



Neutral Citation Number: [2019] EWHC 2073 (QB)

Case No: HQ12X03803

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

MR JUSTICE STEWART

Between :

Estate of Michael Heiser and 121 Others

Claimants

- and -

(1) The Islamic Republic of Iran

Defendants

**(2) The Iranian Ministry of Information and
Security**

Professor Dan Sarooshi QC and Peter Webster (instructed by **DLA Piper UK LLP**) for the
Claimants

Simon Rainey QC and Paul Henton (instructed by **Eversheds Sutherland (International)
LLP**) for the **Defendants**

Decision after consideration of full written submissions.

Hand down hearing date 31 July 2019.

Approved Judgment

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

.....

MR JUSTICE STEWART

Mr Justice Stewart :

The Application Notice

1. On 15 July 2019 the Claimants issued an application notice seeking an order in the following terms:

“An order pursuant to CPR 3 and /or CPR 32.1 and/or the Court’s inherent jurisdiction for permission to adduce and rely upon (i) the second witness statement of Mr Curtis Mechling dated 10 July 2019 (which provides further evidence of the extent of Iran’s diplomatic presence in New York) and (ii) an expert report of the Honorable Timothy K Lewis (which addresses the nature of the jurisdiction of the US District Court of the District of Columbia); and that the court be able to have regard (if necessary) to this evidence when determining the state immunity issues as defined in the order of Mr Justice Goose dated 7 November 2018.

The reason for seeking this order is that it became plain in light of the arguments advanced by the Defendants for the first time at the hearing of this case between 2 and 5 July 2019 that evidence on these two issues could (depending on the court’s decision on the Claimants’ primary case about section 31(1)(a) Civil Jurisdiction and Judgments Act 1982) be essential for the correct, and fair, resolution of these claims. For that reason, and those set out further in the fifth witness statement of Mr Jeremy Andrews, it is appropriate to grant the order sought.”

2. As the application notice states, the evidence in support of it is a witness statement from Mr Jeremy Andrews of DLA Piper LLP, the Claimants’ solicitors. The witness statement is dated 12 July 2019.

Background

3. These proceedings stem from the Claimants’ application to enforce in England and Wales twelve Judgments of the United States District Court for the District of Columbia. These Judgments arise out of terrorist incidents occurring in a number of Middle Eastern countries and, in one case, in New York.
4. The proceedings have a long procedural history dating back to the issue of the Claim Form and Particulars of Claim on 5 July 2012. I will refer to this later. At this stage, I can start with the order of Goose J made by consent on 7 November 2018. He ordered a hearing of preliminary issues. The first issues were the “service issues”. The second issues were the “state immunity issues”. The latter were described as:

“whether the Defendants are immune from the jurisdiction of the English courts pursuant to the State Immunity Act 1978 and/or section 31 of the Civil Jurisdiction and Judgments Act 1982 or otherwise. ...”

5. Both the service issues and the state immunity issues were ordered to be listed to be heard together on the first available date after 6 May 2019 with a time estimate of 4 days.
6. A detailed timetable for the preliminary issues was ordered as follows:
 - “4. The timetable in relation to the preliminary issues shall be as follows:
 - 4.1 The Defendants shall file their additional evidence in relation to the preliminary issues by 4pm on Friday 11 January 2019;
 - 4.2 The Claimants shall submit evidence in response by 4pm Friday 8 March 2019;
 - 4.3 The Defendants have the right to submit evidence in rebuttal by 4pm Friday 5 April 2019;
 - 4.4 The evidence referred to in paragraphs 4.1-4.3 above may include expert evidence on matters of US law of relevance to the preliminary issues if the parties are so advised;
 - ...
 - 4.7 Skeleton arguments are to be exchanged by close of business 2 clear days before the start of the hearing”.
7. The evidence filed by the parties was as follows:
 - (i) Second witness statement of Mark Howarth, solicitor for the Defendants. This statement is dated 11 January 2019.
 - (ii) Witness statement of Sean William McGuinness, solicitor for the Claimants. This witness statement is dated 15 March 2019.
 - (iii) Witness statement of Curtis C. Mechling. Mr Mechling is an American lawyer at the law firm Stroock & Stroock & Lavan LLP, the attorneys for a number of the Claimants. His witness statement is dated 15 March 2019.
 - (iv) Third witness statement of Jeremy Edward Needham Andrews. Mr Andrews is a solicitor for the Claimants. His witness statement is dated 15 March 2019.
 - (v) Witness statement of Laina C. Lopez. Ms Lopez is an American lawyer acting on behalf of the Defendants. Her witness statement is dated 12 April 2019.
 - (vi) Third witness statement of Mark Howarth. This witness statement is dated 12 April 2019.
 - (vii) Report of Professor Michael D Ramsey dated 12 April 2019. This was served on behalf of the Defendants. Professor Ramsey is Professor of Law at the University of Santiago School of Law in Santiago, California.

- (viii) Report of Professor David P Stewart. This report is dated 17 May 2019 and was served on behalf of the Claimants. Professor Stewart is currently Professor of Practice at Georgetown University Law Center, Washington DC.
 - (ix) Affidavit of Shale D Stiller. Mr Stiller is an American lawyer and partner in DLA Piper LLP (US) in Baltimore, Maryland.
8. The hearing of the preliminary issues took place between Tuesday 2 July 2019 and Friday 5 July 2019. All the submissions on state immunity were completed. There was not enough time to deal with the service issues. These were adjourned to be heard on Monday 22 July 2019.
 9. The matters to be decided in relation to the state immunity issues are complex. They fall into three main categories namely:
 - i. Have the Defendants submitted to the jurisdiction?
 - ii. Have the Claimants fulfilled the requirements of section 31(1)(a) of the Civil Jurisdiction and Judgments Act 1982 (“the 1982 Act”)?
 - iii. Have the Claimants fulfilled the requirements of section 31(1)(b) of the 1982 Act?
 10. This application concerns only the matters arising under section 31(1)(a). Those matters fall under two main subheadings:
 - (i) Does English law require the Defendants to have had a presence in the United States at the time when the proceedings were instituted? The Claimants submit that there is no such requirement. The Defendants submit that there is.
 - (ii) If there is a presence requirement, were the Defendants present in the US so as to fulfil that requirement? It is this question which has given rise to the application notice.
 11. Before I turn to the detail, I will return to the timetabling. Absent this application I intended to send out a draft Judgment on the state immunity issues during the week commencing 15 July 2019. After hearing the service issues on 22 July 2019, it was my intention to send out a draft Judgment on those issues within a few days of that hearing. I had hoped that the entire Judgment (consolidated as one Judgment) would have been handed down before the end of term on 31 July 2019. Whether that would have been possible, and whether an order could have been made, including consequential orders, is not known. It is right to say that, during the hearing of 5 July 2019, counsel for both sides agreed that time was not of the essence, and that the formal hand down of the Judgment and consequential orders could if necessary be left to the beginning of the new term in October 2019.
 12. During the evening of Friday 12 July 2019 my clerk sent to me details of the proposed order and documents in support of it. At that stage the application notice requested that the application be dealt with on paper. On Saturday 13 July 2019 I caused my clerk to send an email to the parties stating, inter alia, that I did not believe that dealing with the application without a hearing was possible, unless the Defendants

consented. The Defendants did consent and I have received written submissions from both sides during the week commencing 15 July 2019. This judgment is based on those written submissions.

The Issues Sought to be Addressed

13. The first issue concerns two organisations. These are the Alavi Foundation and 650 Fifth Avenue Company. The evidence from the documents is that the Alavi Foundation is a public charitable association incorporated in New York and 650 Fifth Avenue Company is a partnership comprising two partners, Assa Corporation and the Alavi Foundation. Assa Corporation is a New York corporation incorporated in 1989 and dissolved in 2010.
14. The second issue concerns whether or not the Claimants can prove that the Defendants had a presence in the United States by virtue of their United Nations delegation.

The First Issue

15. The Claimants relied on a case in the United States District Court for the Southern District in New York so as to attempt to establish that the Defendants were present in the United States. This case is **Kirschenbaum et al v 650 Fifth Avenue** [257 F.Supp.3d 63(S.D.N.Y.2017)]. From this case the Claimants say that this Court should find that both the Alavi Foundation and 650 Fifth Avenue Company were agents or instrumentalities of Iran. The Defendants submit that findings in the Kirschenbaum case are not admissible in this court as evidence of the facts decided.
16. However, in their skeleton argument, counsel for the Defendants made this further submission:

“53. Finally, the US is a federal system and the US Judgments emanate from state rather than federal courts. Accordingly, it is submitted that the Claimants would have to show that Iran were present in the *state* (District of Columbia) rather than the Federation (USA). Whilst the former embassy was of course in Washington DC, the Alavi Foundation and 650 Fifth Avenue Company are both New York entities. Accordingly the Claimants’ arguments for presence via these two entities cannot succeed in any event.”

During the hearing the Defendants accepted that the District of Columbia Court was in fact a federal court.

17. Relying on the case of **Adams v Cape Industries plc** [1990] 1 Ch 433, the Defendants submit that the English Court cannot take judicial notice of whether the court in the District Columbia had jurisdiction such that the presence of a body in New York state is subject to its jurisdiction. They said it is a fact to be proven and there is no evidence before the court.
18. The Claimants’ response was that it is a matter of law whether a state is present within the jurisdiction of a foreign court. Alternatively, they submitted that the point could

not be taken since the Defendants had not raised it before. The Defendants submitted that the onus was on the Claimants to prove factual jurisdiction, and that the Defendants were entitled to take points of evidential insufficiency.

19. Mr Andrews' statement in support of the application encapsulates the situation if the Defendants are allowed to take the point. He says:

“8. If, contrary to the Claimants' submission, the court considers that this argument can be raised by the Defendants even though they have adduced no evidence in respect of it, the Lewis Report is filed to provide the court with evidence on US law regarding the jurisdiction of the DC district court in order to assist the court in determining the matter with the benefit of all appropriate evidence before it.”

20. Mr Lewis is a former federal judge. In his report dated 12 July 2019 he deals in some detail with the jurisdiction of the United States District Court for the District of Columbia. In brief it appears that his opinion is that this court had jurisdiction irrespective of where the Alavi Foundation and 650 Fifth Avenue Company were present in the United States.

The Second Issue

21. As an alternative means of proving presence, the Claimants argued for the first time during the hearing, and on the last day of the hearing, that Iran's presence at the United Nations (“UN”) in New York sufficed to fulfil any requirement of presence pursuant to section 31(1)(a) of the 1982 Act. They relied upon some evidence given in Mr Howarth's second witness statement at [145] - [148]. This is evidence about Iran's permanent mission to the UN with its Headquarters in New York. This evidence was given in the context that Mr Howarth was saying why the Defendants did not have a relevant presence in the United States.

22. The Defendants objected to the Claimants raising this argument. They said it had never been raised before. The Claimants accepted that it had not been raised before. They said they had relied upon the Defendant's solicitor, Mr Brook, who said in a 17 October 2014 statement that a state was not present in the jurisdiction of another state by virtue of maintaining a diplomatic presence there. This was based on the case of **Kuwait Airways Corporation v Iraqi Airways** [1995] 1WLR 1147 at 1155H-1156D. Mr Andrews' witness statement in support of this application continues:

“10. This is a position with which the Claimants agreed. Indeed, the Claimants had relied on that decision in submissions before Mr Justice Singh (see pages 29-36). The fact that it was common ground between the parties that diplomatic presence is viewed as not being sufficient to amount to legal presence is one of the reasons why the Claimants maintain as their primary case that when enforcing a Judgment against a state, the English court does not ask whether the Defendant state was present in the foreign forum state.

11. Despite this shared view between the parties, at the state immunity hearing, the Defendants' position changed. Leading counsel for the Defendants stated on the first day of the hearing: "*so to take a simple example, a state which has official diplomatic presence in the country concerned is present for the purposes of the presence test.*" ...

12. If the court is minded to accept that diplomatic presence does count, the Mechling statement is relevant and in the Claimants' submission should be admitted as it confirms and supplements the evidence regarding the Iran Permanent Mission provided in Mr Howarth's second witness statement ... the Mechling statement is a short statement, only 5 pages in length, and confirms: (i) that the Iran Permanent Mission was established at the time the US proceedings were commenced; (ii) its address (which is *distinct* from the address of the UN building, which is located between First Avenue and the East River in New York); (iii) its activities. This evidence relies on material from public sources and is not controversial. I respectfully suggest that there can be no grounds to object to it being considered when determining an issue which arose only because of the position adopted by the Defendants for the first time at the state immunity hearing."

23. As I previously said, Mr Howarth mentioned Iran's UN delegation in his statement when dealing with why the Defendants do not have a presence in the United States. Mr Andrews responded in his statement of 15 March 2019 in some detail to Mr Howarth's statement. Mr Andrews nowhere suggested that UN presence would suffice. In my judgment, whatever Mr Brook had said in his statement in 2014, if the Claimants wished to submit that, alternative to their primary argument, a presence was required and it could be established by the presence referable to the UN delegation, then it was incumbent upon them to make this point in some way (eg in witness statements) well in advance of the hearing so that the Defendants had a proper opportunity to address it evidentially and legally. I shall return to this point later.

Discussion

Legal Principles

24. The Defendants submit that the situation is akin to a very late amendment application i.e. an application to amend where the final hearing date has been fixed and where permitting the amendments will cause the final hearing to be lost. It is true that the application to adduce further evidence is extremely late and follows what was thought to have been the closure of all submissions on the state immunity issues. However, the final hearing date has not been lost in the sense that the four days have been used. The majority of the time used during those four days will remain relevant.
25. I should say that there is no objection based on an argument that the Claimants need relief from sanctions. What the Defendants submit is that the Court applies the principles in **Quah Su-Ling v Goldman Sachs International** [2015] EWHC 759 (Comm) where Carr J said at [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 Civil Procedure Rules 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.”*

26. The Claimants submit that the principles I should apply are rather those stated by Hamblen J in **Foster v Action Aviation** [2013] EWHC 2930 (QB) where he said at [8]-[9]:

“8...this is a very late application and to allow evidence in would be a relatively exceptional course which the court is unlikely to take without good reason.

9. In considering how to exercise my discretion I would regard the following considerations being of particular relevance; (1) the reason why the evidence was not put forward before, (2) the significance of the evidence, (3) the prejudice to the applicant if the application is refused, (4) the prejudice to the other parties if the

application is allowed and (5) the need to do justice to all the parties having regard to the overriding objective.”

27. In fact, on analysis, apart from the factor in Su Ling about the loss of the trial date, the principles in both cases are essentially the same. Both (i) refer to whether there is a good reason for the late application, (ii) emphasise the significance of the new material as a factor, (iii) require consideration of prejudice to each party to be considered and (iv) refer to the need to do justice to all the parties having regard to the overriding objective.
28. As to the overriding objective, Carr J’s points in (a), (e), (f) and (g) are just as applicable to this case as to the case of a late amendment application.
29. I have cited the relevant passages from the Su-Ling and Foster cases. I remind myself that in the case of **Kimathi and others v Foreign and Commonwealth Office** [2017] EWHC 2145 (QB) at [34] I reviewed a number of authorities and said that I did not read them as requiring, as a precondition to the Court granting a late amendment, evidence showing why the change is sought so late and was not sought earlier. I continued [34.6]:

“It is a factor to be weighed in the balance, that a properly informed application of justice to all litigants is the key to the Court’s power to grant an amendment – see in particular **Swain v Mason** at paragraph 68-74 and the principles distilled in Su-Ling at paragraph 38 and in particular at paragraph 38(a)”

The Defendants’ Background Points

30. The Defendants make a number of points. I shall summarise them as follows:
- (1) The court should have firmly in mind that the Claimants applied for permission to serve out of the jurisdiction and they bear the burden of proof in relation to all aspects of section 31(1) of the 1982 Act.
 - (2) As early as the ex parte stage, in an email from Walker J dated 19 July 2012, the Court raised the question and asked for written submissions on how the requirements for jurisdiction under 31(1)(a) were fulfilled. Therefore the Claimants had the burden, and were expressly told they had the burden, of showing how they demonstrated compliance with the subsection.
 - (3) Subsequently, on 14 September 2012, still at the ex parte stage, the Claimants’ case was either (a) that the presence requirement should be considered as being fulfilled when account is taken of the special nature of a status of legal entity, or (b) the Defendants were present in the United States by reason of the Alavi Corporation and/or 650 Fifth Avenue Company.
 - (4) In accordance with Goose J’s order for the hearing of the preliminary issues, the Defendants served their evidence first. It explained that Iran lacked any diplomatic presence in the United States after the 1980s; also that Iran maintained only an

Iranian interests section at the Pakistani Embassy and a Permanent Mission to the United Nations. In addition, Mr Howarth's evidence gave notice to the Claimants that the findings in the Kirschenbaum case were not admissible evidence for the purposes of the hearing of the preliminary issues.

- (5) At no stage did the Claimants try to establish presence via the UN Mission point or to prove that the District of Columbia Court had jurisdiction in respect of the New York entities.

The Lewis Report

31. In Mr Andrews' witness statement at [6]-[7] he says that if the Defendants wish to rely on an argument that presence elsewhere in the United States does not constitute presence for the purposes of enforcing the Judgments of the DC District Court, then it was incumbent on the Defendants to raise this in evidence and not to wait until the hearing and deploy it in submissions.
32. The onus is on the Claimants to prove factual jurisdiction. In Adams the Court received evidence from foreign jurists and heard detailed submissions. It also had to rule on disputed evidence on the foreign law. In detailed obiter dicta the Court of Appeal considered what they described as "the country issue". Relevant passages are before Scott J at first instance at [1990] 1 Ch 433 at 484D-492G, and in the Court of Appeal beginning at page 550F, in particular at page 556F.
33. The Claimants refer to the fact that throughout, from the time of the appearance before Singh J in 2012, their case has always been that what was being enforced were 12 federal court judgments and that the Defendants could be said to be legally present in the United States. Their case was that this presence was satisfied by the entities in New York.
34. The Claimants say that the Defendants, who did raise various legal arguments in their witness statements, should have raised also the fact that they were taking the federal court's jurisdictional reach point. Further, the Defendants' witness statements specifically referred to the issue as being presence in the United States, not presence within any possible restricted jurisdictional reach of the federal court in the District of Columbia.
35. In the Claimants' written submission at [19], it is said that the Defendants' account of the procedural history ignores the fact that their own case proceeded on the basis that the question for the court was whether there was presence in the United States. In Mr Howarth's second witness statement [117] he said: "I turn now to what Singh J described as the "other main issue" in his considerations, the question of whether the Court would have jurisdiction to enforce the District Court's Judgment pursuant to common law on the basis that the government of Iran had a presence in the United States." This emphasis on presence in the United States, with no reference to the jurisdictional reach of the District of Columbia Court is repeated in a number of subsequent paragraphs. At no stage was it raised that, for the purposes of rule 43 in Dicey, Morris & Collins, the question was whether Iran was present in a particular state under the jurisdictional reach of the District of Columbia Court.

36. Unfortunately, this is not a case where there has been pleadings. If there had been, I take the view that it would have been for the Defendants to raise this issue in a defence so as to comply with the requirements of CPR rule 16.5(2)(a). Once raised as an issue, the burden would then be on the Claimants to adduce evidence to prove this particular aspect of jurisdiction.
37. I strongly suspect that both parties overlooked this point until the Defendants prepared their skeleton. Even then they made an error as to the level of the District of Columbia Court. I feel confident that had they seen the point earlier they would have raised it via witness statements or correspondence.
38. Technically, and in the absence of pleadings, I regard the Defendants' case as correct. It is for the Claimants to prove their case. I do not accept the Claimants' alternative submission that it was for the Defendants to raise expert evidence that the United States is not one country for English conflict of laws' purposes.
39. Nevertheless, in the above circumstances as a whole, I take the view that there was a good reason why the Claimants did not adduce evidence on this point before. For reasons to which I now turn, the overriding objective, taking into account other relevant matters, militates in favour of allowing this evidence.
40. In relation to the application to adduce the Lewis Report the Defendants make these points:
 - (i) The court should not allow the Claimants further bites at the cherry absent a strong and compelling explanation for what has occurred. I find that there is a good reason for the evidence having not been adduced before.
 - (ii) The Report cites various new US authorities and textbooks for the first time. If allowed in, the Defendants would inevitably need to respond with like evidence, leading to inevitable additional cost and delay.
 - (iii) The report emanates from an entirely new expert. The Defendants themselves may need to search for and instruct an expert in an entirely new discipline in order to respond fairly.
 - (iv) The complex nature of the issues of US jurisdictional law now raised for the first time would inevitably mean reopening aspects of the "presence" issue at a further hearing – at further expense to the parties and to the detriment of other court users. It is said that this is not simply a question of time and cost, but of substantial unfairness. It would be highly undesirable and substantively unfair, it is said, for the state immunity issues to be retrospectively rendered "part heard". Delays between the hearings lead to the possibility of fading judicial recollection of the nuances of the points already argued, as well as possible "mission creep" and/or difficulties in confining the parties' submissions to just the restricted further remit.
 - (v) Criticism is also made that the Lewis Report is insufficiently probative of the key issue to justify the above disruption and substantive unfairness. The criticism is in essence that the report deals only with the jurisdictional

reach of the District of Columbia Court in cases such as these, and does not explicitly explain what precise jurisdictional reach the Court has over either Alavi or 650 Fifth Avenue Company. However, notwithstanding this point the Defendants, if the report is allowed in, would wish to adduce appropriate evidence in response from a suitably qualified expert.

41. Dealing with the points apart from good reason:
- (i) I agree that if the report is allowed in the Defendants will need to be able to respond with like evidence thus potentially leading to additional cost and delay. I shall explain why I say “potentially” later in this judgment.
 - (ii) It may well be that the Defendants need to find an expert in an entirely new discipline.
 - (iii) The detriment of other court users is also a relevant and important factor. Although aspects of the “presence” issue would be reopened for the very first time at any hearing, given the judicial preparation and indeed preparation of the draft Judgment, the effect of any possible fading judicial recollection would be minimal. The jurisdiction of the US court over the New York entities is a discrete point. The possibility of “mission creep” etc. on this point could be addressed by robust case management.
 - (iv) Despite the criticisms of the Lewis Report it cannot be dismissed as being irrelevant. It would appear to satisfy the requirement of demonstrating “strength of the new case” (Su-Ling) and “the significance of the evidence” (Foster).
42. Ultimately, I have to make a decision to apply the overriding objective. The overriding objective must be informed by the factors set out by Carr J in Su-Ling. I do not lose sight of them. They must be seen against the backdrop that I have found good reason for not adducing the evidence earlier. Considering that factor and the factors of saving expense, dealing with the case expeditiously, allotting to it an appropriate share of the Court’s resources, while taking into account the need to allot resources to other cases and enforcing compliance with orders on the one hand, there are factors to weigh in the balance on the other hand. These are that I have to deal with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. The amount of money involved is over \$600million. The importance of the case, both financially and considering the facts underlying the US Judgments, is very high, as is the complexity of the issues. There is no suggestion that the financial position of the Defendants is a factor which should weigh against allowing this evidence. I also have to ensure that, apart from dealing with the case expeditiously, it is dealt with “fairly”. Finally, the overriding objective itself is to enable “the courts to deal with cases justly and at proportionate costs”. I take the view that the balance is in favour of allowing the Lewis Report to be adduced in evidence albeit at this very late stage.
43. This is particularly so since, it seems to me, that there is a sensible means of dealing proportionately with this part of the Application. I have decided to send out, contemporaneously with this judgment, my judgment on the State immunity issues.

This is now reported at [2019] EWHC 2074 (QB). It will be seen that if my decision is correct, the jurisdictional reach of the District of Columbia court over the New York entities does not arise. What I have decided is that the application to rely on the Lewis Report will be allowed, but it will be prepared for and heard if, and only if, it becomes critical to the success of the Claimants' case after any successful appeal. This way forward is possible because it is a self-contained point. By this means the main case is not held up, the further hearing will only occur after directions have been given following any successful appeal. Mission creep, the fading of the judicial memory (if any), and any unnecessary waste of time and cost are thereby effectively averted.

The Mechling Witness Statement and Its Attachments

44. I have set out above what Mr Andrews said at [10]–[12] of his witness statement.
45. My state of mind prior to the application being made was that I would not have allowed the Claimants to rely upon the UN presence argument. This was because it was raised far too late and the Defendants were prejudiced by the lateness. It would require a detailed exposition of and/or evidence about the UN presence and its purpose. The Defendants had had no proper opportunity to assess it evidentially and legally. I was of the view, and remain of the view, that the Claimants were not entitled to rely upon what Mr Brook said in his 2014 statement.
46. Unlike the first part of the application where I have found that there was good reason for the evidence not being adduced earlier, there is no such good reason here. Whether to rely upon the Iranian UN presence is something of clear primary importance which, if it was to form part of the Claimants' case, should have been appreciated from the outset, or at least well in time to comply with Goose J's directions. The reliance said to have been made upon Mr Brook's statement is no proper basis for the Claimants' deciding how to present their own case.
47. The Claimants' submission is:
 - (i) At the ex parte stage in 2012 the Claimants cited the Kuwait Airways case in the skeleton argument dated 1 October 2012. This was on the basis that Evans J, confirmed by the House of Lords, rejected the argument that the Iraqi Embassy could be regarded as an emanation of the Iraqi state in the United Kingdom for the purposes of proper service. The Claimants went on to say in that skeleton that by implication the only basis for the exercise of in personam jurisdiction by the English courts over Iraq was by proper service being effected pursuant to section 12(1) of the 1978 Act. This was in support of the argument that the concept of presence in relation to states should be recognised as being fulfilled so long as proper service of process in person has been made upon the state. I do not believe the Claimants actually submitted, either expressly or by necessary implication, that an embassy could not be regarded as presence for the purposes of section 31(1)(a).
 - (ii) They relied on paragraph 34 of Mr Brook's statement. It is important to set it out in full. He said:

“There is House of Lords authority that a state is not present in the jurisdiction of another state by virtue of maintaining a diplomatic presence there ... In the case of the Islamic Republic of Iran, the Claimants could not even point to a diplomatic presence as the basis for presence within the jurisdiction of the District Court. It is well known that diplomatic relations between the US and Iran have been virtually non-existent since the US Embassy hostage crisis from 1979 – 1981. I understand that there is no Iranian Embassy in the US ...”

48. As I have previously set out, Mr Howarth’s second witness statement raised the question of the UN delegation expressly to say why it was not presence for the meaning of section of 31(1)(a).
49. The Claimants say that it would be extremely unjust to decide the case without considering evidence about the extent of Iran’s diplomatic presence through its UN mission because the Defendants have changed their position and seek to persuade the Court adopt a presence test which they say can be satisfied by diplomatic presence. They rely on the further matter that in the skeleton exchange shortly prior to the hearing, counsel for the Defendants at paragraph 26 (5) said, relying on the Kuwait Airways, “the House of Lords has confirmed that even the presence of a mission for the purposes of diplomatic intercourse should not automatically equate to a legal presence within the jurisdiction” (my underlining).
50. If the Claimants did rely on Mr Brook’s statement prior to the hearing, then it was not appropriate for them to do so. My reasons are:
 - (a) Although the Claimants’ primary submission was that presence is not required for the purposes of section 31(1)(a) in the case of a state, nevertheless they addressed the alternative by preparing a case that the state of Iran was present in the United States via the Alavi Corporation and 650 Fifth Avenue Company.
 - (b) There was no reason whatsoever why the Claimants could not have advanced an alternative case that the Iranian UN Mission also constituted a presence.
 - (c) What the Defendants’ solicitors said as to the legal position as he considered it is nothing to the point. It is for the Claimants to make their own decision. I wonder what the Claimants would have done, if anything, on this point had Mr Brook not made his statement. It seems odd if they thought at some stage that they had an argument in the alternative, that they did not pursue it because of what Mr Brook said on a matter of law.
 - (d) This is particularly the case when Mr Howarth flagged up the fact that Iran has a UN Mission in New York and then proceeded to argue why that was not a presence. This also put the Claimants on notice that there was a potential argument here and that it was one which the Defendants felt should be mentioned, if only to refute it.

- (e) The fact that the Defendants argued, the Claimants say for the first time, at the beginning of the hearing that presence could be established by an embassy or other diplomatic entities does not change the situation. In short, it is for the Claimants to advance the case they wished to present and to prepare for it accordingly. If they did rely on what Mr Brook had said in 2014 in the circumstances set out above, then they should not have done so.

51. The Defendants make these further points:

- (i) If the Claimants had wished to argue for “presence” via the Iran’s UN Mission, they could and should have done so from the outset (July 2012) when they were invited by the Court to explain how they proposed to discharge their onus under section 31(1)(a).
- (ii) Alternatively, they could have raised it at any stage whereby it could properly and efficiently have been dealt with by appropriate evidence in time for the full hearing in the first week of July 2019.
- (iii) There is no adequate explanation as to why relying on the presence of the UN Mission was not properly advanced by the Claimants well in advance of the hearing. It was first raised on day 4 of the 4-day hearing.
- (iv) The Defendants will have to respond by adducing further evidence. The UN Mission point raises many further complex factual and legal questions. They say that Mr Mechling’s statement contains a cherry-picked selection of material said to be in the public domain regarding Iran’s mission to the UN which is only part of the picture.

52. Looking again at the principles I have to apply and the overriding objective, it seems to me that the balance is firmly tipped against the Claimants in this part of the Application. That is because:

- (i) The complexity of, and potential delay caused by, the Iranian UN delegation point is far greater than in relation to the District of Columbia jurisdictional reach issue. My impression is that the Mechling statement represents only the foothills of the potential evidence, lay and probably expert, which would have to be adduced to deal with this point properly. It would also require the Lewis Report evidence to be admitted now, rather than left as a mere possible further issue in the event of a successful appeal, since it would be necessary to show that the District of Columbia court had jurisdictional reach over a presence in New York, however, that presence is sought to be proved via the UN Mission.
- (ii) This is not a matter which lends itself to a potential self-contained hearing on a discrete point and one which needs to be raised only in the event of a successful appeal. It would have to be addressed in detail now. I fear it would cause immense disruption to the progress of the case.
- (iii) I am not persuaded that admitting the Mechling evidence satisfies the criterion in Su Ling that “a heavy burden lies on a party seeking a very

late amendment to show the strength of the new case...”, and the “significance of the evidence” as referred to in Foster. Mr Mechling’s evidence about the United Nations delegation does not seem, without more, to be evidence that would satisfy a criterion of presence in the United States. This is because the presence would not seem to be for the purpose of carrying on state business with the United States. The Claimants say this is irrelevant. Although I cannot rule this out, the argument appears far from a strong one. If I am wrong about this, then I believe that the evidence which the Defendants suggest they would have to file in response may well lead to yet further applications, delay and problems in the litigation.

- (iv) In paragraphs 48-49 of their submission the Defendants say that the Mechling evidence is “merely the tip of the iceberg”. As previously stated, they say that many further complex factual and legal questions arise. These concern the precise role of the individuals at the UN Mission, the purpose for which they were there and the extent to which they were transacting Iran’s official business vis-a-vis the United States. They then cite authorities to support this. Further they say that potentially they would wish to adduce further expert evidence concerning the roles and purposes of the UN Mission in New York, the extent to which it can be said to be fulfilling the above state functions on behalf of Iran, the extent to which its functions are exercised from its own building or from the UN Headquarters, etc. etc. The Claimants say that they do not accept that any of these matters would be relevant, the simple question being whether there were diplomats present in the US acting on behalf of Iran. They submit it does not matter whether the diplomats who are present in the US interact with the US or the UN. I am not at all convinced by this. In any event I could not stop the Defendants adducing evidence in response which they thought necessary. All this underlines that the disruption and delay will almost certainly be much greater than the Claimants suggest.
- (v) This militates against allowing further evidence which would have a serious effect on the proceedings. If it was an argument of obvious merit, rather than a belated attempt to fill an evidential lacuna, it is difficult to understand how, over the years, the Claimants have never relied on it. The explanation about Mr Brook’s 2014 statement is unsatisfactory to say the least.
- (vi) Therefore, the requirements to deal with the case expeditiously and fairly and to enforce compliance with court orders have greater significance and weight against the Claimants in relation to this part of their application. So does the factor of allotting to the case an appropriate share of the court’s resources taking into account the need to allot resources to other cases. In addition there is no good reason for the lateness of the application. My discretion, in conformity with the overriding objective, must be exercised against the Claimants on this part of the application.

Summary

53. For the above reasons I allow the application to rely on the Lewis Report but refuse the application to rely upon the second statement of Mr Mechling and its enclosures.