Neutral Citation Number: [2020] EWHC 738 (TCC)

Case No: HT-2017-000383

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2020

Before :

MR JUSTICE STUART-SMITH

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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, Phillip Aliker (instructed by Johnson & Steller) for the Claimants
Lord Goldsmith QC, Dr Conway Blake (instructed by Debevoise & Plimpton) for the Second and Third Defendants

Hearing dates: 24th March 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.

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 27th March 2020.

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MR JUSTICE STUART-SMITH

Stuart-Smith J:

Introduction

1. This judgment is the result of a hearing on 24 March 2020 and is consequential on the handing down of my judgment [2020] EWHC 459 (TCC) on 2 March 2020 ["the Main Judgment"]. The hearing was conducted remotely with (so far as I am aware) all or nearly all participants separated because of the Coronavirus pandemic. I am told, and readily accept, that the consequences of the pandemic adversely affected the ability of the parties to prepare as easily and efficiently as they might otherwise have done. It is right that the Court should acknowledge both the achievements of and the difficulties faced by all in this case who have had to confront the changed litigation and human landscape created by the virus at short notice.

2. In the light of the Main Judgment the Defendants proposed that:

    i) The proceedings should be struck out because the effect of the Main Judgment is that (a) the claims being brought by the two lead Claimants, Mr Jalla and Mr Chujor are statute barred and should be struck out, (b) the Bonga Community was never properly added and has never been represented in the proceedings, (c) since the claims of the two lead Claimants should be struck out there are no lead Claimants to represent the Bonga Community (or, if different, the thousands of individuals listed in Annex 1 to the Particulars of Claim), and (d) the action is not a "representative action" because there is insufficient identity of interest between the Claimants;

    ii) The appropriate course is to follow the conventional route identified in *Chandra v Brooke North* [2013] EWCA Civ 1559 and refuse permission across the board (which would lead to a dismissal of the proceedings);

    iii) The Defendants should have their costs of the proceedings;

    iv) The Claimants' solicitors should provide information about how and by whom the Claimants have been represented.

3. The Claimants proposed a significantly different outcome, namely that:

    i) Permission should be given to appeal the conclusion that time should not be extended by reference to the concept of continuing nuisance: see [62]-[68] of the Main Judgment;

    ii) Declaratory orders should be made reflecting the Court's conclusions on the various applications;

    iii) The Defendants' application to strike out the proceedings should be adjourned as not being truly consequential on the judgment and because the Claimants had not had time to prepare to meet it;

    iv) There should be a direction that the Claimants file a further statement of case setting out and particularising their case on when their causes of action accrued. There should then be a CMC to address (a) whether, and if so how, the representative nature of the proceedings needs to be restructured, (b)

whether there should be a preliminary issue to determine the applicable limitation period for these claims, and (c) how to determine which (if any) of the Claimants' claims are statute barred in light of the conclusions in the Main Judgment;

v) Detailed costs orders should be made to reflect what the Claimants regard as significant success on the issues covered by the Main Judgment.

Background matters

4. The Main Judgment sets out the history of delays on the part of the Claimants both before and since issuing proceedings. It does not need to be set out again here. What matters most, in my judgment, for present purposes is that it appeared until the morning of the September 2019 hearing that the Claimants were taking a unified and unitary approach to limitation. There was nothing in the pleadings to suggest that there were multiple different dates spread over many months or years upon which individual causes of action accrued. Such indications as there were suggested the opposite. For example, [5] of the Particulars of Claim alleged 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." (Emphasis added). It appears from a map produced for the present hearing that the address given by the two lead Claimants was on the coast. The particulars of losses suffered (which are set out at [55] of the Main Judgment) gave no indication of any significant time-lag. The evidence put forward by both sides for the various applications in September and October strongly suggested that, if the Bonga oil reached land, it did so soon after the spill: see [34] of the Main Judgment. Even as late as their written submissions for the September hearing, the Claimants accepted that the Defendants' position on limitation (namely that the limitation period had expired by 4 April 2018) was arguable, without qualification. On the basis that it was appropriate to adopt a unitary approach to limitation, this concession would be sufficient for the Defendants' purposes on the applications and meant that there was no divergence of interest between Claimants on limitation.

5. The Claimants' response was to try to put in evidence about the date that damage was suffered many kilometres from the coast after the October hearing. That evidence was ruled inadmissible. No further steps were taken or submissions made by the Defendants in relation to the constitution of the proceedings as an apparently representative action within the meaning of CPR part 19 at any time after the Claimants' change of position on the first day of the September hearing until after the handing down of the Main Judgment. Then, by letter dated 10 March 2020 the Defendants informed the Claimants that striking out of the claim as a whole was a necessary consequence of the Main Judgment. The Defendants repeated and amplified their reasons thereafter in correspondence to the Court and in their Skeleton Argument for the present hearing. The Claimants objected to this application to strike out on the basis that it would be a new application and not one that should properly be regarded as consequential upon the Main Judgment, though they acknowledge that it arises as a result of observations contained in it.

Should the strike out application be entertained today?

6. The Claimants are correct to submit that the arguments now being pursued by the Defendants were not articulated as part of a submission that the proceedings should be struck out before, during or after the hearings until being outlined in the Defendants' letter of 10 March 2020. During the October 2019 hearing Dr Blake for the Defendants referred to the fact that the action is said to be brought under CPR 19.6 and to the provisions requiring that members of a group share common interests and that "that is of course another obstacle that my friends face." The point was not developed. Later, when the Claimants made their late application to adduce further evidence about the date of damage, one of the points raised by the Defendants in opposition to the application was that "the Claimants cannot maintain a representative action under CPR rule 19.6 in circumstances where each of the 27,830 different Claimants comprising the representative group relies on a different instance of damage and therefore has a separate basis for claiming against the Defendants. Once again, the point was not developed further; and it was not raised at that stage as a reason to strike out the proceedings. As a matter of fact, the Defendants have not issued an application to strike out on this separate basis and first gave notice of their intention to take the point by their letter dated 10 March 2020.

7. It is also right that the strikeout submission goes further than the Main Judgment because a significant part of the argument rests on the factual premise that the claims being brought by the two named Claimants are statute barred. That is not a finding that the Court made or could have made in the context of the Main Argument, and it is plain that it would be heavily contested now. Furthermore, it appears to have been accepted at a CMC before Fraser J on 5 October 2018 that the status of individual Claimants would not need to be considered in the context of the applications that were then being made, though this was not a ruling that fetters the Court now. To that extent I accept that the strikeout application is not directly consequential upon the Main Judgment.

8. That said, the argument has now been raised and, if successful, has the potential to save enormous costs and expenditure of resources; and its clear connexion with the Main Judgment makes it desirable that it should be resolved soon and at relatively more modest expense rather than being left over indefinitely. Mr Dunning QC advanced two main arguments. First, he said that the Claimants had not had sufficient time to prepare to meet the strikeout application fully and that it would be unfair to require them to deal with it now. He pointed out that the fully-reasoned skeleton from the Defendants only became available to him at 4pm the day before the hearing and he said that, despite best efforts, he needed further time to develop the Claimants' response both in terms of arguments and evidence. In the circumstances of the emerging pandemic that is a powerful plea. Second, he submitted that the strikeout application is better heard after the Claimants have served a Statement of Case on accrual of causes of action, as to which see below.

9. Lord Goldsmith QC emphasised the fact of past delays and that any further delay is unacceptable going forward unless absolutely necessary. And he made the point, which has substance, that the only reason why the Claimants are facing the strikeout application is because of their decision to introduce a new and far-reaching submission on the morning of the September hearing. I agree with and accept both points.

10. In the face of Mr Dunning's statement that he could not be ready to deal with the strikeout application fully and properly at this hearing, it would be unfair to force the issue at the present hearing. However, I can see no justification for putting the issue off until after the Claimants have taken the steps that I will indicate below. The avoidance of further unnecessary delay is an important factor in my decision; as is the need to impose some order upon the conduct of the issue. The hearing of the strikeout issue will also be the appropriate occasion to consider more generally the "representative" nature of the action and whether the structure of the action should be varied, if it is to continue. To that end, the issue was not dealt with at the hearing but I now give case management directions for its future conduct, namely:

    i) The Defendants shall by 4pm on 27 March 2020 provide to the Claimants a draft Notice of Application raising the strikeout issue. The draft Notice will be treated as if it had been issued on that date but need not be issued unless the Defendants chose to do so;

    ii) The Claimants shall by 4pm on 20 April 2020 serve on the Defendants and file (a) any further evidence upon which they wish to rely in opposition to the Defendants' strikeout application and (b) their skeleton argument (or other document) setting out their full response to the Defendants' strikeout application. The skeleton argument shall also set out any proposals the Claimants wish to advance for the possible restructuring of the present proceedings, if they are to continue;

    iii) The Defendants shall by 4pm on 18 May 2020 serve on the Claimant and file (a) any further evidence, limited to evidence that is responsive to that served by the Claimants pursuant to (ii) above and (b) any skeleton argument (or other document) in reply to that served by the Claimants pursuant to (ii) above;

    iv) There shall be a hearing (format to be agreed nearer the time) on a date to be agreed during the week of 25 May 2020, time estimate 1 day. The parties are to liaise with each other and with the Court to fix the date through usual channels;

    v) For the avoidance of doubt, no further evidence or written submission shall be admitted between the service of the Defendants' materials pursuant to (iii) above and the hearing of the strikeout application without prior leave of the court.

Permission to appeal

11. Permission to appeal against the conclusion at [62]-[68] of the Main Judgment that the concept of "continuing nuisance" is inapplicable is refused. In my judgment the principles are clear and well established and there is no other compelling reason for the appeal to be heard.

12. If the Claimants renew their application for permission to the Court of Appeal, they should keep the Defendants and this Court updated on progress. There should be permission to either party to apply (in writing in the first instance) if the progress of any application for permission to appeal or (if permission is given) any appeal is liable to derail the other directions given either today or in the future.

Further Case Management Directions

13. The Claimants accept that they should serve a "Date of Damage Pleading". Given the delays that have already occurred, I do not think that goes far enough. Any pleading would have to be based upon evidence that justifies it, which in the present case would necessarily include both lay evidence identifying when the Claimants say they noticed or suffered damage and expert evidence validating the allegation that the damage noticed or suffered on a certain date was caused by the December 2011 Spill. If the Claimants serve their supporting evidence with the Pleading, the Defendants will then know the case that they have to meet and the evidence that they have to either accept or dispute. They should then be properly equipped to respond to that case with a view to trying the question when causes of action accrued reasonably soon, if that remains an appropriate course.

14. It is for the Claimants to decide what evidence they shall serve. Because it appears that groups of Claimants live in the same communities so that they may have dates of damage in common, it is not a requirement of this order that evidence from each and every Claimant must be submitted. Nor do I prescribe any particular form of "Date of Damage Pleading" though it seems likely to involve schedule as well as narrative sections. The Claimants should liaise with the Defendants and, as necessary, refer back to the Court for further guidance. The form of the end result is less important than the substance: the Defendants must know the case they have to meet with sufficient particularity to enable them to respond and defend their interests fully and properly.

15. The Claimants should be under no illusions: the iterative approach to this litigation that appears to have prevailed until now must cease. Without in any way fettering the decisions that the Court may make in future, the Claimants should assume that they will only have one opportunity to get their case in order from now on.

16. The Claimants raised the potential difficulties caused by the current pandemic. It is necessary to balance the prospect of difficulties arising with the need to make progress in the action. I therefore extend the time limits that would otherwise be imposed as follows:

    i) The Claimants shall by 4pm on 24 November 2020 (extended by 2 months to allow for prospective difficulties caused by the pandemic) file and serve:

        a) A "Date of Damage Pleading", setting out the Claimants' case on when all relevant accruals of damage occurred with sufficient particularity to enable the Defendants to know the case that they have to meet;

        b) Any lay evidence upon which they rely in the proceedings in support of the case advanced by the Date of Damage Pleading; and

        c) Any expert evidence upon which they wish to rely in the proceedings in support of the case advanced by the Date of Damage Pleading.

    ii) Subject to (iii) below, the Defendants shall by 4pm on 5 April 2021 (extended by 1 month to allow for prospective difficulties caused by the pandemic) file and serve:

a) A "Response to the Date of Damage Pleading", setting out the Defendants' case in response to the Claimants' Date of Damage Pleading;

b) Any lay evidence upon which they rely in the proceedings in support of the case advanced by their Response to the Date of Damage Pleading; and

c) Any expert evidence upon which they wish to rely in the proceedings in support of the case advanced by their Response to the Date of Damage Pleading.

iii) There shall be a CMC on a date to be fixed during December 2020 to review progress and vary or add to these case management orders as appropriate. The present target is to have a preliminary trial (if appropriate) during the summer term of 2021 of preliminary issues (a) as to the date on which Claimants suffered damage, (b) the appropriate limitation period(s) applicable to the Claimants' claims and (c) limitation as a defence to the Claimants' claims.

Declaratory Orders

17. The parties are agreed that declaratory orders should be made and as to the terms of those orders.

Provision of Information

18. By their skeleton argument the Defendants repeated a request for information in the following terms:

> "the Defendants reiterate their requests for clarity regarding the following points: (*i*) the exact role played by the Claimants' legal representatives, Johnson & Steller, particularly in light of the Damages Based Agreement entered into with the Claimants (in relation to which we reiterate our request for further information); (*ii*) the exact role played by Johnson & Steller's "agents", the law firm Rosenblatt Limited, particularly given that they were to be remunerated from "*Johnson & Steller's share of its DBA in the event of success*" (Letter from Claimants dated 8 October 2019); and (*iii*) any third party funding arrangements, including the extent to which (a) any third party funders stood to benefit from a favourable outcome, and (b) any third party funding included funding to cover adverse costs orders against the Claimants."

19. Mr Dunning QC gave a limited answer during the hearing, which included the suggestion that the information had already been provided. The information is relevant both to questions of costs and to settlement and, in my judgment, should be provided in order that the Defendants and the Court may understand what the risks to which the Defendants are exposed may be and the extent to which the playing field is, in this respect, not level. This Court is prepared to take judicial notice of the fact that settlement of large litigation is rendered virtually impossible in the absence of

reasonable transparency about these matters. I did not understand Mr Dunning to submit that the information should not be provided; rather, his submission was that he thought it had been provided already.

20. In these circumstances, I direct that the Claimants shall provide their response to the request for information by 4pm on 1 April 2020. If the Claimants wish to take any principled objection to the provision of the information, they shall state that objection in their response. If the Defendants challenge that objection, the issue shall be decided on the papers, with each party having permission to make submissions limited to 750 words. Submissions shall be sequential, with the Claimants going first and the Defendants responding within two working days of receipt of the Claimants' submissions. The competing submissions should then be submitted to the Court to be decided by me if available or, if I am not, by another judge of the TCC.

Costs

21. It is common ground that the Claimants should pay RDS's costs of the action in the normal way after discontinuance. Those costs shall be subject to detailed assessment if not agreed.

22. It would otherwise be inappropriate to make any order for costs at this stage. The full consequences of the Main Judgment cannot yet be gauged. The Claimants' case on when causes of action accrued has not yet been articulated or tested; but it now appears probable that the Claimants will assert that (at least) significant numbers of individuals are not statute barred, whether the appropriate limitation period is six years or five. The Court is not in a position to express any view, and I do not do so. It is therefore impossible to say at this stage who has been the successful party in these applications; and to adopt an issues-based order as suggested by the Claimants risks an outcome that professes spurious accuracy but proves to be unjust when the end result is known. I therefore say nothing about the merits of any applications for costs other than in respect of RDS: all other questions of costs are reserved, with permission to either party to apply for determination if so advised.