Neutral Citation Number: [2023] EWHC 122 (KB)

Case No: QB-2019-004704

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
The Amerisur plc Putumayo Group Litigation

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

ANDRES FERNANDO BRAVO & OTHERS	**Claimants**
- and -	
AMERISUR RESOURCES LIMITED	**Defendant**

- -
- -

Alexander Layton KC, Richard Lord KC, Alistair Mackenzie (instructed by **Leigh Day**) for the **Claimants**
Alan Maclean KC, Nicholas Sloboda, Monica Feria-Tinta (instructed by **Norton Rose Fulbright**) for the **Defendant**

Hearing dates: 11, 12, 13 and 14 July 2022

- -

Approved Judgment

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

A. INTRODUCTION

1. The claimants, who live in remote rural communities in the Putumayo region of Colombia, seek damages from the defendant pursuant to articles 2341 and 2356 of the Colombian Civil Code ('the Civil Code'), and in reliance on Decree 321/1999, in respect of environmental pollution caused by a spill (or spills) of crude oil on 11 June 2015. The claimants' two causes of action are pleaded under the headings (i) guardianship of a dangerous activity and (ii) negligence. It is common ground between the parties that the oil spillage was the result of deliberate acts by a terrorist organisation, FARC (an abbreviation of *Fuerzas Armadas Revolucionarias de Colombia*, meaning *Revolutionary Armed Forces of Colombia*).

2. The parties agree that, pursuant to articles 4 and 7 of Regulation (EC) No.864/2007 on the law applicable to non-contractual obligations ('Rome II'), the applicable law is the law of Colombia: §35 of the Amended Generic Particulars of Claim ('the Amended POC'); §53 of the Amended Defence to the Generic Particulars of Claim ('the Amended Defence'). Rome II is retained EU law following the UK's withdrawal from the European Union; and the minor amendments made by the Law Applicable to Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 are irrelevant for the purposes of this trial.

3. This judgment follows the trial of preliminary issues:

> "1. If it is assumed that the facts pleaded in the Generic Particulars of Claim are true, would the claims be time-barred pursuant to Article 47 of Law 472 of 1998? ['**Preliminary Issue 1**']
>
> 2. Are the legal principles averred at paragraphs 56 to 61 of the Generic Defence correct as a matter of Colombian law and if so, does this preclude the Claimant's claims under Articles 2356 or 2341 of the Colombian Civil Code? ['**Preliminary Issue 2**']"

4. The first preliminary issue is framed by reference to §§63-66 of the Amended Defence, to which the claimants have responded in §§2-7 of their Reply. In short, the defendant contends that the two year limitation period (*caducidad*) provided by article 47 of Law 472 of 1998 ('Law 472'), which applies to Colombian group actions, applies to these claims. If that is so, the last date to bring these claims would have been 11 June 2017, and so the claims are time-barred. Whereas the claimants contend the applicable limitation period (*prescripción*) is the ten year period prescribed by article 2356 of the Civil Code.

5. In support of their position, the claimants rely on two points of English law and one of Colombian law. First, they contend that article 47 of Law 472 is a procedural provision within the meaning of article 1(3) of Rome II, and therefore it falls outside the scope of Rome II ('**the Rome II issue**'). Secondly, they refute the defendant's contention that this action should be treated as a group action under Law 472 ('**characterisation of the claim/should this English action be treated as a Colombian group action?**'). Thirdly, even if they are wrong on both those points, they submit that application of the

time limit in article 47 of Law 472 would be inconsistent with English public policy, and so the court should refuse to apply it pursuant to article 26 of Rome II ('**the public policy issue**').

6. The second preliminary issue is (expressly) framed by reference to §§56-61 of the Amended Defence. The two experts in Colombian law instructed by the parties agree that the principles of Colombian law averred in those paragraphs are correct, and so it is agreed that the answer to the first question within Preliminary Issue 2 is 'yes'. However, the answer to the second question within Preliminary Issue 2, whether those principles preclude the claims, remains in dispute.

7. In the agreed translations from Spanish of the relevant articles of Colombian law, the translators have rendered both *caducidad* and *prescripción* as "*limitation period*". For clarity, and to avoid pre-judging the issue in circumstances where the claimants contend the time limit in article 47 of Law 472 is not a limitation period within the meaning of article 15(h) of Rome II, I shall use the Spanish terms *caducidad* and *prescripción*.

B. BRIEF HISTORY OF THE PROCEEDINGS

8. The claim was issued on 30 December 2019, and served on the defendant on 7 January 2020. In the original claim form, 15 claimants were named. The brief details of claim stated:

> "The Claimants are farmers in the departamento of Putamayo in the Republic of Colombia, who have suffered both economic and non-economic damage caused by environmental contamination and pollution caused by the Defendant, primarily (though not exclusively) in the form of contamination of watercourses, wetlands and soils by wastes and residues from the Defendant's oil exploration and oil extraction activities, and in some cases caused by the spillage of crude oil from tanker trucks for which the Claimants contend that the Defendant is legally responsible. …"

9. Also on 30 December 2019, the claimants issued an application seeking a worldwide freezing injunction. That application was supported by the first affidavit of Mr Richard Meeran of Leigh Day, the claimants' solicitor, dated 6 January 2020, which described their claim as being for damages for both economic losses and non-economic damages caused by the defendant's oil exploration and exploitation activities. He stated that, to date, his firm had instructions to issue the claim and application from 15 people living in the affected communities in Putumayo (described as the communities of La Alea, Bajo Mansoya, Sevilla, La Rosa, Zamora, Chufiya and Belen), but he anticipated based on the number of families and individuals living in the affected communities that the likely number of claimants would in due course be about 500 people.

10. The claimants' case first came before the court on 9 January 2020, by which stage Mr Meeran's evidence (given in his second affidavit, dated 9 January 2020) was that an additional 72 claimants had already instructed Leigh Day to add them to the claim. I made an interim freezing order, freezing the defendant's assets in England and Wales in the sum of £3,178,600, calculated by reference to the damages claimed by the 87 claimants/intended claimants then before the court, and their anticipated costs of the

claim. At the return date before Martin Spencer J, on 19 March 2020, the freezing order was made final by consent in the sum of £4,465,000 (reflecting the fact that by then the number of claimants had increased to 270).

11. At the hearing on 9 January 2020, I gave the claimants permission to serve an amended claim form, to add additional claimants to the action, on or before 17 January 2020. An application was duly filed on 16 January 2020, seeking to add the 255 persons listed in Part B of the Amended Schedule to the draft Re-Amended Claim Form attached to the application as claimants.

12. At a further hearing on 3 February 2020, I granted the claimants permission to add the 255 intended claimants as claimants in this claim, "*the joinder of each Intended Claimant to take effect upon the filing of his or her signed written consent to be added as a party to the claim*" (§1 of the Order sealed on 10 February 2020). At the same hearing, on the claimants' application dated 21 January 2020 (to which the defendant agreed), and subject to the President of the King's Bench Division's consent under CPR PD19B, para.3.3, which was given on 29 June 2020, I made a group litigation order ('the GLO') (§§4-6 of the Order sealed on 10 February 2020). Paragraph 6 of the GLO identifies the "*initial claimants whose claims are the subject of this order*" as "*those set forth in the title to this order* [i.e. the original 15 claimants] *and those joined pursuant to paragraph 1 of this order* [i.e. the 255 joined claimants]". The "*GLO Issues*" included issues in respect of the "*release/escape of contaminants from oil drilling sites*" (subsequently referred to as "*the general pollution claims*") and of the "*11 June 2015 tanker spill incident*" (subsequently referred to as the "oil spill claims").

13. In accordance with directions given in the Order sealed on 10 February 2020, thereafter the parties engaged in correspondence as if pursuant to the relevant Pre-Action Protocol.

14. On 15 January 2021, Senior Master Fontaine ordered the claimants to serve and file Group Particulars of Claim, including a schedule containing entries relating to each individual following the format of the table attached to the order, by 26 February 2021. The Defence was required to be served and filed by 23 April 2021, and any Reply by 21 May 2021.

15. On 25 February 2021, the claimants served Generic Particulars of Claim, addressing the oil spill claims, together with 140 Schedules of Information. On the same date, the claimants served three applications seeking (i) a stay of 102 general pollution claims; (ii) an extension of time for service of Particulars of Claim in respect of 34 claimants; and (iii) joinder of a further five individuals. The joinder order was granted by consent: Order of Senior Master Fontaine, 10 May 2021.

16. By 26 April 2021, the claimants had served Schedules of Information on behalf of a further 31 claimants, bringing the total to 171 claimants. In the event, no claims in respect of the general pollution claims were pursued. On 29 April 2021, Leigh Day gave notice of discontinuance of 51 general pollution claims. They ceased to act for the remaining 51 general pollution claimants and for two oil spill claimants; and those claims were struck out for failure to comply with an unless order that I made on 27 April 2021.

17. At a case management conference on 7 July 2021 (by an order sealed on 15 July 2021), among other matters, I gave directions for the service of amended generic pleadings, ordered a trial of the two preliminary issues identified in paragraph 3 above, and gave directions in relation to this trial. Paragraph 3 of that order specified that in this trial the court would hear the evidence of the parties' respective Colombian law experts "*but no other factual or expert evidence*".

18. On 4 August 2021, the claimants served the Amended Generic Particulars of Claim and a Generic Reply. On 27 August 2021, the Defendant served the Amended Defence to the Generic Particulars of Claim.

C. THE ROME II REGULATION

19. Article 1(3) of Rome II provides:

> "This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22."

20. Article 15 of Rome II provides, so far as material:

> "The law applicable to non-contractual obligations under this Regulation shall govern in particular:
>
> …
>
> (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."

21. Article 26 of Rome II provides:

> "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."

D. RELEVANT PROVISIONS OF COLOMBIAN LAW

The Civil Code

22. The Civil Code includes the following relevant provisions:

> "**Art. 2341**. A person who has committed an offence or fault which has caused damage to another, must provide compensation, without prejudice to the principal penalty that the law imposes for the fault or the offence committed.
>
> …

> **Art.2356.** As a general rule, any damage that can be attributed to the malice or negligence of another person must be repaired by that person.
>
> The following are especially obliged to make reparation:
>
> 1. Whomsoever recklessly fires a firearm.
>
> 2. Whomsoever removes the slabs covering a ditch or sewage pipes or uncovers them in a street or roadway, without taking the precautions necessary to prevent those who may transit there by day or night from falling.
>
> 3. Whomsoever has a duty to build or repair water pipes or channels that cross a road and maintains it in a state that might damage road users.
>
> …
>
> **Article 2535.** The prescription that extinguishes external actions and rights only requires a certain period of time during which such actions have not been exercised.
>
> This time is counted from when the obligation has become enforceable.
>
> **Article 2536.** <prescripción of executive and ordinary actions>. Executive action has a prescription (prescripción) of five (5) years. And ordinary action has a prescription (prescripción) of ten (10) years.
>
> The executive action becomes an ordinary action after a period of five (5) years, and after that it will only be enforceable for another five (5) years. Once a prescripción is interrupted or waived, the respective term shall start to be counted again."

The General Procedural Code

23. The General Procedural Code ('GPC') provides so far as material:

> "**Article 82**. **Requirements of a Claim.** Unless otherwise provided, the claim for which any proceedings are brought must meet the following requirements:
>
> 1. The naming of the judge to whom it is presented.
>
> 2. The name and address of the parties and, if the parties cannot appear on their own behalf, those authorised to act in their name. The identification number of the claimant and the claimant's representative and that of the defendant, if known, must be indicated. In the case of legal entities or autonomous assets, this will be the tax identification number (NIT).

3. The name of the claimant's legal representative, if applicable.

4. What is claimed, worded in a clear and precise manner.

5. The facts that serve as the basis for the claims, these being duly determined, classified and numbered.

6. The application for the evidence intended to be shown, indicating the documents that the defendant has in its possession, in order for it to provide such evidence.

7. The sworn appraisal, where necessary.

8. Legal basis.

9. The amount involved for the proceedings, when an estimate thereof is necessary to determine competence or process.

10. The place, the physical and electronic address had or required, where the parties, their representatives and the claimant's attorney-in-fact will receive personal notifications.

11. Any other aspects required by law.

…

Article 88. Joinder of claims. Claimants may join several requests in a single claim against the same defendant, even if they are different, so long as the following requirements coincide:

1. That the judge has jurisdiction over all of them, irrespective of the amount.

2. The requests are not mutually exclusive, unless they are put forward as principal and ancillary claims.

3. They may be dealt with by the same procedure.

A claim for periodic benefits may seek an order that the defendant be ordered to pay such benefits as may accrue between the time when the claim is brought and the time when the final judgment is enforced.

Requests by one or more claimants, or against one or more defendants, may also be brought in one claim, even if the interests of one or more of them are different, in any of the following cases:

a) Where they arise out of the same cause [*de la misma causa*].

b) Where they deal with the same subject matter.

> c) Where there is a relationship of [dependence] between them.
>
> d) When they are to use the same evidence.
>
> Requests by one or more claimants who pursue totally or partially, the same assets of the defendant, may be joined in enforcement claims."

Law 472 of 1998

24. Law 472 is a Colombian statute which regulates the exercise of both popular actions and group actions. It includes the following provisions regarding group actions:

> "**ARTICLE 3.-** Group Action [*Acción de Grupo*]. *These are actions filed by a plural number or a group of people who meet uniform conditions with respect to a common cause that gave rise to individual damages.* **Uniform conditions must also be in place with respect to all elements of liability. Underlined text declared UNENFORCEABLE by the Constitutional Court through** Ruling C-569 of 2004 **and text in italics declared ENFORCEABLE.**
>
> The group action shall be brought exclusively to obtain the recognition and payment of compensation for damages.
>
> …
>
> **ARTICLE 5.-** *Procedure*. The processing of the actions regulated hereunder shall be carried out based on the constitutional principles, and especially on those of the prevalence of substantive law, outreach, economy, speed and efficiency. The general principles of the Code of Civil Procedure shall also apply provided they do not go against the nature of said actions.
>
> The Judge shall ensure respect for due process, procedural safeguards and balance between the parties.
>
> Once the action is brought, it is the Judge's obligation to advance it and decide upon the competence (decision de mérito) under penalty of incurring a disciplinary offense, punishable by removal from office. For this purpose, the judge hearing the case must adopt the necessary measures to adapt the petition to the corresponding action.
>
> …
>
> **TITLE III**
>
> **GROUP ACTIONS**
>
> …

ARTICLE 46.- Admissibility of Group Actions. *Group actions are actions filed by a plural number or a group of persons who meet uniform conditions with respect to a common cause* [una misma causa] *that gave rise to individual damages to said persons*. **Uniform conditions must also be in place with respect to all elements of liability. Underlined text declared UNENFORCEABLE by the Constitutional Court through Ruling C-569 of 2004 and text in italics declared ENFORCEABLE.**

The group action shall be brought exclusively to obtain the recognition and payment of compensation for damages.

The group shall consist of at least twenty (20) people. Underlined text declared ENFORCEABLE by the Constitutional Court by means of a Sentence [sic] C-116 of 2008, with the understanding that for active entitlement (legitimación active) in group actions, it is not required to include a number of twenty people who file the claim, since it is sufficient for a member of the group acting on their behalf to set out in the claim the criteria that allow the identification of the affected group.

Declared Enforceable by the Constitutional Court by means of Ruling C-215 of 1999.

ARTICLE 47.- *Limitation* [*Caducidad*]. Without prejudice to any relevant individual action for damages compensation, the group action must be advanced within two (2) years from the date on which the damage was caused or the damaging action that caused it ceased. **Declared Enforceable by the Constitutional Court by means of** Ruling C-215 of 1999.

ARTICLE 48.- *Entitled Claimants.* Group actions may be brought by individuals or legal persons who have individually suffered damage in accordance with the provisions of article 47.

…

PARAGRAPH.- In the group action, the claimant or whoever acts as plaintiff, presents any other persons who have been individually affected by the offending events, without the need for each of the interested parties to separately bring their own action or grant power of attorney to do so.

ARTICLE 49.- *Exercise of action.* Group actions must be exercised through a lawyer.

When the members of the group grant power to attorney to several lawyers, a committee must be formed, and the judge shall recognize, as the coordinator and legal representative of the

group, the one who represents the greatest number of victims, or otherwise, the person appointed by the committee.

…

ARTICLE 52.- *Claim Requirements*. The claim by means of which a group action is exercised must meet the requirements established in the Code of Civil Procedure or in the Contentious Administrative Code, as the case may be, and also express in its text:

1. The name of the attorney-in-fact or attorneys-in-fact, attaching the legally conferred power of attorney.

2. The identification of the principals, identifying their name, identity document and address.

3. The estimated value of damages that may have been caused by the alleged violation.

4. If it is not possible to provide the name of all the individuals within a group, express the criteria to identify them and define the group.

5. Identification of the respondent.

6. The rational on the origin of the group action in the terms of articles 3 and 49 of this Law.

7. The facts of the claim and the evidence that is intended to be asserted within the process.

…

ARTICLE 53.- *Admission, Notification and Service*. Within ten (10) business days following the filing of the claim, the competent judge shall rule on its admission. In the writ admitting the claim, in addition to ordering service of notice to the defendant within ten (10) days, the judge shall order individual service of notice to respondents. The members of the group shall be informed through the mass media or any effective mechanism, taking into account the eventual beneficiaries. For this purpose, the judge may simultaneously use various means of communication.

…

PARAGRAPH.- The writ of admission must assess the origin of the group action in the terms of articles 3 and 47 of this Law.

…

ARTICLE 55.- *Integration to the Group.* When the claim has originated in damages caused to a plural number of people by the same action or omission, or by several actions or omissions, **derived from the violation of [collective] rights or interests**, those who have suffered damages may become party to the process, before disclosure of evidence, by submitting a document with their name, the damage suffered, the origin thereof and their desire to be considered in the ruling and to belong to the group of individuals who filed the claim as a group. People who do not follow this process, **and provided their action is not time-barred and/or expired in accordance with regulations in force**, may join subsequently, **within twenty (20) days following the publication of the decision, by providing the above information**, but they may not seek extraordinary or exceptional damages to obtain greater compensation, may not benefit from the awarding of costs and expenses.

NOTE: The underlined text was declared Enforceable by the Constitutional Court through Ruling 1062 of 2000; the text in bold was declared UNENFORCEABLE by the Constitutional Court by means of a Ruling C-241 of 20009.

NOTE: The underlined text was declared Enforceable by the Constitutional Court through Ruling C-242 of 2012.

The incorporation of new members to the group, after a ruling, will not increase the amount of compensation thereunder.

Individual actions related to the same events may be combined with group action, at the request of the interested party. In this event, the interested party shall enter the group, complete the processing of the individual action and benefit from the outcomes of the group action.

Declared Enforceable by the Constitutional Court through Ruling C-215 of 1999.

ARTICLE 56.- *Exclusion from the Group.* Within five (5) days following the expiration of the term for serving notice of the claim, any member of the same group may express their desire to be excluded from the group and, consequently, not be bound by the settlement agreement or the ruling. A member of the group will not be bound by the effects of the ruling in two situations:

When the exclusion from the group has been expressly requested within the term provided in the preceding paragraph;
When a person bound by a ruling but with no participation in the process proves, within that term, that their interests were not adequately represented by the representative of the group or that there were material notification issues.

Once the term has elapsed without the member so expressing, it shall be bound by the outcomes of the agreement or ruling. Should anyone decide to be excluded from the group, they may attempt individual action for damages.

…

ARTICLE 65.- *Content of the Ruling.* The decision that puts an end to the process shall be subject to the general provisions of the Code of Civil Procedure and, when granting the claims brought shall provide:

1. The payment of collective compensation, which shall contain the weighted sum of the individual compensation amounts.

2. The indication of the requirements that beneficiaries who have been absent from the process must meet in order for them to claim the corresponding compensation, n the terms set forth in article 61 hereunder. Declared Enforceable by Constitutional Court Ruling C-732 of 2000.

3. The amount of said compensation shall be delivered to the Fund for the Defense of Collective Rights and Interests, within ten (10) days following the final ruling, which shall be administered by the Ombudsman's Office …

4. The publication, for a single time, of an extract of the ruling, in a newspaper with wide national circulation, within the month following its execution or notification of the writ ordering to comply the above provisions, with a warning for all the interested parties also injured by the same events that did not partake in the process, **to appear before the Court, within twenty (20) days following publication**, to claim compensation. Declared Enforceable by Constitutional Court Ruling C-732 of 2000.

   NOTE: The underlined text was declared Enforceable by the Constitutional Court by means of Ruling C-242 of 2012.

…

ARTICLE 66.- *Effects of the Ruling.* The ruling shall be res judicata in relation to those who were part of the process and the people who, belonging to the interested group, failed to express their decision to exclude themselves from the group and the outcome of the process in a timely manner."

(The notes and formatting are as they appear in the original translation; words in square brackets are my additions.)

E. OVERVIEW OF THE EXPERT EVIDENCE

The experts

25. The parties called experienced and distinguished experts on Colombian law. The claimants called Professor Jorge Santos Ballesteros and the defendant called Professor Javier Tamayo Jaramillo.

26. Professor Santos is a former justice of the Civil Cassation Chamber of the Colombian Supreme Court, on which he served from 1 July 1996 to July 2003. For about six years, from 1998, he held the office of President of the Civil Cassation Chamber. For about 30 years, from 1976 to 2007, he was a tenured professor in the area of private law at the Pontificia Universidad Javeriana of Bogotá. When his term of office on the Supreme Court ended in 2003, Professor Santos became a founding partner of a law firm, Santos Ballesteros & Asesores Legales SAS, from which he continues to practise. He is the author of a number of published books, including on Civil Liability, and articles.

27. Professor Tamayo is also a former justice of the Civil Chamber of the Colombian Supreme Court, on which he served from 1994 to 1996. He is a founding partner and manager of a law firm, Tamayo Jaramillo & Asociados SAS, founded in 1980, with main offices in Medellín and Bogotá, Colombia. He has 46 years' experience as a practising lawyer. He was a professor of law at Universidad Pontificia Bolivariania and Pontificia Universidad Javeriana for about 15 years from 1991-2005 and in 2011, and he has been a visiting professor at numerous universities in Colombia and elsewhere, including the University of Berkeley in the United States. He is the author of books and articles, including a two volume *Treatise on Civil Liability* (2007) which is used as a reference book in Colombian High Courts and Colombian schools of law, and a book entitled *Popular actions and group actions in civil liability* (2001).

28. Professor Santos provided an expert report dated 17 December 2021 ('Santos 1') and a supplemental report dated 6 May 2022 ('Santos 2'). Professor Tamayo provided an expert report dated 15 December 2021 ('Tamayo 1') and a supplemental report dated 5 May 2022 ('Tamayo 2'). Professor Santos and Professor Tamayo met between 26 and 31 May 2022. It is evident that those were respectful and fruitful discussions. There was a very substantial measure of agreement between them and, where they differed, both were respectful of the other's opinion. On 10 June 2022 , Professor Santos and Professor Tamayo provided a joint memorandum ('Joint Memo' or 'JM'). It is a model of its kind, for which they are to be commended, setting out in clear terms those matters on which they agree, those on which they disagree, and in relation to the latter, explaining the reasons for their differing for view. All the expert reports were written in Spanish and agreed translations were provided for the use of the court and the parties.

29. In my judgment, both experts sought to assist the court by giving their honest professional opinions on matters of Colombian law, and they were obviously very well qualified to do so. Mr Maclean KC, leading Counsel for the defendant, did not suggest otherwise in relation to Professor Santos' evidence, which the defendant largely accepted and relied upon, subject only to a few points of disagreement that I outline below. The claimants contended that insofar as Professor Tamayo's views differed from those of Professor Santos, I should prefer the latter's evidence, on the basis that Professor Tamayo changed his opinion to suit his understanding of his client's case. As I explained below, I do not accept that he did so. Accordingly, where the experts differ

on relevant issues, my determination of Colombian law is based on an assessment of the cogency of their reasoning on each such issue, rather than a presumption that either professor's view is to be preferred.

Admissibility/relevance

30. Where the court has directed that the content of foreign law be established by expert evidence, the proper function of the expert is clear. Evans LJ in *MCC Proceeds Inc v Bishopsgate Investment Trust plc (No 4)* [1999] CLC 417 summarised the position as follows at [23-24]:

> "23. In our judgment, the function of the expert witness on foreign law can be summarised as follows:
>
> (1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction
>
> (2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and
>
> (3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.
>
> 24. The first and second of these require the exercise of judgment in deciding what the issues are and what statutes or precedents are relevant to them, but it is only the third which gives much scope in practice for opinion evidence, which is the basic role of the expert witness. And it is important, in our judgment, to note the purpose for which the evidence is given. This is to predict the likely decision of a foreign court, not to press upon the English judge the witness's personal views as to what the foreign law might be. Thus, in *G & H Montage GmbH v Irvani [1990] 1 WLR 667 (CA)* , Mustill LJ said (at p. 684G)
>
> > 'The fact that the plaintiffs' expert was not able to do more than assert, in this novel situation, his own view on how the German court would react when faced with a similar problem does not disqualify his evidence from being relied upon. There are many fields of law in which the books provide no direct answer, and where the skill of the lawyer lies precisely in predicting what answer should be given. If the judge concludes that the expert's prediction is reliable, he is fully entitled to give effect to it.'
>
> This passage emphasised that the expert witness is entitled to give opinion evidence in the absence of direct authority, but we would underline the restrictions which it places upon him. His role is to 'predict' what the foreign court would decide, and only in this sense should he say 'what answer should be given'.

31. The claimants submitted that parts of Professor Tamayo's evidence were inadmissible, and likewise in correspondence the defendant took issue with the admissibility of parts of Professor Santos' evidence. Sensibly, the parties did not seek to engage in an exercise of excision, not least as the extensive agreement between the experts has made it unnecessary to address much of the evidence which may be said to have strayed beyond their remits.

32. I accept the claimants' submission that Professor Tamayo has, at times, in his evidence, purported to reach conclusions of fact on the case. In doing so, he has gone beyond the role of an expert (and, furthermore, beyond the scope of this trial of preliminary issues). I have rejected such evidence. I have also borne in mind that the application of Colombian law to the facts is a matter for the court, rather than for the experts. To the extent that both parties' experts have given some evidence that goes beyond the scope of the preliminary issues, I have not taken account of such evidence. For example, the experts have addressed whether, as a matter of Colombian law, Law 472, and in particular Article 47 of that law, is procedural or substantive. It is understandable that they did so, given that Professor Santos was asked to address this issue, and this triggered a debate between the experts. However, it is common ground that such evidence is irrelevant: the Rome II issue falls to be determined by an autonomous interpretation of the Rome II regulation.

The nature of the Colombian law system

33. Colombian law is a civil law system. The main source of law is written law (such as the provisions cited above). In accordance with article 230 of the Political Constitution of Colombia, "*[e]quity, jurisprudence, the general principles of law and doctrine are auxiliary criteria for judicial activity*". Although there is no doctrine of precedent akin to that applicable in a common law system, there are some jurisprudential decisions that are, in principle, binding for lower court judges, namely, the *ratio decidendi* of the judgments on constitutional law of the Constitutional Court of Colombia and the "probable doctrine" of the Supreme Court of Justice of Colombia. They are described as binding "*in principle*", as judges of lower courts may depart from such judicial precedent if they do so expressly, giving reasons for departing from it. However, both experts approached the decisions of the Constitutional Court to which they referred on the basis that the lower courts would apply them. (Tamayo 1, §37-38; Santos 1 §§17-20)

F. PRELIMINARY ISSUE 1: THE EXPERT EVIDENCE

34. There was a substantial measure of agreement on the Colombian law relevant to Preliminary Issue 1. Save to the extent that I have identified a difference of opinion below, there was no dispute between the experts on the following matters.

Claimants have a choice of action

35. In Colombian private law there are only two types of proceedings for obtaining compensation from private parties: an ordinary action (also referred to as declaratory verbal proceedings), regulated by the GPC, or a group action regulated by Law 472. A group action provides an "*alternative procedural route*" which has advantages and disadvantages compared to an ordinary action.

36. Claimants have a choice as to whether to bring a group action pursuant to Law 472 or an ordinary action (JM, p.6). A group of claimants who meet all the criteria enabling them to use the group action procedure provided by Law 472 would have the option to do so, but it is not mandatory. It would be open to them to choose to pursue an ordinary action. As Professor Santos put it:

> "… group actions under Law 472 offer only an alternative and non-obligatory means for the reparation of damages suffered by a plural number of injured parties caused by the action or omission of one or several defendants" (Santos 1, §108)

37. The practical and procedural advantages for claimants of the group litigation procedure are such that a group of claimants who meet the criteria for using Law 472 would usually do so, but an unlimited number of claimants can join together (which may be described as a "*subjective accumulation of claims*") in an ordinary action pursuant to article 88 of the General Procedural Code (Tamayo 1, §79). The judgment of the Supreme Court, Civil Cassation Chamber, in Case 5686 of 19 December 2018 ('*OCENSA*'), provides an example where at first instance the court "*ordered the combination of 17 proceedings that were based on the same events indicated in the generic claims*": *OCENSA,* [7]; Santos 1, §§102-105; Tamayo 2, §§81-82. This had the effect that the claims of about 150 individuals were joined in an ordinary action: *OCENSA,* [7.1]-[7.17]. I note that in *OCENSA* the 17 claims were filed four years after the damaging event occurred (i.e. beyond the expiry of the period for bringing a group action).

The Judge must respect the claimants' choice (if made and subject to suitability)

38. If the claimants have chosen to pursue an ordinary action, or they have chosen to pursue a group action, the judge "*must respect the procedural route chosen by the claimants for the proceedings, provided that such route is suitable, according to the law, for such purpose*" (Santos 1, §96). Professor Tamayo's view, from which I do not understand Professor Santos to have dissented, is that the obligation on the judge to respect the claimants' express choice (subject to suitability) would apply, even if the claimants have not expressly invoked the relevant legal provision (e.g. if the choice is to bring a group action, Law 472), as the judge would apply the principle of *iura novit curia* (i.e. the court knows the law): Tamayo 2, §154. Inevitably, however, that obligation would depend on it being clear, in the absence of reference to the relevant legal provision, that the claimants had expressed such a choice.

If no choice was made, the Judge must determine the type of action brought

39. In a case where more than one procedural avenue is open to the claimants, "*if the Claimants have not expressly chosen a procedural route, the judge, upon admitting the claim, will determine the corresponding procedure*" (Santos 1, §98, Tamayo 2, §78-79). (In Colombian courts, there is an admission stage within ten business days following the filing of the claim, and it is at this stage, pursuant to article 53 of Law 472, that the "*writ of admission must assess the origin of the group action the terms of articles 3 and 47 of this Law*" (Santos 1, §19).)

There can be no departure from the type of action brought once chosen or determined

40. Although the claimants have a choice, "*once the relevant action has been chosen, the parties cannot change their procedural route*", and nor can the court direct or permit departure from the chosen route (JM, p.7-8). The parties cannot mix elements derived from group and ordinary actions; "*once a course of action has been chosen, all its procedural consequences apply*" (JM p.8).

41. If a group action has been presented, and the judge finds that the two-year time limit (*caducidad*) in article 47 of Law 472 has expired, the claimants cannot subsequently bring an ordinary action (JM, p.10).

Applicable principles: pro homine principle, access to justice and the primacy of substantive law

42. The experts agreed that "*once the caducidad has been determined, the judge cannot omit to apply it*", but disagreed "*on whether or not a group action is present in the specific case and, therefore, on the caducidad of the lawsuit*" (JM, p.44), with Professor Santos regarding it as an ordinary action and Professor Tamayo considering it to be a group action. In relation to principles applicable in making this determination, Professor Santos said (JM, p.45):

> "… as in this case happens, and of course, respecting Dr. Tamayo's opinion, it is difficult to determine whether we are handling a group action or an ordinary civil liability suit, in light of Colombian law.
>
> In this specific event I have stated that factors of interpretation could be those that I mention in the report, if so be considered insofar as it has to do with the principles of prevalence of substantive law and others as the Constitutional Court has said, that is, *pro homine* interpretation or reasonable interpretation. And I mention it because these interpretations brought to the mention of constitutional jurisprudence are invoked to the extent that both figures have similarities and differences as I explained before."

43. In his first report, to which he referred back in the passage quoted above, Professor Santos referred to the terms of the first paragraph of article 5 of Law 472 (see paragraph 24 above), which provides for the processing of group actions to be carried out based on constitutional principles, including the prevalence of substantive law (Santos 1, §118). He continued (omitting footnotes):

> "For its part, the Constitutional Court has recognized the application of the constitutional principles of prevalence of substantive law, pro homine interpretation, conforming interpretation and reasonable interpretation, in the context of group actions. The same Court has referred to these principles as follows:
>
> I. ***Pro homine***: "*(...) imposes that interpretation of legal norms which is most favourable to man and his rights...in those cases in which more than one interpretation of a norm is accepted, the*

> *one which best guarantees the rights of people should be preferred*".
>
> II. ***Conforming interpretation***: "*(…) all legal precepts must be interpreted in such a way that their meaning conforms to constitutional provisions. The interpretation of a norm that contravenes this principle is simply intolerable in a system that is based on the formal and material supremacy of the Constitution (PCC art. 4)*".
>
> III. ***Reasonable interpretation***: "*The precise nature of the rules forces us to prefer them when faced with conflicts with principles. However, a reasonable interpretation of the rules can lead to situations that are openly incompatible with principles, even if not illegal or illicit... In this sense, the judge and the administration have the duty to avoid interpreting the legal texts in such a way as to commit fraud against the principles of the system*".
>
> 120. Therefore, I consider that the above-described purposes of group actions and the constitutional interpretation principles applicable to such actions could help the court decide whether in this case the *caducidad* of article 47 of Law 472 should be applied, or the *prescripción* under article 2536 of the CC. These principles, I believe would be particularly useful for two purposes:
>
> I. If the court determines that either figure (*caducidad* or *prescripción*) is applicable based on their particular regulating provisions, to evaluate the reasonableness of said result in light of general principles.
>
> II. If the court has any doubt about the application of either figure (prescripción or expiration), to resolve any such doubts." (Santos 1, §§119-120)

44. For example, in Ruling C-242 of 2012 the Constitutional Court "*reiterates*" "*that the processing of these actions must be carried out in accordance with the constitutional principles of the prevalence of substantive law and of pro homine interpretation, that they be interpreted in compliance with the Constitution and reasonably*" (p.16).

45. In the Joint Memo, Professor Tamayo responded that he "*agree[d] with the theoretical framework set forth by Professor Santos*", but his view was that it was not applicable to this case (JM, p.45). He reasoned that this is not a difficult case because Article 47 of Law 472, which regulates *caducidad*, is absolutely clear; "*the judge must apply the procedural rules on the requirements of a group action*", even if the claimant has made a mistake in drafting the claim (JM, p.45). He also agreed with Professor Santos that "*it remains to be seen whether this lawsuit is more like an ordinary lawsuit or a group action, or neither*" (JM, p.47).

46. Professor Santos made a similar point in the Joint Memo at pp.12-13:

> "It should be pointed out that group actions are certainly intended to facilitate, as Dr. Tamayo rightly states, access to the administration of justice and in no case to hinder or complicate it, and of course pursue the legitimate aim of guaranteeing the prompt resolution of conflicts. I recognise that, certainly, procedural rules are of public order and that, in any case, should any conflict arise in the interpretation and application of Law 472 of 1998, the judge can or could resort to the principle of the primacy of substantive law. Of course not in all events, but in those in which there might be difficulty in determining the scope of Law 472." (Emphasis added.)

47. Professor Tamayo responded (JM, p.13):

> "I do not agree. In my opinion, it is only when a legal rule is declared unconstitutional because it violates a fundamental right of the claimant that the judge can cease to apply it. Therefore, if the procedural rule has not been declared unconstitutional, the judge cannot disregard it. In the specific case of the expiration of statute of limitations (caducidad) of Art. 47 of Law 472 of 1998, the case law of the high courts has decided a large number of group action lawsuits, in which it is decided whether the expiration of the statute of limitations has occurred in a given case. I am not aware of a single case in which the expiration of statute of limitations (caducidad) of Law 472 of 1998 has not been applied following the thesis of Dr. Santos. I would be grateful if, if he knows of any particular ruling, he could identify it and subsequently add it to the file."

48. Professor Santos responded (JM, p.13):

> "Clarifications: as I have stated, of course, when the judge finds the existence of a phenomenon of expiration of the statute of limitations (caducidad) fully accredited, he is obliged to give effect [to] it, and I agree with Dr. Tamayo that this has been determined by the case law of the high courts. What I am suggesting is that in the events in which it could be considered that it is not clear what type of action is being sought, as in this case, the judge could well resort to criteria of interpretation such as, among others, the prevalence of substantive law. In the Colombian legal system, I note, such confusion would not arise given the procedural forms that clearly identify a group action or an ordinary action. As I say, I have not cited any case law, because I do not know of any." (Emphasis added.)

Purpose of a Colombian group action

49. The purpose of Law 472 is to streamline the administration of justice, with a view to ensuring the prompt resolution of actions for compensation where damage has caused harm to 20 or more people (JM, p.12). Group actions are "*certainly intended to facilitate, as Dr Tamayo rightly states, access to the administration of justice and in no*

case to hinder or complicate it" (Santos 1, §99; and §117, citing C241-09, p.14). The experts draw attention to judgment C-242/12 of the Constitutional Court of Colombia in which the court observed at p.15:

> "In line with the above, this Court has held that group actions clearly contribute to the realisation of the right of access to the administration of justice and to the development of the principle of procedural economy, by resolving the claims of a plural number of persons who were affected by the same cause in a single proceeding. Indeed, one of the purposes of group actions is to simplify the administration of justice and to combine individual efforts to seek redress for damages caused by a harmful event. It is for this reason that the purpose of group actions is to allow a plural number of individuals who are affected by a common event, being in similar situations, to bring a single action for the purposes of reparation and compensation, thereby achieving greater procedural economy, which translates into terms of reducing the wear and tear on the judicial apparatus and contributes to the fight against congestion in the administration of justice and to reduce the costs of litigation, which makes the democratisation of justice possible."

Main characteristics of a Colombian group action

50. A group action under Law 472 must satisfy a number of criteria, and the experts agree that each criterion identified below is "*one of the main characteristics of a group action*":

    i) "*The damage must come from the same cause* [*misma causa*]." (JM, 13-14)

    ii) "*The group must consist of at least 20 persons"* (JM, p15) "*Group members do not have to be fully identified or individualised. A description of the affected group, rather than of its members, is sufficient.*" In accordance with article 52(4) of Law 472, the members of the group should be identified or, if it is not possible to provide the name of all members of the group, the claim should express the criteria to identify them and define the group. (JM, p.16).

    iii) One member of the group "*can sue on behalf of the group of affected persons*" (JM, p.15). "*The power conferred by a single person to a single attorney-in-fact is sufficient to represent the entire group in the action.*" The person acting as claimant represents the other persons concerned, and the group must be represented by a lawyer. (JM, p.16-17)

    iv) "*For this type of procedure, an individual claim is not required for each claimant with the filing of the application.*" (But it is necessary to give a "*brief description of the damages of the members of the group*".) (JM, p.17)

    v) When the claim is filed, "*a narrative of the facts that indicate in a specific manner each damage suffered by each claimant*" is not required. (But when judgment is to be executed, the individual facts giving rise to damages must be given, and the individual damages must be quantified.) (JM, p.18)

vi) "*Other members of the group may join the process as claimants after it has started.*" (JM. P.18)

vii) "*The claimants represent other affected persons, unless the latter expressly opt out of the group action.*" (JM, p.19)

viii) "*Court rulings are binding on members of the group both for those who took part in the action and those who did not, and who did not expressly opt out of the process.*" (JM p.20)

ix) "*Claimants must have suffered individual damages and are required to provide details of those damages, but such a demonstration can be made subsequent to the claim and even subsequent to the judgment fixing the defendant's civil liability.*" (JM,p.21) There are mandatory time limits within which a person who did not take part in proceedings may do so after the judgment is given.

(I expand on their views in relation to some of these criteria below.)

Misma causa/common (or same) cause

51. Although the experts agree that one of the essential criteria that must be met before a claim can be admitted as a group action is that the claimants' individual claims for damages arise from a "*common cause*", and they agree that the Constitutional Court judgment C-569 of 2004 broadened or relaxed this criterion, there were some differences in their views regarding this criterion. In particular, they expressed differing views as to the breadth of the criterion, whether it is wide enough to encompass "*general pollution claimants*" and "*oil spill claimants*" within the same group, and whether the concept of common cause has the same meaning in the context of article 88 of the GPC as in article 46 of the Law 472.

52. In C-569 of 2004, the Constitutional Court observed:

> "82 … the expression 'uniform conditions' in the section on 'uniform conditions with respect to the same cause that caused individual damages for said persons' has another meaning, and that is that it establishes an obvious requirement: the need for the damages[to] have been caused in a common way, which justifies, together with the social relevance of the affected group, that these individual damages be processed and resolved collectively.
>
> 83 However, the Court specifies that the notion of 'uniform conditions with respect to the same cause', typical of the legal regime of group actions, must be interpreted in accordance with the Constitution, as a structural element of responsibility. The basic consideration at this point is not novel: the notion of causality or causal link must be interpreted in accordance with the principle of effectiveness of the rights; consideration that is linked to the need for the judge of the group action to examine the nature of the elements of responsibility, not only under the prism of its naturalistic reality, but also of its implications in the

post-industrial society and the solidarist conception of the Constitution ([Constitution] art 1). This implies that, in accordance with the modern doctrine of non-contractual liability, the element of the causal relationship should not be approached as a purely natural phenomenon but rather an essentially legal one, and likewise, that the particularities of the interests object of protection (group interests with a divisible object) and the harmful events (generally diverse and complex) require a special interpretation of this element of responsibility, according to the well-known legal requirement of the existence of 'uniform conditions'.

For the Court, the satisfaction of the uniform conditions with respect to the causal relationship between the harmful event or events cannot be interpreted solely from the factual point of view. An assessment of the phenomenon of liability for damage to group interests guided by this criterion would make it impossible to build a relationship of identity between the various harmful events that have the capacity to generate common damage to the interest of the group. The case of the infringement of consumer rights is illustrative: a businessman floods the market with a defective product (main harmful event) that will only cause damage when said product is actually purchased by consumers (secondary harmful event: multiple purchases deferred in time) and that it will have the capacity to generate various damages in different situations (consequences of the particular use of the defective product). Among the various damages that can be caused by the harmful act of defective manufacturing (in addition to that of acquisition and subsequent use), there may be various causal links, which, despite sharing a common element, could be considered as different facts, and some might conclude that the conditions are not uniform in relation to the cause that gave rise to the damage. Therefore, a requirement of strict uniformity from the factual point of view, which would confuse the idea of a common legal cause with the existence of a single fact that causes the damage, would make the protection of the group interest fail by way of compensation for the damages. individual damages suffered by its members, since such uniformity is exceptional, from a purely factual perspective.

Based on the foregoing, the Court considers that the assessment of the causal relationship must be defined in legal terms and taking into account the nature of the protected interests and the solidarist conception of the Constitution. In the example presented, a similar valuation would be constituted by the evidence of the omission in the duties in the production process, the affectation of the principle of trust of the consumers, the realization of different damages and the foundation of the duty to repair the damages from the verification of a relationship of

> imputation of the latter to the subject who omitted the duty. Thus, it would be indifferent, for purposes of establishing uniformity in the causal relationship, for example, to determine the measure of the principle of trust of each of the consumers or to specify the timeliness of the sale, and even to determine the measure of the damages suffered by each of the consumers, if it was only the impossibility of using the product, or if said defect generated another type of damage. And it would be contrary to the constitutional purpose to exclude group action in these cases, arguing that there are no common conditions regarding the same cause that caused individual damages for said persons, since there is a multiplicity of sales of the defective product. The uniform conditions are predicated, despite the multiplicity of individual sales, by the uniform situation of the buyers regarding the manufacture and distribution of the defective product that caused them the specific damage." (Emphasis added.)

53. In his first report, Professor Santos addressed the "*restricted*" and "*ample*" interpretations that had been given to the term "common cause" by the Colombian courts and he expressed the view, in relation to the ruling cited about, that:

> "58. This ruling could be interpreted as a relaxation of the "same cause" requirement, which other rulings have qualified as "identical" and "one and the same harmful event" …
>
> 59 In this sense, I consider that the 'same cause' requirement is being relaxed to some extent, in order to protect groups that may suffer different damages caused by one or several harmful events."

54. Professor Santos described the example given by the Constitutional Court, involving a "*single initial event*" (e.g. placing a defective product on the market) that may cause different types of damage, as illustrative of what is encompassed within the concept. In his view, if a single defective product is placed on the market (such as a defective bicycle which causes some people injuries and others economic loss as they cannot use the bicycle for their jobs), those harmed would have a common cause, whereas "*if we were talking about two different defective products, it would be very difficult to identify a common cause*". It is a matter to be determined on a case-by-case basis, by reference to particular facts. (Santos 1, §59)

55. In his supplemental report, Professor Santos was asked to consider whether this action would be considered to be a group action according to Law 472 or an ordinary action (although the claimants submit evidence as to how foreign law should be applied is inadmissible). Professor Santos expressed the view that the claim form (and Mr Meeran's first affidavit) identified "*two distinct causes of damage*" (Santos 2, §14), namely, claims arising from the oil spill of 11 June 2015 and general pollution claims arising from overflows, spills and the discharge of toxic waste from the defendant's operations, starting shortly after 2008-2009 (Santos 2, §17). He expressed the view that "*at the start of the process, the claims of the current claimants in this case did not meet the "common cause" requirement of Law 472*".

56. In relation to article 88 of the GPC, although it is common ground that only one of the criteria (a) to (d) needs to be met to enable joinder of ordinary claims, Professor Santos' view – as he confirmed orally – is that in this case all four criteria are met, including "*(a) Where they arise out of the same cause ['misma causa']*". In his supplementary report, Professor Santos explained (Santos 2, §31(I):

> "It is observed that the claims of the different claimants against the defendant arise from the same *petendi* cause, understood as the reasons and the series or set of specific facts that support the requests the claimant makes before the judge … That is, in this case, oil exploration and drilling activities … and, in some cases, by crude oil spills. …
>
> This concept of *causa petendi* in Article 88 is different from the concept of 'same cause' referred to in Article 46 of Law 472 …, which has been understood as the 'harmful event of social importance, from whose occurrence all of them [the victims] must be compensated' (Judgment C-241 of 1 April 2009, page 14); that is, the concrete, factual event giving rise to the damage. By contrast, in the opinion of the Constitutional Court, the *causa petendi*, 'contains, on the one hand, a factual component made up of a series of concrete facts and, on the other, a legal component, made up not only of the legal norms to which the facts presented must be adjusted, but also of the specific argumentation process that sustains the aforementioned adjustment. In short, it is possible to affirm that the *causa petendi* is that group of legally qualified facts from which it is hoped a specific legal consequence will be drawn' (Sentence T-162 of 30 April 1998, of the Constitutional Court, page 16). That is, the expression 'same cause' in Law 472 alludes to a purely factual question." (Emphasis added.)

57. In his oral evidence, Professor Santos acknowledged that the words "*misma causa*" in article 46 of Law 472 and article 88 of the GPC are the same, but said "*the concept for me is different*". The Constitutional Court had not said in relation to article 46 of Law 472 that there could be "*two unique causes*"; it was "*talking about a single cause*". Whereas article 88 of the GPC is "*a much more procedural matter*" and "*the interpretation is different*". He acknowledged that Professor Tamayo's view that the concepts of common cause in article 46 of Law 472 and article 88 of the GPC are essentially the same was a "*very respectable one*", but he took a different view.

58. Professor Santos observed in the Joint Memo that the Constitutional Court determined that the concept of common cause in Law 472:

> "consists of the fact that the event giving rise to the damage is identical without failing to consider that the Constitutional Court has also referred to this requirement in a broad sense because what is important is that the victims are effectively compensated for the damage caused, without a requirement of strict uniformity, from a factual point of view, which would confuse

> the idea of common legal cause, with the existence of a single event that causes the damage" (JM, p.14; emphasis added).

59. Professor Tamayo addressed the concept of a common cause in Law 472 at §§34-43 of his second report. Professor Tamayo, first, said that the "*broad interpretation of the term same cause*" referred to in Santos 1, §§57-59, was generally accepted, and Ruling C-569 of 2004 had effectively put an end to the debate about the scope of the expression, "*at least in the fundamental points*" (Tamayo 2, §§35-36). He went on to say that, in any event, whether a "*broad or restricted*" interpretation of the term was adopted made no difference on the facts of the case because "*the cause of all the damages claimed is exactly the same: the terrorist act of 11 June 2015, which caused the contamination of water sources…*" (Tamayo 2, §§37-38). Professor Tamayo did not, at that point, address the fact that when the claims were filed there had also been general pollution claims. He continued,

> "There would be no identical act if, for example, the claims were based on oil spills derived from different terrorist acts in different rivers or from any other different cause" (Tamayo 2, §39). (Emphasis added.)

60. Professor Tamayo observed in the Joint Memo:

> "I originally interpreted the notion of the same cause as synonymous with *causa petendi* and, therefore, only claims of 20 or more persons who are victims of the same act, could be heard in a group action. I also admitted that it was feasible that, within the same group action, two claims from different groups of victims could be joined together, alleging a different but similar fact, [who] could bring the two claims in the same group action, but with clarity as to which were the victims of each group, what the facts of each claim were, and the applicable norms. In other words: two *causes petendis* within the same action. This is allowed in the GPC. However, although in Colombia, in principle, the judge is only subject to the rule of written norms, by way of exception the Constitutional Court established that certain rulings of that body were binding precedents to be respected by judges and lawyers, unless they had strong arguments to contradict them. Therefore, aware of the principle that "case law kills doctrine", I accept with the greatest respect for the Court, all that Dr. Santos has explained to us and quoted from case law, where he accepts a broad meaning of the criterion of the same cause." (Emphasis added.)

61. This statement has been relied on by the claimants as suggesting that Professor Tamayo changed his mind about the breadth of the concept of common cause once he realised that the initial claim encompassed general pollution claims as well as oil spill claims. In my view, this contention is ill-founded. On analysis, Professor Tamayo's reference to his original interpretation is a reference to the view he expressed in the book he published on *Popular actions and group actions in civil liability* (2001). It is not a reference to his earlier reports.

62. First, this is evident from the fact that in his second report Professor Tamayo made clear that although there had once been a debate about the scope of "*common cause*" in Law 472, that had been effectively laid to rest by Constitutional Court's judgment in C-569 of 2004, in which the concept was given a broad interpretation. What he wrote in the Joint Memo plainly did not reflect a change of view during the course of proceedings. Secondly, this is evident from the fact that the original interpretation to which he refers in the Joint Memo appears in the book but not in his earlier reports. In the book he stated at pp.129-136:

> "WHAT IS MEANT BY A 'SAME CAUSE', ESPECIALLY IF THERE ARE SEVERAL DEFENDANTS?
>
> Greater confusion and inaccuracy are impossible! The concept of 'the same cause that originated the damages...' is as vague and controversial as it gets. In our opinion, 'the same cause' does not mean that all the damages are necessarily derived from the same legal act or fact. Rather, the concept refers to the cause in the sense of a causal link. In this line of thought, the Constitutional Court ruling of April 14, 1999, set out that:
>
> > 'The common element is the cause of the damage and the interest whose injury must be repaired, which is what justifies joint legal action by those affected.'
>
> Thus, there will be a 'same cause' when the damages physically have the same origin or a similar one. But in this case, different hypotheses must be considered.
>
> INDEPENDENT, BUT SIMILAR EVENTS, WITH ONE OR VARIOUS RESPONSIBLE PARTIES
>
> But it can also happen that there are several independent events, with the same or different perpetrators, but with circumstances of fact and law so similar that the mechanism of group action is justified and possible. Of course, it will be necessary for there to be a minimum of 20 claimants, even if each party responsible affects less than 20 victims. In such circumstances, we understand by 'the same cause' the fact that the legal and factual phenomenon is similar, even if they are not the same, or rather, they are not identical.
>
> Thus, for example, it may happen that the same type of defective medication is manufactured independently by several pharmaceutical laboratories. If said drug causes massive damage to 20 or more people, all of them may sue their respective laboratories through a group action. Of course, each defendant is only liable for the damages that their drug has caused. There is no several liability among those responsible. What simply happens is that the victims can come together in the same process, against all those responsible.

> And that similarity arises from the same type of contract, even if they are separate agreements; from the same type of damage and the same type of conduct, even if they are different defendants. What matters is that the judge does not have to analyze the conduct of the defendant or defendants one by one in order to know whether or not the claim is admissible.
>
> On the other hand, if in our defective drug example, some members of the group took an antibiotic that caused gastric damage and others took a painkiller that caused body paralysis, then there will be no common cause, regardless of whether it is the same manufacturer or different manufacturers. The same thing would happen if the buyers of one type of car complain about the poor quality of the tires of the '97 model and the others complain about the poor quality of the brake system of that same or a different model.
>
> …
>
> WILL A SINGLE CLASS ACTION BE POSSIBLE WITH TWO GROUPS OF VICTIMS FOR TWO TYPES OF COMMON CAUSE?
>
> The example is utopian, but not impossible: Suppose a laboratory manufactures two different drugs that are defective, but for different reasons, more than 20 affected victims appear with each type of drug. Will all the victims be able to initiate a single group action to collect the respective compensation? In our opinion, the answer is affirmative, as long as the victims of each drug are at least the 20 required by article 46. In that case, when setting the conditions to form the group, the judge must be absolutely clear about the conditions of uniformity of each group." (Emphasis added.)

63. Thirdly, in stating in his second report that there would be no "*identical act*" if the spills derived from different terrorist acts in different rivers or from any other different cause, Professor Tamayo did not assert that without an "*identical act*" there would be no common cause. Such an assertion would have been inconsistent with the view he had expressed in his book, and *a fortiori* with his acceptance in his second report that the Constitutional Court had reached a broader interpretation of the concept than had previously been recognised.

Group of 20 or more

64. In his second report, Professor Santos expressed the view that "*the requirement to identify a group of at least 20 persons would probably be interpreted flexibly*". His view was that although the claim form only named 15 people, "*in practice it was possible to identify 'at least 20 persons' affected*", and so he "*conclude[d] that this case meets the 'at least 20 persons' requirement*" (Santos 2, §§21-22). There was no dispute between the experts in relation to the existence, scope or application of this criterion, which

Professor Tamayo also considered was met. He observed that the definition of the group can be, for example, "*the inhabitants of the river banks of X River*" (Tamayo 2, §46).

Global compensation and opt-out nature of a Colombian group action

65. Professor Tamayo described the important difference between a group action and an ordinary claim in which several claimants are joined as being that *"in a group action, global compensation is requested and awarded to be distributed among all the victims who manage to prove that they have suffered damages for the same cause*". Whereas in an ordinary action a request for global compensation cannot be made. (JM, §49). This was not in dispute. But it was common ground between the parties that Professor Tamayo's understanding that in this claim the claimants were requesting global compensation (JM, §49) was a misunderstanding of the facts.

66. The experts agree regarding the opt-out nature of a Colombian group action. In his first report, Professor Santos drew attention to the terms of articles 56 and 66 of Law 472 (paragraph 24 above) and stated (Santos 1, §75):

> "… the ruling is applicable to all members of the affected group, even those who 'were not part of the process', unless they have excluded themselves from the group (see article 56 above). This is explained because those who 'were not part of the process' were actually represented by the other claimants."

67. To the same effect, Professor Tamayo observed (Tamayo 1, §77):

> "However, and this is quite important, according to the final paragraph of Article 56, persons who did not present a claim from the beginning, and who were not expressly excluded from the group, will be affected by the favourable or unfavourable judgment, and may not initiate any subsequent individual action."

Purpose and main characteristics of a Colombian ordinary action

68. The purpose of an ordinary action is to compensate damage caused to the individual claimant(s) (JM, p.22). With respect to an ordinary action, the experts agree that:

    i) "*a global claim cannot be brought as a 'class', but a number of individual claims can be joined in a single lawsuit*" (JM, p.23). Two or more persons with different claims can join together and claim their respective compensation in the same proceedings, but they cannot claim "*lump-sum compensation similar to that regulated in Law 472*".

    ii) there exist "*formal and [temporal] limits to jointly claim damages from different persons in an ordinary process*" and it is impossible to add claimants to the action outside such limits (JM, p.24);

    iii) there is an "*obligation for each claimant to present an individual power of attorney to an attorney-in-fact to become part of the process*", although there is

nothing to prevent several claimants from instructing the same lawyer (JM, p.25);

iv) there is an "*obligation to individualise each and every one of the claimants, list their identification number, address and place of notification at the initiation of the process*" (JM, p.25);

v) there is "*not a strict requirement*" that "*the damages arise from the same cause*", "*as there are more options for a 'subjective joinder of claims'*" (JM, p,26);

vi) there is an "*obligation for each claimant to provide details of their individual losses in the facts of the claim at the commencement of the proceedings*" (JM, p.27);

vii) there is an "*obligation to make individual claims, laid down with clarity and precision, for each damage that each claimant claims at the outset of the proceedings*"; this "*must be done in the application that initiates the process, in accordance with Art.82.4 of the GPC*" (JM, p.29);

viii) there is an "*obligation of each claimant to make an oath estimating each monetary damage sought, under penalty of sanctions for breach (lack thereof) or improper estimate*" (JM, p.29);

ix) there is an "*obligation to submit the evidence relating to each statement of claim at the beginning of the claim*" (JM, p.30);

x) there is an "*obligation of the Judge to rule specifically, only against the damages presented in the claim and or the individuals who took part in the process*" (JM, p.30);

xi) it is not possible for third parties "*to benefit from the judgment or to prove damage after the ruling*" (JM, p.32);

xii) it is not possible for claims to be brought by "*named persons on behalf of other unnamed persons who have suffered damage arising from the same cause of action*" (JM, p.32);

69. The experts agree that "*the joinder of claims under Article 88 GPC must meet the requirements of the ordinary action*" (JM, p.36).

70. Professor Tamayo's view is that the selection and trial of lead cases would only be consistent with a group action "*since an ordinary action would require the identification of the facts and claims relating to each of the plaintiffs, from the beginning of the action*" (Tamayo 1, §§121(c), 151). Professor Santos does not agree with the characterisation of this claim, but it was common ground that the process of selecting lead or test cases was one that could only occur in a group action, not an ordinary action within which multiple claimants were joined.

Prescripción and Caducidad

71. Professor Santos and Professor Tamayo broadly agree that it is quite difficult in practice to differentiate between *prescripción* (specifically, for the purposes of this case,

prescripción extintiva) and *caducidad*. From a practical point of view, whether the time limit is in the form of *caducidad* or *prescripción*, if the court finds either concept applies, the consequence is the same: it is impossible to enforce the obligation or right and the claim is brought to an end. However, the experts also broadly agree that caselaw of the Constitutional Court indicates there are some differences between these two concepts. Most importantly, first, although both are public order phenomena which seek to protect a general interest in legal certainty, *prescripción* prescribes the point of time when the right or obligation is extinguished, whereas *caducidad* prescribes the point of time when the right or obligation is rendered unenforceable. Secondly, *prescripción* must be invoked by the defendant, otherwise it will be deemed to have been waived, whereas if *caducidad* applies, if it has not been pleaded by the defendant, it must be declared by the court of its own motion.

G. PRELIMINARY ISSUE 1: (a) THE ROME II ISSUE

72. The parties agree that pursuant to articles 4 and 7 of Rome II the law applicable to the substantive claims is that of Colombia; and that this claim proceeds in the courts of England and Wales pursuant to the rules of procedure and evidence of this jurisdiction in accordance with article 1(3) of Rome II. The dispute relates to the scope and interrelationship of articles 1(3) and 15(h) of Rome II.

73. It is common ground that Rome II should be construed purposively, having regard to its objectives and legislative history; and it should be construed autonomously, giving provisions concerning its scope, in particular, a single, uniform meaning across the European Union. Characterisation of a particular matter as procedural or otherwise for the purposes of Rome II is conducted without regard to the characterisation of the same rule by English law as the *lex fori* or Colombian law as the *lex causae*.

74. The claimants draw attention to the genesis of Rome II in a Commission Proposal dated 22 July 2022. The Commission Proposal did not include article 1(3). The Commission explained:

> "The proposed Regulation does not take over the exclusion in Article 1(2)(h) of the Rome Convention, which concerns rules of evidence and procedure. It is clear from Article 11 [which became article 15 of Rome II] that, subject to the exceptions mentioned, these rules are matters for the lex fori. They would be out of place in a list of non-contractual obligations excluded from the scope of this Regulation."

75. In other words, the Commission did not consider it necessary for the exclusion of rules of evidence and procedure to be expressly stated. The European Parliament took a different view and in its First Report dated 27 June 2005 introduced the precursor to the text now contained in article 1(3), with the following explanation:

> "This amendment takes account of the universal principle of 'lex fori' within private international law that the law applicable to procedural questions, including questions of evidence, is not the law governing the substantive legal relationship ('lex causae'), but, rather, the procedural law of the forum."

76. Mr Layton KC, who addressed Preliminary Issue 1 for the claimants, submits that the starting point should be article 1(3), not article 15(h). Article 1(3) defines the scope of Rome II; and it excludes evidence and procedure. If a rule of Colombian law is properly characterised as procedural, then it is not applicable in English proceedings under Rome II. He submits that some matters that may, *prima facie*, appear to fall within article 15 of Rome II, such as rules relating to the assessment of damage or the remedy claimed, may nonetheless be matters of evidence or procedure and therefore excluded from Rome II by article 1(3).

77. In support of these propositions Mr Layton relies on two decisions of the Court of Appeal. The first is *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263. The case concerned a claim for damages in respect of a road traffic accident in France. Liability was admitted and judgment was entered for the claimant with damages to be assessed. The issue was whether the question of what expert evidence the court should order was governed by English law or French law. The Court of Appeal held that Rome II did not govern the way in which evidence of fact or opinion was to be given; and in particular the question whether there should be a single joint expert or more than one expert was a matter of "*evidence and procedure*" within the meaning of article 1(3) of Rome II, rather than a matter of the "*assessment of damage*" within article 15(c).

78. Longmore LJ had "*no doubt*" that the claimant's argument should prevail, as it could not be the case that the law of the place where the damage occurs should govern the way in which evidence should be given ([12]). This was so even though it was "*inevitable that the same facts tried in different countries may result in different outcomes*" ([15], and see [11]). Jackson LJ (who agreed with Longmore LJ ([31]), noted that the claimant contended the phrase "*evidence and procedure*" in article 1(3) of Rome II should be given its "*normal meaning*", whereas the defendant contended article 1(3) "*should be construed narrowly*" ([40]). He held the claimant's contention was "*correct*" ([41]), and that the claimant's interpretation accorded with the "*natural meaning of article 1(3)*", whilst the defendant's interpretation involved imposing a "*strained and artificial construction on the provision*" ([42]). Christopher Clarke LJ (who agreed with both Longmore and Jackson LJJ ([47])) observed that:

> "Any question as to the extent to which, and the form and manner in which, expert evidence may be given, (ii) how many experts may give evidence, and (iii) whether such evidence shall be the subject of cross-examination is, almost self-evidently, an issue of evidence and procedure to which, by virtue of article 1(3), [Rome II] does not apply" ([48]).

79. The second judgment of the Court of Appeal on which Mr Layton relies is *Actavis UK Ltd & ors v Eli Lilly and Co* [2015] EWCA Civ 555, [2015] Bus LR 1068. The claimants brought an action seeking declarations of non-infringement (DNIs) of a patent owned by the defendant. The court heard argument on the issue whether the English court was required to apply the corresponding foreign laws governing the conditions for applying for DNIs in each of the foreign jurisdictions in respect of which they were sought, or to apply English law, as the law of the forum.

80. The court's analysis of the Rome II issue was strictly *obiter*, and so I am not bound to follow it. But it is entitled to great respect, particularly given that it followed full

argument and the court dealt with the issue fully in view of the potential importance of the issue ([100)]. The court held that the conditions for applying for a DNI are procedural, and so subject to the law of the forum. Floyd LJ (with whom Kitchin and Longmore LJJ agreed) observed:

> "130 Article 1(3) of Rome II is a rule about what is sometimes called the 'vertical scope' of the Regulation. Evidence and procedure are excluded from the scope of the Regulation. Although it does not automatically follow that these issues will be subject to the *lex fori*, the private international law principle that such matters are for the law of the forum is well recognised. It is enough to quote *Dicey*, para 7.002: 'The principle that procedure is governed by the *lex fori* is universally admitted.'
>
> 131 Article 15 of Rome II is not itself directly concerned with clarifying the distinction between substance on the one hand and evidence and procedure on the other. It simply contains a list of matters which are 'in particular' to fall under the designated law. Included in the list are matters, such as limitation periods, which were traditionally the subject of some debate as to whether they were substance or procedure. Article 15 does not answer that question, but merely declares that they will be subject to the law which governs non-contractual obligations under Rome II. I therefore do not regard article 15 as a safe guide to whether matters which do not fall within its scope are procedural or substantive.
>
> 132 The distinction between substance and procedure is a fundamental one. The principle underlying it is said to be that a litigant resorting to a domestic court cannot expect to occupy a different procedural position from that of a domestic litigant. Thus, that litigant cannot expect to take advantage of some procedural rule of his own country to enjoy greater advantage than other litigants here. Equally he should not be deprived of some procedural advantage enjoyed by domestic litigants merely because such an advantage is not available to him at home. Thus, at common law, every remedy was regarded as procedure: see, for example, *Don v Lippmann* (1837) 2Sh & MacL 682, 724—725.
>
> 133 Whether a rule is to be classified as one of substance or one of procedure or evidence under Rome II is a matter of EU law: the fact that a rule is classified as one or the other under domestic law is of no relevance. There is therefore a need for an autonomous EU criterion for allocating rules into one or the other category.
>
> 134 … This court held [in *Wall*] that the issue of which expert evidence the court should order was one of 'evidence and procedure' within article 1(3) and not an issue relating to 'the existence, the nature and the assessment of damage' within

> article 15(c) of Rome II. It was argued that the objective of the Regulation was to ensure uniformity of outcome, and that the English court should do its best to ensure that uniformity by adopting all the rules of the foreign court which might affect outcome. The court rejected that argument (see Longmore LJ, at paras 11—14 and Jackson LJ, at paras 40—43), holding that it was inevitable that the same facts tried in different countries might achieve different outcomes. The words 'evidence and procedure' were thus given what Jackson LJ called their 'natural meaning'.
>
> 135 In my judgment, subject to any impact on the question which Rome II may have had, the rules with which we are concerned are conditions of admissibility of actions, rather than rules concerned with the substance or content of parties rights. They are all concerned with whether the court should hear a dispute about substance. They are not concerned directly with the substance itself …
>
> 136 Such rules would traditionally, for private international law purposes, be classified as procedural and not substantive. In my judgment, therefore, they should continue to be so treated unless Rome II requires a different outcome.
>
> 137 … Whilst the passage from *Dicey* on which Mr Mitcheson relies suggests a very narrow interpretation of 'evidence and procedure', the authors nevertheless say at 7—072: 'It is clear that rules on the conduct of the parties prior to the instigation of proceedings, for example on providing notice before action, or on the need for a meeting between parties before starting proceedings, are procedural.'
>
> …
>
> 139 I do not accept that article 15 should be given a wider effect than its language suggests, treating the listed matters as no more than examples of a class of analogous matters regarded as procedural in private international law, but now to be brought within the designated law. Mr Raphael is right that the legislative history shows that the Regulation was intended to respect the private international law principle that the 'lex fori' is applicable to procedural questions.
>
> 140 Although article 15 applies the lex causae to a number of matters which at least the English common law would have treated as procedural, none of them, as it seems to me, is apt to encompass the rules for admissibility of a DNI. …" (Emphasis added.)

81. In their skeleton argument, in light of *Wall* and *Actavis*, the claimants invited the court to approach article 1(3) on the basis that the words "*evidence and procedure*" should

be given their ordinary meaning, and should not be construed narrowly. In his oral submissions, Mr Layton went further and submitted that the effect of these authorities is that article 1(3) is to be construed widely, while article 15 is to be construed narrowly. The defendant's converse contention that article 1(3) is to be given "*narrow effect*" and article 15 is to be given "*broad effect*" is, Mr Layton submits, directly contrary to *Wall* in which the submission that article 1(3) should be construed narrowly was expressly rejected by Jackson LJ (with whom Christopher Clarke LJ expressed agreement). Mr Layton also draws attention to the judgment of Arnold J at first instance in *Actavis* ([2015 Bus LR 154), at [222] and [224], in which he held that *Wall* is authority contrary to the proposition that article 1(3) should be narrowly construed. As I explain further below, Mr Layton contends that in the subsequent decisions of the High Court on which the defendant relies, the English caselaw has taken a wrong turn.

82. In any event, the claimants submit that any interpretation of article 1(3) which excludes distinctions between Colombian group actions and ordinary actions from the realm of "*procedure*" would ignore the natural meaning of the word and the place of that article within the structure of Rome II in defining the Regulation's scope. The claimants contend that a group action pursuant to Law 472 is a procedural device which must be invoked within two years if it is to be relied on. The defendant is seeking to take advantage of a Colombian procedural rule (article 47 of Law 472) to enjoy greater advantage than other litigants here (*Actavis*, [132]). Article 47 of Law 472 is a condition of admissibility of the action, rather than a rule concerned with the substance or content of the parties' rights (*Actavis*, [135]). As that time bar is a matter of procedure within article 1(3), it does not fall to be considered at all.

83. Mr Layton further contends that article 15(h) of Rome II does not apply to all time bars of whatever nature. Article 47 of Law 472 imposes a time limit which bars a particular procedure while leaving the underlying right available to be pursued by other procedural means. Such a time limit is akin to those found in CPR 7.5 (time limit for service of a claim form), 10.3 (time limit for filing an acknowledgment of service), and 11(4) and (5) (time limit for disputing the court's jurisdiction). It does not, he submits, fall within the meaning of "*limitation*" in article 15(h) of Rome II.

84. The claimants contend that the question whether these English proceedings are a Colombian group action or a Colombian ordinary action is surreal: in Mr Lord's colourful phrase, it is liking asking whether a cat is a Jack Russell or a Chihuahua. This binary question is based on the false premise that it must be one or the other, when it is neither: it is an English action. If article 47 of Law 472 is excluded from Rome II, then it follows the claim was issued in time. The ten year period prescribed by article 2536 of the Civil Code attaches, Mr Layton submits, to the *cause of action* rather than to any procedure. In accordance with article 2535 of the Civil Code, time began to run when the obligation became enforceable and all that is required for it to come into effect is the effluxion of time. There is no requirement, he submits, that the claimant pursues a particular form of procedure for the *prescripción* period to apply.

85. Mr Maclean KC, leading Counsel for the defendant, submits the focus should be on article 15(h) of Rome II. As Colombian law is the applicable law pursuant to Rome II, it follows that Colombian law also governs, among other matters, the "*rules of prescription and limitation*" (article 15(h)). There is (rightly) no suggestion that the action has no limitation period or that its limitation period is governed by the law of England and Wales. Mr Maclean's first, simple submission is that if article 47 of Law

472 is a limitation provision (as, he says, it plainly is), then it forms part of the applicable Colombian law in accordance with article 15(h); and that is the end of the Rome II issue. Article 2536 of the Civil Code is, of course, also a rule of "*prescription or limitation*", as the claimants acknowledge, so the question then is which of the only two possible Colombian limitation periods applies? (That is the second issue within Preliminary Issue 1.) It follows that it is unnecessary to consider article 1(3) and the issue does not turn on how broadly or narrowly that provision should be construed.

86. Nonetheless, Mr Maclean maintains article 15 should be construed broadly and article 1(3) should be given narrow effect. In support of this proposition he relies on four decisions of the High Court, namely, *Vilca v Xstrata Ltd* [2018] EWHC 27 (QB), *KMG International NV v Chen* [2019] EWHC 2389 (Comm), [2020] 2 All ER (Comm) 68, *Pandya v Intersalonika General Insurance Co SA* [2020] EWHC 273 (QB), [2020] ILPr 44 and *Johnson v Berentzen* [2021] EWHC 1042 (QB). In addition, he relies on three academic works which I will address first, as two of them are cited in the authorities, before I turn to consider those High Court authorities, and the parties' submissions in relation to them.

87. First, the defendant relies on *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, 2015) ('*Dicey, Morris & Collins*'), §34-036. Since the hearing, the 16th edition (2022) has been published. In the 16th edition, the first part of the passage relied on by the defendant (which is in essentially the same terms as the earlier edition) states (omitting the footnotes):

> "[Article 15] includes issues which, at common law, are characterised as matters of procedure, to be governed by the law of the forum. Foremost among these are 'the nature and assessment of damage or the remedy claimed' and 'rules of prescription and limitation'. Whatever may be the position in cases to which the Regulation does not apply, these issues cannot be considered to fall within the scope of the exclusion of matters of 'evidence and procedure' in Art. 1(3), and they will henceforth be governed not be the *lex fori* but by the law to which the Regulation refers."

88. The second part of the passage from §34-036 relied on by the defendant has been amended, so I will refer to both versions. In the 15th edition, §34-036 continued:

> "In order to secure the objectives of the Regulation in enhancing the predictability of litigation and the reasonable foreseeability of court decisions, it is suggested that the Art.1(3) exclusion should be interpreted narrowly as covering only matters, such as the constitution and powers of courts and the mode of trial, that are integral and indispensable feature of the forum's legal framework for resolving disputes, such that they cannot satisfactorily be replaced by corresponding rules of the *lex causae*."

In the latest edition, that passage now states:

> "Moreover, although it has been suggested that the concepts of 'evidence' and 'procedure' should be given their 'natural meaning', the legislative context remains important: the objectives of the Regulation in enhancing the predictability of litigation and the reasonable foreseeability of court decisions, support a narrow (although not strained) interpretation of Art.1(3) as covering matters, such as the constitution and powers of courts, the methods of proving disputed facts and the mode of trial, that are an integral and indispensable feature of the forum's legal framework for resolving disputes, such that they cannot satisfactorily be replaced by corresponding rules of the *lex causae*." (Emphasis added.)

89. Secondly, I was referred to "*The Rome II Regulation: The law applicable to non-contractual obligations*", Professor Andrew Dickinson (OUP, 2008) ('*Dickinson*'). In particular, *Dickinson* states:

> "14.48 Art 15(h) reflects, in large part, the position reached under English law following the adoption of the Foreign Limitation Periods Act 1984. Prior to that, English private international law differentiated in its treatment of two types of rule concerning the consequences of delay in bringing a claim to enforce a non-contractual obligation. First, those extinguishing the right/obligation, which were treated as substantive and within the scope of the law applicable to the right/obligation in question. Secondly, those that only extinguished the remedy, which were treated as procedural in nature and a matter for the law of the forum. That distinction, and the application by the English courts of English limitation rules (most of which were of the second kind) to claims governed by foreign law, was heavily criticized, and led to the adoption of the 1984 Act. For claims governed by foreign law, s 1 of that Act substituted the limitation rules of the relevant foreign law for the limitation rules of English law. That is also the result achieved by the second part of Art 15(h).
>
> …
>
> 14.57 … First, it should be noted that Art 1(3) is solely a restriction on the (vertical) scope of the Regulation. It does not designate the lex fori as applicable. Instead, for matters to which Art 1(3) applies, Member State courts may continue to apply their pre-existing rules of private international law, which may or may not lead to application of the forum's own rules. Secondly, as with all matters that define the scope of the Regulation, the concepts of 'evidence' and 'procedure' must be understood as autonomous concepts, to be given a uniform meaning independent of the forum's notions as to the reach of the law of evidence and the law of procedure. Thirdly, as noted above, the Commission suggested that restrictions on the scope of the Regulation should be interpreted strictly. As a general

> proposition, that seems debatable. In relation to Art 1(3), however, a strict interpretation of the concepts of 'evidence' and 'procedure' is justified, both by the Commission's view that Art 15 of the Regulation 'confers a very wide function on the law designated' and by the stated objectives of the Regulation, namely that 'in order to improve the predictability of the outcome of litigation, certainty as to the law applicable' there is a need 'for the conflict-of-law rules in the Member State to designate the same national law irrespective of the country of the court in which an action is brought'. A broad interpretation of either of the concepts used in Art 1(3), giving greater freedom to Member State courts to apply a law other than that applicable to non-contractual obligations under the Regulation, would put the achievement of these objectives in jeopardy. … Finally, the scope of the exclusion must itself be defined partly by reference to the list of matters set out in Art 15. That Article makes clear that certain matters that might otherwise be considered to be matters of 'evidence' or 'procedure', fall squarely within the scope of law applicable under the Rome II Regulation. These include, in particular, (1) the assessment of damage (Art 15(c)148), (2) the available remedial measures (albeit 'within the limits of powers conferred on the court by its procedural law') (Art 15(d)149), and (3) rules of prescription and limitation (Art 15(h))." (Emphasis added.)

At 14.60-14.61 the author suggested that a "*restrictive approach to the concept of 'procedure' in Art 1(3) seems justified*".

90. Thirdly, in Private International Law in English Courts, Adrian Briggs (OUP, 2015) ('*Briggs*'), under the sub-heading "*Other issues: Article 15(e)-(h)*", the author states at §8.199:

> "The applicable law … will also determine whether a claim or claimant is in or out of time to bring the claim. It does not matter whether, according to the analysis taken under the applicable law, the time rules are seen as procedural or substantive in nature. The Regulation calls for the application of the calendar and counting of time according to the applicable law: to determine the starting date, the length of the period, any stopping of the clock, the finishing date, and any power or discretion to lift the time bar or to dispense, or set it aside, which is provided for by the applicable law. …"

91. *Vilca* concerned a claim brought by Peruvian citizens, 20 of whom alleged they were injured by members of the Peruvian National Police during a protest at a mine in Peru, and two of whom brought claims arising out of the deaths of relatives during the same protest. It was common ground that, pursuant to Rome II, the applicable law was Peruvian law and the relevant limitation period under Peruvian law was two years from the date on which each claimant alleged that he or she was injured during the protest ([3], [51]). In issue was when the limitation period was interrupted ([5](vii) and (viii), [56]). Stuart-Smith J held that under Peruvian law a valid *demanda*, containing

sufficient information to enable a defendant to know the case and the risk they had to meet under Peruvian law, had to be served to interrupt the limitation period ([99]). The claim form and particulars of claim did not provide sufficient information to be comparable to a *demanda* ([106]). Accordingly, Stuart-Smith J held that the claims were time barred ([108], [127]).

92. Mr Layton submits that *Vilca* provides no assistance because it was common ground that the Peruvian limitation period applied and there was no discussion of whether a requirement to serve a valid *demanda* under Peruvian law was a procedural requirement within the scope of article 1(3). Mr Maclean acknowledges the extent to which matters were undisputed in *Vilca.* Nevertheless, he submits that it neatly illustrates that article 15(h) encompasses rules which are necessary to understand whether the limitation period has been interrupted, and it provides an example of the court asking itself whether steps taken in the proceedings in England (the issue and service of a claim and particulars of claim) sufficed to comply with the requirement of a foreign law (for the service of a *demanda*).

93. In *KMG,* Christopher Hancock KC, sitting as a judge of the High Court, held that the rule against reflective loss fell within article 15 and was excluded from Rome II. He concluded at [36] that "*Article 1(3) falls to be construed narrowly*", and "*the provisions of Article 15 should be construed widely*". In support of these conclusions he relied on "*the authoritative statements of the textbook writers*", namely, *Dickinson* at §§14.04 and 14.60-14.61 and *Dicey, Morris & Collins* (15th ed.) at §§34-036 and 34-052; the Commission's 2003 Proposal; and the aim of Rome II to promote legal certainty in cross border disputes. In addition, he emphasised "*the breadth of the list of matters falling within art 15, which cover the entire gamut of matters which would generally arise in the course of non-contractual claims, including a number of matters which would, under the law as it stood before the Regulation, have been considered to be outside the scope of the applicable law (such as limitation, assessment and remedies)*; and suggested "*this broad list is probably not exhaustive, as the words 'in particular' in art 15 suggest*" (citing *Dickinson* at §14.04 and *Dicey, Morris & Collins* at 34-052). In reaching these conclusions, the deputy judge considered the judgments of the Court of Appeal in both *Wall* and *Actavis*: see [23(5)], quoting *Actavis,* [130]-[145], including [134] in which Floyd LJ addressed *Wall* (see paragraph 80 above).

94. In *Pandya,* the claim arose out of a road traffic accident in Greece. The claimant, a UK national, was struck by a motorcycle as she was crossing the road, and she suffered a severe traumatic brain injury. It was common ground that the law applicable to the issue of liability was Greek law by virtue of article 4(1) of Rome II, and that English law governed the rules of procedure and evidence, in accordance with article 1(3) of Rome II. The dispute in *Pandya*, as in this case, related to the scope of articles 1(3) and 15(h) of Rome II ([9]). Specifically, the issue was whether the five year limitation period under Greek law was interrupted by the *issue* of the claim, or whether the claimant needed to issue *and serve* the claim in order to interrupt the limitation period ([13]). As a matter of Greek law, service of the claim form was an essential step which was necessary to interrupt the limitation period.

95. Tipples J rejected the claimant's contention that service of the claim could be carved out as a matter falling outside article 15(h), and treated as a mere matter of procedure to be dealt with under English Civil Procedure Rules. In addressing the law, she observed:

"26. Secondly, art.15(h) is not exhaustive and this is made clear by the words "in particular" in the opening phrase of that article before the various categories (a)–(h) are listed out. The provisions of art.15 are therefore to be construed widely, and that is emphasised by the breadth of matters listed in art.15. This point was made recently by Mr Christopher Hancock QC, sitting as a Deputy High Court Judge, in *KMG International NV v Chen* [2019] EWHC 2389 (Comm) at 36(3)–(5). Further, Ms Wyles says that art.15 should be construed widely to promote legal certainty and the more that is covered by the applicable law, in this case Greek law, the more certain is the outcome.

27. Thirdly, art.1(3) of the Rome II Regulation … is an exception to the general rule set out in art.4 which, in this case, is that Greek law shall apply to the law of tort. This means that, as art.1(3) is an exception, it should be construed narrowly. There is no dispute between the parties about this.

28. Fourthly, art.15(h) includes various matters which historically or traditionally have been regarded as 'procedural'. This point is addressed by the editors of Dicey, Morris & Collins, *The Conflict of Laws*, 15th edn (London: Sweet and Maxwell, 2012), para.34-036. …

29. This passage from Dicey, Morris & Collins, *The Conflict of Laws* was recently quoted and applied by the deputy judge in the *KMG International* case at paras 30(4) and 36(6). The Fifth Cumulative Supplement to the 15th Edition of Dicey & Morris refers, in relation to para.34-036, to *Wall v Mutuelle De Poitiers Assurances* [2014] 1 WLR 4263 in which the Court of Appeal held that the Rome II Regulation did not require the law of the place where the damage occurs to also govern the way in which evidence of fact or opinion is to be given to the court which has to determine the case: see Longmore LJ at [12] (p.4269C). Rather, matters of evidence or fact fall within the narrow exception provided for in art.1(3). …

30. Fifthly, one of the principal aims of the Rome II Regulation is, as is set out in the sixth recital:

> 'To improve the predictability of the outcome of litigation, certainty as to the law applicable … for the conflict of law rules in the Member States to designate the same national law, irrespective of the country of the court in which the action is brought.'

31. Similar points are made in the 14th and 16th recitals to the Rome II Regulation. In this context Ms Wyles reminded me that the Rome II Regulation must of course be construed purposively, and with reference to those recitals." (Emphasis added.)

96. The issue in *Johnson v Berentzen* [2021] EWHC 1042 (QB) was whether the claimant's claim (which was issued in England and Wales, but concerned a personal injury suffered in a road traffic accident in Scotland) was time barred ([1]). There was no dispute that the applicable law was that of Scotland, or that the rules of procedure and evidence of England and Wales applied ([8]). It was also common ground that pursuant to article 15(h) of Rome II, Scottish law imposed a three year limitation period ([8]-[9]). The claim was issued but not served within the three year limitation period. Unlike the position in England and Wales, in Scotland it is necessary to effect service of the claim on the defender to interrupt the relevant limitation period ([15]). The claimant contended that the service of proceedings was a procedural step within the scope of the exception in article 1(3) of Rome II and therefore governed by the law of England and Wales ([11]). The issue was acknowledged to be materially identical to that considered in *Pandya*, but the claimant contended that case was wrongly decided ([15]).

97. Stacey J rejected the assertion that "*Pandya wrongly interpreted Art.15(h) in concluding that the provisions of Art.15 are to be construed widely consistent with the promotion of legal certainty and case law such as KMG*", holding that it was "*unsustainable and not supported by authority*" ([16]). She noted that permission to appeal from Tipples J's judgment in *Pandya* had been refused by Stuart-Smith LJ ([14]). Stacey J stated:

> "18. Furthermore, it was uncontroversial (and agreed between the parties in *Pandya*) that Art. 1(3) is an exception to the general rule set out in Art. 4 and, as an exception, is to be construed narrowly. In this case, as in *Pandya*, the claimant has not succeeded in arguing that the service of proceedings falls within that exception.
>
> 19. I can see no error in Tipples J's conclusion that *Dicey, Morris & Collins* correctly identified that Art. 15(h) includes matters which historically or traditionally had been regarded as procedural but which are no longer to be considered so and her approval of [the passage from §34-036 of the 15th edition quoted in paragraphs 87-88 above] …
>
> I agree and also agree that support for the proposition is contained in *Wall v Mutuelle de Poitiers Assurances* [2014] WLR 4263 per Longmore LJ.
>
> …
>
> 22. The claimant's late submitted additional case note suggesting that *Pandya* had not considered the authority of *Actavis UK Ltd and others v Eli Lilly & Company* [2016] RPC 2 which had led the court to fall into error, turned out to be incorrect on closer analysis. Although *Actavis* was not referred to directly in the judgment, *Pandya* considered *KMG International NV v Chen* [2019] EWHC 2389 (Comm) in great detail– see paragraphs 26 and 29 for example –and *KMG International NV* had considered and dealt with all the points made in *Actavis*. There was nothing

> in *Actavis* that had not been considered by Tipples J in her careful judgment in *Pandya*."

98. Mr Layton submits that I should follow *Wall* and *Actavis* rather than *KMG*, *Pandya* and *Johnson*. He contends that it is evident that §34-036 of *Dicey Morris & Collins* was cited to the Court of Appeal in *Wall* (Longmore LJ, [123]) and *Actavis* (Floyd LJ, [137]), but it was not followed by the Court of Appeal in either case. Mr Layton draws attention to the fact that *KMG* did not concern a limitation rule. He submits that it is hard to see how Mr Hancock KC could have reached any conclusion other than the one that he did. Nonetheless, to the extent that the deputy judge relied on his conclusion that article 1(3) falls to be construed narrowly, Mr Layton submits he erred in following the textbook authors rather than the binding authorities of *Wall* and *Actavis*. In *Pandya*, there was no dispute that the court was concerned with a limitation period within the meaning of article 15(h), and it was (wrongly, Mr Layton submits) a point of agreement between the parties that article 1(3) should be construed narrowly ([27]). Tipples J referred only to Longmore LJ's judgment in *Wall*, not to the judgments of Jackson and Christopher Clarke LJJ, and *Actavis* does not appear to have been drawn to her attention. In any event, Mr Layton submits that *Pandya* does not assist on the scope of article 15(h), and it is not authority for the proposition that any rule which has a bearing on limitation is itself a rule of limitation within article 15(h) of Rome II.

99. In relation to *Johnson,* Mr Layton submits that Stacey J was wrong to conclude that she was bound by *Pandya* because it is established that "*a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case (even if that proposition formed part of the ratio decidendi of the case)*": *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361, [2020] Ch 365, Leggatt LJ (giving the judgment of the court), [136], and see [134]. He contends that this case, too, provides no assistance as there was no dispute that the court was concerned with a limitation period within the meaning of article 15(h) of Rome II.

100. Mr Maclean submits that *KMG*, *Pandya* and *Johnson* were rightly decided, and there is no inconsistency with *Wall* or *Actavis*. In any event, although not technically bound by the High Court decisions, I should follow them "*unless there is a powerful reason for not doing so*" (*Willers v Joyce* [2016] UKSC 44, [2018] AC 843, Lord Neuberger PSC (with whom the eight other Justices agreed), [9]. He submits there is no such reason, particularly given that those authorities are all of a piece. It is not open to the claimants to contend that *Pandya* was wrongly decided because the judge did not refer to *Actavis*: that point was directly addressed and rejected by Stacey J in *Johnson*. The High Court authorities are also consistent with *Dicey, Morris & Collins*, *Dickinson* and *Briggs*. The learned authors of *Dicey, Morris & Collins* evidently do not consider that their analysis in §34-036 has been declared wrong or doubted by the Court of Appeal, and the defendant contends their analysis is correct.

101. Mr Maclean submits that the claimants' contention that the two year period for group actions is procedural and so falls outside Rome II, while the ten year period for ordinary actions as accepted as being within Rome II, is incoherent. He refutes the contention that the ten year period runs with the cause of action: it is derived from article 2356 and it applies to ordinary actions. Article 47 of Law 472 specifies a time limit within which legal proceedings of a particular kind must be brought, and so it falls four square within the concept of a rule of limitation in article 15(h).

Decision on the Rome II issue

102. In my judgment, the defendant is right to focus on article 15(h). Neither *Wall* nor *Actavis* provide any support for the proposition that even if a provision is, *prima facie*, a rule of limitation, nonetheless if it is properly classified as a matter of procedure it will fall outside Rome II. On the contrary, as Floyd LJ explained in *Actavis* at [131], article 15 contains a list of matters which are 'in particular' to fall under the designated law, *irrespective* of whether they would be classified as matters of substance or procedure. Floyd LJ's emphasis on the fundamental nature of the distinction between substance and procedure ([132]) was in relation to matters which *do not* fall within the scope of article 15 ([131]). This interpretation of the structure of Rome II is supported by *KMG* (30(4) and 36(2)); *Pandya* ([28]-[29]); *Johnson* [19]; *Dicey, Morris & Collins*, §34-036 (paragraph 87 above); *Dickinson*, §14.57 (paragraph 89 above); and *Briggs*, §8.199 (paragraph 90 above). There is no authority to the contrary, and it accords with the interpretation I would in any event have reached applying the agreed principles of construction and having regard to the legislative history.

103. In *Wall*, it is evident that the Court of Appeal considered it obvious that rules as to the extent to which expert evidence may be given, and the form and manner of its admission, were rules of evidence and procedure, and were not part of the law governing "*the existence, the nature and assessment of damage or the remedy claimed*" (article 15(c)): see especially Longmore LJ at [12] and Christopher Clarke LJ at [47]. The classification of such rules as ones of evidence and procedure accorded with the natural meaning of those words, and the court rejected the defendant's "*strained and artificial construction*" of article 1(3). Insofar as the judgments in *Wall* address the question how article 15 should be interpreted, Longmore LJ observed (and the other members of the court agreed) that in the context of a Regulation intended to have international effect, a "*narrow view*" of the term "*law*" in article 15(c) would not be appropriate ([24]).

104. Contrary to the claimants' unexplained assertion that the analysis of this issue in *Actavis* is binding, as I have said, it was *obiter* (paragraph 80 above; and see *KMG* [36(9)], *Dicey, Collins & Morris*, §34-36, fn.244). The rules for obtaining DNIs, considered in *Actavis*, were not expressly within article 15. The defendant's contention was that they were either implicitly within, or closely analogous to, the matters specified in article 15(a), (c), (d) or (h). The court rejected the contention that article 15 should be construed so widely as to encompass matters which are not listed, and are procedural in private international law, but which might be said to fall within a class of matters analogous to those listed ([139]). The argument which was rejected involved giving article 15 a wider effect than, in the court's view, the language of the provision suggests.

105. In *KMG* the deputy judge held that article 15 should be "*construed widely*" ([36(3)-(5)]). In *Pandya*, Tipples J also held that the provisions of article 15 are to be construed widely ([26]). The reasons Tipples J gave for that conclusion were, first, the words "*in particular*" in the opening phrase which suggest the matters expressly listed are not exhaustive, secondly, the breadth of the matters listed, and thirdly, the objective of promoting legal certainty, which is advanced by wider application of the law applicable pursuant to the general rule in article 4. She did not state that this point was common ground (*cf.* [25] and [27]), and so I consider that, in *Johnson*, Stacey J was right to apply *Willers v Joyce* in determining whether to depart from *Pandya*. In any event, Stacey J

rejected as unsustainable the argument that the conclusion that article 15 is to be construed widely was wrong ([16]).

106. I am wholly unpersuaded that there is any compelling reason to depart from the conclusion reached in this harmonious trio of judgments that the provisions of article 15 of Rome II should be construed widely. In my view, there is no inconsistency between this conclusion and the approach to interpretation of article 15 taken by the Court of Appeal in *Wall.* At first sight, there may appear to be a tension between, on the one hand, this conclusion and, on the other hand, the *dicta* of Floyd LJ in *Actavis* at [139]. However, I consider that a broad approach to interpretation of article 15, albeit not one which treats the listed matters as mere examples within wide-ranging classes of faintly analogous matters, is compatible with the approach taken by the Court of Appeal in *Actavis.*

107. In any event, for the purposes of this case I do not consider that it matters how broadly or narrowly article 15 is interpreted. Nor whether the list of matters falling within article 15 is exhaustive. Article 15(h) undoubtedly has the effect that the applicable law (here, Colombian law) governs (i) the manner in which an obligation may be extinguished, (ii) rules of prescription and (iii) rules of limitation, and that includes, at least, any rules relating to the commencement, interruption and suspension of a period of prescription or limitation. Article 15(h) of Rome II plainly extends beyond rules of prescription which extinguish the right to other forms of limitation rule which bar any remedy.

108. I have no doubt the defendant is right that article 47 of Law 472 falls squarely within the concept of a rule of limitation in article 15(h) of Rome II. It specifies a time limit of two years within which legal proceedings of a particular kind must be brought. It is a *caducidad* rule which, if the claim is not brought within the specified period, deprives the litigant of a forensic remedy. Although it does not technically extinguish the litigant's right, it is no less fatal to the claim than a rule of *prescripción*. The fact that "*caducidad*" is translated as "*limitation*", and that the claimants described article 47 of Law 472 in §4 of their Reply as providing a "*two year limitation period*", are far from decisive, but in my view they do reflect the obvious reality.

109. It follows, for the reasons I have given, that it is of no consequence whether the limitation period in article 47 would be regarded as a matter of procedure or substance. It is a Colombian rule of limitation. Article 2356 of the Civil Code is also a Colombian rule of prescription or limitation (a point that is not in dispute). I agree with Mr Maclean that the key question, to which I turn next, is which Colombian limitation period applies to these English proceedings.

110. Finally, on this point, I note that each of the official language versions of Rome II is equally authentic and the Court of Justice of the European Union has affirmed that all of them need to be taken into account when interpreting its provisions: *Dicey, Morris & Collins* (16th ed, 2022), §34-011. Although only the English language version of Rome II has been carried across into the law of England and Wales, following the UK's exit from the European Union, other language versions of Rome II may be taken into account in its interpretation: *Dicey, Morris & Collins,* §34-010. Each language version of Rome II is intended to produce the same legal effect.

111. After the hearing, I drew the parties' attention to the Spanish language version of Rome II and I have considered their written submissions on the issue I raised. In the Spanish language version, Article 15(h) provides:

> "el modo de extinción de las obligaciones, así como las normas de prescripción y caducidad, incluidas las relativas al inicio, interrupción y suspensión de los plazos de prescripción y caducidad." (Emphasis added.)

112. It can be seen that the term "*rules of prescription and limitation*" is translated as "*las normas de prescripción y caducidad*", and the words "*of a period of prescription or limitation*" is translated as "*de los plazos de prescripción y caducidad*". The claimants draw attention to the point that in neither English nor Spanish do the words quoted refer to national concepts of prescription or limitation; as I have said, the terms fall to be construed autonomously. They have also drawn attention to the equally authentic French language version of Rome II in which article 15(h) refers to "*les règles de prescription et de déchéance fondées sur l'expiration d'un délai*", and to the translation of the term "*déchéance*" as "*forfeiture (of a right)*" in Doucet's Legal and Economic Dictionary.

113. The three language versions confirm my view that article 15(h) plainly extends beyond rules of prescription which extinguish the right to other forms of limitation rule which bar any remedy. In my judgment, the Spanish language version of Rome II confirms the point that, in any event, I consider is clear in the English language version that the *caducidad* contained in article 47 of Law 472 is a type of limitation rule that is encompassed within article 15(h) of Rome II.

H. PRELIMINARY ISSUE 1: (b) CHARACTERISATION OF THE CLAIM/ SHOULD THIS ENGLISH ACTION BE TREATED AS A COLOMBIAN GROUP ACTION?

What is the question?

114. The alternative headings to this section reflect the fact that the parties are not agreed on the question that the court should be asking itself. The defendant's submission is that once it is recognised that there are two possible limitation periods in Colombian law, a question arises as to which one applies. This gives rise to a binary issue as to whether this English action is more akin to a Colombian group action or a Colombian ordinary action, recognising that neither is a precise analogue for this claim.

115. Mr Maclean submits that the court's task is to ascertain and apply Colombian rules of limitation and, as those rules have been designed for Colombian proceedings, this "*necessarily involves a process of transposition*": *Iraqi Civilians v Ministry of Defence (No.2)* [2016] 1 WLR 2001, Lord Sumption JSC (with whom the four other Justices agreed), [14]. In other words, the question is how best to characterise these English proceedings. This involves assessing which of the two relevant types of Colombian action is the closer fit, having regard to the main characteristics of each type of action. It may involve "*an element of hypothesis or fiction*": *Iraqi Civilians v Ministry of Defence (No.2)* [2016] 1 WLR 1290, Tomlinson LJ at [23].

116. In the *Iraqi Civilians* case, the applicable law pursuant to the Private International Law (Miscellaneous Provisions) Act 1995 was Iraqi law. The standard limitation period

applicable to the tortious claims, in accordance with Iraqi law, was three years from the day on which the claimant became aware of the injury and of the person who caused it. The question that arose was whether that limitation period had been suspended by operation of article 435 of the Iraqi Civil Code which would apply if there was an "*impediment rendering it impossible for the plaintiff to claim his right*". The claimants contended that Order 17 of the Coalition Provisional Authority ('CPA'), which provided that the British forces were immune from process before the Iraqi courts, and subject to the exclusive jurisdiction of the United Kingdom, was an "*impediment*" within the meaning of article 435.

117. The Court of Appeal ([2016] 1 WLR 1290) considered that an English court was bound to disregard any impediment arising from CPA Order 17 because it was not a law with respect to limitation or a substantive rule of Iraqi law; it was a procedural law of no relevance in an English court. The Supreme Court came to the same result but their reasons differed. Lord Sumption held:

> "5. The question which arises on this appeal is how the Act is to be applied in a case where the foreign limitation law depends for its operation on facts which are not germane to litigation in England.
>
> …
>
> 11. The Court of Appeal was of course right to say that CPA Order 17 had no legal effect in an English court. … However, although CPA Order 17 is devoid of *legal* effect outside Iraq its consequences may none the less be relevant as fact. It is as fact that those consequences affect the operation of article 435 of the Civil Code. The question posed by that article is whether CPA Order 17 was as a matter of fact an 'impediment rendering it impossible for the plaintiff to claim his right'. 'Impediment' and 'impossibility' are questions of fact. This is no less true because the impediment is the consequence of a rule of Iraqi law.
>
> 12 … It is common ground that CPA Order 17 was an impediment and that it did render it impossible for the claimants to sue in Iraq. Their agreement on this point is an agreement about the practical consequences of the Order. However, it does not follow from the fact that an English court recognises the consequences of a rule of Iraqi law that it is giving effect to the rule in question.
>
> 13 The real question is whether it is legally relevant when the claimants have brought proceedings in England what impediments might have prevented similar proceedings in Iraq. … this was not a question of Iraqi law but of English law. In English proceedings, the relevant law is the Foreign Limitation Periods Act 1984. Where the cause of action is governed by a foreign law, the Act requires an English court to ascertain the relevant rules of the foreign law of limitation and then to apply it to proceedings in England. Because the foreign law of

> limitation will have been designed for foreign proceedings, that necessarily involves a process of transposition. There may be facts which the foreign law of limitation would treat as relevant to foreign proceedings but which are irrelevant to proceedings in England.
>
> 14 It is sometimes said that the ascertainment of foreign law involves asking what the foreign court would decide. That is of course true, but the English court is concerned only with what the foreign court would decide to be the relevant foreign law. It is the function of the English court to apply that law to the relevant facts. …
>
> 15 It follows that where the Iraqi law of limitation depends for its operation on some fact about the proceedings, the relevant fact is that applicable to the actual proceedings, viz those brought in England, and not some hypothetical proceedings that the claimants have not brought in Iraq …" (underlining added).

118. Although the claimants' case is that this claim is governed by the 10 year limitation period in article 2356 of the Civil Code and not by the two year period in article 47 of Law 472, they refute the contention that the issue is a binary one as to whether these English proceedings are more akin to a Colombian group action or a Colombian ordinary action. Mr Layton submits that the *caducidad* in article 47 of Law 472 only bites where there is a judicial decision admitting the claim as a Colombian group action. That could never happen in relation to this case. But the criteria by which a Colombian court would determine whether this is an action brought pursuant to Law 472 are analogous to the procedural rules under CPA Order 17 in the *Iraqi Civilians* case. Unless the criteria for admitting this action as a group action are satisfied, the claimants would continue to enjoy the benefit of the 10 year *prescripción* period. Accordingly, the claimants submit it is sufficient for them to show that this action does not fulfil the criteria for the application of Law 472. The only relevance of the evidence of the characteristics of an ordinary action is to contradistinguish a group action.

119. Mr Maclean's submission that I should compare this action to the characteristics of the two types of Colombian action, and determine whether it is more akin to one or the other, is attractively simple. However, I have come to the view that it is not the correct approach to this case. It is common ground that this is not, of course, a Colombian group action or a Colombian ordinary action; it is an English action. In Colombian law, ordinary proceedings are the default, and group proceedings are a special procedure. The question posed in Preliminary Issue 1 is whether the claims are time-barred pursuant to Article 47 of Law 472. In my judgment, the key question that arises is whether, applying Colombian law, this action falls to be treated as a group action to which article 47 of Law 472 applies. The characteristics of an ordinary action are of some relevance in determining whether article 47 of Law 472 would be activated, as the group action is defined not only by its own characteristics but also by how those contrast with those of an ordinary action, but the primary focus should be on the rules applicable in determining whether a claim is regulated by Law 472.

By reference to what point in time does the characterisation fall to be assessed?

120. In Colombia, the question whether this a group action in respect of which the *caducidad* period has expired would be determined at the admission stage. There is, of course, no equivalent in the CPR to the Colombian admission stage. Nevertheless, the claimants submits that the court should decide the equivalent point in time in these proceedings, with a view to determining the question by reference only to those documents that were available at that point in time. The claimants submit that the equivalent point to the admission process is when the claim was filed, or at the latest when the GLO was made. And so the assessment should be undertaken by reference only to the original claim form issued on 30 December 2019, or alternatively by reference to the documents available on 3 February 2020 when the GLO application was made, not by reference to subsequently filed documents.

121. The defendant submits this is a red herring. The court is determining the limitation question now. It is unnecessary to find a stage of our proceedings that is analogous to the Colombian admission process. But if the court considers it is necessary to do so, then the defendant contends that the most natural point in the context of this case would be when the GLO was made.

122. I agree with the defendant's submissions on this issue. The Colombian admissions process is a rule of Colombian procedure; and it is not a rule related to limitation. It is not, and could not be, suggested that article 53 of Law 472, which requires a Colombian court to rule on the admission of the claim within 10 working days following the filing of claim, is applicable. In my view, it is of no relevance. This court is determining the limitation question now, and so it is not precluded from taking into account documents that would not have been available if this issue had been determined at the same stage as it would be in Colombia. In any event, if it is relevant to pinpoint an analogous stage, it seems to me that it would not be earlier than the hearing of the claimants' application for a GLO on 3 February 2020. The claimants' primary submission that it would be the stage at which the claim is issued would pre-date the point at which this matter came before the court, and so is not analogous to the Colombian admission stage.

Is the common cause requirement met?

123. When the claims were filed, and when the GLO was made, the claimants contend the common cause requirement was not met because there were two groups of claims, namely, the general pollution claims and the oil spill claims. As matters stand now, the only claims are the oil spill claims: no generic particulars of claim were ever served in respect of the general pollution claims. It is not suggested that the oil spill claims alone would not meet the common cause requirement: they undoubtedly would. So if my conclusion that this issue falls to be assessed now is right, then it is clear that the need for a common cause is met.

124. However, even if it falls to be assessed by reference to a point in time when the general pollution claims were also being pursued, in my view, this requirement would be met. First, it is clear and undisputed that the Colombian Constitutional court has given a broad interpretation to the requirement that to bring a group action the claimants must have a common cause.

125. Secondly, all the claimants and former claimants were said to be farmers in the *departamento* of Putumayo. They were all said to have suffered both economic and non-economic damage caused by environmental contamination and pollution as a

consequence of the defendant's oil exploration and extraction activities, albeit in some cases this was said to have been the result of contamination from wastes and residues, and in others the direct cause was the spillage from oil tanker trucks.

126. Thirdly, although the claimants now submit there was no common cause, they chose to bring all the claims together and sought a GLO on the basis that they raised "*common or related issues of fact or law*".

127. Fourthly, having regard to the tenor of the Constitutional Court judgments and the purposive approach they take, in my view, Professor Tamayo's opinion is to be preferred on the question whether the Constitutional Court would require the initial cause to be identical. In my view, that is not a requirement, and in a case such as this the court would accept the group formed by the claimants has common cause.

128. Fifthly, it was common ground between the experts that the common cause criterion in article 88 of the GPC would have been met. I accept that this is not an identical criterion to that in article 46 of Law 472, but it is at least very similar. The lack of any doubt that such a similar criterion would be found to be met supports my view that applying a broad interpretation, as required, a common cause exists in relation to the oil spill and general pollution claimants.

129. In any event, I also accept Professor Tamayo's view which he had expressed in his book even before the common cause requirement was relaxed by the Constitutional Court, that two groups each with a common cause, and each numbering 20 or more people, would be able to bring a group action. This claim, when it included both general pollution and oil spill claimants, seems to me to be precisely the kind of claim in which such a group would be permitted to bring their claims in a group action under Colombian law.

Is the group size requirement met?

130. If I am right in my view that the question *when* the court examines whether this should be treated as a Colombian group action, and if so determines whether the *caducidad* period has expired, is irrelevant, then this requirement is undoubtedly met. The number of claimants who are party to this action far exceeds the requirement that there should be at least 20 persons in the group. However, if the question falls to be determined at the outset of the claim, the claimants submit that as there were then only 15 claimants, the criterion was not met.

131. When the case first came before the court on 9 January 2020 (even prior to the application for a GLO on 3 February), although there were only 15 named claimants, the evidence before the court was that the claimants' solicitors had instructions from a further 72 individuals to add them to the claim (and anticipated receiving instructions from several hundred more). The order I made on that occasion was based on accepting the claimants' evidence that the group already consisted of 87 persons, albeit most were not yet formally joined to the claim. I accept the evidence of Professor Santos, in respect of which there was no disagreement, that this is a requirement that would be treated flexibly, with a view to ensuring that very small groups are not able to take the procedural advantages inherent in bringing a group action under Law 472. In my judgment, even if this issue fell to examined at the hearing of the application for a GLO, or even earlier, the requirement was met.

Should this action be treated as a Colombian group action?

132. In my judgment, the principles cited by Professor Santos (to which I have referred in paragraphs 42-44 above) are of vital importance in assessing whether this action should be treated as a Colombian group action. Professor Santos' evidence was firmly supported by the cases he cited, and Professor Tamayo agreed with this theoretical framework. It is evident that these principles fall to be applied not only when interpreting laws, but also in the "*processing*" of actions. Professor Tamayo took the view that these principles are inapplicable on the facts. However, his view was based on a misconception that in this case the claimants had expressly chosen to bring a group action and, importantly, that they had requested global compensation.

133. Although there are important differences between this action and a Colombian group action, most significantly the opt-out nature of the latter compared to the opt-in nature of this claim which I address further below, in my judgment, this is a case in which the claimants would have had a choice as to whether to bring a group action or an ordinary action. They would not have been precluded by the criteria applicable pursuant to Law 472 from bringing a group action.

134. But the essential starting point is that the claimants did not *choose* to bring a Colombian group action. They did not invoke Law 472 or otherwise expressly stated that they wished to bring such an action. The claimants sought to use the procedures available under the CPR, in accordance with the applicable English procedural law, to bring a group claim, identifying "*GLO issues*" and anticipating the selection of lead claims. In my view, the fact that they did so cannot reasonably be interpreted as making a choice (still less expressly) to bring an action pursuant to Law 472. That is not what they did.

135. It follows that, contrary to the view expressed by Professor Tamayo, this is not a case in which the court must respect the claimants' choice to pursue a group action. This is a case where more than one procedural avenue would have been open to the claimants in Colombia and they have not expressly (or even implicitly) chosen a Colombian procedural route. Therefore, it would be for the court to determine the procedure (paragraphs 38-39 above), recognising that the claimants would not have been precluded from bringing either type of action on grounds of unsuitability and neither type of action is an exact analogue for the action the claimants have brought. That determination must be made applying the *pro homine*, reasonable interpretation and primacy of substantive law principles.

136. Whether this issue had fallen to be examined when the case first came before the court, or when the GLO application was heard, or falls to be examined now, it is and would have been clear to the court that a determination that this is a group action would be fatal to the action as the *caducidad* period has expired. Whereas a determination that it was an ordinary action would not have that effect. A decision that the claimants should be treated as if they had erroneously chosen the procedure that is fatal to their claims, rather than the one that is not, would not be reasonable or consistent with the *pro homine* principle. In addition, I accept that the principle of the primacy of substantive law may also lead to the same result, given that *prescripción* extinguishes the right and so, as a matter of Colombian law, may be seen as substantive, by contrast with the procedural nature of *caducidad.*

137. It is clear, in my judgment, that this action has not been brought under Law 472, and it does not fall to be treated as if it had been brought as a Colombian group action. Therefore, this action is not time-barred pursuant to article 47 of Law 472.

138. For the reasons that I have given, I do not consider that Colombian law approaches this question in the binary way posited by the defendant. In any event, although the issue is finely balanced, if it were necessary to determine whether this claim is more akin to a group action or an ordinary action, I would find that it is closer to an ordinary action. Most importantly, there is a greater difference, in my view, between, the nature of this opt-in GLO action (in which lead cases may be selected) and, on the one hand, a Colombian group action in which anyone who is encompassed within the group, even though they have taken no part in the process and may not have been aware of it, is bound by the result, unless they positively excluded themselves within a strict timeframe; and, on the other hand, a Colombian ordinary action (in which an unlimited number of claimants may be joined), albeit such claims are 'front-loaded' in terms of pleadings and evidence, and there is not the same ability to select lead cases. Although superficially this group action may appear to bear less resemblance to a typical ordinary action than a group action, the significant differences between the nature of opt-in and opt-out group actions are described in Lord Leggatt JSC's judgment in *Lloyd v Google* [2022] AC 1217 (albeit I recognise that Colombian group actions require an individual assessment of damage), and the ordinary action procedure can encompass an action in which hundreds of claimants are joined, as in the *OCENSA* case.

I. PRELIMINARY ISSUE 1: (C) THE PUBLIC POLICY ISSUE

139. In view of my conclusion that article 47 of Law 472 does not apply, the question whether it should be disapplied pursuant to article 26 of Rome II does not arise. I can, therefore, state my conclusion on this issue shortly.

140. The claimants' contention is that the application of article 47 of Law 472 would penalise them for using English procedural rules, in particular seeking a GLO, in accordance with the overriding objective, and it would encourage claimants in a case of this nature to avoid seeking a group litigation order (the purpose of which is to enable the effective management of the claim), in order to avoid a determination that the *caducidad* period applies (where it has expired). This, the claimants submit, would be manifestly incompatible with English public policy.

141. I agree with the defendant that the contention that applying the two year limitation period in article 47 of Law 472 would be "*manifestly incompatible*" is untenable. Article 26 of Rome II has to be read alongside Recital 32. The threshold for disapplication of a foreign rule of limitation is very high: see *Begun v Maran* [2021] EWCA Civ 326, [2022] 1 All ER (Comm) 940, Coulson LJ at [113]-[114]. In *Vilca* Stuart-Smith observed at [98] in relation to a two year limitation period:

> "I must respect the balance struck by Peruvian law as its chosen compromise between the legitimate interest that claims should be fully explored and resolved and the separate legitimate interest in the finality of litigation. There are, of course, other elements of Peruvian law which differ from English law and which form part of that overall compromise. For example, the two-year limitation period under Peruvian law for non-

> contractual claims has no in-built flexibility such as exists under English law under the Limitation Act 1980, which allows the primary limitation period to be disapplied and extended in certain circumstances. That is not to be regarded by the English Judge who grapples with Peruvian law as a deficiency: it is simply a fact and is part of the balance that Peruvian law has decided to strike between the interests of Claimants and Defendants."

142. Plainly, there can be no objection in principle that a two year limitation period is contrary to public policy, still less manifestly so. If I had found that article 47 of Law 472 applied, that would have been because the claimants had expressly chosen that type of action or because the nature of the action is such that, as a matter of Colombian law, the court would determine that this action is by its nature a Colombian group action. It is impossible to see how an application of article 47 of Law 472 which reflected the claimants' choice of action, or which was made applying Colombian law, including the *pro homine* and reasonableness principles, could be said to be manifestly incompatible with English public policy.

J. Preliminary Issue 2

143. Paragraphs 56 to 61 of the Amended Defence, by reference to which the second preliminary issue is framed, state (under the heading "*No Parent Company liability under Colombian law for acts/omissions of a subsidiary*"):

> "56. It is averred that the applicable law to establish the rules governing the liability of a parent company for acts/omissions of a subsidiary is Colombian law.
>
> 57. It is averred that under Colombian law, parent companies are not liable extra-contractually for the actions or omissions of the employees of their affiliates or subsidiaries, because these are independent legal persons. This is consistent with one of the most important principles in the law applicable to companies in the Colombian law system, such as the principle of legal personality, enshrined in the second item of Article 98 of the Commercial Code. It is averred that by virtue of this principle, the acts of a company do not bind or make its partners or shareholders liable, whether they are natural or legal persons, and regardless of whether they are business groups. The Superintendency of Companies of Colombia has held this principle of the independence of legal persons (parent companies/subsidiaries) to be as follows:
>
> > 'The subjects brought into the action, in a situation of control or business group in the terms of Law 222 of 1995, retain their individuality, that is, they maintain their own attributes and obligations. The control assumptions established in article 27 of the aforementioned regulation assume one or more controlling persons and one or more controlled commercial companies, in such a way that at both ends of the control

> relationship there are subjects with the possibility of acquiring rights and of contracting obligations, independently.
>
> **Within the effects of the subordination, the solidarity of the parent or controlling company has not been established in the payment of the obligations contracted by its affiliates or subsidiaries, by the mere fact of the relationship.** Understanding solidarity as a special mandatory legal relationship in which creditors can claim the entire debt from any of the potentially liable debtors, in accordance with the provisions of article 1568 of the Civil Code'. (Superintendency of Companies. Query No. 220-072648 of 11 May 2018). (emphasis added).

58. It is averred that Colombian law carefully protects this principle and establishes only a few exceptions in which it is allowed to ignore the separate corporate legal personality. Those limited exceptions are set out in Law 222 of 1995, which regulates companies, and are namely two: (i) relating to some instances of fraud; and (ii) some instances of insolvency. It is averred that none of these exceptions are relevant to this case, nor are they suggested to be.

59. It is averred that Colombian jurisprudence has been careful to preserve the autonomy of the legal personality of the different companies (parent companies/subsidiaries) and has only ignored it in the events expressly authorised by the Law, mainly referring to events in which subsidiary companies are used as vehicles to commit fraudulent or malicious acts, or have been culpably led to insolvency situations. It is averred that in Colombian law, even a situation of control by the parent company does not eliminate the legal status of the subsidiary so as to make the controlling company (i.e. the parent company) directly responsible for the acts/omissions of the controlled company (i.e. the subsidiary).

60. Colombian law is a civil law system. Any source of obligations and liability is laid down in statutory law as a principle of legality. It is averred that the Claimants have not identified any statutory basis to assert that a parent company is liable for the acts or omissions of a subsidiary or the circumstances in which such liability allegedly takes place, under Colombian law.

61. Further, it is averred that under Colombian law, legal persons can be liable for direct liability only (and not for acts of third parties). It is averred that the Claimants have no cause of action under Article 2341 (general negligence) or Article 2356 (dangerous activities) other than for direct liability. Thus, they have no cause of action against Amerisur under those provisions."

144. Professor Santos and Professor Tamayo agree that paragraphs 56-61 of the Amended Defence correctly state Colombian law. So the question whether the legal principles averred in those paragraphs are correct as a matter of Colombian law is no longer in issue between the parties.

145. The remaining question is whether those legal principles have the effect of precluding the Claimant's claims under Articles 2356 or 2341 of the Colombian Civil Code. The issue falls to be determined on the *assumption* that the relevant passages of the Amended Particulars of Claim in which the claims are pleaded are correct. There is, of course, no corresponding assumption that facts asserted in the Amended Defence are true, unless they are admitted in the Reply. As Mr Maclean acknowledged (and regretted) this is not a summary judgment application.

146. The parties (and experts) agree that there is a principle of separation of legal personality between a company and its partners or shareholders, which applies to parent companies and their subsidiaries. Colombian case law has respected that separation (JM, p.68-70). There are specific exceptions to the principle of separation of legal personality in the case of fraud and insolvency, but it is common ground those exceptions are inapplicable. They agree that control over a subsidiary, its direction or management exercised by a parent company does not eliminate the separation of legal personality between the parent and subsidiary (JM, p.70). A company (X) is not vicariously (or otherwise) liable extra contractually for the acts or omissions of another company (Y) by reason of the fact that X is Y's parent.

147. But the experts, and the parties, disagree as to whether the principles of Colombian law relied upon by the defendant preclude the claims. There were also a number of sub-issues on which their opinions differed but it was common ground that it was unnecessary to explore or determine those matters.

148. Mr Lord KC, who addressed Preliminary Issue 2 for the claimants, contends that under article 2341 the defendant is liable for *its own* acts and omissions and under article 2356 liability flows from *its own* status as a guardian. Mr Maclean took this issue briefly, and I consider it appropriate to do the same. His argument is, in essence, that in reality the claimants' case rests on an argument that the activity of the defendant's subsidiary gives rise to legal responsibility on the part of the defendant.

149. Professor Santos gave clear and compelling evidence that the principles described in paragraphs 56-61 do not preclude the possibility of liability on the part of the parent company; it all depends on the "*concrete facts*". Mr Maclean put to Professor Santos in very broad terms that his suggestion that it is possible that there could be direct liability of the parent company in a situation such as this was based on a number of assumptions which are "*in the true sense 'fantastic'*". Professor Santos disagreed, and Mr Maclean did not seek to explore with him the particular assumptions that were said to be "*fantastic*". As Mr Lord submitted (and it was not disputed), the component parts of Professor Santos' opinion that led to his conclusion that liability will depend on the facts, and is not precluded by the acceptance of the principles pleaded by the defendant, were not challenged.

150. Professor Tamayo was taken by Mr Lord to *Lungowe v Vedanta Resources plc* [2020] AC 1045, in which Lord Briggs JSC observed at [51] that

> "There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking…"

Professor Tamayo agreed that there is nothing in Colombian law that would prohibit the same spectrum of possibilities in terms of the degree of control exercised by a parent company.

151. Professor Tamayo gave evidence that he had understood the second preliminary issue to be asking whether there was or was not liability, and that was "*not a question that can be answered in abstract*" (day 3, p.42). In my view, this supports Professor Santos' conclusion that liability can only be determined on the facts; it is not precluded by operation of the identified legal principles. Moreover, I note that the experts agreed that the question whether a (legal) person is a guardian is a question of fact.

152. Professor Tamayo's opinion that it is precluded was clearly based on unwarranted assumptions as to the facts. By way of example only, in the Joint Memo, Professor Tamayo said:

> "In the case at hand, it comes down to whether the parent company in fact directed and controlled the contracting of the transportation of the crude oil that was spilled as a result of a terrorist act. On this point, there is no doubt that the parent company did not commit any negligence, nor did it have any power of direction and control over the contracting of the oil transport, a contracting which, autonomously with its own legal personality, was carried out by the subsidiary." (JM, p.96; emphasis added)

> "…it is up to the claimant to prove that such measures [to prevent the terrorist activity from occurring] were possible and that he could have taken them but did not do so, and this has not been and will not be proven." (JM, p.98; emphasis added).

153. On this issue, insofar as their views differed, I have no hesitation in preferring and accepting the evidence of Professor Santos. On the claimants' pleaded case, the defendant's "*main business activity was on-shore oil exploration, extraction and transportation in Colombia*" (Amended POC, §5); the defendant "*has its principal office in Bogotá and the majority of its staff were based there, including most of the senior management*", with the defendant's CEO, based in Colombia, performing a "*hands-on role*" (Amended POC, §32(b)); the defendant is alleged to have been "*directly involved in the activities of AE Colombia, which it closely directed, managed and controlled*", including AEC's activities in relation to environmental issues (Amended POC, §32); and the defendant is alleged to have been a guardian or co-guardian of the dangerous activities (Amended POC, §40(b)).

154. It may be that Mr Maclean's assertion as to the reality of the claimants' case will be borne out on the facts, but this preliminary issue falls to be determined by reference to the claimants' pleaded case, and in my judgment, the defendant has not established that the claims are precluded by the accepted legal principles pleaded in paragraphs 56 to 61 of the Amended Defence.

K. Conclusions

155. In relation to Preliminary Issue 1, I conclude that article 47 of Law 472 is a rule of limitation with the scope of Rome II and if I had found that it applied I would not have disapplied it pursuant to article 26 of Rome II. However, for the reasons I have given, that provision does not apply and so the answer to Preliminary Issue 1 is 'no', on the assumption the facts pleaded by the claimants are true, the claims would not be time-barred pursuant to article 47 of Law 472.

156. The answer to Preliminary Issue 2 is, first, that the legal principles averred at paragraphs 56 to 61 of the Amended Defence are correct and, secondly, this does not preclude the claimants' claims under articles 2356 or 2341 of the Civil Code.