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QB-2020-001883
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QB-2022-002474
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QB-2022-002776

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2023

Before :

MASTER STEVENS

- -

Between :

Wambura & Others	**Claimants**
- v -	
1. Barrick TZ Limited (formerly known as Acacia Mining PLC) and 2. North Mara Gold Mine Limited	**Defendants**

- -
- -

Philippa Kaufmann KC and Toby Fisher (instructed by **Hugh James LLP**) for the Claimants
Lord (David) Wolfson KC and Andrew Bershadski (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the Defendants

Hearing dates: 17th May 2023 & 12th July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 23rd October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER STEVENS

Master Stevens:

INTRODUCTION

1. These proceedings concern claims brought by 14 Tanzanian nationals for personal injury and death said to be caused by Tanzanian police engaged by the defendants for security operations on or near the North Mara gold mine in North-West Tanzania. This is not the first case to have been brought in the High Court against the mine for damages for injuries and death caused to local people living within the vicinity of the mine. It is alleged that at times the police force was deployed, and actively directed in their activities, by the private security team employed by the defendants. One incident also includes an allegation that mine guards were implicated in an attack alongside the police, and in another incident, there is an allegation that the defendants' private security team was directly involved alongside the police.

2. At all material times the first defendant was Tanzania's largest gold producer and one of the five largest gold producers in Africa. The second defendant was a wholly owned indirect subsidiary of the first defendant, and the company which held the licence for the mining activity at North Mara. There have been 4 case management conferences and disclosure has been protracted, involving the defendants uplifting over 1 million documents and reviewing in excess of 110,000. The case has been budgeted through to a preliminary trial on liability listed for June 2024.

3. All of the claimants live in remote rural villages near the mine, an area said to have one of the highest incidences of poverty severity in Tanzania. The expansion of the mine has involved the defendants acquiring more local land which has impacted the ability of local villagers to earn a living; that land was previously used by them not only for agricultural activities but also for small-scale prospecting. Those responsible for the mine have, over time, initiated a number of projects to assist the local economy and to address historic reported human rights violations; these are the subject of international reports and ownership and control of the mine has changed hands since the majority of the reports and the incidents complained of in these proceedings, which span a period between 3rd October 2014 and 2nd September 2019.

BACKGROUND TO THE REQUEST FOR SECURITY EXPERT EVIDENCE

4. At the second case management hearing ("CMC") on 7th December 2022 a direction was given that the question of whether the claimants should have permission to call expert security evidence should be determined after completion of initial disclosure and any consequential amendments to the Particulars of Claim.

5. In early May 2023, shortly before the next CMC, the parties corresponded further on the issue, and on 11th May 2023 the claimants indicated in a letter that they proposed an expert "*specifically*

experienced in issues of the use of firearms and the use of force". They noted that the defendants had denied "*unreasonable and excessive force was used by the police in the relevant incidents*" and their denial that "*the defendants were aware of a likelihood that the police would use unreasonable and excessive force against trespassers*". The claimants expressed a belief that the court would benefit from expert evidence on those contested issues and indicated that they had identified Gary White MBE as the appropriate expert. They supplied his CV and introduced him as a "*law enforcement expert with extensive operational and senior command experience in policing violent disorder*". They explained that he had "*advised and trained national police forces across the world, including in a number of African countries, on public order policing, human rights and the use of force… He has particular experience in these issues in the context of extractive industries… Mr. White has contributed to or authored authoritative publications on human rights and the use of force, including Amnesty International's International Guidelines on the UN Basic Principles on Police Use of Force and Firearms".*

6. The claimants' letter identified that the "*expert will plainly assist the court in determining whether Tanzanian police used excessive force in breach of international standards and whether any measures adopted by the defendants to mitigate the risk of police using excessive force were adequate when assessed against international standards and comparators*". As to any reliable body of knowledge or experience on human rights and use of force, they cited the *UN Basic Principles of Police Use of Force and Firearms by Law Enforcement Officers* and the *Voluntary Principles on Security and Human Rights*. They also referenced the *UN Guiding Principles on Business and Human Rights*.

7. In their letter the claimants specifically identified 3 issues which the expert evidence should address:

   i) use of force by the Tanzanian police force generally;

   ii) use of such force during the relevant time at the mine, and in the specific circumstances of each of the cases; and

   iii) the measures taken by defendants to mitigate the risks of excessive use of force by the police.

   The defendants responded the next day stating that the first issue identified was not one which fell to be decided in the case, and other matters raised were to be determined on the basis of factual evidence. They maintained that no proper justification was given as to why the court could not assess the security matters for itself, and noted that the claimants had provided no reasons to distinguish this case from 2 earlier High Court cases where they said similar issues had been considered (I will return to these when summarising the defendants' submissions on this particular application below at [33-42]).

8. In the claimants' skeleton argument dated 15th of May 2023, prepared in advance of the third case management hearing on 17th May 2023, a renewed request for permission for an expert on security issues was made. This time the claimants produced a CV from Mr van der Walt, whose expertise was said to be "*security risk assessment and risk management in the extractive industries*". It was submitted that Mr van der Walt was "*well placed to assist the court in:*

   i) The process of security risk assessment and risk management in extractive enterprises in complex environments in Africa, focusing in particular on the integration of police into security management; and

   ii) *the extent to which the defendants risk assessment and risk management process accord with recognised industry practice and standards.*"

9. The request for permission was opposed by the defendants. In their skeleton argument, they noted that the claimants had been able to plead a detailed case on the issues which they said the expert was required to opine on, without the benefit of any expert report, such that they believed that evidence could not be said to be "*necessary*". They also maintained that such evidence was unlikely to provide significant assistance to the court as the judge would have CCTV evidence relating to many of the incidents, and was likely to hear from numerous witnesses, including many called by the claimants themselves; an experienced trial judge it was said would therefore be able to decide the issues without expert evidence. They referenced other cases where such evidence had been held to be inadmissible in any event.

10. Due to a shortage of time for full submissions at the CMC, an order was made providing a timetable for the following steps:

    i) The claimants to provide the defendants with proposed terms of reference for the instruction of the expert, together with the identity and CV of the individual they sought to instruct and a letter from the expert if so advised.

    ii) Subsequently the defendants to indicate whether they agreed on the terms of reference or to provide alternative terms.

    iii) Absent any agreement the parties were to file and serve any remaining written submissions, so the court could determine both permission and terms of reference for any such expert.

11. In fact, there were in addition, supplemental submissions at a further CMC already listed for 12th July 2023. That hearing lasted all day although the court's major preoccupation was with ongoing disclosure issues, so a decision was reserved.

THE LEGAL TEST

12. CPR Part 35 governs the use of expert witness evidence in civil proceedings. It is useful to remind myself that expert opinion evidence is an *exception* to the general rule that only evidence of fact may be adduced to the court. It therefore follows quite naturally that the court should not be shy about limiting the occasions when such evidence can be adduced. Indeed, the court has to be satisfied in 2 regards, pursuant to CPR Part 35 before granting permission, namely:

    i) whether such evidence is admissible; and

    ii) whether it is "reasonably required to resolve the proceedings".

    The court must make its decision in accordance with the overriding objective.

AUTHORITIES

13. By way of introduction, the test of admissibility has been usefully summarised by Hildyard J in *Re RBS (Rights Issue Litigation)* [2015] EWHC 3433 (Ch) at [14] as, "… *whether there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the Court has to decide*". He continued, "*Unless there is, the court should decline to admit evidence which ex hypothesi is not evidence of any body of expertise but rather the subjective opinion of the intended witness*."

14. Mostyn J has also provided helpful guidance in *GM v Carmarthenshire CC* [2018] EWFC 36 at [14] when he said that the evidence should be "*of such a nature that a person without instruction or experience in the area of knowledge or human experience would not be able to form a sound judgment on the matter without the assistance of a witness possessing special knowledge or experience in the area*."

15. The claimants relied upon guidance from the Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] 1 W.L.R. 597 ("*Kennedy*") concerning admissibility as follows:

    i) whether the proposed evidence will assist the court in its task;

    ii) whether the witness has the necessary knowledge and experience;

    iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and

    iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

16. As to what evidence is reasonably required, a 3-stage test to help assess whether to permit expert evidence was usefully designed by Warren J in *British Airways PLC v Spencer* [2015] EWHC 2477 (Ch) ("*BA v Spencer*"). The test is not one of absolute necessity, but where the

evidence may be of assistance to the court a balance has to be struck between its relevance and the proportionality of admitting it, in order to decide whether it is reasonably required. The test is:

i) is expert evidence necessary to decide an issue, rather than merely helpful? If yes, it should be allowed;

ii) if it is not necessary, will it assist the judge in determining an issue? If it would assist but is not necessary then the court should consider,

iii) if expert evidence on that issue was reasonably required to determine the proceedings.

17. In answering the third question, consideration needs to be given to the value of the claim and proportionality, the effect of a judgment either way on the parties, the cost of the evidence and who will pay for it, whether any delay will be caused, or a trial date lost.

THE ISSUES UPON WHICH THE CLAIMANTS SAY A SECURITY EXPERT CAN ASSIST THE COURT

18. The draft terms of reference supplied by the claimants pursuant to the court's order provided that the expert would:

"*provide a report by reference to recognised industry standards on the risk assessment, risk management and risk mitigation carried out by defendants at the North Mara gold mine. The report is to include:*

1) An analysis of the governance and management of the security function within the two defendant organisations with specific focus on the role played by the first defendant in the discharge of the security function at North Mara.

2) An analysis of the effectiveness of the defendants' risk assessment processes over the period of the claims including the adequacy of the probability and impact assessment supported by a risk matrix together with threat and risk assessment.

The analysis is to include a focus on the risk of injury or death to trespassers on the mine caused by Tanzanian police operating as part of the defendants' security management system and:

i) using excessive force in the performance of their role; and/or

ii) using force to advance corrupt and criminal objectives

3) An analysis of: -

i) the effectiveness of the defendants' design, implementation and maintenance of risk management processes and systems including through its security action/management plan;

ii) the ongoing effectiveness of those processes, plans and systems together with the implementation; and

iii) the effectiveness of the monitoring of the same

4) This analysis should consider physical security, security systems and security personnel. The analysis is to include a focus on the risk of injury or death to trespassers on the mine caused by Tanzanian police operating as part of the defendants' security management system and:

i) using excessive force in the performance of their proper role; and/or

ii) using force to advance corrupt and criminal objectives".

SUMMARY OF PLEADED FACTUAL CIRCUMSTANCES INVOLVING ALLEGED SECURITY BREACHES CAUSING INJURY AND/OR DEATH

19. The table below sets out brief details which I have extracted from the pleadings. Facts relied upon by the claimants are shown in normal type and the view of the defendants in italicised script.

Claimant 1	**July 2018** Daughter involved in road traffic fatality involving a vehicle driven by a police officer - NB. this claim appears not to be relevant to the issue of a security expert.
Claimants 2-5	Family members of Claimant 1 - in a crowd that gathered in the aftermath of her being struck by a police vehicle - injured from discharge of tear gas rounds and/or other munitions by police /security personnel - unnecessary force. *Defence avers the crowd became hostile and threw rocks at police and security. D2 believes non - lethal ammunition was fired on 2 occasions. Claimants put to strict proof that they suffered any injuries.*
Claimant 6	**October 2014** Shot in the back on mine site at night by police whilst he was searching for gold-bearing

	minerals ("GBM") with a view to selling it on. *Defence avers he was part of a group of 200 trespassers but D2 believes he was shot by police without sufficient justification.*
Claimant 7	**June 2017** assaulted on mine site by police whilst he was searching for GBM. *Defence avers the claimant was part of a large group of trespassers armed with rocks and pangas who entered the site because a mine security gate was left open by private security personnel who fled on their arrival. Police used CS gas and a water cannon to try to deter the group from entering and asked them to leave but instead they were attacked. D2 has no knowledge of any assault.*
Claimant 8	**May 2019** Felt a blast from behind whilst walking to a shop along a village road passing by the mine, at a time when other local people were running away from the mine (hand now amputated). *Defence avers claimant was part of a large group of intruders attempting to enter the mine, whom police tried to repel but they were attacked. Defendants aver a CS canister was thrown and the claimant picked one up to throw it back but it detonated in the process. Claimant has been acquitted of trespass and assault.*
Claimant 9 (deceased)	**January 2016** on mine site at night and shot by police whilst he was searching for GBM with a view to selling it on.

	Defence avers claimant and 2 others with him were armed with pangas and attacked the police with stones and force was necessary as a risk of injury or death posed to the police.
Claimant 10 (deceased)	**May 2016** on mine site at night and shot by police whilst he was searching for GBM with a view to selling it on. *Defence avers claimant was armed with panga and spear and had previously threatened the police but that they gave verbal warnings and fired warning shots into the air and it was only after the claimant had thrown a spear at the police that he was shot. It is said that the Attorney-General's office has concluded that the officer who shot the claimant acted in self-defence and in accordance with the Tanzanian Penal Code so he should not be prosecuted.*
Claimant 11 (deceased)	**May 2016** on mine site at night and shot by police whilst he was searching for GBM with a view to selling it on. *Defence avers claimant was part of a group of 14 trespassers who attacked police and mine security with rocks, spears and pangas. Defendants deny claimant was shot by any employee of D2 who were not armed with live ammunition.*
Claimant 12	**December 2018** walking home from school along a local road passing the mine. Over 50 people were running away from the mine at the time, and he was shot from behind.

	Defence avers a truck fully laden with GBM broke down outside the mine and a large crowd (believed to be between about 100-250), some armed with pangas and rocks gathered around the truck and stole from it. 3 of D2's employees were forced to hide in the vehicle. Police attended, were attacked and responded with live ammunition in self-defence.
Claimant 13	**August 2019** After entering the mine and approaching a waste dump of rocks ambushed by police and shot. *Defence avers a lack of awareness of use of any firearms by police and the incident has not previously been raised through any grievance or other mechanism.*
Claimant 14	**September 2019** After entering the mine and approaching the tailings chased by police and shot. *Defence avers around 150 trespassers entered the mine, armed with stones, pangas and spears and attacked the police and security personnel. Security used non-lethal force (CS triple chasers) to disperse the crowd and police used sound cartridges. It is admitted the claimant was shot in the arm and D2 has paid for some medical treatment.*

THE CV OF THE CLAIMANTS' PROPOSED EXPERT

20. Following my perusal and comments on the initial CV supplied for Mr van der Walt at the third CMC, he supplied an up-to-date and revised CV to highlight the work that his company was doing across Africa and the Middle East and "*to draw attention to some of my more recent experience that is particularly relevant to the task you have asked me to do*". He referenced the fact that he is the subject of a number of non-disclosure agreements with clients for whom he has provided security

and risk assessment and management services, so he had decided he should omit reference to those from the CV. He confirmed that he had consulted with the claimants' solicitors over the scope of the terms of reference and was comfortable with them and had sufficient expertise in respect of each to give evidence about the issues.

21. Mr van der Walt stated in his covering letter (undated), "*I have extensive experience of security and risk assessment and risk management. That field of expertise is now well established. I do not know of a company involved in the extractive industries that does not make use of this expertise through the instruction of specialist consultants or through the hiring of such expertise in house. In the complex social and political environments in which the extractive industries sometimes operate, it is critical to the success of a company. As we have discussed, there are established industry standards relevant to security, risk assessment and management and there is a body of literature supporting good practice*". Finally, he confirmed that he had not previously provided expert evidence in court but that he had read CPR Part 35 and understood the duties of an expert witness, undertaking to complete any necessary online course considered appropriate in advance of giving evidence.

22. For the purposes of this judgment, I will simply extract from the CV the experiences that relate to extractive industries in Africa and any relevant qualifications. Under the heading "*profile*", the expert asserts he has specialist consultant expertise in private sector security in Africa and elsewhere over the past 20 years which includes the mining sector, and a number of countries are listed. He refers to his role as one "*responsible for the implementation and management of high-level security for asset protection and personnel*".

23. The expert explains that his background was in the military which he stated had laid the foundation for a professional career in security-related issues (risks) from an intelligence point of view. He founded a company called "*Focus Africa*" in 2008 and a successor company whose role is to provide security and risk management, and he states a particular focus has been on the extractive sector. Prior to this, he spent 8 years as a consultant/risk manager in Africa and the Middle East. Core services to clients are listed as:

- risk management-including the conduct of threat and risk assessments.

- security management including conducting security audits; assessing developing and implementing standard operating procedures… and managing the security function.

- dispute resolution and CSR, including assisting in local community relations.

24. Specific assignments mentioned on the CV include:

i) at a solar power plant in Mozambique;

ii) dealing with an insurgency attack on an energy project in Mozambique;

iii) investigations into police brutality and intelligence-driven information in a coal mine in Mozambique and producing a threat and impact assessment and recommendations on risk mitigation, which was subsequently implemented;

iv) dealing with an insurgency threat on a minerals project in Mozambique focused on a community rebellion against police brutality resulting from poverty driven illegal activities and how to improve treatment of local communities;

v) threat and risk assessment for protest activity involving a natural gas pipeline in North America;

vi) threat and impact assessment for an oil exploration drilling project in Somalia where there was an active terrorist group against a background of military and police brutality in the area.

DISCLOSED RISK ASSESSMENT DOCUMENTS

25. I do not intend to summarise the content of various risk assessment documents included within the hearing bundles, but merely to note that there are various assessments commissioned by the defendants such as those from Avanzar LLC over the course of several years, using the mine's own risk matrix and a report by consultants, Assaye Risk. These include sections on mine security and appropriate use of force when dealing with trespassers as well as non-trespass interactions with local people close to the mine site. Furthermore, there is a Memorandum of Understanding with the local police force setting out expectations of conduct and training. These documents acknowledge various historic human rights abuses and issues of violence. They reference international humanitarian law and enforcement principles and include action plans to mitigate risk of violence going forwards.

DOES THE PROPOSED AREA OF EXPERTISE MEET THE REQUIREMENTS OF THE AGREED LEGAL TESTS?

Claimants' submissions

26. The claimants submitted that security and risk assessment, and risk management "is a well-established area of expertise. The integration of human rights considerations within that framework is equally well established". They referenced a body of literature supporting good practices such as ISO 31000 Risk Management and ISO 18788:2015 Management System for Private Security Operations. They stated that their expert would draw on that literature and reference other guidance and tools issued by the International Council on Mining and Metals,

including ICMM Human Rights Due Diligence Guidance and the ICMM Voluntary Principles on Security and Human Rights-Implementation Guidance Tools.

27. The claimants sought to distinguish the expert evidence which they wished to rely upon, from that which Andrews J in *Kesabo v African Barrick Gold* [2014] EWHC 4067(QB) ("*Kesabo*"), another case concerning the same mine. The expert evidence to be advanced in that case dealt with "*mining community engagement in situations of conflict*" which the judge did not recognise as a body of knowledge or expertise which was sufficiently organised to be admissible is offering expert evidence. They maintained that this was a different type of expertise to that being offered by Mr van der Walt. Furthermore, the proposed expert in *Kesabo* had never carried out public order policing on or near a mine in Africa, unlike Mr van der Walt's experience. Similarly, it was submitted that he had experience in similar types of geopolitical environment to that of the North Mara mine, which was another distinguishing feature to the *Kesabo* case. The claimants relied upon Mr van der Walt's experience spanning more than a decade in providing risk assessment and risk management to companies in the extractive sector across Africa and the Middle East.

28. Similarly, the claimants sought to distinguish the decision of Foskett J in *Vilca & Ors v Xstrata Ltd &Anor* [2016] EWHC 2757 (QB) ("*Vilca*"), because the issue upon which the expert was to be opining there was whether the actions taken by the defendant were consistent with the UN Voluntary Principles on Security and Human Rights ("the *VP*"). Permission, in that case, was refused on the ground that while there "*may be … an emerging consensus about what represents good practice in the kind of situation that arose in this case… it would be impossible… to conclude that there was an established consensus*". The claimants maintained that this case had no relevance to the application as it was not focused on risk assessment and management, alongside risk mitigation in the complex geopolitical environment that the defendants operated.

29. The claimants submitted that "*the trial judge will unquestionably be assisted in his or her assessment of the key facts relevant to the determination of the issue of breach in respect of the negligence claims, by expert evidence that can speak to what is acceptable or unacceptable practice according to recognised professional standards. Contrary to the defendants' assertion, the trial judge cannot reasonably be expected to make such findings without such expert assistance, particularly given the complex geopolitical terrain in which the mine operated which falls wholly outside the ordinary experience of the court*".

30. Further in support of the contention that there is a recognised body of professionals who provide security risk assessment and risk management services to the extractives sector, the claimants referenced the defendants' own contractors, Assaye Risk, who were said to be part of a body of professionals carrying out this work with expertise based on an

accumulated body of industry practice and established industry standards. They asserted that Mr van der Walt's "*Focus Group*" is part of the same body of professionals. They further maintained that the defendants would no doubt call factual witnesses to explain their risk assessment and risk management processes, and the measures taken to mitigate risk of death and serious injury. Mr van der Walt would be able to help the court in understanding whether those assessments and mitigation were adequate, as compared to industry practice and standards. Without Mr van der Walt's assistance, the claimants submitted that there would not be equality of arms between the parties because, whilst they intended to call evidence from a former Operations Manager at the mine, his role did not involve high-level strategic design of the mine's security arrangements and he did not have expertise to compare practices at that mine with wider industry practice.

31. The claimants denied that there was any reason to doubt Mr van der Walt's impartiality. They referenced the defendants' concerns because he had used a phrase, "*police brutality*" in his CV, but they said there was no merit in the attack, as he had simply been using the term to describe the focus of a piece of security work which he had been retained to undertake. They also maintained that there was no issue in these proceedings as to whether police around the mine have engaged in acts of brutality.

32. Finally, noting some concerns that the defendants had expressed as to the breadth of materials to be provided to the expert, they confirmed they would be happy to do further work to clarify and restrict the materials to be reviewed under the terms of reference.

Defendants' submissions

33. The defendants criticised the claimants for their very late request for permission to instruct Mr van der Walt as a security expert in the field of risk management, pointing out that until a few days before the CMC in May 2023, they had been seeking to rely on Mr Gary White, whose evidence the court in *Kesabo* had ruled as inadmissible. The defendants suggested that the reality was that the claimants were trying to introduce the same type of expert evidence in this case as in *Kesabo,* by simply swapping the label for the type of expertise i.e., from opinion on appropriate measures to mitigate the risk of use of excessive force to security risk management, when there was no real difference in substance. They argued that essentially all the issues outlined in the proposed terms of reference are ones upon which a judge could make factual findings and did not require assistance of an expert said to possess special knowledge or experience in the area.

34. The defendants described "*near identical issues to those on which the claimants seek security evidence*" in *Kadie Kalma & Others v African Minerals Ltd & Others* [2020] EWCA Civ 144 ("*Kalma")*. They particularly drew my attention to the alleged "*negligence in… failing to take adequate steps to prevent the* [Sierra Leonean Police] *from*

committing torts against the claimants" at [11(vi)]. No expert security evidence had been adduced and the court did not suggest it would have found it necessary or helpful in reaching a determination.

35. Relying on the same authority, the defendants also submitted that the *VP* were applied by both the High Court and the Court of Appeal in *Kalma* without the benefit of expert evidence; in fact, the Court of Appeal described the *VP* as "*general in nature*" and therefore not analogous to technical standards where experts frequently assist the courts.

36. Similarly, the defendants attacked the two sets of ISO standards referenced by the claimants as being far too general in nature to require expert interpretation.They were said to be general, not technical, documents and not focused on mining or any particular geographic area and therefore were said to be "*unlikely to be of any assistance to the Court, or to be a document in relation to which the court would benefit from the views of an expert*".

37. Referencing the *Vilca* case, the defendants reminded me of the factual issues and that the case concerned injuries at the hands of Peruvian police during protests against the operations of a mine and that the claimant had tried, unsuccessfully, to obtain permission for expert evidence in relation to "*good practice - in relation to security and human rights - in the extractive industries*" at [9]. At [25] the judge held that, "*I am bound to say that, whatever effect the VP's do or should have in this context, they are clearly articulated and do not appear to be ambiguous in any material fashion. This means that the trial judge ought to be able to measure what was done or not done by reference to some clearly articulated principles without the need for expert assistance…* [counsel for defendants] *submits that it is for the court to decide whether the defendants followed the guidance in the VP's and, if so to what degree, and if they did not, whether it amounts to a breach of duty… it is not an issue for expert evidence… I agree.*"

38. The defendants also sought to rely on the fact that questions of use of excessive force have already been pleaded in significant detail in the Re-Amended Particulars of Claim without the benefit of expert evidence, which they said underlined the fact that it is not necessary.

39. The defendants referred me to the fact that Mr van der Walt's CV does not cite any qualifications or memberships of professional bodies suggesting there is any organised or recognised body of knowledge or experience. Furthermore, they cross-referred to the draft terms of reference as exhibiting "*a wholesale lack of specificity in the questions asked of the expert*", which they attributed to the fact that there is no recognised body of expertise and as such the terms of reference are not curable by refining the drafting. For example, paragraph 1 asks for "*an analysis of the effectiveness of the defendants' risk assessment processes*", which they said is precisely the type of question for the judge to determine rather than an expert.

40. The defendants were also concerned that the draft terms of reference envisaged the expert reviewing a vast number of documents, and the type of analyses envisaged were far too wide-ranging, such that they would usurp the function of the judge.

41. The defendants raised "*real doubts about Mr van der Walt's impartiality and ability to comply with the requirements of Part 35 of the CPR*". They referenced the fact that the expert's letter stated that he had consulted carefully with the claimants' legal team over the scope of the terms of reference and that he had used what they described as "*loaded*" language, for example mentioning police "*exploiting their position*". They were aware it was the first time this expert would have given expert evidence, noting that "*the fact that he expresses his comfort with the terms of the draft TOR as drafted - notwithstanding the deficiencies identified above - speaks volumes about his lack of experience*".

42. Finally, the defendants asserted that if Mr van der Walt sought to give evidence of what other mining companies may do or might have done that would be inadmissible for the same reasons set out by Andrews J in *Kesabo*. She had found that evidence in which an individual considers matters that "*derive from his knowledge of what, as a matter of fact, other mining companies may or may not do, and what standards they apply, in trying to deal with the problem of people coming on their land as trespassers, and how they police matters […] [is] purely factual evidence and is not a matter of expertise*". They referenced the fact that despite Mr van der Walt had been given an opportunity to put forward better evidence of his suitability by my previous order; despite that his CV still did not demonstrate relevant experience as there was no experience of gold mining, of operating in Tanzania or of trespass in the context of artisanal mining. In fact, of the projects described only 3 related to policing issues and the remainder are threats from insurgency or terrorist groups and Greenpeace protestors.

ANALYSIS AND CONCLUSIONS

43. On the first occasion of security expert evidence being raised in a substantive way at the 17 May 2023 CMC, I had sounded a general note of caution about a lack of focus in some terms of reference for expert evidence which can result in a waste of both time and money. As Aikens J held in *JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWHC 2755 (Comm) at [23], "*There is a tendency to think that a judge will be assisted by expert evidence in any area of fact that appears to be outside the "normal" experience of a [Commercial Court] judge*". But that is no reason to include permission for such evidence as "*all too often, the judge is submerged in expert reports which are long, complicated and which stray far outside the particular issue that may be relevant to the case*". As set out at [10] above, I therefore asked the parties to go away and come up with potential terms of reference for my consideration, as well as some more focused submissions about the type of expertise that could be proffered to the court. Additionally, I had acknowledged that in the modern world risk management is becoming a

recognised area of expertise in certain sectors and settings; that comment was directed to operational expertise but not to expert evidence necessarily in a court setting. At that time, whilst very familiar with the leading and uncontested authorities on the requirements to be satisfied before permission is given for expert evidence generally, I had not seen the authorities relied upon now by the defendants in respect of security issues at both this African mine and 2 others.

Admissibility

(i) Evidence assisting the trial judge

44. Adopting the structure of the *Kennedy* test, on whether the claimants' proposed evidence will assist the court in its task, I need first to reflect on precisely what that task will be as it has been variously represented to me. I have to say that I share the defendants' disquiet as to how the task has been subject to changes in packaging and labelling since the spring of this year. Proposed terms of reference have persistently been far too wide and unfiltered for the issues at hand (see, for example [7 at (i)] and [18 at 1)]. It appears that the constant and more focussed theme throughout submissions has been on assisting the trial judge in reaching findings on whether or not there was an excessive use of force having regard to international standards of appropriate behaviour[1]. That context has also included, on occasion, and most recently, the situation of use of force against trespassers and the implications of integration of the police into the defendants' security arrangements. The "*risk management*" aspect of the requested expertise has been emphasised in the more recent submissions as a distinguishing feature from earlier cases. However, to my mind, any judicial consideration of how well prepared the defendants were to try and maintain peaceful law and order, and their planned actions to minimise acts of violence, will all be interwoven with consideration of the same factual matrix used to determine whether there has been an *excessive* use of force in any particular circumstance of alleged violence; one simply cannot hive off "*risk management*" as a separate process or area of expertise. I accept the defendants' submissions that this analysis is precisely the task that trial judges have undertaken without apparent difficulty, or the assistance of expert evidence, in the authorities placed before me. In *Kesabo,* at [9], where permission for expert evidence directed towards what could be done to minimise and/or control situations of violence leading to injury at the North Mara mine, Andrews J found that whilst it was likely that the defendants would call witnesses to explain systems in place and what they considered "*was a proportionate response to the problems as they saw them developing…. Whether or not the behaviour of the defendants was reasonable or otherwise is going to be a matter for the judge who hears this case to determine on the basis of the evidence before him or her*".

[1] See paragraphs 5,6,7(i) – (iii),18 at 2(i) and 4(i)

45. Another aspect of the trial judge's task in this case will include consideration of relevant international standards governing use of force. Again, I reject the claimants' submission that those standards are so technical that the trial judge will need expert assistance to interpret them. I have reviewed the ISO standards within the hearing bundle, and they are very generalised and written in plain non-technical language. The *VP* have already been considered by the court in *Vilca*, where a request for expert evidence from one of the "*principal architects*" of the *VP* was denied at [25] as they did not "*appear to be ambiguous in any material fashion. This means that the trial judge ought to be able to measure what was done or not done… without the need for expert assistance*". Similarly, on the appeal in *Kalma,* at [129] there was no criticism from the Court of Appeal of the trial judge's analysis and application of the *VP*, without any reliance upon expert evidence, and Coulson LJ [at 150] noted that the *VP* were general in nature.

46. I am aware that the claimants were contending that it was the level of risk posed by the situation whereby police operated as part of the defendants' security team, which was also material to their argument that expert evidence was required. I do not believe this takes matters any further forward as in *Kesabo* the judge was considering whether to permit expert evidence from a former police officer in a situation where private security forces and/or the police had been involved in situations of alleged unlawful and/or excessive use of force. She declined permission. Similarly in *Kalma,* the mining companies relied on the police force to provide security support and the police were involved in various violent incidents that occurred, but there was no suggestion of any difficulty in the trial judge reaching a determination of the issues without expert assistance. I do not believe the reference to "*trespassers*" in the most recent iteration of the terms of reference alters my view; not all of the claimants are alleged to have been involved in trespassing at the time of the incidents complained of and the *Kesabo* case related specifically to the mine at North Mara and included injuries/deaths caused during trespassing activity.

47. Case law makes it plain that having failed to satisfy even just one of the *Kennedy* criteria, the application for permission must fail. Nonetheless, I will consider the other criteria as they were the subject of extensive submissions.

(ii) Necessary knowledge and experience

48. I find force in the defendants' submissions, that despite the claimants' emphasis upon Mr van der Walt's understanding and experience of the geopolitical environment where the North Mara mine is situated, this is not satisfactorily evidenced. Africa is a vast continent with numerous regional and sub-regional variations, and stark cultural differences between different groups of people as to their values, customs and behaviours. Within the hearing bundle, there was an independent report (not referenced in submissions) describing distinctive features of attitudes towards conflict and territorial rights possessed by the local

village inhabitants in the area surrounding the North Mara mine. Even if that report is not entirely accurate, the overarching point remains, that it is a huge oversimplification to assert that an acquaintance with, or indeed experience of security management for the "*extractive sector"* in Africa meets the court's test of necessary knowledge and experience to assist with this specific dispute, in a remote and culturally distinct area where artisanal mining has been prevalent for many years. I find the defendants' submission even more compelling because the proposed expert was given the time and opportunity to tailor his CV in order to demonstrate his expertise more fully to assist me in making this determination now. The version of the CV before me is therefore a considered version.

49. The defendants also cast doubt upon the proposed expert's skills and experience in giving evidence as this would be his first time appearing as an expert witness. I have noted that they criticised him for the terms of reference which he had approved as far too wide and general in nature, but I take account of the fact that they had also been approved by the claimants' legal team, not solely the intended expert. The expert has given every indication that he would wish to work within any boundaries set by the court. Every proficient expert witness has had to start working on a first instruction, and I wish to be clear that the process of initiation, of itself, is not a sound reason to say he lacks the necessary expertise; Mr van der Walt has indicated he would participate in relevant training to get up to speed, if appointed.

(iii) Impartiality

50. I consider that the defendants' criticisms in this regard were rather harsh, and I do not attach weight to them. As mentioned above the expert has quite plainly indicated that this is the first time he has been involved as a potential expert witness at court, so the drafting of his CV was unlikely to be as finessed as that of an experienced witness. I accept that in describing "*police brutality*" he may well have simply been referring to the numerous human rights reports that have been produced in the past raising concerns about security at the North Mara mine. This is no reason to decline his proffered experience as an expert.

(iv) Reliable body of knowledge

51. I have already addressed some of the points raised in respect of this aspect of the test at [45] above, in that the relevant materials appear to be very generalist in nature, such that the trial judge will be able to reach a sound judgment without special help from an expert (as per Mostyn J at [14] above).

52. I do not accept the separate criticism of the proposed expert by the defendants, that he has not revealed any relevant membership of a professional body. In *Vilca* [at 16], Foskett J quoting from a decision of Oliver J in *Midland Bank Trust Company Ltd and Anor v Hett Stubbs and Kemp* [1979] 1 Ch. 384, found favour with that earlier decision that

expert evidence is not confined to that emanating from rules and practices of "professional institutes", but relates to accepted standards of conduct sanctioned by common usage. However, the problem in this case is that whilst there are operational groups of consultants that assist with security functions in mines, such as the Assaye Risk and Focus Africa, there is no overarching published set of detailed standards, or agreed range of acceptable conduct by a security function, or at least none presented to me; what is considered acceptable appears to be all fact specific against very broad generalist guidance, such that it is well within the remit of an experienced trial judge to determine the issues unaided. Thus the situation resembles the one exemplified by the comment of Hildyard J already referenced at [13], that the assistance would only be "*the subjective opinion of the intended witness*" which is not admissible evidence at all.

53. Overall, I do not believe that the *Kennedy* test is satisfied in respect of admissibility of the proposed evidence under limbs (i), (ii) and (iv). That is sufficient to dispose of this application. However, for the sake of completeness, I will now turn briefly to look at the separate test as to what is "*reasonably required*", although there is a significant degree of overlap with what has been set out already.

Is evidence reasonably required?

(i) Is the evidence necessary?

54. I do not feel the need to reference again the various authorities where other courts have held that the type of expert evidence envisaged in this case was not necessary. It is notable that there were no authorities in the bundle where permission had been given for an expert in risk assessment, risk management and risk mitigation regarding alleged excessive use of force by security personnel whether engaged in and around a mine, or elsewhere.

(ii) Would the evidence be helpful?

55. Whilst I acknowledge the claimants' concerns that the defendants are likely to call witnesses who have worked in the security function at the mine, and who have detailed knowledge of the processes that individual claimants will not have, I do not believe the way to assist the court is to permit expert evidence to try to complete the evidential matrix upon which the trial judge will make their decisions, when the nature of that expert evidence would be subjective opinion.

56. As Foskett J held in *Vilca* at [26] a proposed expert may well have relevant factual evidence to give, even though their evidence does not satisfy the tests for appropriate expert opinion. Similarly, Andrew J in *Kesabo* left open the possibility that the intended expert might give evidence of fact in the case (at [15]).

(iii) Is the evidence reasonably required in all the circumstances?

57. This limb of the test is dependent upon me having found that the proposed expert evidence could be helpful, which I have not. Accordingly, I dismiss the application.