Neutral Citation Number: **[2023] EWHC 2229 (Ch)**

Case No: **BL-2021-000461**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **1 September 2023**

Before :

Mr Justice Trower

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Between :

(1) South Tees Development Corporation	**Claimant**
(2) South Tees Developments Limited	
- and -	
PD Teesport Limited	**Defendant**
- and -	
Teesworks Limited	

- -
- -

Daniel Patrides (instructed by **Forbes Hare Forsters**) for the **Claimant**
Andrew Walker KC and Olivier Kalfon (instructed by **DWF Law LLP**) for the **Defendant**
Katharine Holland KC and Admas Habteslasie (instructed by **Taylor Wessing LLP**) for the **Third Party**

Hearing dates: **30th August and 1st September 2023**

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Approved JUDGMENT

Mr Justice Trower **Friday, 1 September 2023**
(**13:40**pm)

Judgment by **MR JUSTICE TROWER**

1. This is an application for permission to appeal a decision of Master Brightwell, delivered on 11 August 2023, by which he granted the applications of the claimants and the third party for permission to amend their re-amended reply and defence to counterclaim and their defence to counterclaim respectively.
2. The amendments for which permission was granted related to the application of section 29 and schedule 3, paragraph 3, of the Land Registration Act 2002 (“the LRA”). At the hearing they were referred to as "the LR amendments", terminology I shall adopt in this judgment.
3. The parties accept that if I allow the application for permission to appeal I should go on to decide the appeal itself. This therefore is a rolled-up hearing. I have also heard argument on the defendant's application to adjourn the trial or, I should rather say, I received submissions on the defendant's application to adjourn the trial, which is advanced in the event that permission to appeal is refused or the appeal itself is dismissed. The issues which arise on that application are intimately connected to one of the arguments which is made on the appeal because the extent to which the amendments sought by the claimants and the third party might imperil the trial was an issue dealt with by the master on the amendment application.
4. The proceedings themselves are concerned with a dispute as to the existence, extent and purpose of a number of rights of way claimed by the defendant over the former site of the Redcar and Cleveland Steelworks located on the South Bank of the River Tees near Middlesbrough. The case summary describes the proposals to regenerate the site and other parts of the development land as one of the largest brownfield development projects in Europe.
5. The claimants are a mayoral development corporation and its subsidiary. The development is proceeding following the making of a compulsory purchase order on 29 April 2020, as a result of which the claimants acquired their interests and rights in the site.

6. The third party is a developer with various options to acquire some or all of the site. The defendant is the statutory port authority for Teesport and the River Tees and owns lands adjacent to the site.
7. The claim was issued on 15 March 2021 and sought negative declarations that the defendant does not enjoy rights of way across the site so as to establish that the claimants had clean title to the development land thereby permitting the development to proceed. At that stage the relief sought related to five identified routes over the claimants' land. These were described in paragraph 3.2 of the particulars of claim as possible means of access to the defendant's land and were defined as "the Redcar Access" and "the Emergency Access". The focus of the declaratory relief sought related to those routes but it was an explicit part of the claimants' pleaded case that the defendant has no right to use not just the Emergency Access or the Redcar Access but also, and I quote, "any other access across the claimants' land". It follows that from the outset the claimants' case was that the defendant had no access rights over any part of claimants' land as identified on plan 1 in the appendix to their pleading.
8. By its defence and counterclaim dated May 2021, the defendant asserted rights of way to and from parcels of its land at South Gare, Redcar Jetty and Teesport. It said that these rights were variously acquired by deeds or conveyances, by prescription, by implication through necessity or intended purpose pursuant to section 62 and/or the rule in *Wheeldon v Burrows*, and by proprietary estoppel.
9. The defendant also has a claim for miscellaneous rights benefitting all its land in the form of rights of access to discharge its statutory duties under the Tees Conservancy Act 1858 and rights granted by or recorded in a conveyance dated 4 March 1921.
10. The defendant pleaded the routes over which it claimed rights of way in paragraph 11 of its defence and counterclaim as follows:

    “There are a number of roadways and routes through the claimants' land and other neighbouring land which are used by the defendant in addition to access routes 1 to 6 as identified on plan 1 to the particulars of claim (collectively with access routes 1 to 6, “the private roadways”). The

additional roadways are shown for illustrative purposes in dashed green and red as additions to plan 1 of the particulars of claim, annexed to this defence at appendix 1 ("Plan 1A"). The defendant will rely on expert evidence (including maps and plans) to identify the private roadways with particularity."

11. The defendant also expressly denied in paragraph 19 of its pleading that it had no right to any other access across the claimants' land, but noted that the claimants sought no declarations in respect of any other right of access save for those identified in paragraph 3.2 of the particulars of claim.
12. It is of relevance to one of the arguments made on the hearing of this application that in paragraph 31 of its defence and counterclaim the defendant also alleged that it had rights which arise by prescription over the private roadways (i.e., the roadways shown for illustrative purposes on plan 1A) on the basis that the defendant and its predecessors in title had, for the full period of 20 years and more preceding the beginning of this action, enjoyed those rights of way. In its prayer for relief in the counterclaim the defendant sought a declaration that it has a right to use the private roadways.
13. The counterclaims made by the defendant were denied in their entirety by the claimants' reply and defence to counterclaim filed in June 2021. However, there was no allegation that, even if the defendant had the rights it claimed to have, they were not binding on the claimants by operation of the LRA. Over the course of the next 18 months there were a number of requests for further information and amendments to the pleadings. At no stage in this process was there any intimation that the claimants might be considering amending their particulars of claim or reply to plead the LR amendments or any like amendments.
14. At the CCMC held in September 2021 the trial was set for February 2023 with a time estimate of 10 days. The third party was joined as a defendant to the counterclaim on 23 November 2022. This was just under one month before the first PTR held on 16 December before Michael Green J. At the PTR the trial window was vacated when it became apparent that the ten-day time estimate was

inadequate. The third party sought a re-listing of the trial on an expedited basis at that hearing but did so without supporting evidence.

15. By then disclosure was complete and witness statements had been exchanged. The defendant had served statements from 24 witnesses to deal with the pleaded points in issue. Its evidence was that it had interviewed significantly more potential witnesses and that it made its decisions on whether or not to call particular individuals taking a proportionate approach by reference to the pleaded issues. Experts' reports and plans had also been prepared based on the existing pleadings and there had been discussions between the experts.
16. Shortly before the PTR the third party pleaded its defence to counterclaim. Before joinder it had said that its pleaded case was intended largely to piggyback the case of the claimants, a position which it confirmed at the PTR.
17. The order made on the first PTR refused the application for expedition then made, but recited that it was open to the parties, if so advised, to make a further application supported by evidence. This permission to apply was exercised by the claimants and the third party by application notice dated 6 January 2023. On 13 January, Michael Green J granted an order for expedition pursuant to which the trial was then listed to commence on 2 October 2023, set down for 20 days.
18. At the first PTR, Michael Green J also made a number of case management orders, one of which was to direct the defendant, by no later than 13 February 2023, to file and serve a detailed schedule fully particularising all of its claims to access rights by reference to the relevant documentation, witness evidence and pleadings.
19. Directions were also given in relation to the filing of plans 7 days later and the filing of experts' reports by 17 March 2023. It was also directed that the schedule of rights was to be updated once the plans and expert evidence were complete. Paragraph 10 of the order contemplated that the updated schedule would refer to any plans and the experts' reports.

20. There was disagreement between the parties as to whether this schedule of rights was strictly speaking necessary to enable the claimants and the third party to understand the case they had to meet. The defendant's evidence, which was not explored at the hearing before me but was not rebutted by evidence from the claimants or the third party, was that it was not. It was said simply to reflect a willingness by the defendants to complete a schedule of information and make further revisions to the plans in an attempt to achieve a measure of agreement on the plans for use at the trial.

21. The master made a finding on this point which was that the order for the schedule was made because the defendant's case in relation to the easements had "not fully emerged". This seems to me to be consistent with it being required as an important tool for the trial, but the master's description falls well short of a finding that the existing pleadings and accompanying plans did not identify the essence of the defendant's case and did not leave the claimants and the third party in a position in which they did not know the case they had to meet.

22. In the event the schedule of rights was not served in February 2023 but was eventually served on 21 April 2023 after two extensions of time had been granted by the master. The consent orders by which those extensions were granted also varied the times within which the expert evidence and the updated schedule were each to be filed and served. I was not addressed on the reasons for the delay, although the defendants said that the claimants' physical features data to be imported into the relevant plans was not produced until 18 April 2023, 3 days before the schedule was served. I am not in a position to draw any particular conclusions from that fact.

23. It is plain that much of the schedule of rights is taken up with presenting existing pleaded and disclosed information in a more digestible form, but I was also taken by Mr Habteslasie through some of the new plans to demonstrate the differences between the precise route lines now particularised and those which had been identified at the outset. I agree that they make that aspect of the case very much clearer than had hitherto been the case.

24. On 16 June 2023 the claimants and the third parties served their pre-trial checklists. The third party's solicitors certified that they believe that no further directions were required before trial, while the claimants' solicitors certified that the only further application that might be required in due course related to an unidentified issue in respect of the claimants' expert. Even though the original schedule of rights had been served almost 2 months earlier there was no hint that an amendment application might be made.

25. On 18 July 2023 there was a second PTR before Mr Robin Vos, who gave detailed directions for the conduct of the trial. They included provision for the trial bundles, the use of technology, including for taking evidence by video link, and the approval of a trial timetable.

26. Although the third party's skeleton for the PTR referred to the fact it was in the process of identifying amendments following service of the schedule of rights and expert evidence there was no indication as to the nature of those amendments or that they might raise a wholly new way of approaching their case.

27. There continued to be discussions and communications between the experts until the updated schedule of rights was served on 25 July 2023. On the same day, i.e., one week after the second PTR, the claimants and the third party made their applications for permission to amend to plead the LR amendments amongst others. These applications, as I say, were made together with a number of other applications for permission to raise additional defences to the defendant's counterclaim which are not the subject of this appeal.

28. The LR amendments, which are the subject of this appeal, pleaded that the claimants' rights as freehold proprietors of identified parcels of land have priority over the defendant's claimed easements because the easements were not protected by section 29 of the Land Registration Act 2002. It was pleaded in paragraph 19.8 of the claimants' re-re-re-amended reply and defence to counterclaim and paragraph 25.4.6 of the third party's defence to counterclaim that even if the defendant was entitled to the easements it alleged, those easements did not override the dispositions

to the claimants which had been made for valuable consideration and were completed by registration.

29. The pleaded reason for this was that the easements were not the subject of a notice on the register nor were they registered under the Commons Registration Act 1965. Furthermore, it was pleaded that they were not within the claimants' knowledge at the time of their acquisition of the land claimed to be burdened by the easements, were not obvious on a reasonably careful inspection of the land so burdened, and had not been exercised in the year ending on the date of the disposition by which the claimants acquired their interest.
30. The allegations that the easements claimed by the defendant were postponed to the interests of the claimants under the dispositions pursuant to which they asserted their rights were general in form. They related to each and every right over the private roadways claimed by the defendant.
31. In support of their applications the claimants and the third parties asserted in their application notices that no real prejudice would be caused to the defendants, nor would they imperil the trial date. It was said that they would always have required to be considered at trial in any event, would not have an impact on the trial timetable, and amounted to legal arguments arising from existing factual evidence. It was said by the claimants that it was not considered that the amendments raise issues which would necessitate fresh witness or expert evidence from the parties and that the amendments sought rose organically at this point in the proceedings due to the claimants' ongoing review of the case, the factual evidence and expert evidence in preparation for trial.
32. It was also said by the applicants that it was only when the schedule of rights was served by the defendant on 21 April and its expert evidence was served on 30 June that it began to understand the full extent of the defendant's case. It was contended that the applications were prepared promptly following exchange of expert evidence.
33. The evidence in opposition to the amendment application pointed out that the essence of the defendant's case had been known to the claimants for over 2 years. The deponent gave a detailed

recitation of the history of the litigation, including the extent to which it had interviewed witnesses in support of its case and the nature of the disclosure exercise that had been carried out.

34. It also pointed out that over a year earlier, on 1 June 2022, the defendant had provided a full suite of plans showing its claimed rights. This was shortly before service of its draft re-amened defence and counterclaim. The deponent said that the schedule of rights consolidated what was already in the pleadings into a convenient schedule alongside specifically prepared plans but that the essence of the information was already in the plans.

35. The application for permission to amend came before the master on 11 August 2023. By paragraph 1.3 of his order he granted permission for the LR amendments. That order also dealt with the other amendments which are not the subject of this appeal. The permission application relating to those other amendments were either adjourned to the trial judge or dealt with without opposition from the defendant. The master also gave directions in consequence of the permission he gave for the LR amendments dealing with issues of disclosure and the service of further witness statements in the light of the order that he had already made.

36. It was common ground, both before the master and on the appeal, that for the purposes of the amendment application the court should proceed on the basis that the burden of showing knowledge and obviousness was on the claimants and the third party, while the burden of showing that none of the easements had been exercised in the year ending on the date of disposition was on the defendants. It is right to say though that for the purposes of any trial of this issue, Ms Holland KC for the third party reserves her right to argue to the contrary.

37. At the time skeleton arguments for the appeal were exchanged an agreed note of the master's judgment had been prepared and approved but without the benefit of a transcript of the proceedings. Since then a transcript of the proceedings has become available from which it is apparent that some additions to the reasoning were made subsequent to the date of the hearing. Those have assisted in elucidating the master's decision but do not in the event affect the conclusions that I have reached.

38. In his judgment the master recited that applications for permission to amend always involve the court striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the amendment is permitted. He also explained that any amendment must be arguable, carrying a degree of conviction, it must be properly particularised, and must be supported by evidence that establishes a factual basis for the allegation.

39. Although the master is not explicitly recorded as having determined that the amendments were arguable, in the sense of carrying a degree of conviction, I think it is clear from his judgment that he concluded that this element of the test for granting permission was satisfied and Mr Walker KC for the defendant did not argue to the contrary.

40. The master then went on to consider the principles as to late amendments and referred in particular to Coulson J's decision in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) at paragraph 15 that the starting point is no longer that amendments should generally be allowed provided that any prejudice can be compensated for in costs.

41. He also reminded himself of the right approach to late amendments also explained by Coulson J, this time in paragraph 19 of his judgment in *CIP*. Excluding the references to supporting authorities the relevant parts of Mr Justice Coulson's judgment cited by the master were as follows:

> "(a) The lateness by which an amendment is produced is a relative concept. An amendment is late if it could have been advanced earlier, or involves the duplication of costs and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and experts' reports) which had been completed by the time of the amendment.
>
> (b) An amendment can be regarded as ‘very late’ if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason.

(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. In essence there must be a good reason for the delay.

(d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused.

(e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around', to the disruption of and additional pressure on their lawyers in the run-up to trial, and the duplication of costs and effort at the other. If allowing the amendments would necessitate the adjournment of the trial that may well be an overwhelming reason to refuse the amendments.

(f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct then it is a much less important element of the balancing exercise."

42. Doubtless conscious of the need to make an assessment of whether the application was properly to be characterised as 'very late', as that expression was used by Coulson J in *CIP*, the master recorded in paragraph 14 of the note of his judgment that he asked Mr Walker whether he was really submitting that the trial date would be imperilled were the amendment was allowed. And I quote:

"At first he submitted that it would be. But I think it is fair to say that as his submissions developed what he prayed in aid was the comparable sizes of the legal teams and thus the resources available to each side and the significant burden placed on the defendant's legal team if the amendments were permitted. As I have already indicated, the application is made late. I did not understand Mr Walker to submit that an adjournment would be inevitable if the amendments were permitted, and he did not positively submit that if I permitted the amendments then I should also adjourn the trial. Nonetheless, at this juncture the application is plainly very late."

43. This summary of the position reflects, anyway in part, an exchange between the master and Mr Walker which took place during the course of argument at the hearing in the following terms:

> “"MASTER: The way I read the case law on ‘very late’, which is how you characterise it, is that the trial must be imperilled at least potentially.
>
> MR WALKER: Well though, the way we put it is this: if you were to allow these amendments then that is exactly what the problem would be because we are going to struggle to be able to even get the evidence together that we would need, never mind prepare, while we are still trying to prepare for the trial, which is 4 weeks, in several weeks' time having been -- and this is the reason I made my point earlier -- having been distracted for the last 10 days or so by this application. I have not been able to move forward with preparation for the trial which I had marked out for this time."

44. Mr Walker then went on to explain in his submissions to the master that his client's evidence did not address or identify who may have used the relevant rights within the one-year period for the purposes of establishing the issue under schedule 3 paragraph 3 of the LRA in respect of which the parties agreed that the onus lay on the defendant. He also submitted that disclosure would have to be reconsidered by reference to all of the new issues that arose.

45. Reverting to the master's judgment he then recited an outline of the history of the proceedings and summarised the submissions of Ms Holland as distilling into three points. The first point was that it was only with the schedule of rights that the work of the claimants to consider in detail the rights claimed by the defendant could be finalised. The second was that the defendant brought the application on itself by the lateness with which it had produced relevant information on its claim. She submitted that, whatever the position of the claimants, it cannot have been incumbent to the third party to consider land registration issues at the outset because it was not a party. The third point was that the LR amendments raise points that would be considered by the trial judge in any event.

46. The third point was rejected by the master on the basis that it was incumbent on the claimants and the third parties to plead the facts necessary to establish the land registration arguments in any event. I think that he was correct to say what he did on this issue in paragraph 23 of his judgment.

47. The master then went on to say that a better point was that the issues with which the LR amendments are concerned overlapped with issues already raised in the proceedings. Although he accepted that the defendant's evidence did not deal with the land registration arguments he explained that he had been shown a number of parts of the claimants' evidence which relate to the user, or rather non-user, of the easements in the period before the land was acquired by the claimants.

48. The master then said that he considered the application to be a finely balanced one and he went on to address his conclusions in three paragraphs at the end of his judgment.

49. The first point he dealt with in his conclusions was his concern that the points now sought to be raised could have been raised sooner and particularly his concern that the application may not have been brought quickly enough after the date of service of the defendant's schedule of rights on 21 April 2023. Having done so he concluded that there was good reason for the delay.

50. He referred to the way in which the defendant's position had emerged and what he referred to as the sheer amount of work which has had to be carried out by the third party to absorb, process and analyse each of the rights in the very long schedule served by the defendant. He also referred to the extent of the work which had necessarily been carried out by the parties in the course of May and June and he particularly relied on the late stage the third party was brought into the claim.

51. Having assessed those considerations the master said he considered that the balance of justice lay in favour of the allowing the amendments. He elucidated this conclusion by explaining that the third party had its own interests in the proceedings and that it was only in the weeks before the application was issued that the defendant's case in relation to the easements claimed had fully emerged in the initial draft of the schedule of rights, doing so nearly 10 weeks after the time at which Michael Green J had directed that it be served. In the concluding sentences of this part of his

judgment he said that he accepted Ms Holland's submission that it was only after the defendant's case had been fully set out and understood that what he called the response to it could be finalised.

52. On one view this part of the master's judgment reads as if he had concluded that, because of the way in which he considered that the defendant's case had emerged, the work which had to be done by the third party and the late stage it had been brought into the claim, the balance of justice lay in favour of the allowing the amendments. If that had been his approach I think he would have gone wrong because what he then held to be good reason for the delay is not in itself sufficient without also taking into account the countervailing prejudice alleged by the defendant.

53. However, particularly having regard to the observations of Lord Hoffmann in *Piglowska v Piglowski* [1990] 1 WLR 1360 at 1372F-H that a narrow textual analysis of a first instance judge's ex tempore ruling should not be permitted to enable an Appeal Court to conclude that he misdirected himself, I do not think that that would be a fair reading of his decision. Although the master expressed his conclusion that the amendment should be allowed without mentioning the prejudice claimed by the defendant, he explained in the next part of his judgment that he fully took into account the burden of additional work on the defendant's legal team. He accepted anyway, implicitly, that further work was required but said that it was a series of discrete tasks in relation to a limited period. He said that he did not underestimate the scale of the task when viewed in conjunction with the preparation for an expedited trial and a complex dispute but he indicated that it may well be necessary for additional assistance to be engaged by the defendant in order to meet the necessarily tight deadlines.

54. The master then drew the threads together at the end of the judgment in a paragraph of which all but the first sentence was added after the hearing:

> "I am satisfied in all the circumstances that the third party in particular has not acted unreasonably in raising the point now. Despite the lateness of the application, the injustice to the third party if the amendment were not permitted outweighs the injustice to the defendants in allowing the amendment even if an adjournment of the trial results. The injustice to the defendant could be

met by consideration of an application to adjourn the trial although, as I have said, its position at the hearing was not that I must adjourn the trial if I permitted the amendments. Any adjournment application will fall to be considered separately."

55. The fact that the master concluded that "any prejudice to the defendant could be met by consideration of an application to adjourn the trial and that an adjournment application would fall to be considered separately" is a point to which I will revert a little later.

56. Finally, the master recorded that it would be unrealistic to allow the third party to amend and not to allow the claimants to do so because the proposed amendments raised identical points.

57. The law on an appeal against an exercise of discretion by the first instance judge, more particularly where it is exercised, as it was in the present case, in relation to a case management decision, was addressed in the parties' skeleton arguments and emphasised in her oral submissions by Ms Holland.

58. As Lewison LJ explained in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA (Civ) 1743 at paragraph 51:

"Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge."

59. It follows from this that an Appellate Court will only interfere if the judge went wrong through misdirecting himself as to the law, because of some procedural unfairness or irregularity, because he took into account irrelevant matters or failed to take into account relevant matters, or reached a decision that exceeded the generous ambit within which reasonable disagreement is possible. These principles have recently been summarised in the helpful decision of Saini J in *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) at paragraphs 50ff.

60. The defendant accepted both that the decision whether to allow the LR amendments was a matter for the discretion of the master and that the principles I have drawn from Mr Justice Saini's summary of the law are to be applied on an appeal from the exercise of that discretion.

61. Having regard to these principles Mr Walker identified two aspects of the master's judgment on which he said that the master went wrong. The first was that he was wrong to identify the explanations for the delay given by the claimants and the third party as a good reason for what he did or should have characterised as very late amendments. The second was that the master went wrong by failing to take into account the true nature of the prejudice to the defendant if the applications for permission to amend were to be allowed.

62. As to point one, and as Coulson J made clear in *CIP*, in the case of a late amendment there must be a good reason for the delay. The absence of good reason is not necessarily fatal to the application but if there is no good reason it does not lie in the mouth of the claimants or the third party to say it has been prejudiced; see *Recovery Partners GP Ltd v Irakli* [2021] EWHC 2057 (Comm) at paragraphs 42 to 43. It is not a good reason to say that the point was overlooked or that a second pair of eyes has reviewed matters and takes the view that further points ought to be run.

63. In the present case, it is appropriate to put the master's reasoning for his conclusion that there was good reason for the delay in the context of the two other arguments that the defendant said were made by the claimants and the third party as explanatory of that delay.

64. The first was that the issues giving rise to the LR amendments were points which made legal arguments and would need to be resolved in any event in order to determine the defendant's counterclaim. This was put at the forefront of their submissions below but, as I have already explained, was rightly rejected by the master for the reasons he gave.

65. In summary, if established, the legal easements claimed by the defendant would be protected against a registered disposition of an interest affecting the land burdened by the easement unless (a) the disponee proves no actual knowledge and that the easement was not obvious on a reasonably careful inspection or (b) the person seeking to vindicate the easement established its use in the year before acquisition. I think on that basis the master was plainly correct that if the claimants or the third party wished to allege that the defendant had no right to use the private roadways for the reasons

pleaded, not just because the easement did not exist, but because even though good against their predecessors it was postponed to them as disponees pursuant to the LRA, that is a point which raised new facts as to knowledge, obviousness and a particular defined usage and as such required to be pleaded.

66. The second argument was that the amendments were said by the claimants and the third party to arise from the factual evidence which had already been exchanged. It is not immediately apparent from the master's judgment whether he considered this argument related to the justification for the delay, which was the way that Mr Walker addressed the issue in his skeleton argument, or to the extent of any prejudice to the defendant if permission to make the amendments were to be granted.

67. Whichever it was, it did not reflect the reason this point was made by the third party. The evidence as to overlap referred to by the master was listed in an annex to Ms Holland's skeleton argument in support of her contention that the proposed amendments were arguable and carried a degree of conviction. In my view the extent to which further factual evidence is required is plainly relevant to the overall balancing exercise, but leaving aside the arguability of the amendments, which is not in issue, I think that this point more naturally relates to the questions of prejudice and whether the proceedings can be made ready for a fair trial if the amendments are allowed than it does to whether there is a good explanation for the delay.

68. The third explanation for the delay addressed by Mr Walker was the reliance placed by the third party on the late service by the defendant of its schedule of rights dated 21 April 2023. It was said by the third party that it was only then that the defendant properly clarified important aspects of its case. However the point may have developed, it was central to the master's reasoning.

69. At the core of the defendant's case on this issue was its submission that service of the schedule of rights was simply clarificatory of its case and was certainly not needed to enable the claimants and subsequently the third parties to plead the LR amendments. Indeed it was submitted with some force that each of the amendments could have been pleaded by the claimants when they first pleaded

their case or at the very least when they pleaded their reply and defence to counterclaim in June 2021. In the same way that the claimants were able to allege not just that the defendant had no access rights over the Redcar Access and the Emergency Access, or indeed any part of the Claimants' Land as defined, so it was always open to them to plead that even if they did have those rights they were not binding on the claimants by operation of the LRA.

70. It is clear that the master was conscious of the significance of the fact that the points now sought to be raised could have been raised sooner by the claimants because in paragraph 25(i) of his judgment he recorded that Mr Walker had argued that the land registration point could have been taken at the outset and in paragraph 27 of his judgment he explained that he has put his concerns to Ms Holland. It is also apparent from paragraph 25(i) of his judgment that he recognised, in my view correctly, both that the claimants had in fact applied their mind to the issue of land registration when they first pleaded their case, and that in a case where every conceivable point is being considered land registration issues were questions which the parties could be expected to consider in any event.

71. It would appear from this that if the master had simply considered the position as against the claimants, he may well have concluded that there was no good reason for the delay. I should make clear that for the reasons I have already indicated I think he should have reached that conclusion even if he did not do so.

72. However, I think that the part of the analysis on which the master went wrong was the significance that he attributed to the distinction between the position of the claimants and the position of the third party in respect of whom he said that the expectation that the parties should consider land registration did not apply with equal force. This caused him to observe that it would be unrealistic to allow the third party to amend its claim but not to allow the claimants to do so because the proposed amendments raised identical points.

73. In paragraphs 27 and 28 of his judgment the master focused on his concerns, not that the application should have been made by the third parties at or immediately after joinder but that they may not

have been brought quickly enough after the date of service of the schedule on 21 April 2023. He then held that the amount of work that had to be carried out by the parties in the course of May and June in analysing each of the rights identified in the long schedule served by the defendant was a good reason for the delay in the making of an amendment application by the third party itself. This approach was said to be justified because it was only in the weeks before the application was issued that the defendant's case in relation to the claimed easements had fully emerged through the service of the schedule.

74. What the master did not appear to consider was that the nature of the third party's position was such either that it should stand or fall with the claimants or, more realistically, that by joining the proceedings late it was under an immediate obligation to reach a concluded view on the defences it wished to run independently of the position of the claimants. In my view, he should have asked himself whether, if the third party chose not to take that course, it was properly to be treated in the same way as if it always had been a claimant in any way in relation to a matter such as a late amendment for which permission was only sought 8 months after it was joined.

75. One of the principal reasons why I think the master was wrong in his approach on this point is that at the PTR in December the third party sought an expedited trial and renewed that application at the beginning of January, when it was granted. I agree with Mr Walker's submission that it is incumbent on an applicant seeking such relief in proceedings which have been active for almost 2 years, to make sure that the case really is ready for trial and that, if there are any amendments then contemplated, they are at least identified at that stage so that the court can take their impact into account when deciding what order it is appropriate to make. At neither of these hearings was any mention made to the court that the dispute either had of might have anything to do with the question of whether established easements were not binding on the claimants or the third party in light of the LRA. The claimants and the third party both continued to represent that the dispute was about the

existence, extent and purpose of any subsisting rights of way, not whether such that existed were overridden by dispositions to the claimant pursuant to section 29.

76. Indeed this consideration was fortified by the fact that the claimants and the third party made a positive representation to the court that the case was ready for trial or would be as soon as expert evidence was finalised. There was no indication that the shape of the case might change once the schedule ordered by Michael Green J at the PTR, attended by the claimants and the third party, had been served, or that the schedule was in any way necessary to enable them to understand the case they had to meet. They continued to maintain that position right up until the amendment application was made in July.

77. While I recognise that the third party has an interest that is separate from that of the claimants, it seems to me that the master was plainly wrong to consider that this factor was of the overwhelming relevance to the issue of good reason for the delay in making the amendment application that he seems to have treated it as being. In my view it is clear that, where the third party, as a putative assignee of the claimants' interest in the land said to be burdened by the easement (a) was consistent in saying that it was piggybacking the claimants' case, (b) acted jointly with the claimants in representing to the court in January that the case was ready for trial in order to obtain expedition and, (c) like the claimants, said as late as June that it had no further relevant pre-trial applications to make, the distinction between the claimants and the third party on this issue becomes one without a difference.

78. I therefore do not think that the third party's submission that it was entitled to await the working out of the directions in relation to the schedule before applying to amend was a good reason for the delay. Even if it should be permitted some indulgence to enable it to get on top of the essential issues immediately after joinder, the question of the LR amendments should, in my view, have been raised by the claimants very much earlier in the proceedings and by the third party, by the latest, at

the time that it applied for expedition in January, at which stage, in the light of the application it then made, it should then at least have known the shape of the case it had to make.

79. I turn next to the defendant's criticism of the master's judgment that he failed to take into account the true nature of the prejudice. There is no doubt that the master focused on the burden of additional work on the defendant's legal team, but Mr Walker identified some other aspects of the prejudice alleged which are not mentioned in the master's judgment, although they had been highlighted in the defendant's evidence and skeleton for the application. In particular he relied on the age of some of the defendant's witnesses from whom proofs may now need to be taken on the new allegations, and also the impact of the passage of time on the photographic evidence that may be required.

80. I pause to say something about this photographic evidence, which seems to me to be of particular relevance to the issue of obviousness, where photographs taken now may be of less value than was the case when the proceedings commenced. The defendant's evidence on the amendment application identified that works carried out by the claimants and the third party since the commencement of the proceedings have affected the physical features of the land over which some at least of the claimed access rights passed. This was adduced by specific reference to the abandonment defence which the master refused but granted permission for a further application to the trial judge. But as Mr Walker submitted, the point may also be relevant to the LR amendments.

81. These are points which are relevant to the balancing exercise when considering whether to grant an application to amend, but which would not be ameliorated in the event of an adjournment of the trial. Although they were not mentioned by the master in his judgment, I think it is fair to assume that he had not wholly forgotten about them, not least because they were intimately connected with his assessment of the work required to get the case ready for trial on the new points raised by the LR amendments. However, the fact that he did not mention them is consistent with the fact that he seems to have considered that the question on prejudice was all about the risk of the trial being adjourned, a risk which he said could be ameliorated by the making of an actual application to

adjourn the trial, an application which, as he explained in paragraph 30 of his judgment, had not at that stage been made and fell to be considered separately.

82. In my view this final point illustrates the more significant explanation for why the master went wrong in his approach on prejudice. I think that he misunderstood the way in which Mr Walker had made his arguments on the impact which any amendments would have on the defendant's ability to be ready for a fair trial commencing on 2 October and whether this meant that the trial date was imperilled.

83. As to this it is clear that the defendant's position in Mr Walker's skeleton argument and its evidence in opposition to the amendment application was that some of the prejudice which would be caused by the LR amendments could only be dealt with by adjourning the trial. The master recognised this but went on to say that Mr Walker's submissions developed into a focus on the issue as really being all about available resources. The master then commented on the fact that Mr Walker did not submit that an adjournment would be inevitable if the amendments were permitted and did not positively submit that if the amendments were permitted he should adjourn the trial. He included those comments in his judgment after it had been delivered and after he had had an exchange with Mr Walker in which Mr Walker made clear that he had thought he had submitted that, if the amendments were allowed, the trial would have to be adjourned and that the amount of work required in the time available was not something his side expected to be feasible.

84. The relevance of this issue is that it goes to the question of whether the amendments are properly to be characterised as ‘very late’ in a technical sense. It is clear from his citation of paragraph 19 of *CIP* that the master had in made the question of whether an amendment should be regarded as ‘very late’. The passage from *CIP* cited by the master immediately followed a paragraph in which Coulson J had referred to the decision of the Court of Appeal in *Hague Plant Limited v Hague* [2014] EWCA 1609 (Civ) in which Briggs LJ elucidated the significance of an amendment being very late in paragraph 32 of his judgment as follows:

"In that succinct passage the judge clearly distinguished between the ‘very late’ amendment cases, such as Swain-Mason, where the risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be heavily loaded against the grant of permission, and ‘late’ amendments in which the consequence of the large scale reformulation of the particulars of claim after the completion of defences and part 18 exchanges will risk undermining work already done in response to the original particulars of claim and causing a duplication of cost and effort."

85. There is obviously a distinction of substance between ‘late’ and ‘very late’ applications, because although Briggs LJ went on to explain that lateness is a relative not an absolute concept, it is clear that once a threat to the trial date is established it may mean, and I certainly stress the word ‘may’, that the balance will then be heavily loaded against the grant of permission. If the reality is that the trial date is not threatened the question will be a different one however late the application may be. The question will then be the weight which must be attached to what may amount to no more than an inconvenience to the defendant of requiring them to respond to a new and expanding defence close to the start of the trial.

86. I cannot be certain whether in the last sentence of paragraph 14 of the note of his judgment the master was expressing the view that the application for an amendment was ‘very late’ in the technical sense used in the authorities. However, it is of note both (a) that he used that form of words immediately after citing the passage in *CIP* in which the distinction between ‘late’ and ‘very late’ is discussed and (b) that it was in a part of his judgment which, according to the transcript, was added after the hearing and was to that extent not immediately ex tempore.

87. The first part of paragraph 14 may indicate that the master was not using the phrase ‘very late’ in its technical sense, because he seems to have thought that Mr Walker was no longer submitting that the trial date was imperilled. However, the second part of the paragraph indicates that he might have thought that this submission was still being made, because he said that what Mr Walker did not do was actually apply for an adjournment or submit that an adjournment was inevitable. This reads as a

contrast to the fact that the master recognised that there was still a threat to the trial; the fact that Mr Walker had not already taken one of the courses referred to is not inconsistent with the 'very late' test, because what that requires is a threat or an imperilment to the trial date amounting to a material risk that the trial cannot go ahead if the application for the late amendment is successful. It does not of itself require that the court determines the issue of an adjournment there and then.

88. As I have already indicated, the master then went on to express the view that any injustice in these circumstances could be addressed by an application to adjourn the trial. He concluded that the injustice to the third party if the amendment is not permitted outweighed the injustice to the defendant in allowing the amendment even if an adjournment to the trial resulted. But it is apparent from both paragraphs 14 and 30 of his judgment that he did so because the option available to the defendant in making such an application in due course neutralised to a material extent any adverse impact on its trial preparation that may be caused if the LR amendments were to be allowed.

89. The difficulty with this approach is that it detracts from the balancing exercise which the court is required to carry out at the time that the application for an amendment is made. I have some sympathy with the master because he was faced with a situation in which he was being told by the defendant that allowing the LR amendments would threaten its ability to prepare for a fair trial but no application for an adjournment had actually been made. But I also have some sympathy for the defendant because it was faced with a situation in which it very much preferred not to have an adjournment (as to which see paragraph 24 of its skeleton argument in opposition to the application) if that could be avoided.

90. But in my view the answer to this dichotomy is not that the court simply says to the defendant that it can make an application for an adjournment in due course. To do that removes the court's ability to carry out a proper balancing exercise between amendment and adjournment because the amendment has already been allowed and the adjournment application will have to proceed on that basis. The approach which the master should have adopted was to weigh in the balance the imminence and

extent of the threat to the ability to conduct a fair trial of all issues if the amendment were to be allowed. The language used in the authorities is the language of threat, not certainty, an approach which, it seems to me, is consistent with the way in which Briggs LJ expressed himself in *Hague*.

91. The consequence of this is that I think that the master approached the balancing exercise on this aspect of the case from the wrong perspective and discounted to an unwarranted extent the evidence and submissions from the defendant on the impact on their trial preparation. He did so in part because he thought it could be dealt with separately on an adjournment application.

92. In my view, this was a significant error because considerations such as the anticipated impact on trial preparation as well as the feasibility of dealing with the new points in the time allowed, are capable of being a material factor which goes into the mix at the stage of the amendment application, not just when and if an adjournment application is actually made; see, for example, the decision of Nugee J in *Bourke v Favre* [2015] EWHC 277 (Chancery) discussed in this context by Coulson J in the passage in *CIP* which I have already mentioned.

93. In the light of what I conceive to be an error in the master's approach I must look at this point afresh. I have reached the conclusion that the master underestimated the significance of the defendant's evidence on what needed to be done to enable a fair trial to be held if the amendments were to be allowed. I do not think that the evidence from the defendant's solicitors on the work required and the infeasibility of it being done before the start of the trial was given sufficient weight. In my view what was said in evidence by the defendant's solicitor both as to the disclosure review that would be required and the witness evidence that would have to be reconsidered, together with what continued to be submitted by leading counsel at the application and on appeal as the disruption in trial preparation, all caused by the late amendment, were factors of considerable weight.

94. More particularly, the claimants and the third parties have not satisfied me, and on this point I think that the burden is on them, that the matters required to be considered for both disclosure and the preparation of witness statements on the new LRA issues will have been sufficiently covered by the

work already done to mean that the defendant has exaggerated to any material extent the burden of task that would now be required to carry out if the LR amendments were allowed to stand. Much of what is said by them on this point seems to me to be looking at matters through the spectacles of the claimants and the third party, rather than having sufficient regard to their impact on the case preparation of the defendant.

95. The approach of the claimants and the third party to what could be required on the issue of knowledge for the purpose of schedule 3, paragraph 3 is a good example. They point to the fact that they themselves only envisage a single witness statement. This may be so, but it does not begin to grapple with how the defendant might itself decide to approach the issue of knowledge. It can scarcely be expected simply to accept whatever may be said by the claimants' witnesses on this issue without having a proper opportunity to determine whether, and if so how, that might be challenged either by an assessment of the disclosure already given or otherwise.

96. As Mr Walker submitted in reply, if the LR amendments are permitted, there will have to be a significant shift away from a focus on past use to a focus on the disponee's knowledge of the right. They are two quite different things. I also have regard to the fact that the defendant is faced with two legal teams against them and their legal team will need to interview witnesses, some of whom are elderly and many of whom are not within the defendant's control. It is also of relevance that the defendant will be required to deal with a number of other recently introduced issues for which preparations will have to be made, comprising issues arising out of the other amendments which were not opposed and those which have been adjourned to the trial judge but for which preparations will have to be made in order to deal with the adjourned application.

97. In short, because I am satisfied that the master was wrong in the respects I have identified, the exercise of his discretion was flawed and the order he made must be set aside unless I am satisfied that the amendments he allowed should have been permitted in any event. I am not so satisfied.

98. In my judgment, the absence of good reason for the lateness in the amendment application and the prejudice to the defendant if the trial were to proceed to determine the LR amendments are two powerful factors in favour of allowing the appeal and refusing the application. They outweigh the fact that the refusal of permission will prevent the claimants and the third party from being able to run a case based on the LR amendments at trial.

99. So far as the latter point is concerned, and whether or not the application ought properly to be characterised as very late or just late, some, although not all, of the prejudice to the defendant could be mitigated by an adjournment of the trial, but this was not a course which the claimants or third parties urged on me if I were to conclude that the amendments were to be allowed if, but only if, an adjournment were to be granted.

100. In any event I take the view that there are powerful reasons why an adjournment of the trial should only be countenanced in this case as a last resort. They include factors relied on by the claimants and the third party which are applicable whatever the outcome of the amendment application in this appeal.

    a. First, the trial has been adjourned once already and has now been expedited.
    b. Secondly, the grounds for expedition remain significant and serious.
    c. Thirdly, there is an ongoing diminution in the pot of public money available for the development as time goes by.
    d. Fourthly, the fact that the freeport tax relief is time limited with deadlines by which construction of qualifying buildings must have been fully completed.
    e. Fifthly, the adverse impact this litigation may have on the ability of the claimants and the third party to attract tenants.

101. I should also say that no additional prejudice to the claimants and third parties other than the prejudice of not being able to run the defence raised by the LR amendments was argued. While

carrying out the balancing exercise afresh, I have proceeded with that in mind, while also recognising that, as was said in *Recovery Partners GP Limited*:

> "If there was no good reason, it does not lie in the mouth of the claimant or third party to say it been prejudiced."

102. In all those circumstances I shall grant permission to appeal and allow the appeal. Paragraph 1.3 of the master's order will therefore be set aside. I would also be minded to set aside the directions given in paragraphs 4 to 9 of the order unless there is some other reason why they should stand. The adjournment application in these circumstances is unnecessary and will be dismissed.