



Neutral Citation Number: [2020] EWHC 2211 (TCC)

Case No: HT-2017-000383

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Heard remotely as at The Rolls Building,  
7 Rolls Buildings, Fetter Lane,  
London EC4A 1NL

Date: 14/08/2020

**Before :**

**MR JUSTICE STUART-SMITH**

**Between :**

**HARRISON JALLA AND OTHERS**

**Claimant**

**- and -**

**~~(1) ROYAL DUTCH SHELL PLC~~**

**Defendant**

**(2) SHELL INTERNATIONAL TRADING AND  
SHIPPING COMPANY LIMITED**

**(3) SHELL NIGERIA EXPLORATION AND  
PRODUCTION COMPANY LIMITED**

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**Graham Dunning QC, Stuart Cribb, Wei Jian Chan, James Burton, Phillip Alier**

(instructed by Johnson & Steller) for the Claimants

**Lord Goldsmith QC, Dr Conway Blake** (instructed by Debevoise & Plimpton) for the Second  
and Third Defendants

Hearing date: 28<sup>th</sup> May 2020

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on Friday 14<sup>th</sup> August 2020.

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## Approved Judgment

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

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**Mr Justice Stuart-Smith:**

### Introduction

1. These proceedings were issued in December 2017 in the name of the two lead Claimants, Mr Jalla and Mr Chujor, “and others” who were then entirely unspecified. They were issued just under six years after an oil spill on 20 December 2011 off the coast of Nigeria. The Claim Form carried a Statement of Truth from Mr Chujor who gave his address as being on or near to the coast that was immediately proximate to the oil spill. In witness statements filed in the action, Mr Jalla has given the same address. After amendment of the Claim Form in April 2018, it said that the proceedings were brought by the two lead Claimants “and others” with the addition of the words “(for themselves and on behalf of the Bonga Community)”. The many individual Claimants and 457 communities on whose behalves the claims were said to be brought were listed in schedules to the Particulars of Claim. The only description of their location came in the Particulars of Claim which said that the Claimants are “Nigerian individuals and communities occupying land along the Nigerian coast on the Atlantic Ocean spanning two States, Bayelsa State and Delta State” and comprising “fishing, farming and periwinkle pickers, commercial and subsistence fishing, shell fish harvesting and other coastal, maritime and riparian activities.”
2. The pre-action history of these proceedings is set out in detail in the judgment handed down on 2 March 2020: [2020] EWHC 459 (TCC) (“the March Judgment”). Until 19 September 2019 there was no suggestion from the Claimants that there was any material distinction to be drawn between individual Claimants or communities and when they would have been affected by the oil spill of which they complain: see [29]-[31] of the March Judgment. That was also implied by the Claimants’ evidence in advance of the hearing, and nothing was ever said to the contrary.
3. Even in September 2019, the submission that some Claimants may have suffered damage materially later than others was put forward as a possibility. No evidence was put forward at that stage to support the suggestion at that stage: see [34] of the March Judgment. Specifically, the only information provided by the lead Claimants and admitted by the Court was that their properties were in the coastal area fronting the Atlantic Ocean which was immediately exposed to the oil spill. There was an attempt to introduce further evidence after the hearing, which was disallowed for the reasons set out at [35] ff of the March Judgment. Accordingly, the March Judgment was required to address limitation and other issues in this unsatisfactory state of the Claimants’ evidence.
4. In the light of the March Judgment, the Defendants launched applications to strike out the proceedings adopting the following lines of reasoning and submission:

Approved Judgment

- i) First, the claims of the Lead Claimants should be struck out as their land, being close to the coast, would have suffered damage soon after 20 December 2011. Their claims are therefore statute barred and should be struck out for that reason;
  - ii) Second, the purported amendment in April 2018 to join “the Bonga Community” was a nullity because Mr Jalla and Mr Chujor were out of time when it was made. The claims of “the Bonga Community”, which were added to the Claim Form by the amendment, should therefore be struck out. This has been referred to as “the Nullity Point”;
  - iii) Third, because the claims of Mr Jalla and Mr Chujor were and are to be struck out (under (i) above), there are no longer any “anchor” Claimants to act as representative Claimants for the purposes of a representative action;
  - iv) Fourth, and in any event, these proceedings are not properly constituted as a representative action in accordance with CPR 19.6 because the lead Claimants and those they purport to represent do not all have “the same interest” within the meaning of the rule. The Court therefore does not have jurisdiction to proceed with the claims as a representative action.
5. These submissions were raised in writing before the hearing of consequential matters arising out of the March Judgment on 24 March 2020. They could not fairly be disposed of on that date. Instead, further directions were given that have led to the present hearing: see [2020] EWHC 738 (TCC) (“the Consequentials Judgment”). Those directions included that the Claimants should file any further evidence upon which they wished to rely in opposition to the Defendants’ strikeout application and should set out any proposals that they wished to advance “for the possible restructuring of these proceedings” if they are to continue: see the Consequentials Judgment at [10]. The directions were intended to lead to a final resolution of all consequential issues (including the Defendants’ strikeout application) at a further hearing in May 2020.
  6. The further hearing took place on 28 May 2020. For the reasons that appear below, final resolution remains a distant prospect. The present position was reasonably described during the hearing as a procedural nightmare. I would describe it as Kafkaesque.

**Further Developments before the May Hearing**

7. The Claimants were required to serve their evidence in reply and any proposals for the future conduct of these proceedings by 4pm on 24 April 2020.
8. On 20 April 2020, the Claimants’ then solicitors issued fresh proceedings (HT-2020-000143 - “the Protective Proceedings”). The Claim Form states that there are 27,830 individual Claimants (described as “Individual Claimants”) and 479 Nigerian communities (described as “Community Claimants”) who are party to the proceedings, all of which are said to claim on their own behalf. Each of the named “Individual Claimants”, as well as claiming on their own behalf, is stated to claim on behalf of each community of which he or she is a resident. It is apparent from the information provided that there must be multiple Individual Claimants asserting that

Approved Judgment

they represent the same Community Claimant in some cases; and that some Individual Claimants who have affected property in more than one community are asserting that they represent each of the communities in which their properties are located. In addition, it is stated that there are some Community Claimants for which there is no Individual Claimant who is resident in the community. For such communities it is stated that a claim is brought on its behalf in a representative capacity pursuant to CPR r. 19.6 by a named representative who is named in a schedule and who is resident in that community.

9. Mr Jalla and Mr Chujor are named Claimants in the Protective Proceedings. They are stated to have been appointed as Lead Claimants by the Community Claimants' Steering Committee and claim in a representative capacity on behalf of all of the communities, alternatively the communities in which they are resident and have land holdings. The number of communities involved has changed: there are now 479 named communities as opposed to the 457 listed in Schedule 2 to these proceedings. Apparently this is because the 22 additional communities have been identified as having been affected. It is asserted that some of the Community Claimants as parties to the Protective Proceedings have a legal personality as a matter of Nigerian Law but the Claimants do not know which. This has the bizarre consequence that the Claimants have joined Community Claimants not knowing whether they have legal personality or not, and therefore not having good grounds for asserting that they have. The Claimants state that they have put the claim in the Protective Proceedings "on every conceivable basis." The Defendants are Shell International Trading and Shipping Company Limited ("STASCO") and Shell Nigeria Exploration and Production Company Limited ("SNEPCO")
10. Given the way that the present applications have unfolded, it is not necessary to analyse the constitution of the Protective Proceedings further. It is sufficient to say that the summary I have given shows two things. First, they are intended to guard against the possibility that these proceedings are struck out. Second, the numbers of persons asserting that they represent communities combined with the assertion that the Community Claimants are entitled to and do bring claims in their own capacity gives rise to a complex structure that may require closer investigation on another occasion.
11. A superficial reading of the brief details of claim makes clear that the Protective Proceedings are intended largely to mirror these proceedings. The brief details recite the alleged facts of the December 2011 spill and allege damage to the Claimants' land, waterways, property (including farm land, crops, livestock, farming equipment, fish farms, fish, fishing equipment, boats, drinking water, mangrove forests and/or shrines, all of which are pleaded to have been damaged in these proceedings) and communities. However, it is now said that the Claimants suffered damage "at different times over a number of years from around 20 December 2011 onwards." Causes of action in negligence, and nuisance (including an allegation of continuing nuisance) are asserted.
12. The Claim Form for the Protective Proceedings claims:
 

"By reason of those matters, the Court is requested to order the Defendants immediately to put in hand measures to remediate the impact of the oil spill, and/or to pay the Claimants the value

Approved Judgment

of said remediation work to allow the Claimants to put it in hand themselves and/or to indemnify the Claimants with respect to remediation work already carried out. Further, the Defendants are liable to the Claimants in negligence and/or nuisance and/or under the rule in *Rylands v Fletcher* and the Claimants are entitled to and claim:

(i) A mandatory injunction requiring the Defendants to carry out an appropriate and effective clean-up and remediation of the affected areas in line with international standards;

(ii) An order that the Defendants indemnify the Claimants with respect to the reasonable costs of any remediation work put in hand by the Claimants or requiring to be funded;

(iii) Compensatory damages to be assessed, including:

(a) Damages in substitution for the mandatory injunction referred to in (i) above, including pursuant to Section 50 of the Senior Courts Act 1981;

(b) Damages in substitution for the order for indemnification referred to in (ii) above; and/or

(c) Damages in compensation for all of the loss and damage suffered by the Claimants;

(iv) Aggravated and/or exemplary damages (including by reason of SNEPCO's wrongful attribution of the damage caused by the Bonga Spill to a third-party mystery spill in circumstances in which it has at all material times since around 22 February 2012 been in possession of a report by Fugro GeoConsulting Limited commissioned by or for its benefit and which concluded that samples of crude oil recovered from the Nigerian coastline in December 2011 and January 2012 were a chemical match for Bonga oil);

(v) Interest;

(vi) Costs ...”

13. This may be compared with the prayer in the Amended Particulars of Claim in these proceedings, which is for:

“1. Damages

2. An order requiring the Defendants to immediately put in hand measures of remediation to eliminate the negative environmental impact from the oil spills.

Approved Judgment

3. In the alternative, an order that the Defendants pay to the Claimants the value of such remediation work so that the Claimants can put in hand the remediation work themselves.
  4. An order that the Defendants indemnify the Claimants with respect to the reasonable costs of any remediation work put in hand by the Claimants.
  5. Interest....
  6. Indemnity Costs.”
14. The preceding section of the Amended Particulars of Claim in these proceedings makes plain that the claim for damages includes a claim for aggravated and/or exemplary damages. It therefore appears that, at least on the face of the two documents, the claims in each action are essentially the same, though the order has been adjusted in the Protective Proceedings to take the individual claims for damages lower down the list.
  15. On 23 April 2020 the Claimants in the Protective Proceedings issued an application for permission to serve the Protective Proceedings out on SNEPCO and to consolidate the Protective Proceedings with these proceedings. The application to consolidate was supported by a witness statement from Ms Weeks, a solicitor at Rosenblatt, who were acting as agents for the Claimants’ then solicitors. The statement explained that the application was being made in case the court were to conclude that the present proceedings cannot validly be continued in a representative capacity. The proposal is that in the event of such a conclusion, the present proceedings should continue but should do so having been consolidated with the Protective Proceedings.
  16. On 24 April 2020 the Claimants submitted their responsive submissions together with 7 new witness statements. In addition to challenging the legal basis advanced by the Defendants in support of their applications to strike out, the submissions and supporting evidence were notable in a number of other respects.
  17. First, the represented Claimants in these proceedings abandoned their “individualised” claims for damages, save for those advanced by Mr Jalla and Mr Chujor, stating that they were “content” to pursue those claims in the Protective Proceedings. It was said that “the remediation relief is the main relief sought in these proceedings, and it is entirely in common”.
  18. The Claimants say that “in view of the Claimants’ decision to limit the relief sought in the [present] proceedings, the [Protective Proceedings] will provide the vehicle in which the Claimants’ individual claims for damages are pursued in parallel.” The concept of having two actions, each having virtually the same parties and advancing the same claims and causes of action yet splitting the proposed relief to be claimed between the two actions is, in my experience at least, unique.
  19. The following points should be noted here:
    - i) On enquiry by the Court, it was quite unclear by what process of decision-making or authorisation the Claimants had decided to abandon the claims for

Approved Judgment

individual relief in the present proceedings for all Claimants other than Mr Jalla and Mr Chujor;

- ii) On being pressed by the Court, Mr Dunning QC for the Claimants accepted that one reason why the step of abandoning individual claims in these proceedings had been taken was to remove what would otherwise be an impediment to their being a representative action. The only other reason that was suggested was a submission that it was “to streamline the case”. That is an impossible submission given the institution of a complete new action to act as the vehicle for the individual claims, and I reject it. In the absence of any other conceivable or credible reason, I conclude that *the* reason the step was taken was as an attempt to circumvent the Defendants’ submissions on this strikeout application.
20. Second, the witness statements included ones from Mr Jalla (“Jalla 6”) and Mr Chujor (“Chujor 2”), each of which states that, in addition to owning the property of which the Defendants and the court were already aware, each of them owns other property further from the coast. Mr Chujor says that his land near the coast was first affected on 17 December 2012. In addition he owns a fish farm about 220 miles from his village, which first suffered damage on 1 September 2015. Mr Jalla says that he owns a number of agricultural businesses including farms remote from the coast. He says his land near the coast was first affected on 17 December 2012; two other pieces of land were near the state borders remote from the sea and were first affected on 20 June 2014 and 1 September 2015 respectively. I shall return to this evidence later; but its immediate significance is to challenge the basis upon which the March Judgment had proceeded, namely that land on or near the coast closest to the location of the spill would have been affected within days or weeks of the spill; and that, in consequence, Mr Jalla and Mr Chujor’s causes of action accrued more than 6 years before 4 April 2018. This had not been foreshadowed previously, though it would have been highly material for the Claimants’ case when the Court was considering the issues covered by the March Judgment. The additional significance of this evidence is to assert that, even if their causes of action in relation to their land near the coast accrued before 6 April 2012, they suffered separate actionable damage giving rise to separate causes of action at their inland properties and therefore should be able to continue as Lead Claimants as those causes of action had not accrued by 6 April 2012. If the evidence is reliable, there is no sensible explanation for the Claimants’ treating limitation as a monolithic issue until 19 September 2019 or for the limited nature of the submission on that date. As I shall explain in more detail below, the evidence in Jalla 6 and Chujor 2 had been largely foreshadowed in earlier statements (“Jalla 5” and “Chujor 1”) that had been served shortly before the hearing on 24 March 2020.
21. The witness statements also included ones from:
- i) Mr Dan Ekotogbo, the author of the report to NOSDRA mentioned at [83] of the March Judgment, describing his work in preparation of that report in March to July 2014. He says that he visited well over 300 communities, some of which were over 30 kms from “the riparian zone of the littoral states of Nigeria” during that period and that “the vast majority of those villages and communities were not affected by the Bonga Oil Spill until after 4-5 March 2014”. He gives outline descriptions of how oil might have migrated over long periods;

Approved Judgment

- ii) Chief Boro Opudu, the Chairman of the Waterways and Land Security Committee in Delta State. He says that oil started to reach communities on the immediate shoreline in Delta State between December 2011 and December 2012. He then describes numerous complaints being made between communities that the Bonga oil spill had “arrived on their doorstep” between June 2014 and May 2015; and that oil (which he believes to come from the Bonga spill) contaminated the borehole that his family uses in March 2015. He also, somewhat surprisingly, states that he has carried out investigations and can confirm that the contents of Chujor 1 and Jalla 2 are true and accurate;
  - iii) Mr Charles Ebio, whose community is located 37 nautical miles north of the shoreline as the crow flies, which takes about 10-12 hours by boat. He offers himself as a replacement lead Claimant and states that the Bonga Spill began to affect him and his community on 24 June 2015 when he noted that his traps were covered with crude oil and that oil had settled on the banks and the surface of the water, suffocating aquatic life;
  - iv) The Hon. Majoku Daniel, who is a former member of the Delta State House of Assembly between 2003 and 2015. He is not a Claimant in these proceedings but states that the community of Aja Edede in his Warri South West constituency, which he identifies as being 30 kms from the Atlantic Ocean shoreline, was first affected by oil from the Bonga spill on 17 December 2012. He also says that, between around December 2014 and in or around June 2015 his office received a large number of complaints from communities further inland that they had been affected by oil from the Bonga spill;
  - v) The Hon. Daniel Reyenieju, who was a member of the Nigerian Federal House of Representatives between 2007 and 2019 representing the Warri Federal Constituency. He says that he started receiving complaints of oil pollution that was attributed to the Bonga spill on 3 October 2014 and that they continued to August 2015; and he speaks of undertaking site visits and witnessing widespread damage by oil pollution. In his view, the oil could not have come from anywhere other than the Bonga spill;
  - vi) Mr Victor Ezewosi, who is one of the named represented Claimants in the present proceedings, lives in a community some 37 miles from the coast as the crow flies. He says that oil from the Bonga spill first affected his community on or around 24 June 2015; and he says that he would be willing to be substituted as a Lead Claimant in place of Mr Jalla and Mr Chujor.
22. These seven witness statements come on top of Jalla 5 and Chujor 1 and the three statements that the Claimants tried to introduce after the hearing in September and October 2019: see [35] ff of the March Judgment.
23. Third, the Claimants disclosed the existence of another set of proceedings arising out of the December 2011 spill and brought against STASCO and SNEPCO (BL-20190002334 - “the Akinruntan Proceedings”). Apparently at the insistence of the court office, the Akinruntan Proceedings were issued in the Chancery Division in December 2019 by the same solicitors, Johnson & Steller, as represented the Claimants in these proceedings and the Protective Proceedings until recently. In the



Approved Judgment

light of the Akinruntan Proceedings the Claimants in these proceedings proposed that they should apply for a GLO.

24. The Defendants do not accept that any of the evidence going to the date of damage, summarised above, is reliable. Their scepticism is fuelled by the fact that the evidence contained in Jalla 5 and Chujor 1, which was subsequently expressly reaffirmed by Jalla 6 and Chujor 2, was wrong and unreliable in exhibiting photographs that demonstrably were not what they purported to be. Though this has been explained on affidavit as being an administrative error, it does nothing to encourage confidence in the Claimants' factual assertions or their diligence in putting evidence before the Court on these applications. Nor does it encourage confidence in Chief Boro Opuđu's unequivocal endorsement of the truth and accuracy of the erroneous statements. Another reason for their scepticism is that, according to the enquiries made by the Defendants' solicitors, only one of the three communities remote from the coast upon which the Lead Claimants rely in their new evidence is included in the schedule of communities annexed to the amended Particulars of Claim.
25. It is not necessary to investigate either the errors in Mr Jalla and Mr Chujor's witness statements or the reasons for the Defendants' scepticism in any further detail here because the Defendants realistically accept that, in the face of this evidence, they cannot pursue the first three of their intended lines of argument, as outlined at [4] above. They are, however, entitled and right to point out that the evidence marks a fundamental shift from the basis on which these proceedings were instituted and run until September 2019: this is now presented as an action about damage suffered over a wide area, up to 50 kms or more from the coast, and not simply along the Atlantic coast. The implications for the need to adduce wide-ranging factual and expert evidence are obvious.

### Post-hearing Developments

26. For completeness I record that:
- i) When filing their submissions, the Claimants had applied to the Court of Appeal for permission to appeal the ruling in the March Judgment on continuing nuisance. Permission to appeal has since been given on 23 June 2020;
  - ii) On 29 July 2020 the Court was informed that the Claimants' solicitors, Johnson & Steller were required by the Solicitors Regulation Authority to cease trading on 15 July 2020. Their agents, Messrs Rosenblatt have informed the Court that they are in the process of arranging to be retained by the Claimants and coming on the record;
  - iii) On 5 August 2020, just before this judgment was to be sent out in draft, Mr Jalla filed notice that he was acting in person;
  - iv) Despite no longer being instructed, Counsel who had acted for the Claimants on the hearing kindly agreed to assist the Court by checking this judgment in draft for typos, while correctly recognising and noting that they were not in a position to offer legal services to the Claimants unless re-instructed.

Approved Judgment**The Issues**

27. As refined in submissions, the issues to be decided are:
- i) Do the Lead Claimants and those they purport to represent have the same interest in the claim that is being made? and
  - ii) Can the represented class be ascertained with sufficient certainty?

**The Applicable Principles**

28. The current rule establishing the criteria for a representative action is CPR r 19.6(1), which provides:

“Where more than one person has the same interest in a claim—

- (a) the claim may be begun; or
- (b) the court may order that the claim be continued,

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.”

*“The same interest”*

29. The parties disagree about the scope and meaning of the criterion that the representative and represented parties must have “the same interest in a claim”. The Claimants press for a more relaxed and generous interpretation and, on that basis, submit that there is sufficient identity of interest between the Lead Claimants and those they wish to represent for the action to be constituted and continue as a representative action. The Defendants submit that this statutory requirement should be interpreted according to its terms, namely that the interest of the parties who are to be joined in a representative action must be “the same.” They submit that the expedient of abandoning the Claimants’ individualised claims for damages is ineffective because what the Claimants describe as their “remediation” claims raise differences of interest equivalent to those that were inherent in the pursuit of individualised claims for damages.
30. The first authority to which reference is customarily made in these circumstances is *The Duke of Bedford v Ellis and others* [1901] AC 1. The relevant rule then stated that “where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued ... on behalf or for the benefit of all persons so interested.” The Duke owned the Covent Garden Market. Two categories of people paid rent and toll in order to be entitled to sell produce in the market. The first category was those who sold their own produce, who were described as growers. The second was “those who are ordinary dealers in the market or middlemen.” The Covent Garden Market Act 1828 conferred preferential rights on growers but not on other traders. It was alleged that the Duke was not complying with his obligations under the Act and was exacting excessive tolls from the growers. The action was brought seeking a declaration that the growers were entitled to their

Approved Judgment

preferential rights under the Act, an injunction to prevent the Duke from doing any acts contrary to those declarations, and an account of the excessive sums charged during the six years prior to the issuing of the writ. The five plaintiffs brought the action on behalf of themselves and all others who fell within the relevant statutory definition of the growers. The issue was whether the plaintiffs were entitled to sue on behalf of themselves and all other growers. The House of Lords held by a majority that they were. The main statements of principle were provided by Lords Macnaghten and Shand. Though frequently referred to since, they bear repeating.

31. Lord Macnaghten stated the applicable principles as follows:

“If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives of the class if they had never been near the Duke; they are not incompetent because they may have been turned out of the market. In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members.” [Page 7]

and

“The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could “come at justice,” to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.” [Page 8]

and

“There are plenty of other cases which shew that, in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent. ... All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter.” [Page 9]

and

Approved Judgment

“... From the time it was first established [the rule] has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such judgments as those delivered by Lord Eldon in *Adair v. New River Co.*, in 1805, and in *Cockburn v. Thompson* in 1809, without seeing that Lord Eldon took as broad and liberal a view on this subject as anybody could desire. “The strict rule,” he said, “was that all persons materially interested in the subject of the suit, however numerous, ought to be parties ... but that being a general rule established for the convenient administration of justice must not be adhered to in cases to which consistently with practical convenience it is incapable of application.” “It was better,” he added, “to go as far as possible towards justice than to deny it altogether.” He laid out of consideration the case of persons suing on behalf of themselves and all others, “for in a sense,” he said, “they are before the Court.” As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will fairly and honestly try the right. ...” [Page 10]

32. To similar effect, Lord Shand said:

“The rule has been framed and adopted for a useful and important object - the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. A series of different actions one after another by different plaintiffs is to be no longer necessary in cases where numerous persons have “the same interest in one cause or matter,” for in such cases “one or more of such persons may sue on behalf or for the benefit of all persons so interested.” The rule is obviously one of advantage not only to plaintiffs but to defendants also, in the way of saving multiplication of suits, ... .” [Page 14]

and

“Now, it is alleged in the record by the plaintiffs (1.) that they are the growers of fruit, flowers, vegetables, roots, and herbs within the meaning of the statute; (2.) that the defendant, the present Duke of Bedford, refuses to give them and other “growers” the privileges of the occupation of the various classes of stalls to which they have right under the statute; and (3.) that when they do get such occupation the rates charged exceed those allowed by the statute. For the purpose of the present preliminary point, of procedure only, these statements must be taken to be true, and on this assumption the question raised is, Does the rule of Court apply to the action? ... [A]ll of the plaintiffs make the same claims - claims to the exercise of

Approved Judgment

the same rights and privileges which the appellant refuses to recognise - and all of them rest their claims on the same ground, namely, the statutory provisions of privileges in their favour as such growers as they describe themselves to be.

... The plaintiffs in their character of “growers” claim statutory preferential rights to the occupation and use of these [market stands], and allege that the defendant refuses to give them such preferential use, and “makes it a practice either to refuse to growers the use of such stands, or by filling such stands, with others than growers, to prevent growers having the use of such stands, with the result that growers have to go to other parts of the market or to places outside the market, or to the public streets, where the restrictions contained in the said Act not being applicable the defendant charges higher rates than would have to be paid under the Act, and with the further result of injury to growers in their trade.” These statements seem to me to amount clearly to an averment not only of the existence of preferential rights, and of the same or substantially the same preferential rights in all the plaintiffs, but to a charge against the appellant that he violates these rights, or refuses to give effect to them, and it follows that the plaintiffs have the same interest in the cause or matter of the complaint. There is no difference in their claims. They all ask the same remedy, which it is unnecessary to specify further than to say they all claim to have a declaratory decree by the Court which shall give effect to their statutory privileges the same in the case of each of them, as growers of fruit, flowers and vegetables, and an injunction to restrain the appellant from doing any act contrary to such declaratory decree. There is thus one cause or matter only in which all of the plaintiffs have an interest, and in which other “growers” have the same interest, as disclosed in the record, that matter being the disregard by the defendant of their statutory privileges, for which accordingly one and the same remedy in the form of the different heads of claim is asked. To that case the rule in question seems to me in its terms directly to apply, and accordingly the objection to the competency of the action is, I think, unfounded.” [Pages 15-16]

33. Lord Shand addressed claims of financial loss suffered by individual growers expressly at page 16:

“There is one head of the claim (the seventh) as to which there was not much said in the appellant's argument, which is no doubt in a different position; I mean a claim by each of the plaintiffs for repayment to him of alleged excess charges for six years for market accommodation. This is a subsidiary matter, and it is not a claim made “on behalf of all other the growers of fruit, flowers,” &c., to which alone the appellant's objection to the representative character of the action applies. The real cause

Approved Judgment

or matter in dispute and raised by the statement and claims is the nature and extent of the privileges of the plaintiffs to the use of the market stands, and to the effect of determining this the action is competent. This being so, it will be found convenient to both parties to have the subsidiary matter of excessive charges made against each plaintiff determined in the same cause; and I do not see any ground for holding that it is incompetent to do so.”

34. It therefore appears that the existence of individual claims either by the lead plaintiffs or those who they represented did not of itself preclude the finding that the action was properly constituted as a representative action, because the individual claims were “a subsidiary matter” and it would be convenient to both parties to have that subsidiary matter determined in the same proceedings as “the real cause or matter in dispute”, namely the nature and extent of the privileges of the plaintiffs to the use of the market stands. The interest of all the plaintiffs in the real cause or matter in dispute was the same.
35. The parties are agreed that there are two recent decisions of the Court of Appeal that require close attention; but they point to other decisions en route that are submitted to be important by one side or the other.
36. The Claimants rely upon *Irish Shipping Ltd v Commercial Union Assurance Co. PLC* [1991] 2 QB 206. Shipowners sued on a policy that had originally been taken out by charterers who had gone into liquidation. The policy was subscribed by 77 insurers on identical terms, which included a leading underwriter clause whereby each insurer undertook to be bound by acts of the leading underwriter and to be liable for its share for all decisions taken against the leading underwriter. The shipowners issued proceedings against the leading underwriter and one other subscribing insurer “on their own behalf and on behalf of all other liability insurers” claiming an indemnity under the policy from them “and those they represent in the respective proportions due from them as subscribing underwriters”. The Court of Appeal rejected the submission that the inclusion of claims for debt or damages to be paid by the represented insurers precluded the use of a representative action. All insurers were held to have had the same interest in the proceedings, notwithstanding that there were separate contracts of insurance with each subscribing insurer, since all the contracts were on identical terms, each insurer was bound by the leading underwriter clause, and the defence of all insurers was that their obligations to the charterers who had originally taken out the insurance had not been transferred to the shipowner claimants. This conclusion was reached although the Court of Appeal recognised that there might be defences available to some insurers that were not available to all.
37. The relevant rule was now RSC Ord 15, r. 12(1) which was in all material respects the same as the rule that had governed the *Duke of Bedford* case.
38. The first submission of the insurers was that “a case can never be within the rule where damages or debt are claimed against all the defendants severally”: see 222F. Staughton LJ noted that this argument would be the same if an identical sum were claimed from each insurer. After a review of authorities since the *Duke of Bedford* case, he answered the submission at 227B:

Approved Judgment

“... it is not, in my judgment, the law that claims for debt or damages are automatically to be excluded from a representative action, merely because they are made by numerous plaintiffs severally or resisted by numerous defendants severally. The rule is more flexible than that.”

39. Turning to the likelihood of separate defences being available to different insurers, Staughton LJ continued at 227E-228A:

“So there were here 12 contracts, one by each of the underwriting agents and the insurance companies which signed on their own. But all 12 were on identical terms, save for the individual proportions of the risk; and to my mind the leading underwriter clause can be taken to provide that, at least for some purposes, they are to be considered as one contract. If there were a defence of misrepresentation, and perhaps also non-disclosure, it might be argued that an individual contract could be avoided; and in that event the leading underwriter clause would go with it. So too if there were a defence of lack of authority to sign. But no such issue appears likely to arise in this case.

For all practical purposes this is one claim upon one contract, which the shipowners have an interest in pursuing and the insurers all have the same interest in resisting, subject only to one point. Some of the insurers may, in certain circumstances, wish to resist the claim on a ground that is not available to others: this is that their obligation is not situate here, and that the leading underwriter clause does not have the effect that the obligations of all must be taken to be situate in the same place as that of the leading underwriter. I do not regard that circumstance as showing that all the insurers do not have "the same interest" in the English action, or that it is not within the rule; all defend because they say that the benefit of their obligation has not been transferred to the shipowners, and the foreign insurers merely have, or may have, an additional ground for arguing that defence. As I have said, I have no qualms about a proceeding which allows that ground to be argued on their behalf by others, if they do not wish to join in the action.”

In the first of the paragraphs, Staughton LJ recognised that the unitary nature of the contracts could be avoided if it seemed likely that any insurers would raise a defence of misrepresentation or non-disclosure because it could be argued that, in that event, “an individual contract could be avoided”.

40. Sir John Megaw gave a similar statement of principle at 231G-232C:

“There may well be cases in which it would not be appropriate to allow the use of the representative action procedure where there are disputes as to the quantum of liability, if liability is

Approved Judgment

established, of persons who come into the action by representation. In such a case, the discretion allowed by the rule enables the court to forbid the continuance of the representative action. But in the present case, where there is no suggestion of any argument as to what are the respective proportionate shares, and where each of the insurers has expressly agreed to accept liability for its respective share "for all decisions taken against the leading company" there appears to be no good reason, even by way of technicality, why the court should hold itself to be precluded from giving effect, by way of judgments, to the various insurers' agreements to accept liability for their respective shares.

It has been suggested for the defendants that injustice might be caused by the application of the rule, since one or more of the insurers might wish to contend that it had no valid or binding contract with the assured because, for example, it had not given authority to an agent who had purported to contract on its behalf, or there had been fraud or misrepresentation inducing the making of the contract. There is no suggestion that in fact any such contention exists in the present case. But if it were to exist, there is ample protection in Ord. 15, r. 12 against the risk that a judgment could be enforced against an insurer who was not liable, without its having been given a proper opportunity to have its objection heard."

41. The first of these paragraphs focuses on the ability of the representative action to dispose of all issues, which harks back to the statements in the *Duke of Bedford* case that the rule is one of convenience that applies if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent, subject to permitting subsidiary issues to be included: see [31] and [33] above. It also recognises that representative proceedings may not be appropriate where there are individual claims giving rise to individual disputes as to quantum after liability has been established. The second paragraph concentrates on the Court's ability under current rules to prevent injustice to an insurer who was not liable but had not had an opportunity to be heard. This ability to safeguard members of the class who may have particular defences was also referred to by Purchas LJ at page 239A-C, who referred to the old rule of Chancery practice as "a broad rule of procedural convenience to be exercised with a wide but carefully used discretion" and to the Court's historically "generous interpretation of the rule."
42. At 244D-E Purchas LJ addressed whether individual claims for debt or damages could be included in a representative action by reference to authority and concluded that those authorities:
 

"... do not ... establish, in my judgment, ..., that an action will not lie in appropriate cases against a representative defendant class for debt or debts provided these can be directly associated within an identified group and can themselves be defined within the framework of the contractual association established."



Approved Judgment

43. It is therefore apparent from both the *Duke of Bedford* case and *Irish Shipping* that the mere existence of a claim for individual relief, whether by plaintiff or defendant, is not automatically a bar to the use of representative proceedings. The Court will focus on the likelihood of such issues being raised and whether they alter the main substance of the proceedings so that a representative action is no longer a convenient procedure for the determination of common issues between multiple parties.
44. Other authorities have emphasised that the rule is one of convenience and, latterly, that it should be interpreted in accordance with the overriding objective: see, for example, *John v Rees* [1970] Ch 345 at 369E where Megarry J said that it was “plain that the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice”, while also stating that such an approach “seems to be consistent with the language of [the Rule].” On a slightly different tack, I accept unreservedly that the rules “exist to enable the court to resolve the matters in issue, not to throw up unnecessary technical obstacles”: see *Williams v Devon CC* [2016] EWCA Civ 419 at [31] per Jackson LJ. The authorities have also looked at the likelihood of separate defences being run and whether that is incompatible with a representative action. It is not necessary to cite from them all, but the following seem the most relevant on the question of “the same interest”.
45. In *National Bank of Greece v Outhwaite* [2001] CLC 591 at [31], Andrew Smith J referred to the need to interpret the rule, now to be found in CPR r. 19.6 with a view to giving effect to the overriding objective and, specifically, that “it should be interpreted in a way that makes the representative proceedings machinery available in cases where its use would save expense and enable a matter to be dealt with expeditiously.” I do not understand this reference to particular facets of the overriding objective to mean that they provide separate and sufficient criteria for representative proceedings that supersede the terms of the rule itself. Rather, Andrew Smith J was noting that the power given by the rule for the claim to be begun or continued as representative proceedings is appropriately to be exercised where that exercise would be in accordance with the overriding objective. If that is not what he was saying, I would respectfully disagree with his approach because, as was clearly stated in *Lloyd v Google* [2020] 2 WLR 484 at [74]:
- “The fact that ... the rule is to be “treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice” cannot mean that the “same interest” test can be abrogated.”
46. At [32] Andrew Smith J despatched a suggestion that one represented syndicate might wish to raise an argument not raised by others by saying that “there is nothing to suggest that this is a realistic possibility on the facts of this case. ... If this should occur, representative proceedings are flexible enough to deal with it.” That appears in context to be a reference to the other provisions of CPR r. 19.6 that provide protection were necessary (e.g. CPR r. 19.6(4)), though that is not unequivocally stated.
47. In *Independiente Ltd and others v Music Trading on-line (HK) Ltd and others* [2003] EWHC 470 (Ch), the claim was brought by the claimants “suing on behalf of themselves and as representing all other members of the British Phonographic Industry Ltd (“BPI”) and Phonographic Performance Ltd (“PPL”) who were the owners or exclusive licensees of the UK copyright in various sound recordings. They

Approved Judgment

brought their claim against the defendants seeking an injunction, damages or an account of profits and delivery up of copies of CDs that infringed their copyright. Monies that were recovered by the claimants were to be accounted for to BPI: see [26]. The issues for determination included whether the claim came within the provisions of CPR r. 19.6(1). Sir Andrew Morritt VC said at [23]:

“The provisions of the civil procedure rules, particularly CPR Rule 1.2, emphasise the need to interpret the phrase "the same interest" and to apply the provisions of CPR Rule 19.6 both flexibly and in conformity with the overriding objective. Accordingly there are three questions: do the individual claimants on the one hand and the Relevant Members as defined on the other have (1) a common interest, (2) a common grievance and (3) is the relief sought by the claimants in its nature beneficial to the Relevant Members?”

48. Applying those principles, the Vice Chancellor held that any pecuniary relief was in its nature equally beneficial to the representative claimants and to the represented individual claimants, saying “what they [i.e. the representative claimants] do with any money recovered in the action is a matter for them not the Defendants”: see [28]. He concluded that the representative claimants and those they represented all had the same interest in the claim. Referring back to the speech of Lord Macnaghten in the *Duke of Bedford* case and the obiter views of Sir Denys Buckley in *CBS v Amstrad* [1988] 1 Ch 61, he drew the distinction between the claim for an injunction and an individual’s claim for damages which could be regarded as subsidiary in that case.
49. In *Millharbour Management Ltd and others v Weston Homes and another* [2011] EWHC 661 (TCC), Akenhead J reviewed a number of authorities from the *Duke of Bedford* case onwards and provided his own summary of relevant principles derived from those authorities at [22], including:

“(3) The question of whether and the extent to which parties have the same interest can only be answered by reference to the facts of the particular case, albeit that it will be necessary to determine, amongst other things, whether the representing party and the represented parties in effect have the same cause of action or liability as the case may be, subject of course to the relevant facts ultimately being found.

(4) As in the *Duke of Bedford* case, it will be inappropriate, before the final judgement on the issues resolved in relation to the represented parties, for the Court to decide the issues or, indeed, to indicate in some obiter way what the answer may well be. That is simply because the Court will not have heard full argument and will only have unchallenged written evidence before it at that stage.

(5) Once it is clear that there is the same interest, the Court has a discretion whether to allow the relevant party to act or to continue to act in a representative capacity. Indeed, the Court retains a discretion even at and after the judgement to direct

Approved Judgment

that a judgement is not binding or is not to be enforced. Thus, it is conceivable that, if in the judgement findings of fact or other law are such that it emerges that one or more of the represented persons does not have the same interest, the judge could well direct that the judgement is not to be enforced against them.

(6) The overriding objective must always play an important part in the exercise of the discretion. Thus the saving of cost and time to the parties, and indeed to the court, must be factors in appropriate cases to take into account.

(7) Limitation defences could be a factor to take into account depending obviously on when the representative character is sought to be imposed. In general, however, it would be open to a defendant to run a limitation defence in relation to represented parties who were not actual parties to the litigation. If such a defence was established against certain persons, it would be a wholly exceptional case in which the judge allowed the judgement to be enforced by a person who had not been a party to the claim and against whom the limitation defence had been established.”

50. I respectfully agree with this passage. Specifically, I agree that there need not be congruity of causes of action as between the represented and representing parties, though they will need to be “in effect” the same. In *Millharbour* there were two groups of represented claimants whose causes of action were not identical in relation to defects alleged to be prevalent throughout a residential development. There was, however, no conflict between the two groups who shared the common interest in proving the defects. Although there was no evidence before the court that specific and particular defences would be raised in relation to individual flats, it was recognised as possible that this might turn out to be the case, in which case provision could be made for them within a representative action: see [26] and [31]. Akenhead J regarded an argument that the defects were not so widespread as alleged by the claimants to be “essentially a generic defence”: see [27]. He therefore concluded that the represented and representing parties had the same interest in the claims “for the cost of remedial works organised by MMI, and to be charged to them by MMI”: see [30]. This appears to be a similar approach to that adopted by Sir Andrew Morritt VC in *Independiente*: see [48] above. Akenhead J catered for potential limitation issues by limiting the representative capacity of the lead claimants to a given date.
51. The first of the two more recent Court of Appeal decisions on point is *Emerald Supplies v British Airways Plc* [2010] EWCA Civ 1284. The claimants, who were importers of flowers, alleged that the defendant had been party to price-fixing agreements which distorted competition. By their amended Particulars of Claim, the claimants claimed on their own behalf, and on behalf of all other direct or indirect purchasers of air freight services (the prices for which were inflated by the distorting practices and agreements) a declaration that damages were recoverable in principle from the defendant by those purchasers. The aim was to obtain collective redress for the purchasers of affected air services.

Approved Judgment

52. Mummery LJ (with whom Toulson and Rimer LJJ agreed) commenced by identifying the range of problems that may be raised in a multi-party proceedings context. He did so at [3] by citing with apparent approval a passage from *Zuckerman, Civil Procedure - Principles of Practice*, 2<sup>nd</sup> ed (2006) which I would respectfully endorse:

“As Uff observed, two different sorts of interest may arise in the multi-party proceedings context. One is the true collective interest, where all those concerned share a single common interest (eg pollution; anti-discrimination). The second arises where individual substantive rights happen to be shared by several persons relating to a single event or similar transactions (eg personal injury claims following mass disasters; product liability claims). The procedural process suitable for administering one such sort of claim is not necessarily suitable or most appropriate for administering the other. Accordingly CPR Pt 19 provides two principal devices for handling multi-party actions. One is the representative action. The other is the group litigation order ...”

53. At [4] Mummery LJ said:

“CPR r 19.6 requires the parties in question (in this case the claimants and those whom they purport to represent) to have “the same interest”. As Professor Zuckerman explains, the key factor in representative proceedings is identity of interest in the relevant group. That identity of interest is determined with a view to promoting the litigation objectives of justice, economy, efficiency and expedition. Although the modern trend is to give the rule an increasingly liberal interpretation, so that the court can deal with as many claims as possible within one set of proceedings, Professor Zuckerman comments, at para 12.27, that “it is not surprising that the use of this procedure has so far been confined to situations where the interests of the representatives and represented were virtually the same”. That approach is conditioned by two principal considerations: first, the binding effect of the proceedings on the represented persons, who have not given their leave to litigate on their behalf and do not actively or actually participate in the proceedings; and, secondly, the limited powers of the court to ensure that the proceedings are conducted in the interests of all the represented persons. The potential presence of separate defences also militates against representative proceedings by claimants: a defendant should not be prevented from raising a defence that he may have against only some of the persons represented.”

54. The approach outlined in this paragraph is conventional and compelling. It recognises that the relevant criterion is that the parties have “the same interest” and that the identity of interest is determined with a view to furthering the overriding objective. It is not entirely clear (at least to me) what is meant by that approach being “conditioned”, but the Court of Appeal evidently considered that (a) the potential

Approved Judgment

impact on represented persons who have not given permission for litigation to be brought on their behalf, (b) the limited powers of the court to ensure that the proceedings are conducted in the interests of all the represented persons, and (c) the potential presence of separate defences are all material considerations when assessing whether representative proceedings are appropriate. Later, at [13] he made the point concisely that if a case “falls within the rule at all, it is as “a common interest” case and is not synonymous with a case arising from a single event, product or transaction.”

55. Two features stand out in the Court of Appeal’s analysis, which were identified at [14] and [15]. First, there was a problem of identification, because “only if and when judgment is given in favour of Emerald are the members of the represented class capable of being identified.” The second was the potential conflict between those represented persons who “passed on” and those who did not “pass on” to their customers the inflated element of the illegally fixed prices. The effect of this “passing on” would be that direct purchasers who had “passed on” the increase would not want the defendant to raise the point, whereas the indirect purchasers to whom the increase had been passed on would want the defendant to raise it as against the direct purchasers. Therefore the interests of groups of represented persons could conflict.
56. Having described the requirement that those represented in the action must have the same interest as “fundamental”, Mummery LJ said at [64] said:
- “A second difficulty is that the members of the represented class do not have the same interest in recovering damages for breach of competition law if a defence is available in answer to the claims of some of them, but not to the claims of others: for example, if BA could successfully run a particular defence against those who had passed on the inflated price, but not against others. If there is liability to some customers and not to others they have different interests, not the same interest, in the action.”
57. As will be seen, Mummery LJ regarded the first point, namely the need for identification of the class, as the essential point that the Court of Appeal was deciding. But [64] supports the proposition that the existence of defences that are available against some but not other members of a represented class militates against a representative action being appropriate.
58. Similar questions arose in *Lloyd v Google*. Mr Lloyd brought the action against Google on his own behalf and on behalf of more than 4 million users of iPhones for damage suffered by reason of Google’s contravention of its duties under the Data Protection Act 1998, it being alleged that it had tracked and used the browser generated information (“BGI”) of users of a particular smartphone without their consent. The claimant disavowed any claims based upon the particular facts relating to an individual represented person’s loss. He claimed a uniform sum in respect of the loss of control of data sustained by each member of the represented class. The Court of Appeal held that the claim satisfied the CPR r. 19.6(1) requirement of “the same interest”. At [75] ff Sir Geoffrey Vos (with whom Davis LJ and Dame Victoria Sharp P agreed) gave the Court’s reasons for its conclusion:

“75. Once it is understood that the claimants that Mr Lloyd seeks to represent will all have had their BGI—something of value—taken by Google without their consent in the same circumstances during the same period, and are not seeking to rely on any personal circumstances affecting any individual claimant (whether distress or volume of data abstracted), the matter looks more straightforward. The represented class are all victims of the same alleged wrong, and have all sustained the same loss, namely loss of control over their BGI. Mr Tomlinson disavowed, as I have said, reliance on any facts affecting any individual represented claimant. That concession has the effect, of course, of reducing the damages that can be claimed to what may be described as the lowest common denominator. But it does not, I think, as the judge held, mean that the represented claimants do not have the same interest in the claim. Finally, in this connection, once the claim is understood in the way I have described, it is impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others. The wrong is the same, and the loss claimed is the same. The represented parties do, therefore, in the relevant sense have the same interest. Put in the more old-fashioned language of Lord Macnaghten in *Duke of Bedford v Ellis* [1901] AC 1, para 8, the represented claimants have a “common interest and a common grievance” and “the relief sought [is] in its nature beneficial to all”.”

76. I have considered whether there might be injustice in allowing Mr Lloyd to represent individuals who may have sustained significant pecuniary loss or distress as a result of the data breach alleged. But since the limitation period has now expired, and represented claimants could, at least in theory, seek to be joined as parties if they wished to claim additional losses, I cannot see that there is any injustice in the pleaded claim proceeding as a representative one.

77. The judge explained at paras 89–93 of his judgment why he thought that the breaches and the losses would vary across the represented class. He was concentrating on the amount of data removed without consent and the differing impact on individual represented claimants. ... In my view, however, this approach did not pay adequate regard to the way that Mr Lloyd put his case. If individual circumstances are disavowed, the representative claimant could be entitled to claim a uniform sum in respect of the loss of control of data sustained by each member of the represented class. The sum will be much less than it might be if individual circumstances were taken into account, but it will not be nothing for the reasons I have given in answering the first issue. It will take into account, at least, the facts of the tort proved against Google generically, and the effect, in terms of loss of control of personal data, that the

Approved Judgment

breaches would have on any person affected by Google's unlawful actions.

59. The decision in *Lloyd v Google* is subject to further appeal. I note, however, the following features of this passage:
- i) It gives primacy to the words of the rule in explaining how it is satisfied;
  - ii) The represented class were all victims of the same alleged wrong, namely the tort alleged generically against Google. Although each member of the class technically had a separate cause of action, they were in effect the same for all practical purposes;
  - iii) The disavowing of reliance of any facts affecting any individual represented claimant was integral to the Court of Appeal's decision that all represented parties shared the same interest in the claim, because it meant that they had all "sustained the same loss" namely loss of control over their BGI;
  - iv) The Court of Appeal considered the possibility that Google could raise any defence to one represented claimant that did not apply to all others, and rejected it as "impossible to imagine".
60. I shall apply the principles identified above; but it may be convenient to draw some of the salient strands together at this point:
- i) Representative proceedings are not the only vehicle for multi-party litigation: see the citation from *Zuckerman* at [52] above;
  - ii) The requirement in CPR r. 19(6)(1) that persons have "the same interest" is statutory and is not to be abrogated or substituted by reference to the overriding objective. That said, the rule is to be interpreted having regard to the overriding objective and should not be used as an unnecessary technical tripwire: see [44]-[45], [53] above;
  - iii) The purpose of a representative action is to accommodate multiple parties who have the same interest in such a way as to go as far as possible towards justice rather than to deny it altogether. This is done by adopting a structure which can "fairly and honestly try the right": see the citation from page 10 of the *Duke of Bedford* case at [31] above;
  - iv) It is for this reason that representative proceedings may be appropriate where the relief sought is in its nature beneficial to all whom the lead claimants propose to represent: see the citation from page 8 of the *Duke of Bedford* case at [31] above and see [47] above;
  - v) The "same interest" which the represented parties must have is a common interest, which is based upon a common grievance, in the obtaining of relief that is beneficial to all represented parties: see [47] above. It is not sufficient to identify that multiple claimants wish to bring claims which have some common question of fact or law;

Approved Judgment

- vi) It is not necessary that the claims or causes of action of all represented parties should be congruent, provided that they are *in effect* the same for all practical purposes: see [39] and [49] above;
- vii) The existence of individual claims over and above the claim for relief in which the represented parties have the same interest does not necessarily render representative proceedings inapplicable or inappropriate: see [38] above. The question to be asked is whether the additional claims can be regarded as “a subsidiary matter” or whether they affect the overall character of the litigation so that it becomes or approximates to a series of individual claims which raise some common issues of law or fact: see [33] above;
- viii) Similarly, while the court will pay little attention to potential individual defences that are merely theoretical, the existence of potential defences affecting some represented parties’ claims but not those of others tends to militate against representative proceedings being appropriate. One reason for this is that it may be procedurally difficult or impossible to accommodate individual defences in representative proceedings, though the rules make provision for affected parties to be protected: see [53] above. Another is that if a defence is available in answer to the claims of some but not others of the represented class they have different interests in the action: see [56] above. Adopting slightly different language, I would add that the existence of individual defences calls into question whether the action really is a claim for relief that is beneficial for all or is a collection of individual claims sharing some common issues of fact or law;
- ix) If the criterion of “the same interest” is satisfied the Court’s discretion to permit representative proceedings to continue should be exercised in accordance with the overriding objective.

*Ascertainment of the class*

- 61. It is common ground that it must be possible to identify the members of the represented class at all stages of the proceedings (and not just at the end) and that the represented cohort must be defined with a sufficient degree of certainty. It is not necessary that the membership of the represented cohort should remain constant throughout the proceedings. These principles are so well established that they do not need citation from authority. The questions remain: how precisely must the represented class be identified and what is the relevance of conflicts of interest between persons who are said to be represented as part of the class? These questions are closely related because, as Mummery LJ said in *Emerald* at [63] “it defies logic and common sense to treat as representative an action if the issue of liability to the claimants sought to be represented would have to be decided before it could be known whether or not a person was a member of the represented class bound by the judgment.” In other words, a class is not sufficiently defined if the outcome may be that significant numbers may fail even if others succeed.
- 62. In the *Duke of Bedford’s* case at page 11, Lord Mcnaghten addressed the nature of the class as follows:



Approved Judgment

“... It was said that the growers are so fluctuating and indefinite a body that it is impossible to tell who is or who is not a grower, especially in these modern times when there are such improved facilities for carriage of goods. I cannot say that I am much impressed with that difficulty. It seems to me that the description of the persons apparently intended to be favoured by the Act is sufficient for all practical purposes. It may be difficult or impossible to compile a catalogue of growers. But there cannot, I think, be much difficulty in determining whether a particular person who claims a preferential right to a vacant stand in the market is a grower or not. ...”

63. Lord Shand, adopted a similar approach at page 15, observing that, although at trial questions might arise as to whether the plaintiffs were growers within the meaning of the statute, on the basis of the pleaded case (which was to be taken to be true) there was no reason to doubt the title of each person who asserted that they were a grower to sue on their own account. What is common to both speeches is that the terms of the Act of 1828 provided a definition of growers that could be applied at any point in order to determine whether someone was in that category or not. In this way, certainty was provided by statutory definition.
64. There was no statutory definition in *Millharbour*; but the class was sufficiently defined and the identity of those being represented could be established at any time, including by reference to the land registry in the case of leaseholders. Akenhead J expressly limited the representative capacity of the lead claimants to the claims for damages relating to the cost of remedial work organised by MML and passed to be charged to leaseholders through service charges. Any other legal or financial claims were excluded: they were not within the “same interest” that he had identified as being shared by the lead claimants and the identifiable classes of represented parties: see [36]
65. As noted above, the Court of Appeal in *Emerald* addressed the lack of identification of the class. At [62] ff Mummery LJ said:

“62. In my judgment, Emerald's case for a representative action, whether as originally pleaded or as proposed to be amended, is fatally flawed. The fundamental requirement for a representative action is that those represented in the action have “the same interest” in it. At all stages of the proceedings, and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having “the same interest” as Emerald.

63. This does not mean that the membership of the group must remain constant and closed throughout. It may indeed fluctuate. It does not have to be possible to compile a complete list when the litigation begins as to who is in the class or group represented. The problem in this case is not with changing membership. It is a prior question how to determine whether or

Approved Judgment

not a person is a member of the represented class at all. Judgment in the action for a declaration would have to be obtained before it could be said of any person that they would qualify as someone entitled to damages against BA. The proceedings could not accurately be described or regarded as a representative action until the question of liability had been tried and a judgment on liability given. It defies logic and common sense to treat as representative an action, if the issue of liability to the claimants sought to be represented would have to be decided before it could be known whether or not a person was a member of the represented class bound by the judgment.

...

65. In brief, the essential point is that the requirement of identity of interest of the members of the represented class for the proper constitution of the action means that it must be representative at every stage, not just at the end point of judgment. If represented persons are to be bound by a judgment that judgment must have been obtained in proceedings that were properly constituted as a representative action before the judgment was obtained. In this case a judgment on liability has to be obtained before it is known whether the interests of the persons whom the claimants seek to represent are the same. It cannot be right in principle that the case on liability has to be tried and decided before it can be known who is bound by the judgment. Nor can it be right that, with Micawberish optimism, Emerald can embark on and continue proceedings in the hope that in due course it may turn out that its claims are representative of persons with the same interest.”

66. No part of this reasoning is dependent upon the fact that the claimants had not sought or obtained the authority or permission of those they purported to represent; nor is it dependent upon the fact that the members of the represented class were not named in the Claim Form or subsequent Statements of Case. In these respects, the case was on all fours with the *Duke of Bedford* case where the represented class were not identified by name and there is no indication that the plaintiffs sought the permission of those they claimed to represent: to the contrary Lord Macnaghten’s reference to the indefinite class (cited at [62] above) indicates that they had not. It is essential that, whether by reference to statutory definition (as in the *Duke of Bedford* case) or otherwise (as in *Millharbour*) the identity of interest must be capable of being identified at any and all stages of the proceedings. It is therefore clear that, although I have treated them as separate questions, the questions of “the same interest” and “identification of the class” are closely connected.
67. The reasoning in *Emerald* on identification of the class was applied by the Court of Appeal in *Lloyd v Google* at [79] ff. The Judge at first instance had been concerned that the class could not be identified before trial by any workable and conceptually sound method. Specifically, (a) he rejected the fact that disclosure from Google could validate the identity of those who should be in the class; and (b) he was concerned

Approved Judgment

that self-certification by members of the class was open to honest error and abuse. The Court of Appeal adopted a more robust approach at [80], adopting the terms used in *Emerald*:

“In my judgment, the only applicable test is that “it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having” the same interest as Mr Lloyd “[a]t all stages of the proceedings, and not just at the date of judgment”. I cannot see why that test is not satisfied here. Every affected person will, in theory, know whether he satisfies the conditions that Mr Lloyd has specified. Also, the data in possession of Google will be able to identify who is, and who is not, in the class. Both exercises can be undertaken at any time. It is true that some persons’ memories may be at fault, and that there could, in theory, be abuse, but those factors are practical ones, not ones that affect the formal ability to identify the class. It has repeatedly been said that the number of claimants cannot itself affect the ability to use the representative procedure.”

68. Despite the express adoption of the *Emerald* test, it is not clear precisely how it is to be adopted or what principles are to be applied to determine whether or not a person is in the represented class of persons before judgment. Evidently, it is not necessary for them to be listed in court documents, for that was not done in the *Duke of Bedford* case or in *Lloyd v Google*. Nor can it be determinative that reference to third party sources (such as disclosure from an opposing party or documents from the land registry) will evidence whether or not a person is within the class, although that may be a convenient check and additional evidence, as in *Lloyd v Google* and, to a certain extent, *Millharbour*. Furthermore, the authorities contemplate that a representative action may be appropriate even if some represented persons fall by the wayside after judgment. However, if clarity of definition of the class and self-certification are sufficient, as suggested by *Lloyd v Google*, it could be said that the classes in *Emerald* were comprehensibly defined and capable of self-certification even if the action was going to fail in whole or in part when it came to judgment. With considerable hesitation, I would suggest that the touchstones should be (a) clarity of definition of the class; (b) lack of internal conflict within the class, which will be a subset of (a); (c) ability to evidence inclusion within the class, whether by self-certification or otherwise; and (d) whether it appears that the class, as defined, share the same interest in the outcome of the representative proceedings that are considered to be in accordance with the overriding objective. My suggestion at (d) may be said not to be a feature of identification, but it may help to explain the different outcomes in *Emerald* and *Lloyd v Google* respectively. It also harks back to the observation of Professor Zuckerman, which I have set out at [52] above, that CPR Part 19 provides for different ways of handling multi-party actions: the mere fact of multiple parties and common issues does not necessarily or even probably indicate that a representative action is appropriate.

### Applying the Principles to the Present Action

69. There can be no doubt that the claims being advanced by the Lead Claimants and those they claim to represent raise some common issues of law and fact. Each claim

Approved Judgment

requires determination of the fact of the Bonga oil spill, how and why it occurred, and whether its occurrence was caused by breach on the part of STASCO or SNEPCO of any duty owed to the Claimants. For present purposes I assume (without deciding) that any duty owed to some of the Claimants would have been owed to all. It is obviously desirable that, if these issues are to be litigated in England, they should be litigated once and in the context of a structure that accommodates all potential Claimants. That would include the additional Claimants in the Protective Proceedings and the Claimants in the Akinruntan Proceedings. The Court has ample powers to enable that to be achieved, including the making of a GLO or common case management of the various actions that are now in being. It also appears reasonable to assume for the sake of argument that the basis of the claims being brought by individuals and communities in relation to these issues are in effect the same for all practical purposes even if there might be some variation in the precise causes of action being alleged by some claimants as opposed to others. In this regard and in relation to these issues, I see no conflict between the claimants that would render representative proceedings inapplicable or inappropriate.

70. Even assuming that all findings were made in the Claimants' favour, the facts and issues outlined immediately above do not give rise to a right to relief because they stop short of landfall or damage to the Claimants' interests. Beyond the common issues of fact and law outlined above, these proceedings are individual claims because each Claimant (or possibly small group of Claimants living in a particular community) and each community needs to go further and prove that Bonga oil caused them damage. Adopting the language of Lord Macnaghten, the matters in which the Claimants may have a common interest are not sufficient to enable the Court to "try the right". That is not changed by the expedient of abandoning the individual Claimants' individualised claims for damages in these proceedings and pursuing them in another action, though the obvious purpose of taking that step was to align the position of the Claimants in this action more closely with the facts of *Lloyd v Google*. The difficulty for the Claimants is that, whether claiming individualised damages or "remediation relief", any individual or community Claimant will need to prove that they have been adversely affected by Bonga oil pollution. By their skeleton argument for the present hearing the Claimants accepted that they need to show that they have suffered some damage in order to complete the causes of action upon which they rely for their claims. I agree, but would go further: it will be necessary for them to show that they have suffered damage to an extent that justifies their claim for "remediation relief".
71. The Defendants make it clear that they would raise substantial objections to the English court granting "remediation relief" by ordering either an English company (STASCO) or a Nigerian company (SNEPCO) to remediate damage to land situate in Nigeria, as requested by paragraph 2 of the prayer in these proceedings. Leaving those objections on one side, the Court could not make such an order (or the orders sought in the alternative of paying the costs of remediation works) without investigating precisely where such remediation was required and whether it was attributable to the 2011 Bonga oil spill. No principle of law has been identified that would enable a Claimant or community at one location in the allegedly affected area to claim remediation for damage suffered by another community at another location or for the whole area. It is therefore, in my judgment, a misuse of language to characterise the "remediation relief" that an individual or community Claimant seeks

Approved Judgment

as being relief that is beneficial for all whom the Lead Claimants propose to represent. If one community were to succeed and another were to fail in proving its individual loss and damage, any order for “remediation relief” would necessarily be restricted to the loss and damage proved by the successful community. That would not be beneficial for all as it would be limited to the consequences and need for remediation affecting the successful community. It is possible to imagine a patchwork of success, but not obvious that even such a patchwork would justify orders for the wholesale remediation of all consequences of the Bonga oil spill apparently contemplated in these proceedings.

72. In principle, the existence of individualised claims does not necessarily prevent an order for representative proceedings. The question is whether the individualised claims can be regarded as “subsidiary” to the main issue that is the subject of the proceedings. In my judgment it is impossible to do so. I do not underestimate the significance of or, in general terms, the resources that will need to be devoted to the common issues. The court cannot form a precise estimate of the resources that would need to be devoted to the common issues and the individualised issues respectively, but the evidential complexity inherent in proving pollution caused by the 2011 Bonga oil spill over the wide area that is apparently the subject of these proceedings can readily be appreciated. The need for (a) individual evidence of damage and (b) extensive expert evidence on pollution migration and attributing damage to the Bonga oil spill when the damage is said to have occurred years later and great distances from the coast is self-evident to anyone with experience of such litigation. Although I make no findings of fact, the difficulties of attribution of causation are highlighted by the evidence of Ms Keibi Atemie who describes many other sources of oil pollution that plague the Nigerian coast and hinterland. Nor can it be said that the issues of loss, damage and causation are subsidiary in importance to the Claimants since they are just as critical as the common issues (as outlined above) to any prospects of any success or relief at all. They are not “subsidiary” to another issue that can be described as “the main issue”: they are an integral part of the overall issues that are raised by the proceedings.
73. One of the oddities of the abandonment of individualised claims for damages in these proceedings is that it only applies to represented persons and not to Mr Jalla and Mr Chujor. The Defendants submit that this oddity shows that Mr Jalla and Mr Chujor do not have the same interest as those they wish to represent. I would not decide the issue on that basis, not least because of the broad statement by Lord Macnaghten at page 7 of the *Duke of Bedford* case, cited at [31] above. What it does evidence, in my judgment, is that the decision to abandon is a procedural expedient which owes little or nothing to the application of the overriding objective.
74. It is obvious that individualised factual and causation defences will be raised in relation to all individual claimants (or groups of individual claimants from one location) and all communities. The Claimants submit that limitation is not an issue to be brought into account because it has been decided by the March judgment. I disagree. Although the principles and framework have been established, it may safely be predicted that the Defendants would scrutinise the dates on which damage is alleged to have been suffered by individuals and communities alike with a view to running individualised limitation defences (whether on the basis of a limitation period of five or six years).

**Approved Judgment**

75. Standing back, I do not accept that the demonstration of some common issues of law and fact is sufficient to satisfy the requirement that the multiple parties have “the same interest” within the meaning of CPR r. 19(6)(1) and in accordance with the principles that I have identified earlier in this judgment. The matters that the Claimants have in common are insufficient to lead to the relief that they claim; and it is impossible to escape the conclusion that these are a very large number of individual claims requiring individual consideration and proof of damage and generating individual defences.
76. In the period to 19 September 2019 it might have appeared possible, at a stretch, to treat the suffering of damage and defences of limitation monolithically, in which case it might have been tempting to formulate the common issues in terms that could give rise to the claimed relief. However, since the Claimants’ case began to shift on that date, it has become increasingly clear that such an approach would have been mistaken.
77. I therefore hold that the represented Claimants do not satisfy the requirement of “the same interest” either as between themselves or as between themselves and the Lead Claimants. These proceedings therefore cannot continue as a representative action. I therefore strike out the representative elements of the proceedings, leaving the personal claims of Mr Jalla and Mr Chujor to continue in existence.
78. Had I been satisfied that representative proceedings were otherwise available and appropriate I would not have struck them out on the basis of failure to ascertain the class. In my judgment the statements of principle in the *Duke of Bedford* case, *Emerald* and *Lloyd v Google* must be read in the context that there was no identification of the class by annexing the names of represented people to the court documents and questions arose (at least in *Emerald*) about whether and to what extent the Lead Claimants might be authorised or appropriate to act in a representative capacity for those they wished to include by definition in the class. In the present proceedings the individual and community Claimants who were to be represented are listed in schedules to the amended Particulars of Claim and their solicitors asserted that all had given authority to the Lead Claimants to act on their behalf. The latter assertion was not accepted by the Defendants; but at this stage it would not be possible to hold that it was wrong. In those circumstances I would hold that the class is sufficiently identified. The fact that some might prove not to have suffered damage or might fail for limitation reasons does not demonstrate or even suggest that the class is unascertained.

**Estoppel**

79. In their submissions in reply to the Defendants’ strikeout application, the Claimants submit that the Defendants are estopped from disputing that the Claimants other than Mr Jalla and Mr Chujor were validly joined as Claimants in these proceedings. They rely upon (a) estoppel by convention, (b) litigation estoppel and the doctrine prohibiting approbation and reprobation, and (c) issue estoppel.

*The applicable principles*

80. The March Judgment summarised the principles applicable to estoppel by convention at [90]-[94]. They do not need to be repeated here.

Approved Judgment

81. Litigation estoppel or the doctrine prohibiting approbation and reprobation may arise where a party adopts two inconsistent attitudes towards another party. In appropriate cases “he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance”: see *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320 at 1329 per Lord Browne-Wilkinson VC. It reflects “the unwillingness of the courts to countenance inconsistent conduct by one party where this is prejudicial to the other”: see *Benedictus v Jalaram Ltd* (1989) 58 P. & C.R 330 at 344-345 per Bingham LJ. As the explanatory example given by Bingham LJ in *Benedictus* illustrates, it is founded upon the Court’s view that for a party to take unfair litigation advantage of another by founding on the truth of an assertion of fact but subsequently to deny that fact in order to obtain further litigation advantage is (or may be) unconscionable.
82. The third type of estoppel upon which the Claimants rely is based on the concept of abuse of the process articulated by Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100, 115. As such it may stretch wider than a “pure” issue estoppel such as described in *Arnold v National Westminster Bank plc* [1991] 2 AC 93,105E:
- “Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen the issue.”
83. The *Henderson v Henderson* line of authority has been helpfully summarised by Pepperall J in *Mansing Moorjani v Durban Estates Limited* [2019] EWHC 1229 (TCC) at [17.4]:
- “Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in *Henderson v. Henderson* where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:
- a) The onus is upon the applicant to establish abuse.
  - b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
  - c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
  - d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

Approved Judgment

- e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant".

*Application of the principles to the facts*

84. The Claimants rightly draw a distinction between the first three lines of the Defendants' argument summarised at [4] above and the fourth. The central tenet of their submission is encapsulated by the following passage, taken from [177]-[180] of their written submissions in reply to the Defendants' strikeout application:

"177. The parties have now been conducting these proceedings for over two years since December 2017, including three CMCs and most recently a four-day hearing before the Court in October 2019, culminating in the Court's Judgment dated 2 March 2020.

178. At no point prior to the Defendants' first letter dated 10 March 2020 ... did they ever suggest that any of the original [Claim Form or statements of case] **failed validly to include the Claimants other than Mr Jalla and Mr Chujor (the Other Claimants and Community Claimants) as represented in these proceedings**. Indeed, they positively asserted the contrary (see below) when seeking to challenge jurisdiction. ...

179. At the absolute highest, the Defendants hinted at (but did not develop) a *different* argument that the Other Claimants and Community Claimants might not share the same interest as Mr Jalla.

180. To be clear, the argument hinted at presupposed that Other Claimants and Community Claimants were represented in these proceedings, and complained that they lacked the requisite identity of interest in the claim (which is a separate point on which the Defendants are wrong for the reasons set out [elsewhere].") (Emphasis as in original)

85. The Claimants develop their submission by arguing that the Defendants fought the October hearing on the express basis that the represented Claimants were represented in the proceedings. They do so in terms that are consistently directed to the first three of the Defendants' potential strikeout arguments as summarised at [4] above, but not the fourth. They go on to submit that this gave rise to a common assumption that all Claimants were represented in the proceedings and that the Claimants relied upon this state of affairs to their detriment in two ways. First, they submit that they responded in their own evidence and submissions to the case being advanced by the Defendants, "which presupposed the validity of the joinder. If the Defendants had advanced the different and inconsistent point that the Other Claimants and Community Claimants were not validly joined, the Claimants would have responded to that case instead." Second, "if the Defendants had advanced the point that they are now advancing – namely that Mr Jalla and Mr Chujor are time-barred and that the Other Claimants and Community Claimants were never actually represented in these proceedings and thus



Approved Judgment

fall to be struck out – at an earlier stage, the Other Claimants and Community Claimants could and would have taken steps to protect their position, including by issuing a protective claim at an earlier stage.”

86. Addressing the *Henderson v Henderson* line of authority, the Claimants again refer to and rely upon “the parties’ common assumption that amendments in the 4 April 2018 Amended Claim Form were effective to add the Other Claimants and Community Claimants as represented parties”.
87. The Claimants are right, in my judgment, to draw a distinction between the Defendants’ first three lines of argument and their fourth. That has certain consequences, of which the most immediate is that this judgment has not been concerned with the first three lines of argument because the Defendants sensibly conceded that they could not proceed on those grounds in the light of the Claimants’ new evidence: see [25] above. I should therefore immediately make clear that I make no findings on the Claimants’ estoppel submissions so far as they related to the first three of the Defendants’ lines of argument.
88. The question remains whether the Claimants’ estoppel submissions could have any relevance to the Defendants’ fourth line of argument. In my judgment it cannot, for the reasons I now give.
89. The question of identity of interest was mentioned in the March Judgment at [25] where I commented that “no one appears to have given thought to the appropriateness of using a representative action when, at least arguably, the Claimants cannot be said to have the same interest.” It would, in my judgment, be an abuse of language to suggest that there was a common assumption, shared by and between the parties, that all Claimants had the same interest. There is no evidence of an assumption and no evidence that it was shared between the parties.
90. Even if it could be said that there was any such assumption, it would have been based on the Claimants’ presentation of their action as a monolithic issue affecting those immediately affected along the coast of the Atlantic Ocean. That started to change on 19 September 2019 when, in an attempt to avoid the prospect of a monolithic finding on limitation, the Claimants raised the possibility that they had not all suffered damage at the same time. The change was only rendered complete with the service of the Claimants’ evidence in response to the Defendants’ strikeout application, which made clear the split into multiple individual claims and forms the basis for the conclusions elsewhere in this judgment. Had there been any prior assumption that all Claimants had the same interest, it was negated by the Claimants’ procedural and evidential manoeuvring on and from 19 September 2019. In my view, the expedients adopted to avoid unpalatable findings on limitation opened up and brought into focus the different problem facing the Claimants, namely their lack of the same interest.
91. Furthermore, lest there be any doubt, I would not criticise the Defendants for proceeding as they have done. I have referred at [76] above to the possibility of regarding the action as monolithic before September 2019. Given the Claimants’ presentation of the case up to that date, any decision to launch a strikeout based on absence of identity of interest would, in my judgment, have been finely balanced. It became an obviously potent point once the Claimants shifted their ground. That process started in September 2019 but it would be wrong to criticise the Defendants

Approved Judgment

for not attempting to shoehorn the new and additional point into the already congested hearings in September and October 2019, quite apart from the fact that the Claimants' evidence about different causes of action accruing (even for the Lead Claimants) only started to be forthcoming after the October hearing had been completed. I reject any suggestion that the conduct of the Defendants in raising the "same interest" point at this stage was either unconscionable or abusive. In my judgment it was a natural response to the Claimants' progressive shifting of position and evidence on and after 19 September 2019.

92. The Claimants' submissions on estoppel therefore do not affect the substance of this judgment.