Neutral Citation Number: [2023] EWHC 390 (KB)

Case No: QB-2021-001059

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2022

Before

MR DEXTER DIAS KC
(sitting as a Deputy High Court Judge)

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Between:

CHRISTOPHER OAKES	**Claimant/First Respondent**
- and -	
BRITISH ENGINEERING SERVICES LTD	**First Defendant/ Applicant**
CHANNEL TUNNEL GROUP LTD	**Second Defendant**
-and-	
THE OFFICE OF RAIL AND ROAD	**Second Respondent**

- -
- -

Mr R. Glancy KC for the **Claimant/First Respondent**
Mr D. Cunnington for the **First Defendant/Applicant**
Mr. G. Menzies and Mr W. McBarnet for the **Second Respondent (statutory regulator)**
The Second Defendant did not appear and was not represented

Hearing dates: 20 December 2022

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Judgment

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DEXTER DIAS KC:

(*Sitting as a Deputy High Court Judge*)

1. This is the judgment of the court.

2. It is delivered *ex tempore* immediately after the conclusion of submissions by counsel. I took this course because of the high degree of need to provide parties with the court's decision on this application to inspect mechanical equipment, given the proximity of trial in this matter. Trial is listed to start a month from now on 25 January 2023. It is vital that parties know where they stand.

3. The judgment is sub-divided into seven principal sections as set out in the table below.

(B123 et cetera indicates the page in the electronic application bundle)

§I. APPLICATION

4. This is a personal injury claim. On 5 April 2018, when Mr Christopher Oakes, an engineering surveyor, was going about his professional work inspecting lighting equipment at the Folkestone Depot of the Channel Tunnel, a metal frame collapsed

and fell on him from above causing him serious injury. The metalwork fractured his skull and ribs and caused further injury to his back. This has deeply impacted his life. With a trial imminent to adjudicate on who is responsible and for what, there is now a prospect, through an application to inspect certain equipment, that this matter may go off for almost another year.

5. I now list the parties to the application. The applicant is the first defendant in the head action, the company that employed Mr Oakes at the time. This is British Engineering Services Limited ("BES"). BES is represented by Mr Cunnington of counsel. Its application is to inspect and test relevant equipment, most importantly a "torque limiter", a device that protects mechanical equipment by preventing overload. If inspection/testing necessitates the trial being vacated, that is part of the application. The first respondent is the claimant Mr Oakes, who is represented by Mr Glancy KC. The second respondent is the statutory regulator (and designated prosecuting authority), the Office of Rail and Road ("ORR"). ORR is represented by Mr Menzies and Mr McBarnet of counsel. The application is strenuously opposed by the respondents, the claimant and the regulator. The second defendant to the main action is Channel Tunnel Group Limited ("CTG"). The second defendant owns the premises where the incident occurred. It has chosen not to appear before me in this application and adopts an avowedly "neutral" stance.

6. The first defendant's application is dated 22 September 2022. Specifically, it is for the inspection of a drill and torque limiter held by the statutory regulator, and consequential orders. This matter is listed for a liability only at the January 2023 trial. The split trial was ordered at a costs and case management conference on 28 February 2022. The trial date of 25 January 2023 was set on 11 March 2022, with an estimated length of hearing of five days. The applicant submits that inspection and testing of equipment ought to be possible whilst maintaining this trial date. BES seeks visual inspection of the equipment in question (what I have called "Stage 1 permission"); then non-destructive testing, that is testing the equipment in the mode it was found (what I have called "Stage 2 permission"). There is no application before the court for Stage 3 permission, which would entail destructive dismantling of the equipment.

7. CTG the second defendant has made no submissions about this application, save for in correspondence between parties. In a letter from its solicitors dated 25 October 2022, CTG stated that it intends to adopt the "neutral stance" mentioned. It does not consent to the application; it does not oppose it. Mr Litchfield, the solicitor in question, writes:

> "We understand that the equipment in question is too badly damaged to make an inspection beneficial. We considered that the application had been made too close to the trial window to succeed."

That begs the question. It is precisely what the court must determine today.

§II. FACTS

8. On 5 April 2018, BES was Mr Oakes's employer and the incident occurred at the premises of the second defendant. Both defendants deny liability. The second

defendant also makes allegations of contributory negligence. This incident occurred in the maintenance area of the works train yard of the Folkestone Terminal of the Channel Tunnel. In more detail, Mr Oakes was performing his duties as an engineering surveyor acting on behalf of BES when part of a lighting tower he was examining (Number 2022) collapsed and injured him. This was an annual mandatory inspection carried out to see if the towers complied with the relevant regulations and for insurance purposes.

9. Mr Paul Dinsdale and Mr Peter Werrey are technicians in the second defendant's power supply department and they were operating the equipment as directed by Mr Oakes in the course of his examination. However, exactly what they did and under whose instructions are matters that ultimately might be a question for the trial judge. Nevertheless, these two men controlled the movement of the lighting frame using a power tool which was fixed with a torque limiting device. The lighting tower was 18m high. Such high mast lighting installations are used to illuminate large areas of surface with a minimal number of columns obstructing the ground. For maintenance purposes and to eliminate working at height during the maintenance, the carriage which the lights are attached to can be lowered to the ground by a winch. That winch is built into the base of the mast. The winch is activated by a bespoke portable power tool. The power tool is self-supporting by mounting it on a bracket attached within the mast base. The manufacturer is Abacus and it requires the use of a torque limiting device, also called in site terminology an "adaptor", between the power tool and the winch. The purpose of this device is to limit the torque transferred to the winch and thus prevent overloading of the winch line.

10. There are experts instructed in this case. The expert instructed on behalf of the claimant is Dr Lamont; on behalf of the first defendant, Dr Graham; and on behalf of the second defendant, Mr Mitchell. These experts agree that the use of a power tool support bracket of some sort was an essential aspect of a safe system of work, but was not used by the second defendant's technicians on the day of the incident. They also agree that the torque limiter failed to operate as intended at the time of the failure. The effect was to overload the cabling which caused the lighting frame to unexpectedly collapse and that is what injured Mr Oakes. The experts agree about one further crucial matter: that the reason the torque limiter failed to operate as intended at the time *is not known*. None of the experts have been able to examine the power tool or the torque limiting device. This is because they have been in the possession of the regulator (the designated prosecuting authority). They remain so. ORR's jurisdiction comes from the location of the incident, on the railway premises of the second defendant. There is a joint statement of issues and agreement and disagreement which is co-signed by each expert and dated 27 October 2022.

11. As to the opinions of the experts, in Mr Mitchell's opinion, BES and Mr Oakes should have either inspected the power tool and torque limiter within their examination, or, if BES insisted on excluding these from the contract, then BES and by extension Mr Oakes should have required proof from the second defendant that these had been satisfactorily inspected before proceeding with the examination. The experts agree that the failure was as a result of overloading due to the application of torque by the power tool that was not properly controlled by the torque limiter. They agreed that the tensile failure of the ropes was caused by the failure of the torque limiter to function as intended. The failure of the winch line was likely to have been due to

overloading. The first defendant does not seek an order, however, which would permit any form of testing or inspection that would compromise the integrity of the equipment, nor that would be destructive and would therefore jeopardise the equipment as an exhibit in any criminal proceedings. Therefore, this ground of understandable anxiety on the part of the regulator does not arise from the inspection applied for.

§III. PROCEDURAL HISTORY (of application)

12. The procedural history is highly relevant to the proper determine of this application and I outline it now. On 14 March 2022 those who represent BES wrote to the inspector in charge of the criminal investigation advising that:

> "Experts instructed as part of the litigation will need access to all of the relevant material within the next couple of months in respect of the trial which has been listed by the court for early 2023. As such, our request is urgent and we should be grateful if the same could be prioritised."

The regulator treated this request as a request under the Freedom of Information Act 2000. On review, ORR decided that the public interest required such disclosure to be refused. The reasons are set out in an email dated 25 March 2022 sent to those who represent BES. So there was the first attempt by the first defendant to gain access to the equipment – March 2022.

13. On 27 June 2022, the first defendant made a secnd request for inspection of "all relevant equipment". At that point there was specific reference to the drill and the torque limiter. The inspector replied two days later on 29 June to suggest that, given the ongoing criminal investigation by the regulator, it was not in a position to assist with the request. Undaunted, there was a third request made by BES. That was on 26 July of this year. It was said that the first defendant's engineer:

> "… cannot fully deal with the issues in the case from photographs alone and needs to be able to inspect the drill and torque limiter themselves to prepare his report for the court in the civil proceedings."

Once more, this request was refused by ORR. This was on the same day, 26 July. The first defendant's expert visited the site on 9 August 2022 before producing his report dated 2 September. In summary, inspection requests in March, June and July 2022.

14. Now the first defendant's application. It was issued (but not served on the regulator) on 22 September 2022. On that day, BES made a fourth request for inspection, again by email. The regulator was notified that an application to the court was being made. But, as Mr Glancy KC points out with factual accuracy, the application was not served on the regulator until 27 October 2022. When the application was served on the claimant, the claimant pointed out this omission to the first defendant. On 30 September 2022, CTG's solicitors, as I have indicated, wrote to the first defendant's solicitors stating that the equipment in question was too badly damaged to make an

inspection beneficial and in any event, the second defendant considered the application was too close to trial to succeed.

15. This matter was first put in front of a master of the High Court. Master Davison transferred the matter to be heard by a judge of the High Court. On 1 December 2022, a King's Bench Division listing manager fixed the date for this application to be today, 20 December 2022.

§IV. ISSUES

16. Having carefully listened to counsel, I identified four issues that the court must determine. They are in order:

(1) What is the true nature of this application?

(2) What is the utility or probative value of inspection and/or testing?

(3) To what extent is inspection/testing forensically necessary?

(4) How should the court's discretion be exercised?

§V. LAW

17. The power to order inspection of property against a non-party arises by virtue of Civil Procedure Rules 25.1(1)(j) and also the general power at CPR 25.1(3). This power is discretionary and must be exercised in accordance with the overriding objective. CPR 1.1 sets this out with unmistakable clarity. It is familiar to all practitioners, but is critical to the disposal of this application, so merits recitation so anyone reading this judgment can follow the argument:

> **1.1**
>
> (1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

18. I have been directed to several authorities on the proper approach to late applications. These rehearse how the court should exercise its supervisory function in respect of active and proper case management. I do not repeat the authorities here. They are largely uncontroversial and the law settled. I considered in particular *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 ("*CIP*"); *Quah v Goldman Sachs International* [2015] EWHC 759 ("*Quah*"); *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14 ("*Swain-Mason*"); *Dehenes v T. Bourne & Son* [2019] SC EDIN 48. There are others, inevitably, that are referenced within them that I have also considered including *Andrew Brown and Others v Innovatorone PLC and Others* [2011] EWCA Civ 3221 (Comm) ("*Brown*") and the *CIP* costs judgment at [2015] EWHC 481 (TCC).

19. To my mind, the essence of these cases is reducible to a series of elementary propositions:

(1) The court is vested with wide case management discretion;
(2) That discretion is not unbounded, but should be exercised in accordance with the overriding objective, which must be the starting-point;
(3) Today there is an increased emphasis on CPR/rule-compliance and procedural rigour;
(4) There is a "heavy onus" on the party seeking to justify a late application (whether to amend pleadings or vacate a trial or otherwise);[1]
(5) Parties have a legitimate expectation that trial dates will be met and not be put back without "good reason" (*Brown* at [7] per Hamblen J (as then was); endorsed in *CIP* at [19], per Coulson J (as then was));
(6) Along with factors that are listed in CPR 1.1, the court should evaluate the balance of prejudice accruing to each side (*Brown* at [14]).

20. Therefore, I recognise and accept Mr Glancy KC's submissions that, first, there is a duty on the applicant to show that the intervention sought is justified. I regard this as another way of saying that the applicant must, amongst other things, justify that the product of the application would have a positive probative value or, put differently, that the party in question would be prejudiced by being deprived of it. Second, the applicant must show that his interest "eclipses" those of other parties. I take this to be an alternative formulation of the balance of prejudice test. Mr Glancy also relies upon the dictum of Nugee J (as then was) that when the applicant is prejudiced by his or her own fault, then it must suffer the consequences. On that, Mr Glancy directed the court to exactly what Nugee J said in *Bourke and another v Favre and another* [2015] EWHC 277 (Ch) at [41]. The relevant passage is cited at [44] of the judgment of Coulson J in *CIP*:

[1] "…a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court." *Swain-Mason* at [72], per Lloyd LJ.

> "In circumstances where the amendment is made late; where no good explanation has been given for so late an amendment; where to permit the amendment might force the defendants to ask for an adjournment but where, even if it does not, it would require a significant amount of extra work and would put the defendants at the disadvantage that I have referred to, as compared to the claimants - a disadvantage entirely down, it seems to me, to the claimants' decision not to apply to amend before exchange of witness statements - it is, in my judgment, more consistent with the overriding objective to refuse the amendment. *This may indeed cause prejudice to the claimants but, if so, they only really have themselves to blame*."
>
> (emphasis provided)

21. I was also helpfully directed to the judgment of Carr J (as then was) in *Quah*, and in particular to [38.a]-[38.g)]:

> "38. Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
> g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different

> now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

22. Such are the legal sources informing and structuring the court's decision. It is to this I now turn.

§VI. DISCUSSION

23. I deal immediately with the dispute about the law. As I have indicated, the claimant relies upon a number of authorities involving late applications to amend. The relevance of these cases is contested by the applicant/first defendant. Mr Cunnington invites the court to rule that because this is a Part 25 application, those authorities are not relevant and submits that to rely upon them would be an error of law. I disagree. I judge that the court can find useful guidance in a Part 25 application from the historic approach of the courts to amendment cases. What those cases examine is how the court should deal as a matter of principle and approach with late applications and especially those that threaten a trial fixture. I make it plain that I take those wider authorities, and the learning gleaned from them, into account. I therefore turn to the four issues I have identified.

(a) Issue 1: The true nature of the application

24. What is the nature of this application? It strikes me that there are two aspects to this existential question. First, is it an application to inspect or is it an application to inspect and test non-destructively? Second, is it an application to inspect and/or test and also to vacate or to inspect and/or test and, only if necessary, to vacate? It is this last permutation that the applicant/first defendant advances in its skeleton. It contains the hope that inspection and testing could occur sufficiently in advance of the trial not to jeopardise the fixture.

25. I am bound to say that this formulation is inconsistent with the explicit terms of the application notice. That notice seeks for the trial to be vacated, as does para.4 of the draft order and, indeed, para.16 of Ms Fearon's first witness statement filed on behalf of the first defendant. But, injecting a measure of necessary realism, I fail to see how it is realistic to secure inspection by three expert witnesses and further reports and a joint statement in good time for a trial starting next month on 25 January - particularly with the intervening holiday season. Indeed, the claimant informs the court that Dr Lamont is away between 22 December and 9 January 2023 and then has other work commitments after that and before the trial. I have no reason to doubt those assertions; they seem to me completely reasonable. The regulator submits:

> "It seems inevitable that the trial will have to be adjourned if the application is successful."

This is an accurate submission. I have indicated to counsel that I proceed to judge this application on the basis that it was previously applied for, that is as an application

to inspect and also to vacate. In my judgment, on the facts of this case and in the real world, these two go hand-in-hand.

26. Then what about the question about whether it is an application for inspection only or inspection and testing. The application at B62 states that it is an application for "inspection". But I am satisfied that whether the application is for inspection only or for inspection and testing, if permission were granted on either basis, this would inevitably lead to the vacating of the trial. Thus, for the question of vacating the trial, it is in fact immaterial whether permission is given to Stage 1 permission or Stage 2 permission, which includes testing.

27. Looking B62, the application form, then at Dr Lamont's report at B322 (in particular paras.15 and 16), then what Dr Graham says in his report, I judge that Mr Cunnington is correct: permission could be granted that is divisible. The court could grant permission for inspection only or it could grant permission for inspection and testing. As to that second point, I am satisfied, looking at the totality of papers, that the application as advanced is sufficiently broad to encompass both inspection and testing and the first defendant should not be shut out from applying for testing as well due to the particular words used in the application form. The sense of it must be seen in the context of the evidence in this case. To hold otherwise would be to engage in linguistic pedantry more akin to Victorian pleadings. This court has a duty to stand back and look at the justice of the case. I find that no party is prejudiced from the application being framed as for both inspection and non-destructive testing. The parties have been able to marshal their arguments in respect of both and, indeed, have done so. The question is whether the court should grant permission for either of those two permission stages.

(b) <u>Issue 2: Utility/probative value of inspection/testing</u>

28. Therefore, I turn to the second issue, utility. Mr Glancy succinctly argues it as follows: section 7 of the applicant's skeleton does not seek any inspection that would "compromise the integrity of the equipment" which may be an exhibit in criminal proceedings. At para.27 of the submissions, the applicant states, "There is no suggestion that any form of destructive testing should be performed." I am then directed to the claimant's expert report for the significance of that limitation. Dr Lamont says in his recent statement, which is exhibited as DM/3 to Mr Marks's witness statement at para.16(b):

> "Physical examination only is unlikely to reveal much about the limiter which cannot be determined from the photographs."

The claimant/first respondent submits that if BES is not asking for testing or dismantling of the torque limiter, then the court should accept the view of Dr Lamont that inspection will not in fact add anything to the court's sum of knowledge about the limiter as a matter of probability. Dr Graham's statement is referenced at para.17 of the first defendant's skeleton. It states:

> "I would therefore like to have the opportunity to see and test the torque limiter. I have not had an opportunity to inspect and test the torque limiter."

29. It is for this reason that Mr Glancy argues with some force that either the position of the first defendant is entirely inconsistent and contradictory or, in combination with Dr Lamont's evidence, the inspection would have negligible utility and thus negligible probative value. The applicant cannot have it both ways. This appears a strong argument. The answer to it seems to me that permission can be calibrated and granted for inspection with no dismantling and for testing that is restricted to such investigation as is not destructive.

30. The regulator submits that the applicant has not identified or explained how the equipment will be tested. What will be done? Thus the applicant cannot credibly provide the necessary reassurance that the testing would not compromise the integrity of the exhibit. It is for this reason Mr Menzies submits that it is irrelevant to suggest that "there is little evidence from the regulator" because the regulator, objectively viewed, has nothing to meet. Therefore, it did not need to provide any significant evidence. In the claimant's skeleton, it is submitted that if the torque limiter was tested or dismantled then Dr Lamont, who has great experience in these matters, agrees with the regulator's view that this would destroy its evidential value in criminal proceedings.

31. It strikes me that these are important matters. Yet the regulator states at para.25 of its skeleton that the way in which criminal proceedings will be presented has not yet been finalised. If the equipment were dismantled, a defendant in criminal proceedings may seek to argue and submit an abuse of process and a stay. The authority relied upon is *R (Ebrahim) v Feltham Magistrates Ibrahim* [2001] 1 All ER 831. In that case, the divisional court held that the granting of such a stay in criminal proceedings is "an exceptional course" (see Brooke LJ at [16]).

32. It seems to me obvious that in this case the inspection and testing could be filmed and carefully documented. The results of any non-intrusive testing may or may not be admissible in a future criminal trial. That would be the subject of admissibility arguments in another jurisdiction. But I see no reason that if the testing of the equipment were deemed important to the prosecution of the case that it could not be done prior to charge to determine whether it provided any further evidence against any suspect or potential defendant. It seems presently that the position of the prosecuting authority is to do nothing in respect of testing the equipment. This is a puzzling stance. There is a duty on investigators in criminal proceedings to pursue all reasonable lines of enquiry pointing both towards guilt and away from it. Indeed, the Criminal Procedure and Investigation Act Code states in terms at §3.5:

> "In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. It is a matter for the investigator, with the assistance of the prosecutor if required, to decide what constitutes a reasonable line of inquiry in each case."

33. Indeed, it is an obvious line of argument by the defence in future criminal proceedings to submit that the prosecuting authority manifestly failed to test the crucial equipment.

34. I emphasise that what a prosecuting authority – the statutory regulator – seeks to do is a matter for it. Unquestionably there is a duty to retain relevant evidence, but that is not the same thing as a duty not to conduct any testing whatsoever prior to a decision to prosecute. That would be a nonsense. It would result in an effective embargo on any forensic testing prior to charge. That is not the law and never has been. What is required is that if testing takes place as part of the investigation by prosecuting authorities, that is carefully documented so there is transparency in disclosure of materials, and that the items in question are retained for further testing by any potential defence experts should there be a prosecution.

35. Thus, the position comes to this: if the regulator wished to test the equipment as part of its investigation, it could. That could take place prior to any investigation in these proceedings in the High Court. Indeed, it could take place at the same time as any inspection or testing in this case. And, as Mr Cunnington correctly points out, who, aside from the two defendants in these civil proceedings, are likely to be the possible criminal defendants? They could be represented at any testing and have their interests safeguarded.

36. At para.29(d) of its skeleton, the regulator submits:

> "Inspection might reveal that the fault developed a very short time before the incident or that it would have been impossible for the second defendant and its employees and indeed the first defendant, should they be charged, to identify. See para.5.5 of the Code of Practice."

37. It is hard to understand why this matter has not been investigated by the designated prosecuting authority, but that is exclusively a matter for that public body. What I do not accept is that lack of testing in the four and a half years since the incident must result in this court being frozen out from inspecting relevant evidence. It is entirely possible that a careful and prudently calibrated approach could be undertaken with permission on Stage 1 and Stage 2. If there came a point where the experts felt that further testing were necessary and that testing may damage or degrade the exhibit equipment, there is no reason why a further application to this court could not be made as a matter of urgency.

38. While Dr Lamont states that physical inspection is not likely to reveal much more than the photographs, he does not rule that out. Against this is the evidence of Dr Graham, that he would like to inspect the equipment and test it. Implicit in that is that mere physical inspection may provide useful information about the cause of equipment failure; equally, testing may provide further evidence.

39. The court's conclusion about this particular sub-issue is that (1) the logic of the first defendant's position is that Dr Graham seeks inspection, and (2) testing and the testing for which permission is sought is strictly limited to that kind of testing that would not destroy evidence. Thus, I proceed to evaluate discretion on the basis that the inspection and testing is capable of providing probative evidence in this case. At this juncture, to go further and to determine precisely on the papers the exact level or

the approximate level of probative value that it would have, in my judgment would be to indulge in an act of unnecessary and unjustified speculation. The point of the inspection/testing is to determine precisely this.

40. As to the further point made by Dr Lamont at para.16(g) about slip torque now and slip torque then, that is a matter of evidence about which, if necessary, all the experts could give the court their opinion. I do not judge that this observation so detracts from the utility of inspection and Stage 2 testing that it should not take place. It must be remembered that Dr Lamont agreed that inspection would be useful. For example, at B273 it is stated:

> "Dr Lamont and Mr Mitchell agree that it would be useful but not essential to the case to be able to say precisely why it [i.e. the torque limiter] failed. Dr Graham considers cause of failure for torque limiter more important."

41. Thus, my conclusion on Issue 2: I find that there is forensic utility in inspecting and testing the equipment. However, that is far from the end of the matter.

(c) <u>Issue 3: Extent of forensic necessity of inspection/testing</u>

42. To assess forensic necessity, it is important to look at the genesis of this application. In his preliminary report, Dr Graham expressed the view that he would like to have the opportunity to see and test the equipment. I have read the extract in the joint report on the question of usefulness. At that point Dr Graham continues:

> "If it were possible to determine whether or not the failure occurred in the course of use or probably pre-existed that day, that would assist the court as to the accuracy of some of the recollections of the witnesses who would inform whether or not a test of the torque limiter before work commenced on that day would have been significant."

Thus, he proposes two distinct bases for importance. It is submitted by the applicant/first defendant that what caused the torque limiter to fail is of central importance to a number of issues in respect of both causation and liability. Dr Graham identified three possible causes of the torque limiter failing: first, a failure to use the torque limiter properly; second, a failure to set the torque limiter properly; third, the torque limiter was defective. In his first report, Dr Graham stated:

> "I cannot say what caused the torque limiter to fail without examining it. The photographs available to do not indicate any outwardly visible defects of the limiter itself and the failure may be entirely hidden within the casing." (B198)

On B199, he continues:

> "The capacity of the drill and possibly the effect (inaudible) the condition of the torque limiter would, furthermore, be very difficult for CTG [the second defendant] to detect because it would require detailed technical knowledge which most

> equipment operators would not have. The torque limiter may have displayed no outward external signs of degradation and it appears possible that it was working during previous inspections. But I would need to examine the device to confirm this."

43. In the joint statement he added:

> "Why or how the torque limiter did not operate as intended I can only speculate without having the opportunity to see it and test it. To assist the court, I would therefore like to have the opportunity to see and test the torque limiter. I have not had an opportunity to inspect and test it."

44. He added at B138:

> "I would want to have an opportunity to examine and test the equipment before expressing a concluded view as to the precise cause of the accident."

45. One issue at trial will be whether the first defendant was obliged to inspect the equipment as part of its contractual or statutory obligations. The first defendant's case is that it was not required to inspect the equipment, but rather the lighting column. The claimant and second defendant contend that there was a duty to inspect the equipment as well. If the court found a duty to inspect, then the court would need to consider what, if anything, might have been identified as the state of the equipment, including which of the three possible causes of failure of the torque limiter is most likely. If it was in fact the third possibility - that the torque limiter was defective - the question is whether the defect might reasonably have been discovered on inspection.

46. One of the possibilities is that the use of settings that were applied to the equipment at the time of the incident was the cause of the failure ("operator/pilot error"). But to assess whether there was, in contrast, an intrinsic mechanical failure, there is a need for further physical evidence if available. That can only be obtained from inspection and testing. There is in this case no operating manual and limited photographic evidence. Thus, absent inspection and testing, there is limited assistance the experts can provide.

47. The cause of the failure, it seems to me, is relevant to liability issues (plural) in this case. The claimant's case against the first defendant is that he ought to have been instructed to examine the equipment. It is also relevant to issues between the first and second defendants. As to the question about whether Mr Werry and Mr Dinsdale did know or ought to have known the correct setting for the torque limiter, I concur with Mr Glancy that there is no evidence from these witnesses about that. In the defendant's skeleton (not drafted by Mr Cunnington), it states at para.32, "Presumably they were so aware." That strikes me as being speculation and not evidence. Mr Glancy is right.

48. I therefore turn to the court's conclusion on this issue. I find that forensically it is necessary to inspect this equipment. It is capable of providing evidence on issues at trial that are central and contested and, critically, which may provide evidence that is

unavailable by other routes. But that is not the end of the matter. The court must assess all the relevant factors that shape its discretion. It is to that I now turn.

(d) Issue 4: How the court should exercise its discretion

49. Discretion must be exercised in accordance with the overriding objective. I first identify the factors for and against inspection and testing before proceeding to evaluate them in accordance with CPR 1.1(2) factors. Therefore, I have been obliged to look at the totality of the circumstances of this case as it stands today.

i. Factors against application

50. I judge that there are nine factors against the application:

(1) I proceed on the basis that if inspection and testing permission were granted, it is inevitable that the trial will need to be vacated. That is a powerful factor against grant;

(2) That is because, as Mr Glancy points out accurately in his supplemental submissions, para.27 of Practice Direction 23A states that:

> "Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it."

That has not happened here;

(3) Further, the White Book states at p.637 in respect of CPR 17.3.8 that parties are entitled to expect that a trial fixture is going to be effective and kept;

(4) The granting of the application would entail a further delay of 11 months from this point. The first date available to this court is November 2023. Looking at factor 2(d) of the overriding objectives means that the case would not be dealt with as expeditiously as it would have been should the trial take place at the end of January 2023;

(5) I fully accept the submissions on behalf of the claimant that this further delay will cause him inconvenience and distress. He describes the prospect of waiting another year as "very upsetting and completely overwhelming". This should be underestimated. I have read in detail Mr Oakes's statement and, in particular, para.4 of it;

(6) It must be remembered that this is a split trial. Should the claimant succeed on liability, there will be further delay before resolution of disputed quantum. I put aside the question of summary judgment against the second defendant. As things stand presently, until the claimant succeeds with liability, he is not realistically going to be able to apply for interim payments. As is emphasised at para.10 of his witness statement, he is under financial strain; I have no reason to doubt this evidence;

(7) I also accept and proceed on the basis that here there was unnecessary delay by the first defendant in making this application. On 14 March, BES sought access to all of the relevant material, which obviously included the torque limiter. The

request was refused by ORR very shortly afterwards on 25 March. Yet, despite further attempts by the first defendant, it did not issue this application at court until the end of September of this year and did not serve the regulator until 27 October. I accept the submission made by the claimant that Ms Fearon in her statements on behalf of the first defendant has not adequately explained the delay. Thus, I find that this application could and should have been made earlier. I regard this as a failure to act promptly and expeditiously. I agree with Mr Glancy that this element of delay was avoidable and is attributable to the lack of promptitude by the first defendant. This is a relevant factor that strongly counts against granting permission;

(8) This late application must also impact other court users because a five-day window is a precious administrative resource and that will be effectively lost;

(9) The court must be alive to the need to deal with a case at proportionate cost. Here, granting inspection and testing and further expert reports as a result of vacating the fixture will add to the overall cost of these proceedings. I fail to see how it would not.

ii. Factors in favour of application

51. I turn to the factors in favour of the application. I have identified 11 factors in all that are capable of supporting this application:

(1) All the experts, including that instructed by the claimant, agree that inspection is "useful";

(2) In the opinion of the applicant/first defendant's expert it is more important than that;

(3) There will be, to my mind, absent inspection and testing, a real risk that the first defendant will not be in a position to put the best evidence before the court;

(4) I accept that the evidence is unlikely to be determinative of this case as the regulator points out at para.20 of its skeleton. That is not the test. If the question is posed, as it should be, "Is there a realistic prospect that it can provide evidence that is material to a central issue or to central issues in dispute?", then the answer is yes. I do not accept the submission of the claimant that:

> "An inspection of the torque limiter can take place but it is unlikely to affect any finding of the court and will only produce at best marginal information."

This case involves both the cause of the accident and a question of legal responsibility between the parties. One of the issues for the trial is almost inevitably going to be: if liability is established, who bears the prime or principal responsibility? I accept Mr Cunnington's point that the inspection and testing may also impact upon whether either defendant is legally responsible at all. Why the torque limiter did not operate properly or safely has the obvious capacity to impact these questions;

(5) There will not be a loss of evidence to the claimant if the matter is vacated;

(6) Although the claimant will be inconvenienced, as I have set out previously, I cannot see how the claimant would be evidentially prejudiced by an adjournment;

(7) The regulator realistically accepts that it would not be prejudiced by the adjournment (see para.17 of its skeleton);

(8) The inspection authorised can be limited to testing that is not destructive and that would not jeopardise third-party interests such as the regulator's interest in prosecution. The regulator has presented virtually no evidence; it is limited to a short statement from a legal advisor (B338). It says that there may be a prosecution, but there may not be. The regulator, in any event, cannot say when that would happen, if it did happen, and it has not said what relevance that this equipment is to any prosecution. I do not see that non-destructive testing would prejudice any prosecution. The likely defendants, the two defendants in the civil action, will in any event be party to any testing if they so choose. That would be a question of their election. Thus, it is impossible to see how they would be prejudiced. I find that this does not provide any solid or sound basis for refusing the application to inspect and test the equipment non-destructively;

(9) While it is unlikely another trial can be listed for a vacated window, undoubtedly other court work can be heard in at least some of the time made available;

(10) As to the question of cost, the inspection and ensuing expert assessment is unlikely to add to the length of the trial and thus not increase the cost of the trial itself. But it will impact the cost of proceedings. The costs incurred by further expert assessment flow naturally from any permission granted. But should this assessment be deemed relevant and necessary, in my judgment those additional costs would be proportionate;

(11) The preponderance of the time from the incident until this particular juncture has been taken up by the claimant not issuing proceedings until March 2021, almost three years after the incident. I emphasise that is his right; he was within the statutory time limit (s.11(4), Limitation Act 1980). But this is a case that in fact has been listed for trial with a measure of, if not expedition, then reasonable promptitude from the date of initiation of proceedings.

iii. Evaluation of factors

52. Having therefore identified the factors for and against, I turn to the evaluation of the court. This is classically a "balancing exercise" (*CIP* at [19c.]). The court must do the best it can to balance the interests of parties fairly. As said in a different sphere, a balance of convenience or justice is actually a balance of injustice (see, for just one recent expression, *Draeger v London Fire Commissioner* [2021] EWHC 2221 (TCC) at [48], per O'Farrell J "least risk of injustice"). My judgment is that the prejudice that is likely to accrue to the first defendant by a lack of inspection and testing significantly outweighs the prejudice to the claimant and to the regulator by granting permission for inspection and testing notwithstanding the inevitable vacating of this trial. I take into account that there is a measure of fault attributable to the applicant/first defendant in not making the application as promptly as it might have. That is an important factor, but not to my mind determinative. I explicitly proceed on the basis that the applicant does indeed have a heavy burden to justify permission for

the inevitable loss of trial date. But I find that this burden is met due to the significant potential contribution to the overall justice of the trial that permission could result in. This is not a secondary matter; it is not an interesting side issue or forensic footnote. Instead, the cause of the failure of the torque limiter has real capacity to go to central questions on liability in this case. The failure to make this application promptly has certainly given me pause, but it is clear that the first defendant sought repeatedly to persuade the regulator to grant access to the equipment. The mistake procedurally was that the first defendant should have made the application to the court more promptly. But it is certainly not the case that the first defendant was sitting on its hands. When it was clear that the regulator was set against the first defendant's request, BES should have come to court. However, it is certainly not the case that the first defendant did nothing to gain access for its expert to this equipment. This "history" (as it was termed in *Brown* at [14], per Hamblen J) is significant.

53. What is important is that the court looks anxiously at the overall justice of the case. It strikes me as wrong for the first defendant to be compelled in these circumstances to have a trial that has the distinct possibility of being unjust given the particular and specific nature of the first defendant's failure in this case which I have just explained, regrettable and unhelpful though it has been. The trial judge will have to consider both liability and the attribution of responsibility between defendants. The cause of the failure of the torque limiter affects this question or certainly has the capacity to do so, and the experts are not presently able to give evidence about this question without at least inspection and probably testing. So long as it is non-destructive, this court grants permission for that to happen. There will be a delay of several further months, but that delay will not materially damage the claimant's rights to a fair trial whereas, by contrast, the lack of inspection and testing may significantly and adversely impact the first defendant's ability to put the best evidence before the court, to paraphrase the factor in the overriding objective.

54. I have at the forefront of my thoughts the dicta of Carr and Nugee JJ that if you are the author of your own misfortune, you have to bear the consequences. But this court is not typically engaged in acts of punishment or forensic vengeance. I judge that it would be disproportionate and draconian to shut the first defendant out from what is possibly important evidence in this case. This is not an application about amending pleadings and I do accept the distinction that Mr Cunnington makes about that, but I reject what he submits that therefore the authorities should not be considered. They must be considered and I have considered them. Nevertheless, there is a critical distinction: rather than about pleadings, this is about the availability of potentially crucial prime evidence. For all the energetically made forensic arguments, I keep returning to the joint position of the experts, that inspection is useful. I concur. I cannot accept Mr Glancy's succinct and trenchant submission that testing would be "of no value". I do not agree that the inspection and testing offer mere speculative possibilities; the experts agree about an identifiable potential utility.

55. I judge that without permission being granted, evidence that may potentially assist the first defendant would be excluded both from the trial, and thus and importantly from the judge's decision-making process. There is a strong public interest, not just in prompt and timely justice, but in the accurate determination of liability and relative responsibility. These considerations, on the specific facts, outweigh the further delay caused by any adjournment to the end of 2023. That delay must be seen in the context

of the fact that the claimant, as was his right, chose to issue proceedings in March 2021. A trial at the end of 2023 is far from ideal, but given the nature of the disputes in this case and the factual background, it is not an unmanageably prolonged lapse of time.

56. I fully acknowledge what Carr J emphasised in *Quah* at [38. g)], that the modern approach to rule-compliance is far more stringent (see also Lloyd LJ in *Swain-Mason* that the courts today are "less ready" to grant late applications than in former times, cited in *CIP* at [16]). This ethos is evident across the High Court (cf. Judicial Review Guide 2022 §2.1.2 on "procedural rigour", and the Court of Appeal in *R (Spahiu) v Secretary of State for the Home Department* [2018] EWCA Civ 2604). Indeed, "enforcing compliance with rules, practice directions and orders" is explicitly included as an overriding objective factor (CPR 1.1(2)(g)). However, in my judgment refusal of permission would jeopardise the ability of the court to deal with the case in respect of the first defendant "justly". This would be in violation of a cornerstone of the overriding objective. As Coulson J made clear in *CIP*, in the "post-Jackson world", the overriding objective is "the starting-point for any consideration by the court of late amendments" (at [18]). It seems to me that nothing has completely usurped the quest for a "better approximation to justice" (the vivid phrase also of Coulson J, in the costs judgment in *CIP*: [2015] EWHC 481 (TCC), at [96]). Indeed, the court has a duty to "seek to give effect to the overriding objective" when it "exercises any power given to it by the Rules" (CPR 1.2).

57. The case before me illustrates, yet again, the recurrent tension between substantive and procedural justice. Both are important. Indeed, they are not surgically separated. One of the high purposes of procedural justice is to promote the prospects that the court will reach the "right" or "just" result (through fairness, lack of bias, access to justice et cetera). In this case, the resolution of the tension rests on the fact that the infringement of procedural rules and expected practice, while clear and with inadequate justification, was in the context of an applicant that repeatedly sought through out-of-court correspondence that which it was finally compelled to seek in court. That history, to my mind, should not be forgotten. The error was to wait too long before seeking the court's intervention. This reduces the weight the court can give the prejudice accruing to the applicant in the balancing exercise ("if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise", *CIP* at [19(f)]). Against this, the applicant sought to obtain evidence that has the capacity to be central to the central contested issues. Given that all the experts, including that instructed by the claimant, agree that inspection of the torque limiter would be useful, the applicant/first defendant's interests in a fair trial, and the public interest in the trial court ultimately reaching the right decision, significantly outweigh the undoubted inconvenience that will be caused to the claimant. Equally, Mr Oakes's Art. 6 rights will not be prejudiced or materially affected by the adjournment. Nor will those of any other party.

58. I therefore find that granting the application is both necessary and proportionate in these circumstances. There must be "good reason" (in *Brown* terms) for vacating a trial. I find that there is. I exercise the court's wide discretion to grant the permission sought.

§VII. DISPOSAL

59. Therefore, the disposal is as follows:

(1) Permission is granted to:
   a. Inspect the equipment (Stage 1 permission);
   b. Test the equipment, but only if – and to the extent that - the testing is non-destructive (Stage 2 permission).

(2) The trial listed to start on 25 January 2023 is vacated.

60. I will receive submissions about when the new trial should be fixed and the question of costs. I direct parties to draft an order to reflect the terms of the court's ruling.

61. That is my judgment.

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