the safeguards will be effective, but if, as postulated, some question were to be asked of a witness by counsel appearing on behalf of a co-defendant which, if answered, would render the applicant's trial unfair because it would reveal something prejudicial to the interests of the applicant said by him at a time when his right to silence was curtailed, then it would be the duty of the judge presiding at the criminal trial to act to ensure that the applicant's rights were not infringed. Precisely how he would exercise his powers would depend upon the circumstances, but the powers of that judge constitute an additional safeguard for the applicant, and so support the conclusion reached by Prescott, J. in the court below.

54 **ALDOUS, J.A.** concurred with both judgments.

Appeal dismissed.

[2010–12 Gib LR 304]

VIALES v. GIBRALTAR HEALTH AUTHORITY

COURT OF APPEAL (Kennedy, P., Aldous and Parker, JJ.A.): March 9th, 2012

Civil Procedure—pleading—amendment—amendment to be sought promptly after was or should have been identified as necessary—delay prejudicing fairness of trial brings balance of justice down in favour of disallowing amendment—delay of 2½ years no automatic bar to amendment

Civil Procedure—pleading—amendment—omission/removal of limitation defence not clear and unequivocal statement that will not rely upon it in future—no estoppel or waiver precluding amendment to resurrect limitation defence

The appellant brought an action in the Supreme Court seeking damages from the Gibraltar Health Authority for failing to diagnose her diabetic retinopathy.

Since her childhood, the appellant had suffered from diabetes and, during her minority, had attended a paediatric diabetic clinic in Gibraltar. The clinic had sent reports to her general practitioner, Dr. Beguelin, with whom the appellant continued to have appointments before leaving for

university in England in the Autumn of 1996. She first noticed a deterioration in her sight the following year and sought the advice of an English optician on November 27th, 1997, whereupon she was referred to a London hospital and diagnosed with severe diabetic retinopathy. Despite receiving the appropriate treatment, she lost much of her sight.

In December 1997, the appellant was informed by her London doctor that the damage to her sight could have been avoided if proper medical checks had been carried out sooner. She instructed solicitors in February 2000 and her claim against the Gibraltar Health Authority was issued on November 23rd, 2000, on the basis that the action was thought to have accrued when she had visited the opticians on November 27th, 1997. However, the particulars of claim, served on March 22nd, 2001, alleged that the appellant's cause of action had accrued before November 1997, upon Dr. Beguelin's failure to properly diagnose her condition before she had left Gibraltar. The respondent served its defence, denying negligence, asserting the defence of limitation, and maintaining that diabetic retinopathy had been diagnosed in April 1996 (based on a mistaken interpretation of a letter written by Dr. Beguelin). Both parties obtained expert medical reports between 2002 and 2006, but their experts reached different conclusions on whether the appellant's condition should have been diagnosed in Gibraltar. The then Chief Justice (Schofield, C.J.) ordered that the experts produce a joint report and gave permission to the parties to amend their pleadings. In April 2007, before the joint expert report was published, the appellant served substantially amended particulars of claim, specifying that the appellant's condition should have been diagnosed in Gibraltar between June 1996 and April 1997. The respondent then served its amended defence, based on its own medical evidence, abandoning the limitation defence and asserting the adequacy of the treatment given in Gibraltar. The experts then produced their joint medical report, the respondent's expert having changed his opinion by agreeing that retinopathy would have been detectable in April or May 1996 and that too little had been done to ensure proper treatment in Gibraltar.

After a delay of about two and a half years after the joint medical report was produced, following the exchange of witness statements, the respondent indicated in 2009 that it intended to resurrect its limitation defence on the basis that the cause of action had accrued in 1996 and had therefore become statute-barred before commencement in 2000. It applied to the Supreme Court (Prescott, J.) to amend its defence to plead limitation, which was allowed on the basis that the defence was arguable and the balance of prejudice came down in favour of amendment.

On appeal, the appellant submitted that the Supreme Court had erred in allowing the amendment as (a) the respondent's delay in pleading limitation meant that the balance of prejudice favoured her; the relevant delay being not the two and a half years since the joint medical statement had been produced, but the much longer period since the particulars of claim had indicated that the action had been commenced out of time; (b) the failure to plead limitation earlier had been a mistake rather than a

decision; and (c) the court had wrongly concluded that no waiver or estoppel precluded the limitation defence.

The respondent counterclaimed, submitting in reply that (a) there was no prejudice that precluded the amendment and the relevant delay was the two and a half years since the joint medical statement had been produced; (b) the failure to plead limitation earlier had been a decision rather than a mistake; and (c) the court had correctly concluded that there had been no waiver or estoppel of the limitation defence, as there had been no unequivocal statement permanently abandoning the defence; and (d) the court should have decided that the merits of the defence were strong, not merely arguable.

Held, dismissing the appeal:

(1) The discretionary power of the court to allow amendments to statements of case was qualified by the need to avoid prejudice affecting the fairness of the trial. The Supreme Court's judgment that, despite delay, the balance of justice favoured allowing the respondent to amend its defence was not wrong in principle or plainly wrong and would be upheld. An amendment to pleadings was to be sought promptly after it was or should have been identified as being necessary. Although the appellant's particulars of claim had apparently made clear as early as 2001 that the claim was being pursued out of time, it was not entirely clear at that stage when the cause of action had accrued and limitation had been pleaded as a defence to the claim. The limitation defence had only been abandoned on the basis of the respondent's medical evidence that the cause of action could not have accrued before the appellant left Gibraltar, which had rendered the defence unnecessary, and on which the respondent had been entitled to rely. Permission to amend had been properly given below, as the need for the limitation defence to be resurrected became obvious only when the joint medical report confirmed that the cause of action had, in fact, accrued before the appellant left Gibraltar, more than three years before the claim form was issued (paras. 28–29; paras. 33–37; para. 52).

(2) The court had not erred in concluding that the respondent's failure to plead limitation sooner had been a decision rather than a mistake. The judge was entitled to infer that the respondent had not been inaccurate or imprecise in its pleadings, but had decided to narrow the issues by discarding a defence which it had considered, on the expert evidence then in its possession, to be unnecessary (paras. 39–40).

(3) The court had correctly concluded that no waiver or estoppel precluded the respondent from seeking to amend its defence to include limitation. An omission, in the absence of special circumstances, would be equivocal, making no representation that could be relied upon. The respondent's amendment to its statement of case, removing the limitation defence, had not, therefore, been a clear and unequivocal representation that the limitation defence would not be raised again in the future.

Accordingly, it was unnecessary to consider whether there had been any change of position or detriment (paras. 45–48; paras. 50–51).

(4) The court had been right to conclude that the limitation defence was arguable and had not needed to go any further in considering its merits in dealing with the application (para. 49).

Cases cited:

(1) *Argo Systems FZE* v. *Liberty Assur. Pte Ltd. (The Copa Casino)*, [2012] 2 All E.R. (Comm) 126; [2012] 1 Lloyd's Rep. 129; [2012] 1 CLC 81; [2011] EWCA Civ 1572, followed.
(2) *Cerisola* v. *Att.-Gen.*, 2005–06 Gib LR 238, referred to.
(3) *Cobbold* v. *Greenwich London Borough Council*, [1999] EWCA Civ 2074, referred to.
(4) *Gale* v. *Superdrug Stores Plc*, [1996] 1 W.L.R. 1089; [1996] 3 All E.R. 468, followed.
(5) *Ketteman* v. *Hansel Properties Ltd.*, [1987] A.C. 189; [1987] 2 W.L.R. 312; [1988] 1 All E.R. 38, *dicta* of Lord Griffiths applied.
(6) *Swain-Mason* v. *Mills & Reeve LLP*, [2011] 1 W.L.R. 2735; [2011] EWCA Civ 14, referred to.
(7) *Walley* v. *Stoke-on-Trent City Council*, [2007] 1 W.L.R. 352; [2006] 4 All E.R. 1230; [2006] EWCA Civ 1137, distinguished.
(8) *Worldwide Corp. Ltd.* v. *GPT Ltd.*, [1998] EWCA Civ 1894, referred to.

P. Limb, *Q.C.* and *D. Bossino* for the appellant;
D. Nolan, *Q.C.* and *S. Catania* for the respondent.

1 **KENNEDY, P.:** This is an appeal from a decision of Prescott, J. who, on May 12th, 2011, gave the respondent health authority permission to re-amend its defence in order to enable it to contend that the appellant's claim was statute-barred.

Background facts

2 In this case the history of the action is important. The appellant was born on September 12th, 1976, so she is now 35 years of age. She was diagnosed in childhood as suffering from diabetes, and attended a paediatric diabetic clinic here in Gibraltar until 1994, when she was aged 17. The clinic reported to her general practitioner, Dr. Beguelin, who continued to see her at intervals, mostly in connection with her diabetes. One of the difficulties with diabetes is that it can attack eyesight, and if that does happen the outcome will be much better if the problem is spotted in good time, so known diabetics should be regularly and appropriately checked. On the other hand, teenage diabetics can be reluctant to accept the restraints of their condition. They do not always attend as advised for checks, and can be reluctant to adopt the constraints on their lifestyle

which they ought to adopt in the interests of their health, and there is evidence to show that the appellant fell into that category.

3 In autumn 1996, the appellant began a university course at Newton Abbot in Devon. She says that in August 1997, when she was at home for the summer vacation, she began to experience spots in front of her eyes. Her mother tried to arrange for a check-up at the hospital, but no appointment was available, so she returned to university and on November 27th, 1997 went to the opticians in Newton Abbot. She was recognized to be in need of urgent treatment, and was referred to London, where she came under the care of Mr. Aylward, a consultant ophthalmic surgeon. She was found to be suffering severe diabetic retinopathy, and received appropriate treatment, but has lost much of her sight.

The progress of the litigation

4 Initially the appellant and her parents did not consult lawyers, even when they knew that her loss of sight might be attributable to lack of proper medical care. In her second statement of November 11th, 2010, the appellant says that—

> "it was not until December 12th, 1997 that Mr. Aylward spoke to my parents and me in connection with the operation which he had carried out the previous week (the first operation). It was at that meeting, as stated in the witness statements, that we were advised that this could have been avoided. He told me that in the UK this would not have happened to me. This was the first occasion that my parents and I had heard the words 'diabetic retinopathy' and also the first occasion that we were told that checks should have been carried out on a regular basis, particularly for those diabetics who have suffered diabetes for more than 10 years.
>
> I was still not being told whether I would lose my sight as I did. In fact, at the time I still had some vision through both eyes. Mr. Aylward was non-committal at this stage as to the progress and outcome of the treatment."

5 On January 10th, 1998, the appellant's mother wrote to the then Minister of Health in Gibraltar about the expenses which the family was having to incur, but it was in no sense a letter of claim, nor was it treated as such.

6 In February 2000, the appellant instructed her present solicitors, who sought release of her medical records. The Gibraltar records were not immediately released and on April 24th, 2000 the solicitors wrote a letter of claim to the respondent. It was then asserted that the appellant's condition must have started to develop before the date of her last eye test in Gibraltar, and should have been detected at that stage. It was also

asserted that tests were not sufficiently frequent, and that the right method of testing might not have been used.

7 Unfortunately, the appellant's solicitors seem to have been under the impression that her cause of action accrued on November 27th, 1997, when she went to the optician at Newton Abbot, because in a letter to the respondent dated October 25th, 2000 they asserted that the period of limitation was due to expire on November 27th, 2000 and invited the respondent to accept liability forthwith. The respondent did not accept liability and the claim form was issued on November 23rd, 2000. It may be that before issuing the claim form the appellant's solicitors should have considered the possibility of an application to the court pursuant to s.6(2) of the Limitation Act 1960, and that had they done so we would not now be considering this appeal. Be that as it may, particulars of claim were served on March 22nd, 2001. In para. 5 of the particulars of claim it was asserted that—"the condition and signs of it [the diabetic retinopath] had been present and could and should have been discovered for some considerable period of time before November 1997."

8 In para. 7 it was asserted that the non-discovery of the appellant's condition prior to November 1997 was due to the respondent's negligence in failing to cause her to be regularly examined by competent and qualified personnel using proper equipment, having first dilated her pupils.

9 On May 17th, 2001, the respondent filed its defence. It asserted that the claim was statute-barred, and stated, in para. 1, that the appellant's retinopathy was diagnosed by April 1996. That averment was apparently the result of an undated letter of Dr. Beguelin being attributed to a date long before it was written and no one now contends that the retinopathy was diagnosed by April 1996. The defence denied negligence, and asserted that the appellant had been treated with reasonable skill and care.

10 On June 20th, 2001, the appellant's solicitors sought further information in relation to the alleged diagnosis in April 1996, and suggested a joint medical report. The respondent's solicitors did not agree to that, and on November 23rd, 2001 the appellant's solicitors instructed Mr. Cooling, a consultant ophthalmologist at Moorfields Eye Hospital, London, to prepare a report. On February 5th, 2002, the respondent's solicitors approached Mr. Dowler, another consultant at the same hospital. There was some difficulty in producing all of the medical notes from Gibraltar and the United Kingdom which the consultants needed, but that is no excuse for the dilatory way in which the matter then progressed. Mr. Cooling produced his first report on April 24th, 2002. In substance he supported the appellant's pleaded case, saying that on the balance of probability her condition would have been detectable in the latter half of 1996 and would then have been amenable to treatment, but he did not

want his report to be released until he was satisfied that he had seen all of the Gibraltar medical notes. The respondent gave that confirmation in June 2002, by which time Mr. Cooling had produced a second medical report and the respondent's solicitors then sought disclosure of the United Kingdom medical notes, but it was not until February 16th, 2005 that Mr. Dowler completed his report, without the benefit of seeing either of the reports of Mr. Cooling. I find that astonishing. It is difficult to escape the conclusion that if matters had been competently handled on both sides the two consultants would have had all they needed, would have reported, and their reports would have been exchanged by the end of 2002 at the latest.

11 When the respondent's solicitors received the report of Mr. Dowler they disclosed it. His conclusion, in broad terms, was that the appellant's condition had progressed rapidly, and that the balance of probability was against sight-threatening diabetic retinopathy having been detectably present in her eyes when she left Gibraltar. The appellant's solicitors then decided to seek legal assistance and invited Mr. Cooling to comment on Mr. Dowler's report. He did so in a third report dated April 9th, 2006, just over a year after the report of Mr. Dowler had been disclosed. Mr. Cooling maintained his view that the appellant's condition in November 1997 was not consistent with an appropriate standard of care having been provided by the respondent over the preceding years.

12 On May 11th, 2006, Mr. Cooling's reports were disclosed and on October 13th, 2006, Mr. Dowler commented on those reports. He maintained his position.

13 On December 18th, 2006, the then Chief Justice gave directions. They included a direction for the experts to meet and to discuss and gave permission to amend the pleadings.

14 On April 23rd, 2007, the appellant's solicitors served substantially amended particulars of claim specifying what it was contended that the respondent should have done and when. The fundi, it was said, should have been examined at regular intervals and to para. 5 was added this sentence—"the claimant's case is that the condition would have been present at the time of the July 1996 and April 1997 attendances, and possibly earlier."

15 In their excellent submissions to us, Mr. Patrick Limb, Q.C. for the appellant and Mr. Dominic Nolan, Q.C. for the respondent put different interpretations on what happened in April 2007. Mr. Limb's contention was that the amendments were not such as to impact upon the issue of limitation. Mr. Nolan contended, and I accept, that although in outline the appellant's case remained the same, the amendments were substantial. The amended pleading speaks for itself, and, as Mr. Nolan points out, for the first time Dr. Beguelin became a specific object of criticism. In the

amended defence which the respondent served in April 2007, the respondent abandoned the allegation that the claim was statute-barred, and concentrated on specifying the treatment which the appellant had received and had been offered in Gibraltar.

16 At the end of April 2007, the two medical experts produced a joint medical report. In that report, Mr. Dowler changed his position completely. He recognized it as likely that there would have been retinopathy in 1996, detectable in April or May of that year if the appellant's fundi had been examined. If treated, then the outcome would have been better and Mr. Dowler accepted that too little was done after October 1993 to ensure that the appellant presented herself for ophthalmic examination.

17 In October 2007, witness statements were exchanged and on October 6th, 2009, two years later and nearly two and a half years after the production of the joint medical report, the respondent's solicitors set out in a letter its intention to resurrect the defence of limitation and its reasons for doing so. It suggests that the cause of action must have accrued in about July 1996 when, according to Mr. Cooling and the particulars of claim, there were changes in the appellant's sight which, it is said, should have been detected. That was more than three years before the claim form was issued on November 23rd, 2000.

18 The appellant's solicitors did not agree to the proposed amendment of the defence, so on December 15th, 2009, before any trial date was fixed, the respondent's solicitors issued the application notice which resulted in the matter coming before Prescott, J. Then, on November 11th, 2010, the appellant's solicitors applied for leave pursuant to ss. 5, 6(1) and 6(3) of the Limitation Act 1960, which permit the court in certain circumstances to extend time. That application will be pursued if this appeal fails. I can easily accept Mr. Limb's submission that the appellant was deeply disappointed when she heard about the respondent's intention to rely upon limitation. He said that her hopes were dashed. She felt that she had been "mucked about." So she had, but not only because of the decision of the respondent in October 2009.

The decision of the judge

19 The judge recognized that when deciding whether or not to allow the proposed amendment she had a discretion which should be exercised in accordance with certain principles, some of which she identified, namely—

(a) that amendments should in general be allowed so that the real dispute between the parties can be adjudicated upon;

(b) that the proposed amendment must have some prospect of success;

(c) that regard must be had to whether the amendment is being made late;

(d) that the prejudice suffered by one side if the amendment is allowed must be balanced against the prejudice likely to be suffered by the other side if it is refused; and

(e) that pleadings should be precise.

20 She examined each of those principles in turn by reference to the facts of this case and she also considered and rejected the appellant's submission that she should rely on the doctrine of estoppel by conduct to defeat the application to amend.

Applications to amend: the law

21 There is no suggestion in this appeal that the general approach adopted by the judge was incorrect. In essence, the submission which underlines Mr. Limb's first three grounds of appeal is that this application was made so late that it should have been refused and that recent authorities show an increasing reluctance to allow late amendments. I accept that the courts do look closely at late amendments, but a chronological approach to the authorities to which we were referred does not seem to me to demonstrate any error on the part of the judge.

22 In *Ketteman* v. *Hansel Properties Ltd.* (5) Lord Griffiths said ([1987] A.C. at 220):

> "Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other."

23 That passage was cited in *Worldwide Corp. Ltd.* v. *GPT Ltd.* (8) where the Court of Appeal was concerned with a very late amendment in a commercial case.

24 In *Gale* v. *Superdrug Stores Plc* (4), the defendant's insurers initially admitted liability but then denied it when proceedings were commenced, so the plaintiff sought to strike out the defence. In the Court of Appeal, Waite, L.J. said ([1996] 1 W.L.R. at 1097) that—

". . . the discretion is a general one in which all the circumstances have to be taken into account, and a balance struck between the prejudice suffered by each side if the admission is allowed to be withdrawn (or made to stand as the case may be)."

25 Millett, L.J. (as he then was) then said (*ibid.*, at 1099):

"In *Clarapede & Co.* v. *Commercial Union Assoc.* (1883), 32 W.R. 262, 263, Sir Baliol Brett, M.R. said:

> 'however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; . . . .'

I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity."

26 Later, Millett, L.J. said (*ibid.*, at 1100):

"Of course, the unexpected nature of the defence must have been a disappointment to the plaintiff; but I cannot think that this should count for anything. The sounder the defence sought to be raised by amendment, the greater the disappointment to the plaintiff if it is allowed and the greater the injustice to the defendant if it is not. What the court must strive to avoid is injustice, not disappointment."

27 Mr. Nolan relies on that passage, but Mr. Limb submits that what the appellant suffered in this case was more than simple disappointment. In the end it is a matter of degree; one of the factors to be weighed in the balance, as Lord Griffiths said. In *Cobbold* v. *Greenwich London Borough Council* (3) Peter Gibson, L.J. said ([1999] EWCA Civ 2074):

"Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest of the administration of justice is not significantly harmed."

28 In *Walley* v. *Stoke-on-Trent City Council* (7), the court was again concerned with the withdrawal of a pre-litigation admission of liability, and Smith, L.J. said ([2007] 1 W.L.R. 352, at para. 35) that—

". . . in order to show that the withdrawal of a pre-action admission is likely to obstruct the just disposal of the case, it will usually be

> necessary for the claimant to show that he will suffer some prejudice which will affect the fairness of the trial. Examples of this kind of prejudice were discussed during the hearing. In the light of an admission the claimant might agree to the destruction of an item of real evidence; he might agree that an expert's inspection is not necessary and it might no longer be possible for one to take place. Witnesses might have died or lost contact. The possibilities are legion."

29 Mr. Nolan submits, and I agree, that the issue of prejudice was carefully evaluated by the judge in the present case, and there were none of the sort of features to which Smith, L.J. referred. Mr. Limb places particular reliance upon the last in this line of cases, *Swain-Mason* v. *Mills & Reeve LLP* (6), where, having referred extensively to *Worldwide* (8), Lloyd, L.J. said ([2011] 1 W.L.R. 2735, at para. 72):

> "As the court said, it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a very heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

30 As can be seen from the judgment, the line of authorities to which I have referred was carefully considered by the judge in the court below.

The grounds of appeal and notice of cross-appeal

31 In grounds of appeal dated June 6th, 2011, the appellant's counsel makes four criticisms of the decision of the judge, and in a notice of cross-appeal dated December 12th, 2011 the respondent's solicitors contend that in certain respects the judge should have gone further than she did. I will deal with each of the points raised in order.

Grounds 1 and 2

32 The first ground of appeal asserts that—

> "the learned judge erred in law by directing herself that, when assessing the lateness of an application to amend, time starts to run against the applicant from when it identified the amendment was

'necessary'—the test is from when it should first have realised the amendment sought was available."

33 If an application to amend is made late that is a material consideration for the court to consider when deciding whether to permit the proposed amendment, as the judge recognised, and in the passage criticized in the first ground of appeal I detect no error of law. In her judgment, having referred to a passage in the *White Book*, the judge said:

"In the spirit of the CPR and recent authorities, I accept that once an amendment is identified as necessary by an applicant, good practice and observance of the overriding objective dictate that he should make a prompt application for leave to amend. But, in this case I think it is taking it too far to say that the defendant could have and should have identified this particular defence following service upon it of the particulars of claim. It is as a result of the joint expert report of May 1st, 2007 that the defendant now applies to be allowed to rely on the defence of limitation which he argues is based on a different evidential premise to the first limitation defence raised, which was based on an actual diagnosis (albeit it a mistaken one) having taken place. I agree with that submission so that the earliest point in time at which the defendant could have sought to rely on the defence following a change in the evidential basis was May 2007."

34 If before the word "identified" at the beginning of that passage one inserts the words "or should be" the alleged error of law disappears, and that was clearly what the judge had in mind, as can be seen from the last sentence where she refers to when the defendant "could and should have identified this particular defence." In my judgment the error of law alleged in the first ground of appeal is simply not substantiated, and I move on to the related second ground of appeal which reads:

"The learned judge erred in concluding that 'a change in the evidential basis of the defence,' rather than the cause of action pleaded in the particulars of claim, here determines how late was the application to plead limitation."

35 The appellant is entitled to say that the availability of the limitation defence should have been apparent to the respondent from the time of service of the particulars of claim in March 2001, but because of the nature of the action it was not then entirely easy to see when the cause of action accrued. The respondent did in fact plead the defence of limitation, but as a result of a mistaken reading of Dr. Beguelin's letter. As the medical evidence available to the respondent changed, it had to consider whether the pleadings properly represented its case. When the misunderstanding in relation to Dr. Beguelin's letter was resolved, the respondent instructed Mr. Dowler, whose initial opinion, set out in his report of February 16th, 2005, long before the reports of Mr. Cooling were

disclosed, was that there was no potential liability for the respondent to consider, because when the appellant left Gibraltar no examiner would have found anything wrong with her, so far as her sight was concerned. Put in legal terms, the cause of action could not be shown to have accrued by then, and the limitation defence as originally pleaded had become largely, if not entirely, redundant. So in April 2007, shortly before the production of the joint medical report, the defendant chose to amend its defence and abandon its original limitation defence.

36 Then, when the joint medical report was disclosed, it was clear that Mr. Dowler had changed his mind. Both consultants were in effect agreed that the cause of action probably accrued well before the appellant left Gibraltar, and once the respondent had assessed the impact of the agreed report it was obvious that they would want to consider resurrecting its limitation defence, albeit on a different factual basis. They did not act as quickly as they should have done, and the judge was fully alive to that. She said:

> "Despite the plausibility of the explanation for seeking to rely on limitation as a defence following the joint expert report, and the reliance placed upon it by the defendant, no explanation has been proffered as to why, having identified a change in the evidential basis of the defence on May 1st, 2007, it should then have taken the defendant some two and a half years to make the application on December 15th, 2009."

37 She was fully alive to the delays which have bedevilled this action, and adopted what seems to me to have been a proper overall approach when deciding to what extent the delays should affect the decision which she had to make. As has been pointed out by Mr. Nolan, the amended particulars of claim served by the appellant in April 2007 drastically amended the appellant's case to take account of the expert evidence on which she wanted to rely, and in reality the respondent was entitled to respond to the medical evidence in a similar way. I can find no substance in the second ground of appeal.

The third ground of appeal

38 The third ground of appeal is that—

> "the learned judge wrongly found, without any evidence or argument in support, that the defendant previously chose to 'discard' the limitation defence it subsequently applied for—the failure to plead that defence sooner was in fact the function of basic oversight, rather than a decision."

39 This ground of appeal arises out of the way in which the judge dealt with one of counsel's submissions in the court below. She said:

> "Mr. Limb criticizes the defendant's pleadings, submitting that he could properly have relied on Mr. Dowler's view as the basis for the formulation of a defence to breach of duty and causation, whilst still retaining the original limitation defence as an alternative. It may well be that this would have been the choice of many drafters, but the defendant chose to narrow the issue, rely on a defence which in his view was justifiable on the evidence before him and discard a defence which in his view was not justifiable. This does not amount to inaccuracy or imprecision of pleadings, but rather to a choice of defence. Provided that choice is not frivolous or unsustainable a defendant must be free to identify and plead the defence he wishes to rely on."

40 It is now said that the judge erred because the sentence in the middle of that passage was not supported by evidence. It did not need evidence. The facts set in context spoke for themselves, and the judge was entitled to draw the obvious inferences as she did.

The fourth ground of appeal—waiver?

41 The fourth ground of appeal relates to what the judge said towards the end of her judgment when dealing with estoppel and waiver. She said:

> "Essentially what is being alleged is that the defendant, by his conduct in deleting the limitation defence, represented that the defence of limitation was waived and in reliance upon that action the claimant changed her position to her detriment."

42 She then looked at detriment and said:

> "It is not unreasonable to conclude that the incurring of costs by the defendant's extension of the trial process is to the claimant's detriment, as is adopting a frame of mind which waits in expectation of a settlement and disengages from having to prove a case."

43 As to change of position the judge said:

> "The only change of position identified is that the claimant has gone from pursuing the action as claimant, readying herself for a fight, to relaxing her position on the basis that there was no defence on the merits and a settlement would be forthcoming. That seems more of a change of perception, and I am not sure that a change of perception necessarily qualifies as a change of position, but I do not decide the point given that in any event the claimant stumbles fatally at the next hurdle."

44 The judge then turned to the impact of the amendment to the defence, which deleted the defence of limitation. The appellant's counsel was contending that thereafter the limitation defence could not be revived. He

quoted part of the judgment delivered in this court by Stuart-Smith, J.A. in *Cerisola* v. *Att.-Gen.* (2). That was a case arising out of injuries sustained as a result of a rockfall. Limitation was only introduced as an issue at a fairly late stage, and it was in that context that Stuart-Smith, J.A. said (2005–06 Gib LR 238, at para. 14) that—

> "a defendant is not obliged to take a limitation defence. Provided that he does not mislead the claimant into thinking that he will not take it, whereby the claimant suffers detriment, and provided he does not actually waive the defence, there is nothing to prevent him raising the defence at any time."

45 Nothing in that passage assists the appellant in the present case, where the issue is whether by making an amendment to the defence the respondent so waived its defence of limitation that it could not thereafter be relied upon. The judge in the present case quoted a passage from *Halsbury* which was of some value because it shows the reluctance of the law to read too much into a pleading. That passage reads:

> "[T]he delivery of a defence in an ordinary or default action does not operate as a waiver of the defendant's right to demand further and better particulars of the plaintiff's claim or any irregularities in the process, or the defendant's right to rely on any further or other defence or counterclaim."

46 That quotation is the foundation for the appellant's fourth ground of appeal which reads:

> "The learned judge wrongly directed herself on the applicable law relevant to waiver by conflating withdrawal of a defence with delivery of it; and failing to apply the *dictum* of Stuart-Smith, J.A. in *Cerisola* v. *Att.-Gen.*"

47 I see nothing to indicate that the judge conflated withdrawal of a defence with delivery of it and in my judgment there is nothing in the fourth ground of appeal.

48 For an effective waiver there would have to be a clear and unequivocal representation by the respondent that the defence of limitation would not be relied upon then or at any future date and the appellant can point to nothing of that kind. In *Argo Systems FZE* v. *Liberty Assur. Pte Ltd.*, *The Copa Casino* (1), Aikens, L.J. said ([2012] 1 CLC 81, at para. 46):

> "Saying nothing and 'standing by', i.e. doing nothing, are, to my mind, equivocal actions. This court has stated that, in the absence of special circumstances, silence and inaction are, when objectively considered, equivocal and cannot, of themselves, constitute an unequivocal representation as to whether a person will or will not rely on a particular right in the future. In my view there are no

special circumstances in this case that are capable of turning the silence and inaction of Liberty into an unequivocal representation to Argo that it did not intend to enforce its strict legal rights based on a breach of the Hold Harmless Warranty."

The cross-appeal

49 The respondent submits that the judge should have gone further than she did when she said that the proposed limitation defence is arguable, because it is strong. In my judgment the judge was right to confine herself to wording suitable for dealing with the application before her. She did not need to say more.

50 Similar considerations apply to the second ground of cross-appeal where it is asserted that the judge could and should have held—

"(a) that the decision by the respondent to abandon the different limitation defence originally put did not induce any true change of position on the part of the appellant; and

(b) that the continuation of her claim (in whatever frame of mind) by the appellant after the abandonment of the original limitation defence could not reasonably be described as a 'detriment' and in any event any alleged 'detriment' did not arise from the abandonment of the original limitation defence."

51 In my judgment, the judge was entitled to deal with the matter as she did, concentrating on the lack of anything to make it unconscionable for the defendant to seek to raise the limitation defence.

Conclusion

52 As the judge noted, and as Mr. Nolan emphasizes, the judge was exercising a discretionary jurisdiction, with the overriding objective of enabling the trial judge to achieve justice between the parties, and this court will not interfere with her conclusion unless she can be shown to have erred in principle or to have been plainly wrong.

53 Obviously it is most unsatisfactory that an appellant who consulted solicitors in February 2000, 12 years ago, has still not had her case tried, when it was clear from the outset that she was in a position to contend that in Gibraltar she had not received proper medical care as a result of which she was suffering from a grievous loss of sight. Her solicitors realized early on that limitation was likely to be an issue. As the medical evidence unfolded the focus shifted, but the judge, having considered the evidence and the submissions, was entitled to hold that the defence now sought to be raised can still be properly considered in a fair trial, and ought to be decided. I agree, and I would dismiss this appeal. What matters now is that there should be no further unnecessary delay.

Costs

54 It follows that, as my Lords agree, the appeal will be dismissed with costs. As the appellant is legally aided, the amount of costs to be paid by her will be referred to the Registrar for determination

55 **ALDOUS** and **PARKER, JJ.A.** concurred.

Appeal dismissed.

[2010–12 Gib LR 320]

IN THE MATTER OF MACIAS

SUPREME COURT (Dudley, C.J.): April 19th, 2012

Legal Aid and Assistance—refusal of legal assistance—counsel's opinion on merits—by Legal Aid and Assistance Act 1960, s.14(3), Registrar entitled to take into account counsel's opinion on merits of applicant's case, but must nevertheless reach own conclusion—counsel's opinion to be limited to merits of case and not extend to whether applicant meets residency criteria for legal assistance

The appellant applied to the Registrar of the Supreme Court for legal assistance.

The appellant, a Spanish national, applied to the Registrar for legal assistance for the purposes of representation in divorce proceedings and an action under the Domestic Violence and Matrimonial Proceedings Act 1998. The Registrar sought counsel's opinion on the merits of his case, pursuant to the Legal Aid and Assistance Act 1960, s.14(3). That opinion concluded that the applicant was not ordinarily resident in Gibraltar so as to qualify for legal assistance, which conclusion the Registrar adopted in refusing legal assistance. The appellant had a civilian registration card, driving licence and tenancy agreement from the Government of Gibraltar.

On appeal to the Supreme Court, the appellant submitted that (a) the Registrar had placed too much weight on counsel's opinion rather than forming an independent judgment; and (b) counsel's opinion that he was not ordinarily resident in Gibraltar was wholly irrelevant, as that was not an opinion on the merits of his case for the purposes of the Legal Aid and Assistance Act 1960, s.14(3), and should have been entirely disregarded.

The respondent submitted in reply that (a) the Registrar had been entitled to rely upon counsel's opinion; and (b) counsel's opinion that he