any basis for the allegations that the documents in Appendix B do not exist. In this regard the Defendant refers to three specific occasions when the Claimants had asserted that documents were missing and/or concealed and these assertions were erroneous[96]. In addition column 4 of the counter schedule to Appendix B gives further examples as to the availability of material[97]. The Defendant in summary says it does not know what material may be available in the archives they have searched, much less in other archives such as Syracuse University New York, International Committee of the Red Cross archive[98], Kenyan organisations[99], libraries worldwide or papers held by former colonial servants or their estates.

93. The Claimants say that the court can effectively exclude the possibility that allegedly destroyed documents may still exist. They have given standard disclosure. However, standard disclosure requests only a reasonable search of documents within a party's control[100]. On the evidence available I cannot exclude as a realistic possibility that some of the allegedly destroyed documents still exist. It cannot be put higher than that.

94. In relation to destruction, the oral submissions substantially limited the Claimants' case. They then accepted that they cannot prove what was destroyed, save by inference in relation to 2/3 classes of documents[101]. These were the Prison Standing Order 1957 documents; also, personal detainee files containing a dossier for each detainee and records of interrogation which may/may not have been kept in the personal detainee files[102]. They also accepted that the knowledge that there was destruction and as to what documents were destroyed is no better now than in 1961-

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[96] (i) Claimants' General submissions 15 December 2017 that there was no regulation amendment to permit the Governor to delegate powers. This document was available in Lincoln's Inn Library (Ms Smith 2nd February 2018); (ii) 23 November 2016 during the Claimants' Opening Submissions the allegation that the UK copies of telegrams allegedly destroyed in Kenya must also have been destroyed in the UK. The Defendant identified one of those telegrams on Caselines and the Claimants subsequently obtained and disclosed a large volume of traditional telegrams from TNA. (iii) 14 December 2016 during the Claimants' Opening Submissions it was said that cabinet papers relating to June and July 1959 had been removed. All but one of the documents was then found at TNA and the majority are on Caselines.

[97] The Defendant says that absence of citation going to every alleged fact is not an admission that no such material is available in the trial bundle, the disclosed documents or anywhere else.

[98] The Claimants have disclosed some documents from this source but have not provided evidence of the extent of their searches or the criteria used.

[99] Such as prisons, hospitals, surgeries, courts or police stations and other libraries in Kenya.

[100] CPR 31.7; 31.8.

[101] A large amount of information on destruction of documents therefore now appears to be otiose. I will cover it in this judgment (a) for completeness (b) in case it has any relevance subsequently in this case.

[102] The Claimants accepted that they could not say that personal detainee files should have been kept under the WATCH policy.

1963. The only point they made was that the Hanslope documents, disclosed in 2011[103] may shed light on the contents of what was destroyed. They said that the destroyed documents were relevant to section 32, but that relevance may be limited.

95. Turning to the example of the Prison Standing Orders 1957 and on the assumption that they applied to detention camps[104]:-

- Those documents which were not to be kept indefinitely could have been properly destroyed at the relevant time.
- There were 3 types of documents to be kept indefinitely (Admissions registers, Prisoners' Property cash book and Superintendent's Order book).
- Some extracts from MacKinnon Road and Manyani detention camps were adduced by the Defendants. These were from originals in the KNA. The Claimants say that these extracts do not comply with the requirements of the Regulations, whereas a prison book does contain all required information.
- The Claimants' case is that the inference should be drawn that these documents were destroyed by the Defendant/Colonial Government because:-

    a. There was a statutory requirement to keep them

    b. Therefore, it is probable that any destruction would not be by accident

    c. It is unlikely that the Kenyan Independent Government would have destroyed them subsequently as, in 1967, it asked for documents relevant to Colonial rule so as to piece together its history

    d. It is just speculation that the documents may well still exist given the fact that the parties have not found them

96. The Defendant points out that the duty to keep those documents was on the officer in charge of a prison. Detention camps were at different times and places under varying types of control. Importantly, there was no requirement to keep the documents centrally, whether in the KNA or elsewhere. There is no direct evidence that any such record was destroyed at all. Nor is it safe to infer that they were destroyed or, if so, by the Colonial Government or the Defendant. Some may still exist for the reasons already given. Some may have been destroyed, or lost, not by the Colonial Government or the Defendant. There was no statutory duty on the new Kenyan government to keep them. It may even be that the individual establishments did not in fact keep such records.

97. In my judgment there are various possibilities other than that these documents were deliberately destroyed by the Colonial Government or the Defendant. I cannot find on

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[103] See below.

[104] They may have done since Regulation 18 of the Emergency (Detained Persons) Regulations 1954 applied the Prisons Ordinance and Prison Rules 1949 to detention camps, subject to modification.

the balance of probabilities that they were so destroyed. This finding should be seen in the context of the evidence generally as to destruction of documents, with which I will deal shortly.

98. For similar reasons I do not feel able to draw any inference that, on balance of probabilities, the other classes of documents, i.e. the detainee records/records of interrogation were deliberately destroyed by the Colonial Government/Defendant. If they were sent to the central registry in Nairobi, and do not still exist, were they destroyed? Just as there is no evidence of destruction taking place at camps, so also there is no evidence of destruction at the central registry.

99. I now deal with the second question, namely, even if those documents were destroyed in/about 1961 by the Colonial Government/the Defendant, how does that fit into s32(1)(b)?

> (i) In respect of those destroyed documents, what new information has been discovered by the Claimants? The fact that documents were destroyed has been public knowledge[105] since at least September 1961. There is no basis for saying that the nature and extent of the destruction would have been any less discernible if an action had been commenced in the 1960s. [Indeed the probabilities may well be to the contrary]. (Para 46A GPOC (b)-(d)).
>
> (ii) The only facts which would have been concealed by destruction remain concealed. Unlike in all the cases to which I have been referred, nothing new has emerged which enables the Claimants to plead their causes of action.
>
> (iii) There is nothing which the Claimants can point to in any of the allegedly destroyed documents which would be a fact relevant to their cause of action. For example, detention records: the Claimants know they were detained. The records would be evidence only.

100. Against that background, I now deal in some detail with the factual background to the alleged destruction and concealment.

A Caveat

101. Apart from two witnesses, Professor Rotberg and Mr Nottingham, there is no witness evidence in relation to destruction of documents. The evidence is based on inference from various documents. I have already commented on the fact that the Defendant's disclosure duty was limited and was not full standard disclosure. I must be cautious in drawing inferences from documents when (a) I cannot be sure that I have all the relevant documents and (b) those documents I do have are not put into context or explained by a witness.

Pre-1961

102. The Claimants referred to a document dated 10 October 1958 from Mr Dent, the Permanent Secretary for Defence at the Ministry of Defence in Nairobi. This refers to

[105] See the Guardian "Bonfire of Documents" September 4 1961 (wrongly stated on the document as 1951).

downgrading and destruction of documents. It says that the destruction of classified material does not require the authority of the originating office, since security can only be improved and not endangered by destruction. It continues:

> "3. Officers who authorise the destruction of SECRET papers should be careful not to destroy original material, or material which they have originated, and which may be the only surviving copy, if it is likely to be of historical value.
>
> 4. A record will be kept of all documents destroyed, and when the documents bear an individual number, a destruction certificate will be sent to the office of origin."

103. On 9 December 1959 a despatch was sent from the Secretary of State in London to the office administering the government of Kenya. It is clear from paragraph 7 that the despatch was to all people in charge of colonies. Among other things it updates a secret circular despatch of 1950 and requires an annual return of "All Accountable documents" held by the government and a return of "Accountable documents destroyed (if any)". It also requires the Governor, on ceasing to administer a territory, to hand over all top secret and accountable documents to the officer administering the government.

104. The above two documents, in isolation, do not assist me in determining the allegation in relation to deliberate concealment from 1961 onwards i.e. the Claimants' pleaded case. Neither contains anything about passing on documents to a successor government or criteria for selecting and destroying documents. Nor, in isolation and without context, does a letter from F D Corfield dated 21 November 1958 to a Mr Davies at the government office in the Isle of Man. This refers to a long letter from Mr Davies about the "general set up before the Emergency and the part played by the main actor." I do not have the letter which Mr Davies sent; I do not know whether he asked for it to be regarded as purely personal/confidential. Mr Corfield, who was the Government Commissioner appointed to provide the history of the Mau Mau, promises to burn Mr Davies' letter eventually and says "It will not find its way onto any file that I leave behind, although I will probably make use of a good deal of background knowledge which you have supplied." The Claimants are critical on the basis that "there was no sense that the information provided had historical significance and should be kept," but I have no evidence, nor can I make any finding, as to whether Mr Corfield was acting within or outside any guidance he may have received in his capacity at that time.

105. Apart from being a Government Commissioner, I do not have evidence of Mr. Corfield's precise status at the time. Finally, Mr. Corfield said he would not burn the letter immediately, which suggests he had been asked by the author to burn it. In what capacity the author had sent it is not known. What is known is that Mr. Corfield's letter, evidencing the fact of the other letter, was retained.

106. There is also reference (paragraph 13 of the Claimants' written Opening) to destruction of documents in 1959. The documents relating to this are in response to a Savingram from the Colonial Secretary, dated 10 August 1959, seeking information from 8 colonies about their methods of destroying classified documents. This is said to be "with a view to arranging for the Department of Scientific and Industrial

Research to undertake research in this field." The response is of no relevance to the concealment submissions.

107. In short, there is nothing in any pre-1961 documentation which can be relied upon in support of deliberate concealment.

The WATCH Policy

108. Paragraph 46A(iii) of the Re-Re-Re-Amended Generic Particulars of Claim relies on the WATCH Policy. Paragraph 46A(i) and (ii) specifically point to the Defendant issuing an instruction from the Colonial Secretary. Paragraph 46A(iii) says that those instructions required the classification of documents "for removal and destruction – the so-called "WATCH documentation". The Defendant's document is dated 3 May 1961. It was sent to the office administering the Government of Tanganyika and repeated to the equivalent officers in Uganda, Kenya, Zanzibar and the East Africa High Commission. The central part of the document states as follows:

> "Disposal of Classified Records and Accountable Documents.
>
> 1. As you are considering the disposal of classified records and accountable documents, it may be useful if I set out guidance given shortly before the achievement of Independence to Governors of certain territories which are now independent.
>
> 2. The general principles which have been followed in disposing of documents in these circumstances are:-
>
> (i) There would be no objection to the transfer to the successor Government of secret or lower papers provided that they have been scrutinised and selected by a small committee of, say, a Special Branch Officer and two Senior Administrative Officers to ensure that none are passed on which:-
>
> (a) might embarrass H.M.G. or other Governments;
>
> (b) might embarrass members of the police, military forces, public servants or others, e.g. police informers;
>
> (c) might compromise sources of intelligence information;
>
> (d) might be used unethically by Ministers in the successor Government.
>
> (ii) There would be little object in handing over documents which would patently be of no value to the successor Government."

The letter then goes on to consider how to deal with other documents and how they should be dealt with, including, in some cases, destruction by fire or dumping in the sea.

109. It is of note from that letter that:

(a) It is of general application to a number of countries in the process of achieving independence.

(b) It refers to "general principles" which "have been followed" – it therefore does not appear to be a new policy, nor one tailored to the situation in Kenya and its recent Emergency.

110. Ten days later there was a document apparently sent to all Provincial Commissioners. This emanates from the Ministry of Defence in Nairobi. It is dated 13 May 1961 and is accompanied by a circular headed "The Designation "WATCH"". It drew a distinction between WATCH material, the designation applying only within Kenya, and other material. WATCH material was to be seen only by authorised officers and would ultimately have to be either destroyed or removed to the UK. Other material was described as "Legacy" material and was to be eventually inherited by an independent government. I have already set out the basic principles of WATCH from paragraph 3 of that document. They are similar, but not identical, to (a)-(d) in paragraph 2 of the Secretary of State's 3 May 1961 letter.

111. The circular then contains the following sections:

(1) What should be considered "WATCH" material? Unclassified material is likely to be Legacy and the concern is said to be in deciding what classified papers should be WATCH. Some types of papers in Appendix A to that document are automatically WATCH[106]. Designating WATCH is said to be a matter of discretion which is why the urgent operation "should not be left in the hands of officers with too little experience". Further, "the designation WATCH must not be debased by over use; it should be employed as sparingly as possible…"

(2) Authorised officers had to be servants of the Kenya Government who were British subjects or of European descent and with the appropriate security clearance.

(3) It is then said that there will have to be a thorough purge of all the classified files held in government offices and archives. As to "destruction":

[106] I was not taken through Appendix A. A number of the types of documents they had not looked for or said were not relevant; the Claimants had some Kenya Intelligence Committee periodical reports and other documents. In their Opening the Claimants referred to items (h) and (n) for the submission: The lack of record of a particular Claimant first suggests not that they are making up their story but that the records were destroyed as embarrassing the Defendant or indicating racial prejudice, and secondly that the records were deliberately kept from subjects". As indicated elsewhere in this judgment, the Claimants have not proved that the records were destroyed by the Defendant nor was there deliberate concealment within the meaning of s26/s32.

> "There is undoubtedly much old classified material in many offices which is never used, for reference, and which has no historical significance: this should be burnt by an "authorised" officer in person. An important principle in deciding upon the irrevocable solution of destruction, is that it is the "originator" who should withhold from destruction items such as reports which it is desirable on historical or other grounds to retain, but which will fall within the "WATCH" category; if this principle is followed, the recipients of copies of such reports may appropriately destroy their copies. It is certainly not envisaged that political records of any importance or antiquity should be destroyed, even though possibly in some cases the excision and segregation of "WATCH" type material may be justified."

(4) Old files which could not be appropriately destroyed but which came within WATCH material had to be over-stamped with a "W".

(5) Finally, WATCH material had to be strictly segregated from Legacy material such that the Legacy file would not contain any reference to WATCH material. The very existence of the WATCH material was not to be revealed.

112. There were many other provisions, but these I believe are the essential ones.

113. It is not the case that the policy and the WATCH designation simply followed on from the Secretary of State's document of 3 May 1961. Documents adduced by the Defendant evidence that Uganda had circularised a memorandum on 28 February 1961 distinguishing Legacy papers from what they called "DG" papers. DG papers were classified similarly to WATCH papers. There were also a number of documents between February and May 1961 showing communication of the Ugandan Policy to Kenya and, as early as (at least) 16 March 1961 drafts of a WATCH Policy in Kenya.

114. In summary:

(a) The first document to consider is the one dated 3 May 1961.

(b) This document:

(1) Was sent to a number of governments

(2) Reflected general principles which had previously been followed as to segregating documents.

(3) Post-dated a number of documents in which there had been communication between Uganda and Kenya and draft WATCH documents prepared in Kenya culminating in the 13 May 1961 document issued by the Permanent Secretary of Defence.

(4) Was sent to the Officer administering the governments of Kenya. There is no evidence that the document of 3 May 1961 was instrumental in the creation of the WATCH Policy, though it is broadly consistent with it and with the preceding documents from Uganda and drafts in Kenya. This letter does not, unlike the WATCH Policy, deal with the return of important documents to the UK; however, it is clear from the WATCH policy itself that the Colonial Administration were aware of the need to preserve and return documents of importance[107].

115. Even if there was destruction amounting to s32(1)(b) deliberate concealment based on the WATCH Policy, any finding would have to be subject to the Defendant being vicariously liable for such destruction and acting in right of the UK. This would be a matter then for generic submissions.

116. The Defendant accepted that any finding of s32(1)(b) of deliberate concealment, based on bringing the Hanslope documents back to the UK, would not be subject to any further argument about vicarious liability/acting in right of the UK.

The WATCH Policy – Analysis

117. Returning to the 13 May 1961 WATCH Policy itself:

(a) It emphasised that as much material as possible should be left for the functioning of the succeeding independent government and for the proper recording of the past.

(b) The WATCH documents in (a)-(d) paragraph 3 were not to be made available to individuals or to the future government.

(a) It was not a policy of indiscriminate destruction. In paragraph 11 it was said that old classified material "which is never used, even for reference, and which has no historical significance" could be burnt; also that it was not envisaged that political records of any importance or antiquity should be destroyed. In paragraph 12, WATCH documents which could not "appropriately be destroyed" should be over stamped with the "W" and separated from Legacy material[108].

118. Therefore, there is nothing in the WATCH Policy document to support that there was intended to be deliberate destruction of documents for the purpose of concealing information, or to give rise to an inference that the reason for destruction of documentation was to conceal the information contained in it.

119. Of course there are separate considerations when handing over to a new independent government after a period of colonisation, but similar principles to those found in the

[107] See also later in this judgment re the letter from the Colonial Secretary dated 8 October 1962 and the Circular dated September 1962.
[108] Details of the segregation are under the heading "Registry Action" from paragraph 16 onwards.

WATCH document are echoed in the Public Record Office 1962 document[109]. The 1962 Guide:

- Emphasises problems of space and that existing arrangements for reviewing and storage had proved inadequate[110].

- Sets out the primary function of the Public Record Office (PRO) to receive "records as must be permanently kept for official purposes"; and a further function "to hold and make available for general use of those records of the same organisations which contain information likely to be permanently valuable as evidence of private rights or for historical and other research"[111].

- States that documents, other than those to which members of the public had access before their transfer would not be available for public inspection until in existence for 50 years or such other period, longer or shorter, as the Lord Chancellor (with Ministerial input) might prescribe[112].

- Further states that documents which might be undisclosed for longer than 50 years included "documents containing information about individuals or organisations which might cause embarrassment or distress…"[113].

120. Therefore, the WATCH Policy was broadly in line with the Public Records Act 1958 and the Guidance, in respecting the need for administrative functioning of the succeeding independent government and the proper recording of the past; whilst destroying documents which did not fulfil either of these functions, and retaining with a WATCH classification those documents which did have importance or antiquity which fell foul of the criteria in paragraph 3(a)-(d).

1961-1962; Lists and Policy

121. Some destruction lists survive[114]. The dates of these lists are not clear but the one at Caselines Reference 32-73502/73631, relied on by the Claimants, bears the date "March 1962"[115].

122. Nothing on these lists can be said to be of historical interest and therefore something which should not have been destroyed in accordance with the WATCH Policy[116].

123. On 6 July 1962 Mr Neil[117] sent a memo about secret files which were being kept secure in the basement of the building where he worked. He said:

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[109] Probably November 1962 "A Guide for Departmental Record Officers (Revised)"; this followed the Grigg Committee Report in 1954/1955 and the enactment of the Public Records Act 1958. There was then a provisional guide for departmental record officers brought out in 1958 followed by the Definitive Guide in 1962.
[110] Pages 1 and 2.
[111] Paragraph 7.
[112] Paragraph 91.
[113] Paragraph 94.
[114] These are to be found at 32-73095, 32-73502 (also at 32-73631) and (possibly) at 32-73528.
[115] The Defendant thinks it might in fact be earlier, perhaps November 1961.
[116] Or the circulars before May 1961 or Public Records Act Guidance.
[117] Office of the Chief Secretary, Nairobi.

> "The basement is overcrowded and it is essential that a weeding exercise of these files should be carried out as soon as possible and this should be done by fairly senior and sensible officers. The files should be classified as follows:
>
> (a) Those for destruction (which should constitute the majority);
>
> (b) Those to be preserved as a Legacy to a successor government; and
>
> (c) Non-Legacy files which should be, I imagine, very few in number."

The Claimants criticise this saying that for no discernible reason the files that were to be destroyed "should constitute the majority". However, it is impossible to infer that there was no actual reason. Maybe the majority would be useless to a successor government and useless for historical purposes. Mr Neil would have known but there is nobody else who has or could give assistance on this. The documents which were to be designated WATCH and preserved as Non-Legacy files, he considered to be "very few in number" and therefore the greater number of those which were to be preserved would be those passed on as Legacy documents to the successor government. No adverse inference can be drawn from this memo.

124. In September 1962 the Colonial Office issued a document "Protection and Disposal of Classified and Accountable Documents and Records Generally." It is a document to territories in the transition to self-government. It contains advice similar to that in the 3 May 1961 document and the WATCH policy.

125. On 8 October 1962 the Colonial Secretary wrote to the Officer administering the government of Kenya enclosing (probably) the September 1962 document. The message states:

> "Disposal of Records
>
> You will doubtless shortly wish to consider, in the light of constitutional development, measures which should be taken for the protection and disposal of classified documents. It is clearly desirable that timely arrangements should be made to that and I note from your secret and personal saving gram number 2385 of the 29 September 1961 that a start has already been made on certain records, but I hope that the enclosed note (which follows generally the instructions given to the Governor at Tanganyika in my secret and personal savingram of 3 May 1961, copied to you as number 76) will be of assistance to you in considering the disposal of records generally. If on detailed consideration of the matter in the light of circumstances in Kenya you wish to seek further guidance, I am very ready to give you such assistance as I can…"

126. As to this:

(1) It is not clear what (if anything) was destroyed after this date.

(2) I have not been taken to any documents within 3 months either side of this document so as to put it into context (apart from the Note of September 1962).

(3) Therefore nothing can be inferred from it[118].

Destruction of Documents Not in Accordance with Policy?

127. The Claimants suggest that in any event the WATCH Policy was not followed.

128. In my judgment, for reasons which will become apparent, the Claimants have not proved what was destroyed, by whom and when.

129. In this section I will, nevertheless, deal with certain paragraphs in the Claimants' written Opening which suggest that the Defendant went beyond the WATCH Policy. I shall also deal with certain ancillary matters raised in some paragraphs of that Opening.

130. Before I do that, I will briefly mention Mr Nottingham's evidence, which was the subject of a Civil Evidence Act notice. As far as I can tell, the Claimants' Opening only refers to it to say that by early March 1963 the administration was actively checking whether documents were being destroyed. They mention two letters. The first is from Mr Brown, District Commissioner Nakuru, dated 7 March 1963, to Mr Cumber in the Governor's office, Nairobi. Mr Brown said that in the bottom of a confidential box he had found a Secret and Personal letter to John Nottingham regarding the destruction of compromising material in personal files. He continued: "there is no record that any action was taken on this. Can you throw any light on the matter?" Mr Cumber replied on 11 March 1963 saying that he never saw the letter and John Nottingham had not drawn his attention to it when he handed over the District "late last August". He said: "However, if it is the sort of letter which I think it is, I suggest you take action on it". There is no other document explaining any follow-up[119].

131. Paragraph 7

The Claimants stated:

> "…similar consideration was given to personal files of government servants. A minute following a meeting in April 1962 makes clear that the objectives were to ensure that no material was left after

[118] There are minutes in May 1963 at 32-73880. It appears to be a London document suggesting that Kenya was sending more than just documents of historical interest. Somebody has written "Kenya are unlikely to have the time to ponder too long over the historical potential of the papers being reviewed by them. It is better for too much, rather than too little, to be sent home – the wholesale destruction, as in Malaya, should not be repeated."

[119] In para 72 of his witness statement Mr Nottingham says that Colonial Officers such as he received written orders to destroy sensitive materials that could be used to incriminate the Colonial Administration. He says he disobeyed this, but the majority obeyed. Unfortunately, it was not possible for Mr Nottingham to give oral evidence. No document which I have seen mandates the destruction of such documentation where no copies exist. There is a Circular, apparently from 1 May 1962, which says: "…it is suggested that all papers at Provincial and District level should be taken off files and destroyed when originals or copies are known to exist at Ministerial or Departmental level". It is not clear, therefore, whether what was being destroyed on Mr Nottingham's evidence was anything more than copies.

> independence which could be the cause of discrimination against an individual officer; and to ensure that confidential reports would be held safely. Confidential reports of operations against Mau Mau were to be destroyed."

As to this:

(1) The document relied upon[120] is from Mr Loyd, Permanent Secretary at the Governor's Office. It is not a minute of a meeting which took place on 2 April 1962 but a draft memo (with amendments) following that meeting.

(2) As regards material "which could be the cause of discrimination against an individual officer"[121], paragraph 4 stated:

> "…it is suggested that all papers at Provincial and District level should be taken off files and destroyed when originals or copies are known to exist at Ministerial or departmental level. When such copies do not appear to exist the papers should be forwarded to the Permanent Secretary or Head of Department as appropriate…."

Therefore this material was not to be destroyed unless originals or copies were kept by the Minister/Department.

(3) Paragraph 5 refers to the fact that material in confidential reports may contain "instances of officers whose duties have included, for example, operations against Mau Mau to which reference is made; such reports will be of a non-Legacy nature and it is desirable that all copies should be destroyed. Ministries/Departments should, therefore, examine their own copies of confidential reports at all levels. Where it is decided that a report should be destroyed, a note should be made and advice sent to the retaining authority, which will generally be the Civil Service Commission, in order to ensure that the copy or original held by that body may also be noted for destruction at a later date." Therefore:

(a) It is not correct that "confidential reports of operations against Mau Mau were to be destroyed"

(b) The documents referred to in paragraph 5 were not "reports of operations against Mau Mau", but possible references in an officer's personal confidential report to the fact that his duties included operations against Mau Mau.

(c) Copies of the above were to be destroyed but the "retaining authority" (generally the Civil Service Commission) would hold its own copy or the original who could note such a document for destruction "at a later date". It is unknown if or

[120] Caselines 32-73247.
[121] Paragraph 2 of the document.

when this retaining authority copy was destroyed and, if so, on whose authority.

132. Paragraph 8

In this paragraph reference is made to the witness statement of Professor Rotberg. Professor Rotberg's evidence was read, as the Defendant did not challenge the assertions of fact in the statement. Professor Rotberg has an impressive academic history and is a long-term student of Africa. He visited Kenya in the early 1960s. His statement says:

> "5… I travelled into the Marangu and other Kikuyu areas north of Nairobi to attempt to locate district records that pertained to the Mau Mau Emergency. In the process of several research tours I discovered that at one boma after another clerks were busy collecting files relating to Mau Mau and the Emergency and burning the results.
>
> 6. Clyde Sanger was then the Guardian correspondent in Nairobi… When I learned that archives were being destroyed I told him about what I had found and urged him to alert his Guardian readers after making his own journalistic enquiries.
>
> 7. I refer and attach…a copy of Mr Sanger's article from the Guardian Newspaper archives… That article reflected my conversations with Mr Sanger.
>
> 8. I visited as many bomas in the Kikyu Homelands as I could. I witnessed the burning of files in every boma that I visited. The areas I visited included Nyeri, Fort Hall, Kiambu, Nanyuki and Embu. I stopped in each place and saw files being destroyed, and realised that they were files relating to Mau Mau. I cannot say whether or not they were classified files.
>
> 9. In the course of my research I rescued hard copies of reports (it was non-secret material) and other documents that the district officers were tossing out, from as many places as possible.
>
> 10. I also inquired from the District Commissioners in each boma what was going on… I received direct verbal confirmation that masses of files relating to the Emergency were being destroyed, consciously to keep such records out of the hands of the African government which would succeed HMG.
>
> 11. I remember being told that "critical files were being destroyed" per instructions from the Provincial Commissioner…

> 12… I urged Mr Sanger to file a report on the destruction of files, which he did; I was then summoned to the office of the Chief Secretary (Coutts) for an interview. I asked him to halt the destruction of valuable records.
>
> 13. When I was summoned before the Colony's Chief Secretary (after the Guardian article had appeared) I was told essentially to mind my own business and not to interfere with the operations of HMG.
>
> 14. I doubtless asked the Chief Secretary to give me access to whatever was being destroyed so that I could use it in my research. He refused. The Chief Secretary did not deny that destruction was occurring, but he may well have said that nothing "vital" (or some such formulation) was being trashed.
>
> 15. I have been provided with copies of documents disclosed by the Defendants that make mention of my name. I produce…a document signed by T Neil and dated 5. 10. 61. Mr Neil describes a meeting with me where he describes me as being "a little put out that I would not allow him access to our confidential papers". This appears to suggest that I saw Mr Neil, but I am positive it was the Chief Secretary himself… (Note that my visit to Kenya and to the office of the Chief Secretary took place in August 1961. By September 1961 I was back teaching African history at Harvard University).
>
> …
>
> 17. Mr Sanger was as upset as I was regarding the destruction of documents. No one assured me, and I doubt Sanger, that documents were not being destroyed and that they were, instead, being sent to the UK."

133. The Claimants submit that being told by the Chief Secretary that nothing "vital" was being trashed conflicted with being told in the provinces that "critical files were being destroyed." I am not able to say whether this is in fact a conflict. The quality of the evidence from the provinces is impossible properly to evaluate. It is not clear what level of person(s) spoke to Professor Rotberg, how he (or they) evaluated something as a critical file and, particularly, whether he/they were aware of the policy that copies of important information could be appropriately destroyed if the original or another copy was kept for posterity.

134. The Claimants also submit that there was a wide-ranging policy of destruction and a culture, sanctioned by an official policy or not, of destruction by the Defendant's servants or agents. In this regard:

(a) Professor Rotberg says that he cannot say whether or not what was destroyed were classified files.

(b) He rescued some hard copies of reports and other documents that were being thrown out and this was "all non-secret material".

(c) There is therefore nothing in Professor Rotberg's evidence which, on the balance of probabilities, evidences destruction beyond that sanctioned by the WATCH Policy[122].

135. Paragraphs 10 and 11

In these paragraphs the Claimants make reference to Mr Sanger's report in the Manchester Guardian on 4 September 1961[123]. It is then said that the "Defendant was keen that Corfield's Report was read, but less keen on the same material then being presented by historians. It is clear that there was a good deal of contemporary criticism which was watered down." As to this:

(1) The only letter cited is from Mr P J Kitcatt, an employee at the Colonial Office. His letter is dated 27 September 1961[124] and was sent to Mr Neil in Nairobi.

(2) Mr Kitcatt refers to controversy over the Corfield Report, particularly on the grounds that Corfield was not a professional historian and says that there was considerable anxiety expressed in particular at the recent conference on African history and archaeology "lest the documents to which Corfield had access be destroyed." He refers to an extract from minutes of a meeting of the Secretary of State's Archaeological and Historical Advisory Committee and says, "It was possible to water down some of this criticism". I cannot, on the balance of probabilities, infer anything sinister from this. It may merely mean that it was possible properly to reduce the potency of such criticism. Whether the criticism, or its watering down, was justified, is not known.

(3) Mr Kitcatt then refers to a Mr Bennett of the Institute of Commonwealth Studies, who had referred particularly to Mr Neil's statement of 3 September reported in the East African Standard on September 7 and described by Mr Kitcatt as seeming "To us to be quite unexceptionable". There is then the reference to the Guardian extract and Mr Kitcatt continues "We would like to be able to say in reply to Mr Bennett and in answer to any other protestations of this nature…that your statement simply stated the position, namely that the weeding out and destruction of government documents is a standing exercise because of the problem of storage space, and to give an assurance that documents of intrinsic or historical value are not destroyed but are forwarded to the Colonial Office or handed over to the successor government in the normal way."

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[122] There is evidence from KNA file lists and other documents that some Emergency documents held by District Commissioners were retained and transferred to KNA – see paragraph 161 of the Defendant's skeleton.
[123] There is also reference to the Corfield Report.
[124] 32-72967.

(4) Mr Neil responded by letter dated 5 October 1961. The letter is over two pages in length. He refers to Doctor Rotberg staying with Clive Sanger and being undoubtedly the source of the Guardian Report, and to the "vast proliferation of classified material," and continues:

> "All this material exists elsewhere and was merely cluttering up our Secret Registry and store rooms. As one of the preliminaries to independence we have recently set about the task in the Ministries of dividing up classified papers into two categories – those which are of fundamental importance to HMG and which must be preserved, and those which are of importance to an incoming government and which may safely be left as part of the legacy from the Colonial Government…There is no point in keeping vast quantities of records which are already duplicated either in Government House, or in Cabinet Office, Nairobi, or which are already with the Colonial Office, and therefore we are, it is true, destroying a certain amount of material.
>
> But you may be assured that nothing which is of historical importance to posterity is being destroyed, and in particular the papers to which Corfield had access are being safely secured…."

(5) The entirety of the letter is an assurance that proper procedures were being followed. It is not possible to draw any adverse inference that the WATCH Policy was not followed, based on these documents in September/October 1961, or on Professor Rotberg's evidence.

136. Paragraph 14

In this paragraph the Claimants state:

> "By early March 1963 the administration was actively checking whether documents were being destroyed. Later that month it was agreed that the WATCH system would be operated only by a small group of top-ranking officers and Special Branch, as part of what appears to be a planned system of "contraction". Special Branch appears to have been wholly unaccountable to anyone else in undertaking the exercise on its own papers. That means that the central Registry established by Special Branch to hold records about Mau Mau suspects was never reviewed. The instructions resulting from the meeting were duly relayed to the Provincial Commissioners, and the Acting Governor, who commented on how he proposed to deal with matters."

The main document referred to is the Ministers' meeting held in the Ministry of Defence on 15 March 1963 "To review the WATCH system and to consider the disposal of records." They did agree to contract the WATCH system at Provincial Commissioner level (with the exception of the Northern Province). The reasons for this are not clear. A number of specific officers were to continue to operate the

system. Under minute 2 which was the progress report on the purging of documents, various ministries are covered. Under the sub-heading "Ministry of Defence" it states:

> "(c) Special Branch
>
> Special Branch was "cleansing" itself. No material would go to the Governor's Office as it was not considered to be of historical value."

Special Branch was responsible to the Ministry of Defence. Special Branch had been involved in the creation of the WATCH designation[125]. I do not find it surprising that Special Branch carried out its own review. It is not clear, by this stage in 1963, what material remained in Special Branch.

137. As to the reference to "The Central Registry established by Special Branch to hold records about Mau Mau suspects" never being reviewed:

(1) The document referred to is dated 15 December 1952 (Caselines 32-2425).

(2) That document records, two months after the start of the Emergency, "The Special Branch would run an interrogation centre and would form a central registry for documents and reports of intelligence and security interest." It may have included records about Mau Mau suspects, but on its face the Registry was wider than that.

(3) I have not seen a document as to whether this Central Registry was reviewed or not. There is no evidence on this point.

(4) The meeting of 15 March 1963 was attended by a number of high ranking officials including the Permanent Secretary of the Ministry of Defence and the Chief Commissioner. The view of the meeting was that none of the Special Branch material was considered to be of historical value.

138. Further, I heard evidence from Mr Philip Green called by the Defendant. He was transferred to Kenya Special Branch under the control of the Directorate of Intelligence and Security from 1960 to 1964. He was the Senior Desk Officer at Headquarters in Nairobi in 1961 and then was transferred to Central Province where he was Provincial Head of Special Branch until 1963. He said:

(1) When he was in Nairobi there were records of people of interest to Special Branch, including Mau Mau terrorists and detainees, held in the Central Records Office on cards. When he left Headquarters in Nairobi all of the records remained and nothing was destroyed.

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[125] Document 16 March 1961 – Caselines 32-72645. This document stated that the contents of WATCH material "may not be made known to non-European Special Branch officers. To this end, the marking 'WATCH' on a document is to be regarded as a warning that the information contained in it is not to be communicated to a non-European officer without the prior agreement of the originator".

(2) When he was in Central Province the Records Office also contained information regarding a number of high profile individuals and a Records Office managed by 3 Records Officers. In mid-1963 he commenced a period of leave of around 6 months. When he left all the records which had existed during his tenure were still kept and were also there when he returned shortly after independence. He was not aware of any documentation in relation to the Emergency being destroyed, and not even routine weeding of files was carried out during his time at Nyeri. As he was in control of the region, he was confident he would have been aware had destruction been going on. He was not aware of the WATCH Policy and was not asked to implement any such Policy during his time in Kenya.

139. Mr Green's evidence undermines any suggestion that Special Branch destroyed Mau Mau records. It also undermines the 15 March 1963 minutes which suggest that Provincial Special Branch Officers would continue to operate the WATCH system pro-tem. On the basis of this evidence I am not prepared to find that Special Branch destroyed the records they had relating to the Mau Mau. If, and if so when, they were lost is wholly unclear on the evidence.

140. Paragraph 15-16

In paragraph 15 it is said that the Ministry of Defence had half a ton of material, though this has no evidential support. It then continues "It was not destroying documents quickly enough, and was uncertain that it was classifying material properly." The reference to this is a telegram from the Ministry of Defence to Mr Loyd at the Cabinet Office. This is dated 5 March 1963. The document therefore pre-dates the meeting referred to in paragraph 14 of the Claimants' Opening. It does not state that the Ministry was not destroying documents quickly enough. It states[126] that the Ministry is behind with its purging. I cannot, on the balance of probabilities, infer that this means any more than they were behind in dealing with non-legacy documents, either by destruction or by preserving the relevant necessary documents in accordance with the WATCH Policy[127].

141. As regards the reference to Special Branch having "gone "clean"", this is referred to in a letter from the Director of Intelligence to the Permanent Secretary at the Governor's Office. The letter is dated 24 May 1963. It states that "With the exception of my own personal office Special Branch is going "clean" with effect from Monday 27 May 1963." This may be no more than suggestive of the fact that Special Branch had by this stage sorted out that material from Legacy material and dealt with the WATCH material in accordance with instructions.

142. In paragraph 16 the Claimants state:

> "The conversation continued and it is clear that material which was "explosive or dangerous" was destroyed. The test for return to the UK at this stage was absolute necessity. Material

[126] Paragraph 3(b).

[127] This appears to be supported by the end of paragraph 5 which refers to the possibility that "Your "W" Officer might…arrange for any of our required papers to be sent home direct."

> concerning villagisation was already an issue which might be "too secret" to retain. Equally a draft memo from the Chief Commissioner in May 1963 complained that destruction was not proceeding appropriately because relevant files had become mixed up with historical records."

As to this:

> (i) The assertions made in the first three sentences need careful scrutiny. They rely upon a document sent from the Governor's Office, dated 8 April 1963 from the Permanent Secretary of the Governor's Office. It refers to difficulty with interpretation of the Policy and sets out the writer's interpretation. At paragraph 2(b) he makes it clear that important papers valuable in themselves for historical reasons are to be transferred to the UK. Then at sub-paragraph (d) under the heading "Destruction" he says:
>
> "This of course in effect is anything that does not come into the other three categories, or they must include in the first instance, any papers which are in themselves explosive or dangerous and which, unless absolutely necessary, do not need to be transferred to the UK."
>
> This document is the writer's own interpretation, which he says has always been his interpretation. Therefore, there is no suggestion that the test for return to the UK had changed. His interpretation is not clearly worded under (d). The sentence is capable of different constructions, though it is capable, notwithstanding (b) and the introduction to (d), of the suggestion that only absolutely necessary documents need to be transferred to the UK.
>
> (ii) As to villagisation, the writer says, "Perhaps we should retain the compensation file for a bit in case matters in this connection arise during ISG[128]. Villagisation, if it is not too secret, will of course help Mr Sorrenson's researches." It is not possible on the information available and out of context to understand what was meant by that, and what otherwise would be proposed in relation to villagisation documentation.

143. The final letter is a draft from the Chief Commissioner's Office in May 1963. It states:

> "Dear
>
> Provincial and District Records
>
> During his recent visits to Provincial and District Headquarters to examine our historical records, Dick Cashmore came across a number of files which would cause us considerable

[128] ISG appears to be Internal Self-Government.

> embarrassment if they fell into the hands of the next government.
>
> The following are typical examples:
>
> (i) Personal files (classified, confidential or secret) on African political personalities some of whom are now ministers or leaders in the main political party.
>
> (ii) Interrogation reports on Mau Mau terrorists, lists of loyalists and lists of Mau Mau gangs.
>
> (iii) Inquest files eg Inquiry into the deaths of the Hola Works Camp detainees.
>
> (iv) Closed volumes of current secret and confidential files
>
> 2. The fact that such files had been mixed up with our historical records is disturbing, particularly as most of our historical records will be "Legacy" material. I shall be grateful, therefore, if you will take steps to ensure that your Provincial and District Records are thoroughly examined by Expatriate Administrative Officers with the object of removing, and destroying, the sort of material referred to in sub-paragraphs (i) to (iv) above. This work must be completed before Internal Self Government for obvious reasons.
>
> 3. Please destroy this letter when you have noted its contents."

As to this:

> (i) This letter is not from Special Branch. It is from the department which was formerly the Ministry of African Affairs. It deals with Provisional and District files, not Central files.
>
> (ii) This is a late and isolated document. It may be that the exercise of destroying documents which were not Provisional and District level copies of any documents of importance had largely been carried out and this letter refers to residual files. It is not clear what, if anything, was destroyed as a result of this letter. However, a substantial number of documents in categories (i), (iii) and (probably) (iv) do exist. As to (ii), if they do not still exist, it is not clear why that is.

The Claimants' Submissions on Destroyed Documents

144. The Claimants' submissions are summarised in paragraphs 6-19 of Mr Myerson's skeleton argument.

145. The burden of proof for deliberate concealment is on the Claimants. It is for them to show what material documents were destroyed and therefore concealed from the Claimants by the Defendant.

146. The Claimants say that the destroyed documentation was in the Defendant's control pursuant to CPR 31.8(2)(b) and (c) and was not specified in the Defendant's disclosure. Assuming for the moment that in the early 1960s, prior to destruction, such documentation was in the Defendant's control, this does not advance the Claimants' concealment case since:

> (i) There was no suggestion of litigation until after the turn of the Millennium.
>
> (ii) The disclosure obligation in this case does not extend to the Defendant listing documents even now within its control, and certainly not any documents which had in the past been within its control.

147. Because documents have not been adduced in evidence, it is likely that they were necessarily, or even probably, destroyed. There is no comprehensive list of destroyed documents, nor anything specifically to link the documents which the Claimants allege were destroyed with either the details or the policy of destruction. The policy of destruction specifically exempted "political records of any importance or antiquity"[129]. The Colonial Secretary's Savingram of 3 May 1961 did not, on its face, either require the destruction of all documents which came within the categories at paragraph 2(a)-(d) and which should not be passed on to a successor government; neither did it specifically exempt, as did the WATCH Policy, political records of any importance or antiquity or material "For the proper recording of the past"[130]. However, the Savingram has not been put into any context; there are two preceding letters[131] which I have not seen.

148. There are other possibilities as to why documents said to have been destroyed have not been adduced in evidence. Not all archives or possible locations of documents have been searched. There is also the possibility that documents are somewhere in the disclosed documents but have not been adduced[132]. In any event, documents may have been lost/destroyed by the successor independent government.

149. In the light of the above, I am not prepared to find on the balance of probabilities that the documents which the Claimants allege were destroyed were in fact destroyed. They may have gone missing for other reasons or they may still be in existence somewhere[133]. In this regard I have considered – and reject – the statement made in paragraph 8 of Mr Myerson's skeleton argument where he says:

> "8. The evidence is that the purpose of destroying documents was to avoid embarrassing D (by making clear the sheer numbers of those unlawfully detained and that punishments

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[129] The WATCH Policy 13 May 1961 paragraph 11.
[130] WATCH Policy document paragraph 3.
[131] From a Mr Fletcher Cook dated 1 December 1960 and a Mr Morgan dated 21 March 1961.
[132] I have previously set out some occasions during the Claimants' presentation of documents where documents were said to have been missing and destroyed which were then produced by the Defendant to the Court, following research at the TNA. Similarly, examples where documents lost/alleged to have been destroyed have been found to be in the already disclosed documents. This is one of the problems of the complexity of extensive historical documentation in this case.
[133] For example, I have heard no evidence that either the Claimants or the Defendant has searched or enquired as to any documents held by the Department responsible for prisons in Kenya, or even individual prisons.

> were imposed for little or no reason) or displaying racial prejudice (by demonstrating virtually all Kikuyu were detained unless they were declared loyalists). There is thus an inference that the documents destroyed were such documents."

As to this:

> (i) I am not persuaded on the balance of probabilities that the documents have been destroyed.
>
> (ii) As already stated, the WATCH Policy required that documents should not be destroyed unless they had "no historical significance"[134] or were copies. Documents which might "Embarrass HMG, the present or any future Kenya Government, or any friendly Government"[135] were not be passed on to the successor Government but were required to be segregated, marked with the WATCH designation and retained.
>
> (iii) I have no evidence that documents were destroyed "making clear the sheer numbers of those unlawfully detained and that punishments were imposed for little or no reason" or "displaying racial prejudice (by demonstrating virtually all Kikuyu were detained unless they were declared loyalists)."[136]

150. In paragraphs 15 and 16 of Mr Myerson's skeleton argument he says that the destroyed documents would have enabled the Claimants to plead the precise dates of their detention and the punishments "for which no authority was given. They would enable the identification of the individuals responsible and provide information as to who employed and controlled the individuals. Instead the Claimants must rely on memory, inference and general facts". He says that what has happened is that Test Claimants have misremembered dates and then efforts to consider thousands of documents suggested the correct date. The Defendant objected to amendments on the basis that it is too late to correct the date. The amendment was refused on that basis (about which Claimants make no complaint) and therefore the Defendant has profited from the destruction of the material. This point does not have validity for the purposes of section 32 on a number of bases:

> (i) There is, as I said before, no good evidence as to which documents were destroyed, when and, if so, by whom. No inferences can be drawn as to what any destroyed documents may have contained. It is clearly not possible to conclude, for example, that "the only reasonable inference is that it (destroyed documentation) contains further facts, concealed from the Claimants which would be relevant to their rights of action."[137]

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[134] WATCH Policy paragraph 11.
[135] Paragraph 3(b) – see also paragraph 3(a) and 3(c)-(d).
[136] Nor do I have evidence that the Policy was applied in individual prisons and camps. The WATCH Policy was for central departmental, Special Branch and Provincial and District Administrative files. Further there are many documents which detailed the numbers of people detained.
[137] Claimants' Opening paragraph 69.15.

(ii) The Claimants knew the approximate dates of their detention and the punishments they received at the time they received them. There was nothing in the documents which concealed any fact relevant to their right of action. Had they commenced proceedings in time then their memories undoubtedly have been much better.

(iii) I do not propose to go over in detail what I said in the judgment on amendments[138], however in paragraph 28 I said:

> "…Sixthly, albeit that in the above extracts from transcript of 23 May 2016, I accepted that mistakes might be made, the fact that the documents now relied upon were in the Claimants' possession from 2013 up to the date prior to the Claimants giving evidence, is a factor against permitting an amendment of substance especially at this stage, in accordance with the overriding objective…Further, and in particular, where proposed amendments are to plead different dates, there were Part 18 Requests in a number of cases where the response was that the TCs could not assist. This may have been the Test Claimants' personal position but, for those acting on their behalf, it was incumbent upon them as soon as possible in pleadings to clarify their case on dates based on the documents, and not to do it by way of proposed amendments served in the summer of 2017."

(iv) In any event, without knowing what was in any documents no longer available, for whatever reason, or not adduced, the Court cannot say whether it is the Defendant who has profited from that unavailability or the Claimants (or some or none of them).

151. Similar considerations apply to the Claimants' submission that "The factual support for the denial of joint and vicarious liability, again depends on the destruction of documents as would establish the reality."[139]

The Hanslope Documents – Alleged Concealment

Overview

152. In the first Mutua judgment[140] McCombe J explained what the Hanslope documents were and how they had surfaced in 2011. In paragraph 32 he said:

> "The evidence served by the claimants in this process, in particular a statement by Professor David Anderson of Oxford University, made reference to his understanding that a number of documents relating to the Emergency had been removed from Kenya before independence in 1963; these were said to be contained in some 300 boxes. Professor Anderson stated that,

[138] [2017] EWHC 2145 (QB).
[139] Paragraph 17 of the Claimants' skeleton.
[140] [2011] EWHC 1913 (QB); an application by the Defendant to strike out the claim.

> from his own researches, he was unable to determine what had happened to these documents. As a result further enquiries were made within the defendant's organisation, including to a division known as the Information Management Group ("IMG") responsible for a section of records held at a property known as Hanslope Park in Buckinghamshire. An enquiry had been made in that quarter, by officials with conduct of these proceedings on behalf of the defendant, prior to the initial service of the defendant's evidence with its first tranche of documents in November 2010, but that enquiry had yielded no result. However, on the occasion of his second inquiry, on 17 January 2011, the relevant official within the defendant's organisation received a telephone call from IMG indicating that what appeared to be the missing 300 boxes had been found…"[141]

153. By the time of the second Mutua judgment[142] 40% of the Hanslope material had been inspected by those acting on behalf of the Claimants. The following was reported:

> "the new disclosure has only served to confirm the impressions and conclusions that they had expressed in their earlier statements about what they see to be the complicity of the British Army and Government in the infliction of abuses upon detainees…"[143]

> "…the Hanslope archive has revealed for the first time a number of documents giving a clearer and more detailed view of the extent of abuses in the camps and what was known about them higher up the chain of administration. Included in the papers are complete minutes of the War Council (on which all the British Commanders in Chief sat), revealing policies on detention, "screening" and interrogation. There are the papers of the Provincial and District Emergency Committees (on which British officers also sat). Significantly, he says, there are the papers and minutes of the Chief Secretary's Complaints Coordinating Committee, set up in 1954 to monitor and manage serious complaints made against the security forces and local administrators. The period covered by these documents is 1954 to 1959. These records reveal, it is submitted, examples of inadequate investigation and/or prosecution of serious abuses, of which examples were shown to me during the hearing. These papers were routinely sent to the Colonial Office in London. There is also correspondence and minutes passing

[141] He made it clear at para 34 that "whatever criticism may be levelled at the absence of these papers from the public archive until now, the defendant's failure to disclose them earlier to the claimants in the course of the proceedings was not in any way a contravention of any requirement of the court rules or in breach of any order of the court."

[142] [2012] EWHC 2678 (QB); an application for discretion to be exercised in favour of the Claimants under s33 Limitation Act 1980. S32 was not put in issue by the Claimants in Mutua.

[143] Paragraph 48.

> between Kenya and London relating to abuse of detainees and the development of the so-called "dilution technique."[144]

154. McCombe J said[145] that the Hanslope material had filled gaps in the parties' knowledge and understanding and that process was continuing. In paragraphs 113-118 he dealt with 'Documents'.

> (i) He first considered the Colonial Office letter of 3 May 1961, noting that it was "a policy not specific to Kenya but general in relation to colonies nearing independence". He thought there was "force in the claimants' submission that the Colonial Office was permitting the destruction of "embarrassing documents not deemed to be of historical value", thus giving considerable leeway to the administration in Kenya to discard "embarrassing" records with regard to detainees"[146]
>
> (ii) He then referred to the fact that under the policy substantial quantities of documents were physically removed from Kenya, including the Hanslope files[147], and that although some documents were clearly destroyed in Kenya before independence, the evidence suggested that "a substantial quantity of what might have been thought to be potentially "embarrassing" documents were included in the papers returned intact to the UK, finding their way in the end to Hanslope." Therefore, it seemed that "whatever the original suspicions of the claimants' advisers may have been, a very significant part of the documentation relevant to the issues in this action are already or will be later available for consideration by the by the Court."[148]

155. Finally, on this matter, the judge said this at paragraph 117:

> "the late disclosure of the Hanslope papers did not prevent the commencement of the action, since the work of the historians in the period up to 2005 changed the academic understanding of the period, based on papers already available in the public

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[144] Paragraph 55.
[145] Paragraph 95.
[146] This was further considered at paragraph 118 where he said: "*However, I do not wish to say more about the history of what happened to documents in the immediate run-up to independence, beyond what is strictly necessary for the determination of the preliminary issue, since the matter may still have a bearing upon issues that might have to be considered at a trial about the knowledge of abuses in the camps on the part of relevant participants. Clearly, deliberate destruction or concealment of embarrassing papers (if that occurred) could well be relevant to the case now made against the defendant. It would not be desirable after a brief consideration of this issue, in the context of a much wider ranging hearing, to reach final conclusions on the many points argued on this aspect of the case. It suffices to say that I do not consider that there is any question of "conduct" of the defendant relating to the loss of documents, now weighing in the scales against it, for the purposes of section 33(3) (c) of the Act, whatever relevance this subject may have at a later stage.*"
[147] 294 boxes, containing about 1500 files. In addition, there were a further 13 boxes of Top Secret papers, containing sensitive material including intelligence reports, names of security officers etc. which became separated from the Hanslope archive sometime after they were reviewed during the 1980s and later destroyed.
[148] The judge mentioned that the Claimants accepted that following the Defendant admitting that 3 Claimants had been tortured as alleged, the main class of lost documents, those relating to individual detainees, had less potential relevance. There is no such admission in relation to any of the Test Claimants in the present case.

> archives in this country and in Kenya. It seems to me that this was the principal trigger for the initiation of the claims."[149]

The Cary Report

156. I have been taken by both parties through paperwork relevant to the Hanslope documents. There is no dispute but that these documents were sent from Kenya to the UK in 1962-1963. The precise dates are unknown. Nor is it clear precisely what was sent.

157. On 24 February 2011 a report was sent by Mr Anthony Cary CMG to Professor Salmon, the Chief Historian. The report was headed "The Migrated Archives: What Went Wrong and What Lessons Should We Draw?" A (slightly) redacted form was adduced in evidence. It is 21 pages long together with a short appendix setting out Mr Cary's terms of reference. The terms of reference record that it had come to light that 294 boxes of records from the former Colonial Government in Kenya were at Hanslope and had been held there since the 1990s and previously at the joint FCO/MOD archives at Hayes. Further, that the Defendant did not declare this material in response to Freedom of Information requests in 2005 and 2006 relating to the Mau Mau with the 2006 response stating specifically that the FCO no longer held any files relating to Mau Mau.

158. Mr Cary records that the 294 boxes of some 1500 files sent in 1963 included, inter alia, Executive Council minutes from 1939 to 1957, War Council minutes from 1954 to 1961, Council of Ministers' minutes from 1954 to 1963, Intelligence Committee minutes from 1953 to 1961, and a complete set of Provincial and District Intelligence Summaries from 1953 to 1961. The Acting Governor commented at the time that the last series, in particular, could not be made available to research workers for many years to come, but should nevertheless be preserved because it contained material of historic value.

159. Between 1963 and 1994 the files were stored at Hayes repository and were moved in 1994 to Hanslope Park to save on storage costs. Although Mr Cary restricted his investigation to the Kenyan files, confusion and uncertainty about the contents of the holdings applied to the migrated archives as a whole.

160. Mr Cary devotes a number of paragraphs to the question of ownership of the Kenyan files within the migrated archives. In summary:

> A. The Kenyans made their first request for the return of the documents in 1967 and were refused on the basis that the papers were the property of the UK Government. Mr Cary says that the decision not to return the files was based on a combination of two matters (a) the concern that this was the thin end of the wedge, and if some files were returned attention would be drawn to the existence of others which they would not wish to release; (b) dangerous precedent, namely that if they were reviewed for sensitivity and

[149] He added: *"the political climate in Kenya after independence and until 2002/3 would not have permitted the potential claims to have been ventilated much sooner; that cannot be laid at the door of the UK government."* This is not relevant to s32. It may have some relevance to s33 Limitation Act 1980.

then returned to Kenya, it might be difficult to withhold un-reviewed and potentially sensitive papers from other former colonies.

B. The Kenyans asked again in 1974 and in the early 1980s. At a meeting with the Library and Records Department (LRD), the Public Records Office (PRO) position had changed and in March 1982 the PRO explained, in relation to the migrated archive from Aden, they were not UK public records, but were records of the former Colonial government administration, most of which, but for concern over their safety, would have been handed over to the incoming government on independence. Somebody proposed that the general question of returning colonial records should be examined 50 years after the date when the first colony, Ceylon, became independent i.e. in 1998. Legal advisers doubted whether it could wait until 1998, but no further action was prompted.

C. In February 1995 the successful particular transfer of the migrated archives from Hayes to Hanslope Park was confirmed. Four options as to what to do with them were considered. The recommendation was that it should be determined by reference to the PRO and the Lord Chancellor's Office, whether or not they were public records, but if not the favoured option was to take the line taken with Kenya as a precedent, and answer any queries from successor governments "By admitting that certain records were destroyed or returned to the UK, but these are the property of HMG and we do not intend parting with them."

D. Further toing and froing is then recorded by Mr Cary and he comments in relation to a 1997 file note that it epitomised "The confusion that by then reigned over the status and contents of the archives. Because the papers were not deemed to be official public records, and because the FCO now saw itself as their custodian rather than their owner, they came to be almost "off limits"". He said that as a result of this confusion over ownership, the Kenyan archive was left in limbo i.e. neither accepted by TNA for the public record, nor formally acknowledged by the FCO[150].

161. Mr Cary concludes that over recent years the department had lost collective memory about the contents of the archives. Erroneously, the conviction developed that they were essentially administrative and/or ephemeral, and that substantive papers would be replicated in Colonial Office records already in TNA. This was also the TNA's view. Since 2006 they had also been stored on a different floor from other historic papers[151].

162. Mr Cary considers why the Kenya files were not identified at the 2005 and 2006 FOI requests. There is a detailed discussion of this. Mr Cary accepts "that there was no deliberate intention to withhold information." He attributes the failure, first, to the fact that it had become understood that the migrated archives were unimportant and

[150] At paragraph 18 he states: "Unless it catalogued the files and conducted a full sensitivity review, the FCO could neither release the files…nor consult them in any systematic way for the purposes of FOI and other search requests, nor even apply for a Lord Chancellor's instrument to authorise retention of them. But no review was conducted. In part, this was because of resource constraints…in part it also reflected a failure by successive senior managers to grip what should have been seen to be an unresolved and potentially explosive problem."
[151] There was a section on 2007 onwards in the Cary Report which I do not further refer to.

unsearchable. However that only explained the failure up to a point as "these misapprehensions were only half believed, at least by the more thoughtful and knowledgeable staff. It was perhaps convenient to accept the assurances of predecessors that the migrated archives were administrative and/or ephemeral, and did not need to be consulted for the purposes of FOI requests, while also being conscious of the files as a sort of guilty secret, of uncertain status and in the "too difficult" tray". Thirdly and, in Mr Cary's view most importantly, "the drive and initiative about what to do about the migrated archives, seems to have been coming from relatively junior staff. More senior management…appear to have been absent from the field, at least as seen through the patchy records… like senior IMG staff over so many years - their attention was on other priorities, and especially the need to meet annual targets for the review and transfer of files to TNA."

163. The remainder of Mr Cary's report considers why the files were not initially identified for the Mutua case and how to resolve this type of failure in the future. As to the former, I have already recorded McCombe J's finding[152] that

> "Whatever criticism may be levelled at the absence of these papers from the public archive until now, the defendant's failure to disclose them earlier to the Claimants in the course of the proceedings was not in any way a contravention of any requirement of the court rules or in breach of any order of the court."

164. I heard evidence from Mr Charles Mochan. He had provided a statement dated 25 May 2017. He had been employed by the Defendant between January 1967 and March 2006. He had been asked to review approximately 300 boxes of files which had been brought to the UK from Kenya, and to consider each file to see whether it contained any sensitive information. He did not recall much about the completion of the task (it being 40 years ago) and considered it routine and quite boring. He did recall that a large number of the files that he reviewed contained sensitive information on the very first page. Where that was the case he did not continue to review the rest of the file. To the best of his memory, all of the files he reviewed contained at least one reference to sensitive information. This all took place in 1980. He reviewed the majority of the documents at Cornwall House, Waterloo but there were a number of documents then stored at the PRO in Hayes.

The Hanslope Documents – Analysis

165. The first point to note is that there is no allegation that the Hanslope documents were deliberately concealed, or would have been deliberately concealed, had a court at any stage made an order for discovery/disclosure. I have also already decided that there was no deliberate concealment of these documents by the Defendant so as to satisfy the provisions of s32(1)(b).

166. Did the Hanslope documents contain any fact relevant to the Claimants' rights of action which could be said to have been deliberately from the Claimants by the Defendant?

[152] Paragaph 34 of the first Mutua judgment.

167. In summary the Claimants' submission (and my responses) on this are:

(i) Until the discovery of the Hanslope documents, action regarding Kenya was limited to particular allegations. In Mutua the Claimants proceeded against the Defendant for personal injury damages based on specific allegations of torture. The Defendant acknowledged the credibility of those individuals[153] and the issue in Mutua was whether the documentation established the relevant legal liability.

- It should be pointed out:

(a) the Mutua claim was brought prior to the parties' awareness of the Hanslope documents or what they contained. The claims for damages for personal injuries were pleaded against the Defendant without those documents.

(b) Nor were admissions made in respect of three Claimants in Mutua as to the physical injury allegations until the start of cross-examination of those Claimants at the limitation hearing in July 2012, proceedings having commenced in 2009[154].

(c) Therefore until 2012 the Mutua Claimants had brought their claim against the Defendant for personal injury based upon torture and other mistreatment, without any admissions by the Defendant as to the fact of that torture/mistreatment and, until 2011, without the Hanslope documentation. It is clear that, prior to the discovery of the Hanslope documentation the claim had been pleaded essentially on the same bases as those for which the present Claimants allege they did not have knowledge till the Hanslope documents became available. In paragraph 13 of the first Mutua judgment, the judge said:

13. "The claim is presented under five heads. First, (1) it is said that the former liability of the Colonial Administration in Kenya simply devolved or was transferred, by operation of the common law, upon the UK Government at the time of independence in 1963. Secondly, (2) it is said that the UK Government is directly liable to the claimants, as a joint tortfeasor, with the Colonial Administration and the individual perpetrators of the tortious assaults, for having encouraged, procured, acquiesced in, or otherwise having been complicit in, the creation and maintenance of the

[153] Mutua second judgment paragraph 27.

[154] The admission was "The Defendant did not dispute that he or she had suffered torture and other mistreatment at the hands of the Colonial administration.". See second Mutua judgment paragraph 27 where McCombe J continued: There remains, therefore, no outstanding issue as to the *fact* of those Claimants' injuries and the manner of their infliction, although legal responsibility on the part of Her Majesty's Government in the United Kingdom remains hotly contested. While Mr Mansfield maintains certain points as to inconsistencies in certain parts of the Claimants' accounts (which may go to other issues in the case, such as the status of the perpetrator of the injury in question and therefore the Defendant's potential responsibility in law for his actions), the substance of what happened to these three claimants is no longer in dispute."

"system" under which the claimants were mistreated. Such liability is said to arise out of the role of the military/security forces under the command of the British Commander-in-Chief. Thirdly, (3) it is alleged that the UK Government is similarly jointly liable, through the former Colonial Office, for the acts complained of, because of its role in the creation of the same system under which detainees were knowingly exposed to ill-treatment. Fourthly, (4) it is said that the UK Government is liable to the claimants (and to the third claimant in particular) as the result of an instruction, approval or authorisation of particular treatment of claimants given on 16 July 1957. Fifthly, and finally, (5) it is alleged that the UK Government is liable in negligence for breach of a common law duty of care in failing to put a stop to what it knew was the systemic use of torture and other violence upon detainees in the camps when it had a clear ability to do so."

(d) It must also be recalled[155] that the Kenyan Government was aware that there were documents in the UK and asked for their return in 1967, 1974, and in the early 1980s. This was before the Hanslope documents went missing. In any action then commenced in the UK these documents would have been subject to the rules on (then) discovery of documents.

(ii) In the present case the Claimants are put to proof about their credibility and accuracy. The documentary record supporting the Claimants' account is critical; without it the Claimants would be limited to their unsupported account. Even if that were sufficient to plead the case, the Claimants could not prove the basis of the Defendant's liability for assault or negligence.

- I do not accept this in relation to the assault claims. The Claimants in Mutua were able to plead those without the Hanslope documentation. Proof is an entirely different matter. It goes to evidence and not concealment of facts relevant to a right of action.

(iii) The documentary evidence system is more important in this case than it was in Mutua because the acts alleged go far beyond admitted torture and into villagisation. The Claimants rely upon evidence that villages were a punishment, that people in them had to work, that disease and ill treatment was rife and villages were places of detention; also facts about the Defendant's complicity and liability in the torts. It is said that the Claimants could not bring proceedings until such documentation was understood, because the facts required for a Particulars of Claim were unknown.

- As to this (a) I have not been provided with any analysis of which documents were available to the Claimants absent the Hanslope documents, and which were not; in other words what could have been supported without the Hanslope documents and (b) in any event, all these matters are at best evidential. The Test Claimants knew at the

[155] Cary Report paras 7-8.

time it was happening what had happened to them. They could describe the alleged punishment conditions, how they had to work and how disease and ill treatment affected them, as well as the restrictions on their liberty which they allege. These matters do not "come from documents". They come from the Claimants with evidential support from documents. (c) As to the "Defendant's complicity and liability in the tort" these are matters which I have already dealt with earlier in this judgment and will return to again shortly. I reject the submission that the Claimants could not bring proceedings until such documentation was understood[156].

- No Test Claimant said, in pleadings or oral/written evidence that it was only when the Hanslope documents became available in 2011 that they discovered matters relevant to their right of action against the Defendant which they did not know before. Quite simply no such has been proven.

168. In paragraph 27 of Mr Myerson QC's skeleton argument he summarises why he says that the Claimants had facts relevant to their rights of action concealed from them. He says this:

> "The analysis of the material found at Hanslope assists Cs in the following ways:
>
> (a) It provides material upon which a proper view of their claims can be formed.
>
> (b) It permits the case to be advanced without historians' evidence.
>
> (c) It explains the system. That, in turn supports individual accounts of injuries (which D does not admit) and establishes the basis of the liability for those injuries should attach to D.
>
> (d) It establishes that D's contention that it would be assisted by missing historical records – and that proceeding into the absence of such records is thus unfair – is very likely to be wrong.
>
> (e) It thereby permits the court to assess credibility by measuring D's contentions against the facts.
>
> (f) It thus establishes – by proving the unlikelihood of it – that D cannot assert its acts were lawful by virtue of the Regulations passed. D did not make this concession until Mr. Mansfield replied to the opening. Until then C's had to prove it."

[156] The Claimants also refer to the fact that historical evidence was not allowed in the present case and said that the Claimants were left with raw documentation. They did not complain about this but said that it could not simultaneously be the Defendant's case that the historians' reviews and books were inadmissible and that books provide sufficient evidence to plead the causes of action. It is not part of the Defendant's case that books did provide sufficient evidence to plead the causes of action. The Defendant's case and the court's finding is that there was nothing in the Hanslope documents which were relevant to the Claimants' right of action within the meaning of section 26 of the 1939 Act or section 32 of the 1980 Act.

This extract demonstrates the confusion of, on the one hand, the facts relevant to the rights of action and, on the other hand, evidence in support of the facts relevant to the right of action.

169. In this regard I return to deal as briefly as possible, in relation to the Hanslope documents, to the Claimants' case that in their claims against this defendant for liability in negligence, joint liability and vicarious liability, facts relevant to the right of action were concealed. The outline of this is set out in paragraphs 77 – 101 of the Claimants' Opening.

170. I begin by emphasising what I have already stated in this judgment, namely that the Claimants accept that they had the requisite knowledge for the purposes of sections 11 and 14 of the 1980 Act at the time the alleged personal injury torts occurred. Therefore, time began to run at that point in respect of all alleged torts. Also that they had knowledge of the facts relevant to the non-personal injury torts. Notwithstanding that I shall consider some of the specific points made by the Claimants.

171. In dealing with negligence, the Claimants accept[157] that there were documents available from the TNA or Cabinet Office which they say:

- Acknowledge that the UK had the final word on the governance of the Colony
- Made statements that the political affairs of dependant territories were essentially a matter within the domestic jurisdiction of the United Kingdom
- That the Defendant directed that things should or should not happen e.g. making clear that those forced to labour should be paid, setting out the legal position as a result of the Defendant's research, dealing with the mechanism summarily rejecting appeals against sentences of death and insisting that the surrender offer of 1955 was not withdrawn until after the UK General Election.

172. The Claimants give examples in paragraph 79 of their Opening of the types of documents that they say were concealed as part of Hanslope. These, they say, demonstrate that the Defendant was in a sufficiently proximate relationship to the colonial administration to give rise to a duty of care, was in a position to direct and influence events and took the lead in dealing with difficulties arising as a result of external criticism of acts and events in Kenya. In the Defendant's skeleton paragraphs 184-187, the documents cited by the Claimants are subject to detailed comment. The Defendant then concludes at paragraph 187 that all of the documents cited in paragraph 79 "Therefore exist elsewhere and/or the information within them was contained elsewhere and/or do not support the proposition alleged." There is force in the Defendant's comments. I do not propose to go through each document one by one.

173. The Claimants submit[158] that the Court will have to assess the extent to which the concealment must be material[159] and the very fact that the Defendant denies the propositions evidenced by the existing documentation is proof that the concealed

[157] Paragraphs 80-81 of the Opening.
[158] Paragraph 82 of their Opening.
[159] Paragraph 84.

documents are material. I reject these submissions. First, I reject them as a matter of law. These are not facts within the meaning of section 32. They are evidence. This is apparent on their face. Secondly, the invitation from the Claimants that the court has to assess materiality is an invitation to assess evidence. Essentially, the Claimants concede that a number of non-Hanslope documents do make out the case. It is no part of the court's function when dealing with the section 32 test to evaluate the weight of differing sources of evidence in support of a "fact relevant to the right of action". This is precisely the problem which might ensue if the authorities were not followed. Thirdly, I fail to see how it can be said that the Defendant's denial of a proposition is proof that the concealed material is material for the purposes of section 32. Finally, to the extent that examples are given by the Claimants, they do no more than provide potential supplementary evidential support to that which was available absent the Hanslope documents.

174. In paragraphs 85-94 of the Claimants' Opening, joint liability is considered. It is pointed out that the Defendant denies common design and that the Defendant was complicit in a system under which the abuses occurred; finally, the allegation that it authorised the use of unlawful force.

175. The Claimants then refer to a number of documents, many from the Hanslope files, which they say indicate knowledge that the system was privileging ends over means and provide examples of how involved London were in drafting Kenyan Legislation and what might and might not be done; also documents that showed that the Defendant knew of particular problems, but did not ascertain whether solutions proposed by the administration were relevant to demonstrating the desire to preserve the system. In relation to these documents, a number of them exist elsewhere than in Hanslope or, being telegrams or correspondence, copies would have existed (or perhaps still do exist) amongst UK records. In any event they are evidential only.

176. It is said that there are incidents that, but for Hanslope, seemingly would not feature at all. The Claimants say that the death of Kabugi Njuna at Aguthi is almost entirely dealt with in Hanslope documents and references are given. The Defendant responds to this by saying that the key facts of that incident are within a public criminal judgment[160] which could not have been concealed. The Hanslope documents are therefore no more than evidence as to internal discussions. That said, some of them appear not to have been concealed/capable of concealment[161]. Other documents[162] are of dubious relevance as to any knowledge or control of the Defendant, being either internal Kenyan Government communications or, in respect of Caselines Reference 32-65119, a letter from Mr Gavaghan regarding the incident.

177. The Claimants further say that all the incidents are cumulative. I reject this and the other submissions for the same reasons essentially as I have given in respect of negligence.

178. Finally, I turn briefly to vicarious liability. This is denied by the Defendant. The Claimants say that Hanslope documents demonstrate that the Army was directly responsible for London and that Baring, the Governor, would prioritise Erskine's (the

[160] Caselines 32-64991.
[161] 32-60663, 32-60871-7; 32-61010; 32-62422 and 32-64991.
[162] 32-61144, 32-61269, 32-61705, 32-62406, 32-64467 and 32-65119.

Commander in Chief's) recommendations. They say that the Defendant was the ultimate source of authority to regulate and ought to have known that violence was widespread and legislation not adhered to. In fact, only three Hanslope documents are referred to in paragraph 96 of the Claimants' Opening under the vicarious liability section. Two of these[163] are not from Hanslope, but from TNA. The third[164] is a telegram from the Governor to the Secretary of State in Colonial Office file 822/442.

179. The above paragraphs also demonstrate that it is not easy to work out which information in the Hanslope documents is to be found elsewhere. Some correspondence between Kenya and the UK is also to be found in Colonial Office files. Telegrams transferred from Kenya to the UK and later stored at Hanslope would have also been received/sent by the UK and therefore would have had UK 'mirrors'. There is no evidence from either party precisely what is in the TNA, but sometimes documents were sent to London and are available in TNA. These include Complaints Coordinating Committee minutes and War Council minutes. Apart from all the other problems therefore, there are real difficulties in the Claimants establishing that what was found in Hanslope might not be elsewhere. There is no evidence, apart from the possibility of inference. Inferences in this area are unreliable. Without specifics as to which document(s) are in fact relevant to the right of action (there seem to be none), and evidence that any such documents are on the balance of probabilities not held elsewhere, the Claimants' case factually on section 32 is not proven.

Deliberate Concealment from the Claimants?

180. I refer to my previous comments on this and add that, in any event, there is no evidence that:

(a) Any of the Test Claimants considered bringing a claim in respect of the alleged abuses during the Emergency prior to shortly before they in fact did so.

(b) Any of the Test Claimants, had certain documents not been destroyed and/or (for example) the Hanslope documents had been publicly available, would have brought a claim earlier than they did.

(c) To quote the words of Rix LJ in the Kriti Palm[165] there was any active and intentional concealment by the Defendant of a fact relevant to a cause of action, or intentional concealment by omission to speak of a fact relevant to a cause of action which the Defendant knew itself to be under a duty to disclose.

181. The Claimants cannot prove either any deliberate concealment by the Defendant within the meaning of section 32(1)(b) and, even if the Claimants could get over that hurdle, that there was deliberate concealment from the Claimants. The date the Claimants' solicitors first contacted the Defendant in relation to these claims was October 2012. Prior to that, there had been no enquiry by any Test Claimant as to

[163] 32-5983 and 32-5985.
[164] 32-7512.
[165] Paragraph 321.

documents the Defendant had in its possession, or any request for disclosure. There was no duty upon the Defendant to disclose any documents to the Claimants before that stage.

"Or Could With Reasonable Diligence Have Discovered It"

182. Clearly this does not arise given my findings so far. However, had the Claimants succeeded until this stage on the section 32 argument, it would have been on the basis that:

(a) Although they knew who the primary perpetrators of the alleged torts against them were, they needed the concealed documents in order to plead their claims in negligence/joint liability/vicarious liability against the Defendant

And/or

(b) That the wider construction of a fact relevant to the cause of action should be adopted, in which case the concealed documents materially assisted the Claimants to prove their case.

183. In those circumstances, and if the Claimants had fulfilled the other requirements for section 32, would they have proven that they could not have discovered the deliberate concealment without exceptional measures which they could not reasonably have been expected to take?[166]

184. The factual matrix would have been not only that the Claimants knew that all the torts had been committed against them by the primary perpetrators but also that they believed that it was the fault of the UK Government.

185. In this regard the following points can be made:

(1) The constitutional position has not changed over the years.

(2) In my judgment there has always been sufficient for the Claimants to plead their case against the Defendant. Had they issued proceedings at any time, then the Hanslope documents would have been disclosable and disclosed on discovery/disclosure[167].

(3) Further and in any event, on or after 2 August 1971, the Claimants would have had reasonable prospects of success of obtaining pre-action discovery[168]. The Claimants say that that would have been met by a flat rejection of the proposition that the Claimants met the test for a real prospect of success[169]. I do not accept that the Claimants have established this.

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[166] Millet LJ in the Paragraph Finance case [1999] 1 All ER 400 at page 418.

[167] Is it possible that for a period in the late 1990s/early 2000s, such disclosure would not have been forthcoming because of the errors in the Defendant's system. However before then the Claimants had not proven that full disclosure would not have been made.

[168] Pursuant to section 31 of the Administration of Justice Act 1971.

[169] Rose v Lynx Express [2004] EWCA Civ. 447.

(4) Further the Claimants say that reasonable diligence does not extend to requesting pre-action discovery/disclosure. The Claimants would have had to have legal advice, which the Claimants could not obtain because they were admitting membership of a proscribed organisation and had no funding. The Defendant says these latter contentions were not evidenced[170].

It is not easy conceptually to decide this issue given all the premises which have to be in place before it is reached and which I have found not to be established. I therefore, with the addition of these comments repeat what I said earlier, namely that it is difficult to see how the claimants would not have had at least relevant constructive knowledge of the facts allegedly underlying the s32 allegations if they had actual, or even constructive, knowledge of the facts material to Section 14.

Conclusions

186. My conclusions are as below:

(1) All the Claimants' allegations are of concealment of evidence, not "the right of action" (s26 1939 Act) or "any fact relevant to the (Claimants') right of action" (s32 1980 Act).

(2) The Claimants had the requisite knowledge to bring their claims for both personal injury and non-personal injury claims at the time of accrual of the causes of action.

(3) Even if the matters relied upon by the Claimant as "the right of action"/"any fact relevant to the…right of action" had been such, rather than evidence, it is not proved that the Defendant deliberately concealed them from the Claimants.

(4) Therefore, subject to the discretionary provisions of section 33 Limitation Act 1980 which apply to personal injury claims only, all claims are barred pursuant to the provisions of s26 of the Limitation Act 1939 and/or s32(1)(b) of the Limitation Act 1980.

Supplementary note:

187. After this judgment was sent out in draft, the Claimants responded in relation to Paragraph 89 in this way: "This paragraph begins a discussion in which findings of fact are made about the documents allegedly concealed, upon which the Claimants relied for the s32 argument. However, the judgment then makes findings rather wider than this, upon which the Claimants advanced no argument. The Claimants' primary suggestion is that a further sentence could be added to paragraph 89 at the end to make that clear. It could read: "Insofar as what follows are findings of fact, those findings are particular to this judgment". An alternative was suggested of amending paragraphs 93, 97, 98, 118, 128, 129, 139, 147 and 149. Those amendments proposed the addition of words which limited findings in those paragraphs to this judgment only and not for the purposes of the case as a whole. The Defendant objected on the basis that the hearing was not an application, as described by the Claimants, but

[170] The Mau Mau was a proscribed organisation in Kenya until 2003. However, whether having taken the Oath in circumstances which many Claimants describe, would have itself have stopped them getting legal advice is not clear.

closing submissions on an integral part of the case, that neither party proceeded on the basis that submissions or findings made were for a limited purpose and that such factual findings are final. The Defendant also relied on R (Binyan Mohamed) v Secretary of State for Foreign & Commonwealth Affairs [2010] EWCA Civ 158, paragraph 4.

188. I have not amended the judgment. I see force in the Defendant's submission. However, I have added this note so that, if so advised, the Claimant can raise the matter subsequently and it can be ruled on formally. If this is relevant to final submissions on TC34's case then it can be heard during the hearing of those submissions which are scheduled to commence on 18 June 2018.

Appendix A

Re-Re-Re-Amended Generic Particulars of Claim paragraphs 46 A-46C

46A. The Defendant engaged in an exercise of deliberate destruction of documentation at the end of Colonial Rule in Kenya, as to which:

i. An instruction was issued by Iain Macleod, Colonial Secretary, in 1961 regarding the material that should be retained or destroyed, the latter including any material that might "embarrass Her Majesty's" government, that could "embarrass members of the police, military forces, public servants or others e.g. police informers", that might betray intelligence sources or that might "be used "unethically by ministers in the successor government". That instruction is compatible with the Claimants' case on system and joint and vicarious liability. It is not consistent with the Defendant's Preliminary Position Statement.

ii. Such destruction was to be undertaken in such a manner as to erase evidence of its occurrence, for example, when documents were burned "the waste should be reduced to ash and the ash broken up" and documents dumped at sea must be "packed in weighted crates and dumped in very deep and current-free water at maximum practicable distance from the coast";

iii. Instructions required the existence of documents classified for removal and destruction - the so-called "Watch" documentation - included, "**automatically"**: "all papers which are likely to be interpreted, either reasonably or by malice, as indicating racial prejudice or religious bias on the part of HMG, the present Kenya Government, other British Colonial Governments, or friendly states". (Appendix A I&S.137/02(S)). Further, the aforesaid instruction, dated 13 May 1961, stated: "The legacy files must leave no reference to watch material. Indeed, the very existence of the watch series, though it may be guessed at, should never be revealed" (page 4 paragraph 15).

46B. Accordingly, the Claimant will rely on section 32 of the Limitation Act 1980, or insofar as it applies, section 26 of the Limitation Act 1939, in that:

(a) the Defendant engaged, and accepts it engaged, in an exercise of deliberate concealment (or, if section 26 applies, concealment) of material at the end of Colonial rule in Kenya; which, if section 26 applies, was "fraud" within the meaning of that Act.

(b) the court is entitled to draw the inference that the deliberate destruction of documentation is likely to be, at least in part, for the purposes of concealing information and not simply to dispose of documents;

(c) the matters set out in paragraph 46A above give rise to an inference that the reason for the destruction or removal of documentation was to conceal the information contained therein;

(d) the only entity capable of asserting otherwise is the Defendant. A Minister of State or suitable Permanent Secretary could provide a witness statement attesting to the nature of the exercise undertaken;

(e) Absent such evidence, the Defendant is not entitled to advance an alternative explanation. Nor does the evidence support any inference, other than the one referred to in (d) above;

(f) The proposition that there has been concealment, which concealment necessarily continues, is implicitly supported by the Defendant further retaining 189 files of the Hanslope Park disclosure.

46C. Further, the aforesaid concealment of documents was discovered in 2011, as to which:

(a) facts relevant to the Claimants' right of action remain concealed from them by the continued retention of files relating to the Hanslope Park disclosure. Therefore, the time for the purposes of section 32 Limitation Act 1980 has not yet started to run;

(b) The instruction that the legacy files "must leave no evidence to Watch material" was self-evidently obeyed;

(c) Accordingly, the Claimants could not have discovered the concealment prior to 2011;

(d) In any event, on any analysis, proceedings have been commenced within the relevant time period.

Re-Re-Amended Generic Defence paragraphs 93-96

93. In respect of paragraphs 46A, 46B and 46C, as a matter of generality:

a. It is repeated and averred that the Claimants' claims are time-barred.

b. It is averred that the policies for the retention or destruction of documents produced during the Emergency, as outlined below, were lawful and lawfully implemented.

c. The Claimants' allegations of deliberate concealment of documents are embarrassing for want of particularity, in that:

i. They have failed to specify which documents have been deliberately concealed from them by the Defendant.

ii. They have failed to specify how those documents bear upon the issue of limitation in this litigation.

d. Further and in any event, those allegations are denied. Specifically:

i. It is denied that 'any fact relevant to the [Claimants'] right of action and/or any right of action has been deliberately concealed from [them] by the Defendant', per s.32(1)(b) of the Limitation Act 1980, and/or concealed by the fraud of the Defendant per s26 of the Limitation Act 1939.

ii. If potentially relevant documents were destroyed by the Colonial Government pursuant to its interpretation of the Colonial Office's policy, it is averred that this destruction cannot be attributed to the

UK Government in right of the UK, either as a matter of fact or law.

iii. In the premises, it is denied that there is any basis for the postponement of the applicable limitation periods in this case pursuant to s.32 or otherwise.

94. In respect of paragraph 46A:

a. As to sub-paragraph 46A.i:

i. It is admitted that the Secretary of State sent a telegram on 3 May 1961 to East African Colonies, including Kenya, and headed '*Disposal of classified records and accountable documents*', which was by way of guidance. This contained the phrases quoted selectively and out of context by the Claimants.

ii. Responsibility for any policies implemented remained with the relevant colonial governments.

iii. The Defendant will refer to the full telegram, as necessary, for its true meaning and effect. Its detailed response to the Claimants' allegations of concealment is set out below.

iv. Further and in any event:

(1) It is denied that the document referred to in sub-paragraph 46A.i is 'compatible with the Claimants' case on system and joint and vicarious liability'.

(2) It is denied that the document is inconsistent with the Defendant's Provisional (not 'Preliminary') Position Statement.

b. As to sub-paragraphs 46A.ii and iii:

i. The 'Instruction' of 13 May 1961 was not issued by the Secretary of State. It was a Circular issued by the then Permanent Secretary for Defence at the Colonial Government's Ministry of Defence in Kenya. The Defendant addresses this document below.

ii. At the material time, the Defendant operated a general policy, pursuant to the Public Records Act 1958 ('PRA'), of only selecting for permanent preservation documents of historical interest, which resulted in retaining for posterity only a proportion ~~10%~~ of documents (on the basis of precedent or historical value) and destroying those documents that were not retained.

iii. There was further a policy when applying the PRA to keep closed from general inspection "documents containing information about individuals or organisations which might cause embarrassment or

distress, those containing information the disclosure of which might constitute a breach of confidence, and those to which special security considerations apply" until the documents were 100 years old; see 'A Guide for Departmental Record Officers (Revised)' 1962 [Caselines 32-73161].

iv. In the run-up to the independence of former colonies, the Defendant developed a policy for the preservation of documents of historical significance. It made clear that documents of historical or administrative value were to be sent to the UK and documents which could properly be transferred to the new administrations should be so transferred.

v. The telegram of 3 May 1961 included the following guidance:

> 'As you are considering the disposal of classified records and accountable documents, it may be useful if I set out guidance given shortly before the achievement of independence to Governors of certain territories which are now independent.
>
> 2. The general principles which have been followed in disposing of documents in these circumstances are:-
>
> (i) There would be no objection to the transfer to the successor Government of secret or lower papers provided that they have been scrutinised and selected by a small committee of, say, a Special Branch officer and two Senior Administrative Officers to ensure that none are passed on which:-
>
> (a) might embarrass H.M.G. or other Governments;
>
> (b) might embarrass members of the police, military forces, public servants or others, e.g. police informers;
>
> (c) might compromise sources of intelligence information;
>
> (d) might be used unethically by Ministers in the successor Government.
>
> (ii) There would be little object in handing over documents which would patently be of no value to the successor Government.'

vi. Pursuant to this policy, the Defendant permitted the Colonial Government to decide what documents might be of historical value. It would have been impossible for London to have made the judgment itself without requiring all of the documents to be returned.

vii. The Colonial Government developed a policy, the 'Watch' policy, for sifting of sensitive documents, i.e. those that were of no value to, or could not safely be left to, any independent government, with a view either to transferring them to the UK or, in some instances, destroying them. The Colonial Government took steps to develop this policy no

later than March 1961, before it received the telegram of 3 May 1961 from the Secretary of State;

viii. This policy is set out in the Colonial Government's Circular dated 13 May 1961 (identified at sub-paragraph i. above).

(1) This Circular~~, which appears to reflect the telegram of 3 May 1961,~~ provided for the classification of documents which could not properly be left to an independent government, and anticipated the destruction of at least some of those documents.

(2) It is admitted that it contained the guidance as to the manner of destruction, and classification for removal and destruction, pleaded in sub-paragraphs 46A.ii and iii.

(3) It falls to be interpreted in the light of the matters set out in paragraphs 94 to 96 of this Re-Re-Amended Defence.

(4) The Defendant will refer to the full Circular, as necessary, for its true meaning and effect.

ix. By October 1962, in broad outline, the policy developed by the Colonial Government was to the effect that:

(1) As at the point of independence, any official documents or records which remained upon the territory in question should be capable of being transferred to the successor government.

(2) There was little point in transferring to a successor government documents which were 'patently of no value' to local Ministers (in the run-up to independence), and hence to Ministers in any successor government.

(3) There was no objection to the transfer of documents classified as 'Secret' or lower, provided that they had been suitably scrutinised so as to apply the guidance referred to above.

(4) Papers of historical or administrative value which could not be transferred to local Ministers and thence to successor governments were to be sent to the Colonial Office in London (addressed to the librarian).

(5) Categories of documents falling into certain specific categories were subject to particular considerations (for instance correspondence in the 'Personal' series of correspondence between London and the Governor and senior officials in the Colonial Government, and 'Accountable' and 'Top Secret');

(6) It was for the Colonial Government to develop its own policies regarding the protection and disposal of records (and, in particular, 'sifting' such records in the period during the

transition towards self-government by local ministerial government and thence to independence).

(7) The documentary material suggests that the Colonial Government had in fact engaged in the routine weeding of documents from at least 1955, and that from no later than September 1960 decision-making regarding archives and the preservation of documents addressed what was to happen to documents upon independence, in particular what might be left behind for the incoming government and what might be sent to London, bearing in mind the need to preserve records of historical value. The position in 1962 reflected this.

x. It is understood that the material to be destroyed fell into a number of categories:

(1) Material pre-dating the Emergency and/or to have been considered to have had no historical significance;

(2) Copy material; and

(3) Materials relating to naturalisation, which were not of historical value.

xi. The Defendant admits and avers that the whereabouts of many documents that previously existed is uncertain, and that they may have been destroyed, either before or after Kenyan independence, or may still exist and have not been found, as to which see further paragraph 96 below. ~~However, it appears that errors occurred: documents marked for destruction were retained and vice versa. Examples of the former include War Council Minutes, Complaints Co-Ordinating Committee Minutes and (in part) Detention Orders.~~

95 In respect of paragraph 46B:

a. The allegations in sub-paragraph 46B.(a) to (c) are denied, for the reasons already given. Further, the Defendant avers that the fact a document is not available to the Court does not mean that it was destroyed, either in the run-up to independence, or at all:

i. In 1956, the Colonial Government created Archives Rules and Regulations for the management and control of all archives within central Government in Kenya under which only documents thought to be of continuing administrative use or historical interest were retained;

ii. There is evidence that these Kenyan records were weeded as a matter of routine, whether under 'Archives Rules and Regulations' or otherwise, for reasons of practicality, administrative need, security and perceived historical importance;

iii. The Court will not, and cannot possibly, have every relevant document that still exists. There is a limit to what can be discovered

through reasonable and proportionate searches. The Defendant avers that it has conducted searches that exceed what is reasonable and proportionate, and that the Claimants have not.

b. Further or alternatively, if potentially relevant documents were destroyed by the Colonial Government, this action could not be attributed to the Defendant in right of the UK or otherwise so as to attach responsibility to the Defendant, either as a matter of fact or law.

c. As to sub-paragraph 46B(d), the Defendant has set out its case in this Re-Re-Amended Defence and will rely on such witness evidence as it sees fit.

d. Sub-paragraph 46B(e) is denied, for the reasons already given.

e. Sub-paragraph 46B(f) is denied, for the reasons given above and further below. The Defendant denies that it has retained '189 files' from amongst the Hanslope documents, and avers that the majority of retained and closed items from amongst the Hanslope documents are extracts from files only, with redacted versions available for public inspection at the National Archives.

96 In respect of paragraph 46C:

a. As to sub-paragraph 46C(a)

i. It is for each Claimant to establish in his or her case that facts relevant to his or her right of action were deliberately concealed from him or her by the Defendant.

ii. It is denied that any fact relevant to any Claimant's right of action was deliberately concealed by the Defendant from any Claimant.

iii. The Claimants and each of them have at all material times known the facts relevant to their right of action against the Defendant.

iv. It is denied that the Hanslope documents contained facts relevant to the Claimants' right of action and/or that such facts were not known to the Claimants at all material times. For the avoidance of doubt, concealment of facts already known to the Claimants is not concealment of facts within the meaning of Section 32 of the Limitation Act 1980.

v. If necessary, the Defendant will contend that the Claimants could, with due diligence have discovered any relevant facts which it is held that they did not know.

vi. The Hanslope documents were returned to the UK because, it is inferred, they were considered to meet the criteria for so doing, i.e. they could not be transferred to the incoming administration, were of historical or administrative significance, and it would be improper to destroy them.

vii. The primary reason why the material from the Hanslope Archive did not make its way into the public domain in the early 1990s under the 30 year rule (or the early 2000s under the 50 year rule) was ignorance and confusion as to the contents and significance of the Archive, and the fact that the Public Records Office and its successor, the National Archive, on three occasions (in 1981, 2007 and 2009) declined to accept the records, as evidenced by the report of Anthony Cary CMG dated 22 February 2011 ('the Cary Report').

viii. There was no intent on the part of the Defendant to withhold the documents from the sight of the public generally or the Claimants (or their lawyers specifically) so as to prevent claims being brought.

ix. The fact that a document is not available for inspection by the public does not mean that it has not been available for inspection by the Claimants' lawyers. The Defendant denies withholding inspection of any document requested by the Claimants.

x. Further, in any event so far as may be material, as appears from the Cary Report (see above), the documents which were returned in about 1963 to the United Kingdom to the Defendant were thereafter in the Defendant's possession custody or control such that:

(1) if, at any time thereafter, any of the Claimants had brought proceedings in the High Court of England and Wales claiming damages in respect of any of the causes of action now pleaded, the Defendant would (subject to appropriate claims to privilege and relevance) have been obliged to disclose the same and (subject to appropriate objection) produce them for inspection.

(2) on or after 2 August 1971 pursuant to Section 31 of the Administration of Justice Act 1971, any of the Claimants, each of whom was (if their present claim is validly brought) a person who would have appeared to the High Court to be likely to be a party to subsequent proceedings in that court in which a claim for personal injuries or in respect of death was likely to be made, might (with reasonable prospects of success) have applied for an order that the Defendant, as a person, who appeared to the court to be likely to be a party to proceedings and likely to have or have had in its possession, custody or power any documents relevant to an issue arising or likely to arise out of such claim –

- disclose whether those documents were in its possession, custody or power; and
- produce to the applicant such of those documents as were in its possession, custody or power.

(3) No Claimant enquired prior to October 2012 documents the Defendant had in its possession or requested disclosure and the

Defendant did not deny to any Claimant that it had documents or had had them.

xi. In any event, even had the documents within the Archive been (a) considered to be documents which should, in principle, be transferred to the National Archives, and (b) the subject of consideration for transfer, given their contents, such of the documents which met the criteria for transfer would undoubtedly have been subject to the 30-year rule, if not the 50-year rule.

xii. Further:

(4) The Hanslope documentation would probably not have been released to the Public Records Office/National Archives until the 1980s or early 1990s (with some of the documentation likely to have been the subject of retention/closure for a further period of time given its sensitivity);

(5) The material amplified, but did not materially change, the broad outlines of information which had already been in the public domain for many years as to the relevant policies and actions of the Colonial Government, the UK Government and the British Army

xiii. If the Defendant (or Colonial Government) had sought to conceal 'embarrassing' documents, with a view to defeating potential claims for compensation, many of the documents in the Hanslope Archive would never have been sent back to London: they would have been destroyed.

xiv. It is averred that the question of whether or not the Hanslope Archive was withheld from the public domain for a period of time (and on what basis) is irrelevant given that its absence did not prevent the *Mutua* claimants bringing their claims prior to the discovery of the archive.

b. As to sub-paragraph 46C(b):

i. Sub-paragraph 94.b of this Re-Amended Defence is repeated.

ii. In the absence of any reference to specific documents or persons, the Defendant cannot respond to the allegation that the 'instruction' was 'self-evidently obeyed'.

a. As to sub-paragraph 46C(c):

i. It is denied that the Hanslope documents were concealed from the Claimants by the Defendant, for the reasons already given.

ii. It is denied that the Claimant could not have discovered the Hanslope archive prior to 2011 and the Claimants are put to proof that they

would not have gained access to the documents if they had initiated proceedings earlier.

iii. The averment in sub-paragraph 96.a.vii of this Re-Amended Defence is repeated.

b. Sub-paragraph 46C(d) is denied, for the reasons already given.

Re-Re-Amended Generic Reply paragraphs 42-52A

42. Paragraph 93 of the Re-Amended Generic Defence is denied. In particular:
    a. It is fanciful to suppose that the Claimants would be able to specify what documents have been concealed from them, in circumstances in which the trial date is predicated upon the Defendant's need to search for more documentation.
    b. The concealment does not have to relate to the question of limitation. S32(1)(b)of the Limitation Act 1980 sets out the statutory test.
    c. The Defendant's case on concealment is at one with its case on liability generally and needs to be determined on the evidence.

43. The relevance of paragraph 94 b iii of the Re – Amended Generic Defence is unclear. Paragraph 94biv of the Re - Amended Generic Defence appears to be incomplete.

44. The phrase adopted in paragraph 94bvi of the Re - Amended Generic Defence, that documents "could not properly be left to an independent government" appears to support the Claimants' case that documents were deliberately destroyed. Insofar as the documents were either to be transferred to the UK or destroyed, the Claimants aver that the Colonial Government was acting as agent for, or jointly with, the UK Government. That averment is supported by the Defendant's failure to acknowledge that the instruction was issued by the UK Government or to plead to the consequences of that fact notwithstanding that the issue goes directly to the question of the Defendant's responsibility for all the acts alleged by the Claimants.

45. The Re – Amended Generic Defence now pleads that the Watch policy was that of the Colonial government. The effect of the removal of the sentence at paragraph 94 viii (1) is to suggest, without expressly pleading it, that the policy in Kenya was developed separately and without guidance from, the UK government. The Claimants aver:
    a. Such a plea is a change of case, for which no permission ahs been sought or given;
    b. There is no evidence now available which was not available when the original Defence was pleaded;
    c. The Claimants do not now understand whether the Defendant's case is that the correspondence between the Watch policy and the Defendant's guidance was coincidence or deliberate.

48A. Paragraph 94 ix (7) is not a complete record of what happened. The Defendant has not addressed the need to destroy documents which were embarrassing or suggested discrimination. Nor has it addressed the unchallenged evidence of Professor Rotberg. In the premises the paragraph is denied and the Claimants aver that the Defendant should not be permitted to re-amend to plead a partial case.

48B. As to paragraph 94bx, it is denied that any errors that occurred, none being admitted, assist the Defendant because:

a. The documents were deliberately destroyed and the act of destruction brings the Defendant within s32 of the Limitation Act 1980; or

b. As paragraph 94bx makes clear, any accidental destruction ought reasonably to have been discovered (and was) within a short time and such errors should have been addressed. Thereafter, any destruction was deliberate.

c. The fact of 'accidental' destruction was itself concealed for what, on the Defendant's case, is the entire period of time when such destroyed documents could have been reassembled or recovered.

48C. Paragraph 95a is not admitted. The Claimants do not understand the distinction apparently made by the Defendant between 'weeding' and deliberate destruction. As to the sub-paragraphs:

a. This is a matter of submission. However, the Defendant does not plead its case as to whether this is the explanation for all, a large part, some, or a small part of the missing documentation. Nor does it plead its case as to what was meant by "continuing administrative use of historical interest".

b. The Defendant does not plead the meaning of 'security' or 'practicality';

c. It is obvious that the court cannot have every document that still exists, if only because the parties have agreed that it should not. The remainder of the paragraph is not admitted and the Defendant must prove it. To rely upon the extent of its searches the Defendant must plead and prove them. It must demonstrate the extent of the material it has found, which was said not to exist, and give evidence regarding material it has seen but not disclosed. Otherwise this pleading is irrelevant and should be struck out.

46. As to paragraph 96aii, the Claimants note that in 1981 the Defendant sought to deposit the Hanslope Archive in the Public Records Office, by virtue of the Public Record Office Act 1838 the national archive of England, Wales and the United Kingdom Government. It appears, in the premises, that the archive was not then regarded as the property of the Colonial Government. Further, the test for concealment does not depend on "the primary reason".

47. Insofar as the Defendant relies upon the factual matters (none of which are admitted) set out in paragraph 96 of the Re - Amended Generic Defence, the Claimants aver that those matters do not assist the Defendant regarding concealment, but merely set out the way in which that concealment was officially described.

48. Paragraph 96avi of the Re - Amended Generic Defence is not admitted. The Defendant's belief in the light of the (then) 50-year rule is a matter of evidence.

49. Paragraph 96avii is denied. the Defendant cannot proceed to draw a conclusion from the *Mutua* case, given that it denied all allegations therein made and now seek to say that the *Mutua* case is wholly different to this case.

52A. No evidence has been adduced to support the new matters now pleaded in paragraphs 96a ix, or x, which are both unparticularised as to when, how and at what expense the alleged inspection would have occurred, and unsupported by evidence. It is not admitted that the Defendant would have disclosed material, which it represented to the Kenyan Government as not being with the Defendant's possession or control. Further, the entirety of the new case now put forward depends upon the Defendant now asserting (as it in fact does) that everything was done in right of Kenya.

Draft Amended Generic Rejoinder

22. As to paragraph 48, it is correct that paragraphs 46A, 46B and 46C of the Re-Amended Particulars of Claim were not new to the Claimants' case but had been pleaded previously. The amendments in paragraphs 94, 95 and 96 of the Re-Amended defence clarify the case advanced by the Defendant and respond to matters raised late, in the Claimants' amended Opening, after the service of the Amended Defence; they set out the Defendant's case to be expanded upon in submissions, but are not required as a matter of proper pleading.

23. As to paragraph 48A, which the Defendant understands responds to paragraph 94 b. ix (7) of the Re-Amended Defence:

a) The paragraph must be read with the entirety of paragraph 98 b. of the Re-Amended Defence, which collectively responds to paragraphs 46A i. and ii. of the Re-Re-Amended Particulars of Claim;

b) The Defendant has addressed the allegation that documents were to be destroyed if they might "embarrass" as it was pleaded in paragraph 46A i. of the Re-Re-Amended Particulars of Claim, *inter alia* by paragraphs 98 b. vii, ix and x of the Re-Amended Defence. The allegation as pleaded in paragraph 46A i. is both denied and is not arguable on the face of the document(s) apparently relied upon in that paragraph.

24. As to paragraph 48C, the burden of proof is on the Claimants to prove that the documents do not exist and indeed have been lost or destroyed by either the Defendant and/or the Kenyan Colonial Government. The fact that a document has not been disclosed by one party or the other does not mean that it does not exist. As to whether either party has conducted reasonable searches, that is a matter for submissions.

25. As to paragraph 52A, and the matters pleaded in paragraphs 96 a., ix. and x. of the Re-Amended Defence:

a) The rights to seek disclosure (previously discovery) and to inspect documents are governed by the CPR and previously the Rules of the Supreme Court. Those are matters for submission.

b) In any event, the Defendant avers that relevant evidence has been adduced as to the knowledge of the Defendant as to the Hanslope documents;

c) No allegation has been pleaded that the Defendant would not have disclosed material in its possession had a Court made an order that the Defendant search for and disclose documents. Such an allegation would be a serious one. The Claimant is required to both plead and prove any such allegation, and to apply to amend the Re-Re-Amended Particulars of Claim if it is pursued and such would be resisted;

d) The allegation that the Defendant represented to the Kenyan Government that the Hanslope documents were not within "the Defendant's possession or control" has been neither pleaded nor opened. The Claimant is required to apply to amend the Re-Re-Amended Particulars of Claim if such an allegation is to be pursued or relied upon;

e) For the avoidance of doubt, the Defendant's case here does not depend upon the assertion that everything was done in right of Kenya. Decisions in respect of documents returned to the United Kingdom, once in possession of the Defendant, were thereafter made by the Defendant in right of the United Kingdom.

Appendix B

Section 32 Facts

Para:22 By 23 September 2016, the Claimants to provide a list of facts relevant to the Claimants' causes of action which are alleged to have been deliberately concealed from the Claimants by the Defendant by reference to all pleadings, including test case pleadings.
Para 23 By 23 September 2016, the Claimants will provide the Defendant with a list of documents for inclusion in the preliminary issues hearing bundle.
Para 24 By 7 October 2016, the Defendant will provide the Claimants with a list of documents for inclusion in the preliminary issues hearing bundle.
Para 25 By 14 October 2016, a separate bundle of documents, replicated in a consistently paginated e-bundle, relating to the preliminary issues will be filed by the Claimants.
Para 26 The Claimants' skeleton argument to be filed and served by 14 October 2016.
Para 27 The Defendant's skeleton argument to be filed and served by 28 October 2016.
Para 28 The parties will file and serve an agreed bundle of authorities, if required, by 28 October 2016.

Particular Causes of Action

The destroyed documents are deliberately concealed. 3

The Hanslope documents were deliberately concealed until a reasonable time after they were placed in the National Archive, before which the Claimants could not have access to them. There is a factual issue over the extent to which that concealment was knowingly committed, and the date of any knowing concealment.

Insofar as forced labour is concerned, this constitutes an assault if unlawful because it was compelled by force or the threat of force.

Concealment prevented and/or prevents the Claimants establishing a positive case that acts were unlawful because regulations were not complied with, restricting the Claimants to relying on the absence of evidence of lawful acts to prove that the acts were unlawful, and permitting the Defendant – if it wishes – to assert otherwise.

In fact, the Defendant asserts that, because the documentation has been concealed (as the Defendant puts it "is unavailable"), the burden is on the Claimants, who must prove the legislation itself was unlawful. If that contention be correct, the concealment of documentation has imposed a mixed legal/factual burden on the Claimants, which they would not otherwise have to discharge. To the extent that the destroyed documents include documents connected with the legality of the acts to which the Claimants were subjected, whether regarding the legislation generally or the observance of particular parts of it, the facts contained within those documents are relevant to the Claimants' causes of action generally.

The issues below apply to each test Claimant insofar as the particular case pleads events giving rise to the issues.

Numbers in brackets are references to the page number in the bundles of statutory material.

Assaults

1. The identity of almost all individual perpetrators of unlawful assaults on the Claimants. The documentation shows that personal files were destroyed.

2. Consequently, whether those perpetrators were British, Kenyan European, Kikuyu, or other and the regular army unit or police unit to which they were attached, or whether they were irregular.

3. The identity of almost all those subjecting the Claimants to forced Labour, or controlling and directing its implementation.

4. Any documentation demonstrating that the officer in charge was satisfied that the forced labour the Claimants were required to do would assist in bringing the Emergency to an end and the basis upon which the officer was so satisfied, pursuant to r22 EA as amended (711) or some other justification relied on by the person concerned, for example, the labour amounted to no more than customary communal work, or village betterment and conservation.

5. All records concerning payment for forced labour made pursuant to rr8 and 22 of the Emergency (Detained Persons) Regulations 1954 as amended (792).

6. Whether records were ever kept of the number of days a detainee was forced to labour, the system for ensuring that such records were accurate, the persons responsible for ensuring that such information (if recorded) was noted and the whereabouts of the records themselves.

7. Whether anyone was enrolled into the KR pursuant to R2 Emergency (Amendment of Laws) (No 4) Regulations 1953, and the enrolment records of the KR (598).

8. Whether anyone was enrolled into the KPR pursuant to R2 Emergency (Amendment of Laws) (No 5) Regulations 1953, and the enrolment records of the KPR (599).

9. Whether any Committees were appointed and heard complaints pursuant to R6 Emergency (Detained Persons) Regulations 1953 and the complaints, and minute books relating to those complaints.

10. Like particulars as sought under the heading "False Imprisonment" below regarding the Prison Ordinance, absent which detention was unlawful and therefore constituted an assault.

11. Whether the Commissioner confirmed any sentence of corporal punishment imposed by someone other than himself before it was carried out as required by S88(2) PO and the confirmations.

12. Whether any rod or cane used for such sentence had been approved by the Member as required by S88(2) PO and all such approvals.

13. Whether the medical officer examined all prisoners prior to the sentence of corporal punishment being carried out, pursuant to S88(4) PO and all records of examination.

14. Whether the officer in charge attended each corporal punishment inflicted as required by r20 (21) Prison Rules (514) and the relevant journal entries he was required to make.

15. Whether there was any discussion regarding the administration of beatings and corporal punishment in villages, and whether they should be subject to the same legal strictures imposed on such activities carried out in detention camps. The relevant documentary record.

16. Whether any orders were made pursuant to r3 and r4 Emergency (Communal Services) Regulations 1953 (652-3) and all such orders.

17. How many evacuation orders were made pursuant to r3 Emergency (Control of Nairobi) Regulations (713) and all such orders.

18. Whether any evacuation orders were continued pursuant to r4 of the Emergency (Control of Nairobi) Regulations 1954 as amended (753)

19. How many people were arrested pursuant to r2(6) ER as amended (768) and the relevant documentation, including that authorising their detention beyond 24 hours.

20. How many curfew orders were made pursuant to s64 Police Ordinance 1948 as amended (793) and each such order.

21. Whether any Tribal Police were appointed pursuant to r4 Tribal Police Ordinance 1958 (852) or r4A (865) and copies of all ministerial approval, notices and declarations.

22. The identity of the people who screened the Claimants.

23. The notes made by the screening teams, the evidence they relied upon, if any, and their final reports.

24. Whether there was any discussion about the legal rules and regulations, if any, governing the conduct of the screening teams, and the relevant documents.

25. Whether the effect of the infliction of violence during screening on the reliability of the information thereby obtained was ever discussed, the notes of such discussions and the conclusions arrived at.

26. The legal justification, if any, relied upon for the infliction of violence on the person being screened.

27. Whether violence was ever inflicted on those being screened merely to satisfy the urge to inflict violence rather than to extract information.

28. Whether, if so, that fact was reported and, if so, whether the decision to detain any Claimant was influenced by such an event.

29. Whether the information obtained via screening was ever the subject of an attempt to test it against information obtained from other sources, such as intelligence reports, before determining whether the screening report was a reliable basis upon which to act.

30. Whether the matters raised in paragraphs 23-27 above were ever raised by the Defendant or the Colonial Administration, the content and outcome of such discussions and the relevant documents.

False Imprisonment

31. The identity of all those purporting to extend the lawful detention of any Claimant beyond 24 hours, pursuant to Reg 3(2) of the Emergency Regulations 1952 as amended (704)

32. The documentation demonstrating that such detention was lawful, under R 3 or 16A,

33. Whether any orders were made by Provincial Commissioners under the same regulations and the orders made.

34. Whether any emergency restriction orders were made pursuant to R2A ER as amended and the orders made (588 and 613).

35. Whether any orders were made by the relevant Executive Member under the R2 Emergency (Forest Area Resident Labourers) Regulations 1953 (576) or as amended (648) delegated under R3 and the orders made.

36. Whether any labour controlled areas were declared by means of R3 Emergency (Control of Kikuyu Labour) Regulations 1953 and the orders making such declarations (583).

37. Whether any rules were made pursuant to R4 of those regulations and copies of the rules.
38. How many movement orders were made under R2 the Emergency (Movement of Kikuyu) Regulations 1953, and the orders made.

39. Whether any, and if so what, arrangements were made in order for the Governor to perform his obligations under R2(3) of the ER 1952 as amended (609), the records of all appointments, meetings, orders, and documentation.

40. Whether any, and if so what, arrangements were made in order for the Governor to perform his obligations under R2(5) of ER 1952 as amended (610), the orders made.

41. Whether any other places of detention were authorised by the Chief Secretary as required by r2(6) EA (as amended) (697) and copies of any authorisations made.

42. All detention orders made and the documentation establishing that the obligations imposed by R4 Emergency (Detained Persons) Regulations 1953 (634) were performed.

43. Whether any orders were made declaring a place a Special Detention Camp pursuant to R20 Emergency (Detained Persons) Regulations 1953 and the orders making such declarations and transfers (638).

44. The Emergency (Detained Persons) Regulations 1953 applied the Prison Ordinance and Prison Rules to all detention camps. Whether every person serving as a prison officer made the declaration in the form required by S7 Prisons Ordinance (357), and copies of the form.

45. Whether any orders were made pursuant to S16 PO (358) and the orders made.

46. Whether examinations were made pursuant to S28 PO (360) and the records of examinations.

47. Whether all people admitted to a detention camp were accompanied by an order of detention pursuant to S45 PO (367) and all such orders.

48. Whether all people admitted to a detention camp had the relevant particulars recorded pursuant to S48 PO (368) and the relevant documentation.

49. Whether the Commissioner directed the removal of any person to a different camp pursuant to S54 PO (369) and all such directions.

50. Whether there was a rest period from 1200-1300 each day during which a meal was served as prescribed by r15(4) Prison Rules 1949 (507).

51. Whether the sanitation arrangements mandated by r15(14) (508) Prison Rules were kept and the documentation relating thereto.

52. Whether each new prisoner was seen by the PC (per r2 EA as amended) (p(711) officer in charge or his deputy for the purposes set out in r20(7) Prison Rules (513) and the relevant documentation.

53. Whether the PC (per r2 EA as amended) (p(711) or officer in charge visited the hospital daily and made the arrangements as prescribed by r20 (11) (513) Prison Rules and the relevant documentation.

54. Whether the PC (per r2 EA as amended) (p(711) or officer in charge gave any notice of deaths and reported thereon as prescribed by r20(12-13) Prison Rules and the relevant documentation.

55. Whether each PC (per r2 EA as amended) (p(711) or officer in charge had a book as prescribed in r20(14) Prison rules and the books themselves.

56. Whether complaints were entered in a detainees record as prescribed by r20(16) Prison Rules (514) and copies of those records.

57. Whether each camp had an officer in charge, the names thereof and the proof of their appointment.

58. Whether any PC (per r2 EA as amended) (p(711) or officers in charge kept the journal prescribed by r20(25) Prison Rules (514) and copies of those journals.

59. Whether any PC (per r2 EA as amended) (p(711) or officer in charge were directed by the Commissioner to keep any of the records set out in r20(28) Prison Rules (515) and copies of those records.

60. Whether each officer in charge informed each detained person of their right to make representations in writing as prescribed by r5 Emergency (Detained Persons) Regulations 1954, and copies of any relevant documents

61. Whether any administrative order issued any direction under r4 or a District Commissioner or District Officer issued a direction under r6 the Emergency (Kikuyu, Embu and Meru Villages) Regulations 1956 and all such directions.

62. How the characterisation of villages as punitive or model was arrived at and the record of such discussions.

63. Whether a decision to fence a village was taken on a village by village basis, or as a general decision, or in some other way and a record of all such discussions.

64. Whether there was any consideration to whether villagers would be permitted to leave villages and, if so, the documentary record of such consideration.

Taking of Property

65. The identity of any person issuing a notice entitling him to take possession of property under Reg 15 Emergency Regulations 1952, to the extent that the same is not disclosed.

66. The notice entitling the person concerned to take possession of property as aforesaid.

67. The orders releasing property or seizing them, required under R4A (3) and/or the later amendment of such order under R4A(5) ER as amended (558)

68. The documentation establishing that property was taken possession of pursuant to R13A ER 1952 (562)

69. Whether any orders were made under R7A Emergency (Movement of Kikuyu) Regulations 1953 as amended (629) and the orders made.

70. Whether any orders were made under S7 Outlying Districts Ordinance as amended (631) and the orders made.

71. Whether any orders were made under R22C EA as amended (690) and any orders made.

72. Whether the colonial administration had accurate maps of each area, setting out the place of each camp, site of forced labour, site where property was taken or destroyed, dispensaries, hospitals, site of police posts, guard posts and police stations, and sites of villages, distinguishing between model and punitive.

Negligence

73. Whether there were any discussions arising from the allegations of assault, forced labour, false imprisonment, dealing with the failure to obey customary international law, the international conventions to which the UK was a party (other than those disclosed) and the documentary record of all such discussions.

74. Whether there was any scrutiny of the emergency regulations and other legislation by the Defendant and the documentary record thereof.

75. Whether the regulation of screening, its practitioners and its methods was ever discussed and the outcome of such discussions together with the relevant documents.

76. Whether there was any consideration of the fact that legislation was based on ethnic origin and the documentary record thereof.

77. Whether there was any discussion about the absence of maps sufficiently detailed to ensure that the whereabouts of detainees and those compelled into villages and forced to labour could be ascertained with certainty.

78. Whether there are medical records from dispensaries, hospitals, camps and prisons; their whereabouts at any stage and the basis upon which they were destroyed given that they would clearly be of value to a successor government and its citizens.

79. Whether any steps were taken to ensure that adequate medical records for those detained in prisons, camps and villages were kept; the outcome of any discussions relating to that issue and the relevant documents.

80. Whether there were any discussions regarding the deliberate omission from, or destruction of, medical records that recorded injuries sustained by detainees in camps or villages in the course of their detention and which they said, or in respect of which it was otherwise believed that such injuries were inflicted by the authorities, whether by order or not.

81. Whether there were discussions other than those hinted at in the documents, regarding the deliberate undermining of the characters of those reporting the torts upon which the Claimants sue, and the facts they were reporting. The extent of those discussions, the parties involved and the documentary record thereof.

82. The extent to which the Defendant was involved in such discussions and the part it played.

83. The decision making process whereby the facts thus reported were disregarded by the Defendant and the factual basis upon which the decisions not to investigate further were taken.

Particular bases of Liability

The concealment prevented and/or continues to prevent the Claimants knowing who precisely originated each particular policy leading to the unlawful acts committed against them, and who precisely determined that each such policy would be applied. Consequently, facts relevant to the case based on joint and vicarious liability have been concealed.

84. A full set of telegrams from the SoS Colonial Affairs to the Governor.

85. Whether there were any discussions regarding the ECHR other than those in the bundle and notes of such discussions.
86. Whether there were any discussions as to the purpose of the Emergency and its continuation and the documentary record thereof.

Double Actionability

87. Whether any certificates were issued pursuant to r3 (4) Indemnity Ordinance 1956 and copies of all such certificates.

88. Whether any certificates were issued pursuant to S7 Crown Proceedings Ordinance 1956 (809) and copies of all such certificates.

Limitation

89. Whether the Defendant had any discussions other than those disclosed about what material had to be destroyed before independence, and the documentary record thereof.

90. Any views communicated by the Defendant to the administration and/or to Special Branch and/or to the Army as to what was to be destroyed and the documentary record thereof.

91. Whether the Defendant turned its attention to obtaining an account of their involvement in the Emergency from any member of the Defendant, the Colonial Administration, the Army or the permanent civil service and the outcome of such consideration together with the documentary record.

92. Whether there was a committee of a special branch officer and 2 senior administrative officers to ensure that no documents were passed on which should not have been passed on (§94 (b) (iv) Amended Defence) and the record of their discussions.

93. When the decision (communicated to the Kenyan Government) was made that the documents belonged to the UK Government and the basis for that decision, by whom the decision was made and at what level it was taken.

94. What mistakes were made regarding retention and destruction (paragraph 94x Amended Defence), in relation to what documentation (examples only being pleaded), by whom and why retained documents, which ought to have been destroyed, were then retained by the Defendant.

95. The extent to which the prejudice for which the Defendant contends arose after the 1990s, until when the Defendant says the concealed documents would not have been publicly available, and the documentation relating thereto.