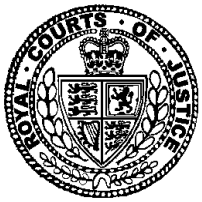

Neutral Citation Number: [2024] EWCA Civ 1500

Case Nos: CA-2024-000769 and
CA-2024-000122

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 December 2024

CA-2024-000769

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mrs Justice May
[2024] EWHC 510 (KB)

Before:

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LORD JUSTICE-STUART-SMITH

- -

Between:

(1) ALAME AND OTHERS
(2) CHIEF MINAPAKAMA AND OTHERS
(3) OKPABI AND OTHERS
(4) EJIRE AWALA AND OTHERS
(5) OKOCHI NWOKO ODODO AND OTHERS

Claimants/Appellants

-and-

(1) SHELL PLC (formerly known as ROYAL DUTCH SHELL PLC)
(2) THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD

Defendants/Respondents

- -

Anneliese Day KC, Edward Craven, Alistair Mackenzie and **George Molyneaux** (instructed by **Leigh Day**) for the **Appellants**
Lord Goldsmith KC, James Willan KC, Dr Conway Blake and **Tom Cornell** (instructed by **Debevoise & Plimpton LLP**) for the **Respondents**

- -

CA-2024-000122

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mrs Justice May
[2023] EWHC 2961 (KB)

Before:

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LORD JUSTICE-STUART-SMITH

- -

Between:

(1) SHELL PLC (formerly known as ROYAL DUTCH SHELL PLC)
(2) THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD

Defendants/Appellants

-and-

(1) ALAME AND OTHERS
(2) CHIEF MINAPAKAMA AND OTHERS
(3) OKPABI AND OTHERS
(4) EJIRE AWALA AND OTHERS
(5) OKOCHI NWOKO ODODO AND OTHERS

Claimants/Respondents

- -

Lord Goldsmith KC, James Willan KC, Dr Conway Blake and **Tom Cornell** (instructed by **Debevoise & Plimpton LLP**) for the **Appellants**
Anneliese Day KC, Edward Craven, Alistair Mackenzie and **George Molyneaux** (instructed by **Leigh Day**) for the **Respondents**

- -

Hearing dates: 8 – 11 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 6 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE STUART-SMITH:

Preliminary

1. At the end of a four day hearing in this fiercely contested multi-party litigation, the Court announced that (a) the Defendants' appeal against the Order of May J in November 2023, which allowed the Claimants to re-amend their pleadings, would be dismissed; and that (b) the Claimants' appeal against the declarations made by May J on 15 March 2024, to the effect that the Claimants' claims were to be progressed on the basis that they are "global claims" and that the Claimants' pleaded case precluded the case management of the litigation being organised by reference to the selection of lead claimants, would be allowed.

2. This judgment sets out my reasons for agreeing with that disposition of the appeals.

Introduction

3. I cannot improve on the introduction to the litigation by O'Farrell J in her judgment on 29 April 2022 ("the April 2022 Judgment"): [2022] EWHC 989 (TCC). Subject to adjustments in the current numbers of Claimants, which are not material to the issues we have to decide, the description holds good today:[1]

> "1. These proceedings concern environmental pollution, including water and ground contamination, that has blighted the Niger Delta region in Nigeria.
>
> 2. The claims arise out of oil spills that have occurred from oil pipelines and associated infrastructure operated in the vicinity of communities in Rivers State in the Niger Delta, causing environmental damage. The Claimants' case is that the Defendants failed to prevent, mitigate or remediate the oil contamination and they are liable to compensate the Claimants in respect of harm suffered by affected individuals and communities. The Defendants' case is that the major sources of oil pollution are crude oil theft (bunkering) and related oil spills, artisanal refining and oil spills from assets controlled and operated by third parties, matters for which they are not responsible and, in any event, do not give rise to any liability under Nigerian Law.
>
> 3. There are four sets of related proceedings before the court:
>
> i) Alame & Others: HT-2015-000430 ("the Bille Individuals Claim");

[1] a. The First Defendant in these claims changed its name from "Royal Dutch Shell Plc" to "Shell Plc" in January 2022.

b. Claims are now also brought against the Defendants for breaches of the Nigerian Constitution and the African Charter.

ii) Chief Ibitamino D Minapakama & Others: HT-2017-000022 ("the Bille Community Claim");

iii) Okpabi & Others: HT-2015-000241 ("the Ogale Community Claim"); and

iv) Ejire Awala & Others: HT-2016-000147 ("the Ogale Individuals Claim").

4. The Claimants in the Bille Individuals Claim are 2,335 existing or former inhabitants of the Bille Kingdom, a riverine community comprising island villages and fishing settlements in the Degema Local Government Area, Rivers State, Nigeria. The Claimants in the Bille Community Claim are 21 council chiefs / community leaders, suing for themselves and on behalf of the people of the Bille Community.

5. The Claimants in the Ogale Individuals Claim are (currently) 26 existing or former inhabitants and/or owners of land and/or fishponds in the Ogale farming and fishing community in the Eleme Local Government Area, Rivers State, Nigeria. The Claimants in the Ogale Community Claim are 15 council chiefs /community leaders, suing for themselves and on behalf of the people of the Ogale Community.

6. In each set of proceedings, the Claimants allege that the Defendants are liable for damage caused by the oil contamination. The claims against the First Defendant, Royal Dutch Shell plc ("RDS"), a UK domiciled company and parent company of the Shell group, are based on common law negligence. The claims against the Second Defendant pipeline operator, The Shell Petroleum Development Company of Nigeria Limited ("SPDC"), a Nigerian registered company and subsidiary of RDS, are based on statutory breaches, common law negligence, nuisance, the rule in Rylands v Fletcher and trespass.

7. It is said that as a result of the oil spills, the natural water sources in the Claimants' communities cannot safely be used for drinking, fishing, agricultural, washing or recreational purposes; the indigenous fish and shellfish populations have been destroyed; large swathes of the mangrove forests have been destroyed and plants and trees that could prevent soil erosion have been destroyed; farmlands have been polluted so that they are no longer suitable for farming; fishponds and swamps have been contaminated by oil; and properties have been damaged by airborne hydrocarbons and ingress of oily water, rendering some of the islands within the communities uninhabitable.

8. The Claimants seek injunctive relief, compelling the Defendants to carry out remediation of the land and waterways or lump sum damages for such purpose; further, the Claimants

> seek damages and/or statutory compensation in respect of loss of income, damage to property, personal injury and loss of amenity caused by interference with their enjoyment of the land.

4. For simplicity, I shall refer to the Defendants collectively unless it is necessary to discriminate between them, in which case I will refer to them as RDS and SPDC respectively. Though the Defendants had started extracting oil from the Niger Delta many years earlier, the relevant period of polluting activities in the Bille claims has from the outset been alleged to be 2011-2013. The first claim forms were issued in 2015. From 2015 to 2021 the Defendants pursued jurisdictional challenges that were ultimately resolved in the Claimants' favour by the Supreme Court: [2021] UKSC 3, [2021] 1 WLR 1294. While they lasted, those jurisdictional challenges prevented any other substantial steps being taken in the litigation. After disposal of the jurisdictional challenges, O'Farrell J made a GLO on 31 May 2022. May J is the Managing Judge.

5. The submissions on these appeals focused on the facts and pleadings of the Bille Individuals' Claim and the Bille Community Claim. For some unexplained reason, the parties did not consistently refer to one or the other of these claims. It was not suggested that there is any difference of principle as between the Bille Individuals and Community Claims. When referring to the pleadings I shall refer to those for the Bille Individuals Claim.

6. It is only necessary to add here that the Claimants have asserted from the start (a) that there exists what may politely be called an asymmetry of information, and (b) that they have been and (to date) remain unable to identify all of the spills that are alleged to have caused contamination for which the Defendants are responsible. I provide further details in the next section.

The procedural background

7. The original Particulars of Claim were filed and served (a) in the Ogale Community Claim on 14 October 2015, (b) in the Bille Individuals Claim on 22 December 2015, (c) in the Ogale Individuals Claim on 13 October 2016, and (d) in the Bille Community Claim on 16 June 2017.

8. The nature of the case that the Claimants have been able to bring was clearly set out in the original Particulars of Claim, including the following:

   i) "The Claimants seek damages arising as a result of serious and ongoing pollution and environmental damage caused by oil spills emanating from the Defendants' oil pipelines and associated infrastructure in and around Bille Kingdom in Nigeria. The oil spills have caused extensive and enduring devastation to the land and fishing waters in and around Bille Kingdom": para 1;

   ii) "In 2011 to 2013 a series of spills from the Bille Pipelines and Infrastructure resulted in the discharge of significant volumes of crude oil into the Creek ("the 2011-13 Spills")": para 23;

   iii) "The repeated oil spillages have resulted in ongoing contamination to the natural environment in Bille, which caused and continues to cause a number of direct

harmful effects. The harmful effects of the 2011-13 Spills include: devastation of aquatic life … widespread death of mangroves … damage to individually owned properties … contamination of wells … erosion of community land … desecration of shrines [and] abandonment of settlements": para 24;

iv) "In support of the averment above [i.e. para 24] the Claimants will rely *inter alia* on the following facts and matters … ": para 25. This was followed by four subparagraphs which stated that satellite imagery showed that large areas of mangroves in the Creek were damaged by oil spilled from the Defendant's infrastructure and listed 9 specific spills recorded on SPDC's website and a further spill recorded on the website of the Nigerian National Oil Spill Detection and Response Agency ("NOSDRA") as having occurred between 2011 and 2013. In absolute terms, 7 of the specific spills were of relatively minor quantities, varying between 0.001 and 22.7 barrels, the volume of the exception being reported as 163 barrels;

v) "It is averred that the Second Defendant's methodology for identifying, assessing and measuring the volume and frequency of oil spills is unreliable. … Members of Bille report significant oil spills that have not been documented in the Second Defendant's records": para 26. This was followed by reference to reports by NOSDRA identifying spills which had not been reported on the SPDC website;

vi) "The Claimants reserve their position in relation to the cause and volume of each of the oil spills listed above and in relation to the other spills that occurred in Bille between 2011-2013 that were not publicly recorded by the Second Defendant": para 27;

vii) "Due to the regularity of the oil spillages and discharges over a prolonged period of time, and due to the lack of effective monitoring and reporting by the Defendants, the Claimants are presently unable to specify the exact number, dates or volumes of the 2011-13 Spills": para 28;

viii) There followed a section alleging that the Defendants are liable to the Claimants under Nigerian common law and statute;

ix) "By reason of the matters aforesaid the Claimants have suffered loss and damage as a consequence of the 2011-13 Spills": para 99.

9. This is not the place for a detailed examination of the causes of action alleged by the Claimants against the Defendants: that we understand will be undertaken in a preliminary issues trial in early 2025. It is sufficient to say that, as originally pleaded, the alleged statutory obligations are wide and the alleged breaches extensive. The common law duties and allegations of breach are also widely drawn:

i) It is alleged that RDS owed a common law duty of care to the Claimants that required RDS to take all reasonable steps to ensure that the Claimants did not suffer foreseeable damage or economic loss as a result of oil spills from the Bille Pipelines and Infrastructure. Although clarified by amendment later, this duty as originally pleaded is wide enough to cover spills caused by third-party interference: see para 66. The alleged breaches by RDS include allegations of

failure to protect the Bille Pipelines and Infrastructure from damage caused by third-party interference: see para 79;

ii) The Claimants' allegations that SPDC is liable for breach of statutory duty and common law negligence assert similarly broad obligations /duties of care both under statute and at common law filling the gaps left by the Oil Pipelines Act 1990: see para 66 ff. For example, the allegations of negligence include allegations of failure to maintain Non-Pipeline Oil Installations in a good state of repair, failure to secure and/or protect producing oil wells in or near Bille, and failures in relation to the maintenance, surveillance and protection of the Non-Pipeline Oil Installations: see para 92.

10. It is clear beyond argument that the 10 specific spills listed in para 25 did not purport to be a list of all spills upon which the claims were based. This was made clear by (a) the words "inter alia" in para 25 itself, (b) paras 26 and 27 with their references to the happening of other spills than the 10 currently pleaded spills and the Claimants' reservation of their position in relation to other spills that had not been publicly recorded, (c) the reference to the regularity of oil spillages and discharges over a prolonged period, which evidently included many more than the 10 specified spills, and (d) the obvious disparity between the limited quantities of oil involved in the 10 specified spills and the very extensive damage that is alleged to be the subject of the Claimants' claims. The Claimants' case was always that between 2011 and 2013 there was a much more extensive series of spills from the Bille Pipelines and Infrastructure, which resulted in the discharge of significant volumes of crude oil into the Creek and of which they were giving the best particulars that they could in para 25.

11. It is also clear that the original pleading, without more, was not sufficiently detailed to enable the Defendants to know the case they had to meet with sufficient precision for it to be a suitable vehicle for a fair trial of the Claimants' overarching assertion that the Defendants were responsible for oil spills that had caused them to suffer the alleged damage. That has been the nub of the Defendants' complaints and strategy ever since and has led the parties into protracted interlocutory skirmishing with their respective positions being, in broadest outline, that the Defendants have asserted that the particularisation of the claims by the Claimants is unfairly inadequate while the Claimants have asserted that they have done the best that they can but will do better in due course, and in particular after the Defendants provide disclosure.

12. It is worth noting that these battle lines are not in any sense novel in large multi-party litigation: to the contrary they could be said to be the regular stuff of such proceedings. Equally, it is routine for there to be asymmetry of information available to the parties and for the Court to be obliged to take that into account in the practical application of the overriding objective.

13. The Supreme Court gave judgment on 12 February 2021. In July and August 2021 the Claimants filed and served Amended Particulars of Claim in all four sets of proceedings. The amendments are not material to the present issues.

14. On 19 November 2021 the Defendants filed and served Defences in all four actions. The Defences complained of the lack of particularity in relation to the spills intended to be relied upon. The Defences also pleaded:

> "8. It is well-documented that Nigerian crude oil is being stolen on an "industrial scale" in the Niger Delta, resulting in oil pollution and environmental degradation, the loss of lives and property and significant revenue losses to the public purse. For over a decade, the area surrounding Port Harcourt, including the Bille Kingdom, has been increasingly blighted by a surge in crude oil theft – known as "bunkering". Oil theft is a sophisticated operation with both a national and international dimension, and has effectively become Nigeria's most profitable illegal private business. Despite significant efforts to combat the problem of bunkering, in 2015 oil companies in Nigeria lost "between 300,000 and 400,000 barrels of oil to illegal theft" every day. …
>
> 9. The clandestine nature of bunkering operations in the Niger Delta means that crude oil theft often leads to oil spills. Indeed, the more significant spills by volume in these proceedings were caused by illegal third-party interference, including attempts to siphon oil from pipelines and other assets. …
>
> 10. A large proportion of the crude oil that is stolen from pipelines and other assets in the Niger Delta is transported to clandestine refining camps (known as "artisanal refineries") located in the area and refined for local use and sale. The illegal refining process results in a large amount of surplus oil being discharged into the environment. The refining process yields a number of separate refined petroleum products, which reportedly account for around 45% of the original crude oil. These refined products are then sold locally. The remaining 55% of the oil "goes to waste, most of which is dumped into the nearby water or into a shallow pit". Not only does this process pollute the environment, it contributes to the "re-oiling" of sites that have been remediated by operators including SPDC. It is in this way that illegal refining operates as a critical driver of oil pollution in the Niger Delta, and in the area surrounding the Bille Kingdom in particular."

15. The role of illegal refining was pleaded elsewhere in the Defences, including as follows:

    i) "It is denied (if it is so alleged) that the Defendants are responsible for the ongoing contamination to the natural environment in the area surrounding Bille town. Paragraphs 8-16 above are repeated. Illegal refining is the critical driver of oil pollution in and around the Bille Kingdom": para 44;

    ii) "The Claimants have not identified any satellite images of Bille showing oil pollution. It is denied, if it is alleged, that the satellite imagery will show that the area around Bille Town was only damaged by pollution caused by spills from SPDC-operated assets… . If there is satellite imagery of the area around Bille town from the period between 2011 and 2013, it will show extensive pollution, as well as the proliferation of illegal refineries in the area during that

period. The main source of pollution in the Bille area during that period was illegal refining": para 45;

iii) "Even if the Claimants can establish liability as against the defendants, the defendants deny that the loss and damage as set out by the claimants…is attributable to them. Without prejudice to the generality of the foregoing: (a) it is denied that oil pollution…was only or predominantly caused by oil spills from SPDC-operated assets. The causes of pollution in the area are varied, and include illegal refining, which is a critical driver of environmental degradation in the area": para 128.

16. At the same time as serving their Defences, on 19 November 2021 the Defendants served Requests for Further Information to which the Claimants responded in April 2022. In response to a request that they identify each individual spill that formed part of the "series of spills" alleged in para 23 of the Bille Individual Particulars of Claim, the Claimants stated that they relied on the 10 specified spills in addition to all those unpublished spills which took place between 2011 and 2013. In response to a request that they clarify what "other spills that occurred between 2011 and 2013" were not publicly recorded by the SPDC, the Claimants replied that:

> "Pending the provision of disclosure by the Defendants and obtaining expert evidence, the Claimants are unable to provide particulars of the dates or causes of the Unpublished Spills, not least for the reasons pleaded at paragraph 13(a) of the Reply."

17. A hearing on 10 December 2021 led to the April 2022 Judgment. It addressed the question of a GLO, Schedules of Information and a possible transfer to the Kings Bench Division. It was at this hearing that the question of "global claims" was first raised. As Males LJ explains at [94] below, the concept of "global claims" originates in decisions of the English and Scottish courts concerned with the proof of causation in contractual disputes relating to delay or disruption in the course of building projects. In broadest outline, it allows that causation may be established by showing that a loss is caused by multiple events, for all of which the Defendant is responsible, even if the loss attributable to individual events cannot be identified. Only two further things need to be noted at this stage. First, it is inherent in the concept of "global claims" that causation will not be established on this basis if a material contribution to the claimant's loss is made by an act or event for which the defendant is not responsible: it is in that sense an "all-or-nothing" approach to causation and liability. Second, the Claimants have never adopted the "global claims" approach as a basis upon which they seek and intend to prove causation in this litigation.

18. The Claimants served Replies in April 2022, which were subsequently amended with leave. The Bille Individuals adopted the Replies of the Bille Community which stated expressly that the 10 specified spills "are not (and do not purport to be) an exhaustive list of all oil spills and leakages from the Bille Pipelines and Infrastructure for which the Defendants are liable". Instead, they are "all spills whose existence has been publicly acknowledged and recorded by SPDC" but do not include what the Claimants describe as "unpublished spills" i.e. those not recorded by the Defendants. The Claimants pleaded that they are not able to provide further particulars of unpublished spills pending disclosure and the receipt of expert evidence; and they set out the broad outlines of their case that the Defendants are responsible for the unpublished spills (as

well as the published ones) because of their "longstanding and systematic failures". In addition, the Replies joined issue with the Defences about the scope and significance of the illegal bunkering relied on by the Defendants, re-asserting that the Defendants failed to take reasonable steps to protect the Bille Pipelines and Infrastructure from third-party interference and that illegally refined oil was a foreseeable consequence of third-party interference.

19. After a further hearing on 5 May 2022, the order that O'Farrell J made on 31 May 2022 established the GLO. Schedule 1 to the GLO was entitled "Bille & Ogale Common Issues", which were introduced as "the high-level common factual and legal issues across the Bille and Ogale claims." Paragraphs 8 and 15 of Schedule 1 were:

> "8. To what extent (if any) and in what circumstances can a licence-holder be liable under the OPA for damage caused by oil that is removed from a licence-holder's oil pipeline or ancillary installation by Third Party Interference and subsequently used in illegal oil refining by third parties?
>
> …
>
> 15. Does Nigerian law impose liability on an oil operator under the Petroleum Act and/or the Petroleum Drilling and Production Regulations 1969 for damage caused by oil that is removed from a licensee's infrastructure by Third Party Interference and subsequently used in illegal oil refining by third parties?"

20. Schedule 2 to the GLO was entitled "Bille Issues" which were introduced as "the high-level common issues across the Bille Claims." Paragraphs 1 and 2 of Schedule 2 were:

> "**The Bille Spills**
>
> 1. What caused (i) the oil spills pleaded at paragraph 31 of the Bille Community Amended Particulars of Claim; and (ii) any Unpublished Spills (as defined in paragraph 13(a) of the Bille Community Reply) (the "Bille Spills")?
>
> 2. What was the approximate volume of oil spilled in each of the Bille Spills and what geographical area was contaminated by oil as a result?"

21. In addition to establishing the GLO, the order made on 31 May 2022 required each Bille Individual Claimant to provide what was described as a Bille Schedule of Information ("SOI") which was to contain information including:

> "h. The particular oil spill or oil spills in relation to which each individual Claimant seeks compensation and/or damages or, if they are unable to provide such details, confirmation of the nature of the case they will rely on at trial.
>
> i. Where each individual Claimant says that he or she suffered damage (assuming that this location cannot be ascertained based on the individual's address).

> j. When each individual Claimant claims that they were first impacted by oil from the particular oil spill."

22. On 27 January 2023 the Bille Claimants served Voluntary Particulars of Claim in respect of Causation ("VPOCs") stating that they were relied upon by all those Claimants who either (a) cannot presently identify any specific oil spill in relation to which they are seeking compensation and/or damages; or (b) cannot presently provide an exhaustive list of all those oil spills in relation to which they are seeking compensation and/or damages but have identified one or more such oil spills. The VPOCs continue:

> "4. Each of the Claimants has sustained loss and damage which was caused or materially contributed to by oil from the Bille Pipelines and Infrastructure … .
>
> 5. Each of the Claimants avers that they have sustained loss and damage which was caused or materially contributed to by one or more of the ten spills identified [in] the Amended Particulars of Claim, and/or one or more of the Unpublished Spills … .
>
> 6. Until such time as the Claimants are in possession of the Defendants' disclosure and/or have obtained expert evidence, each individual Claimant is unable to particularise each specific spill or spills that caused or contributed to their loss and damage."

23. The Claimants explain their inability to provide further particularisation of their case on causation as being not least because of (a) the difficulties imposed by the migration of oil, which renders the attribution of damage to particular spills "invariably not straightforward and in many instances impossible without specialist expert analysis and assistance"; and (b) the Claimants being "members of a rural Nigerian fishing community with limited resources, a lack of expertise, and the absence of a contemporaneous record of the dates, locations and volumes of all spills which have occurred in Bille." That said, they make their position plain in rejecting the application of any principles of causation relating to "global claims":

> "7. For the avoidance of doubt, the Claimants do not advance a "global claim". The Claimants' position is that the principles described in construction law cases … have no application to their claims because, inter alia:
>
> a. As a matter of English law, the concept of a global claim is unique to contractual disputes in the context of construction law, and it has no application to common law tort claims concerning environmental damage;
>
> b. The claims are governed by Nigerian law and to the Claimants' knowledge the concept of a "global claim" has never been referred to in Nigerian case law; and

> c. The Claimants do not, and have never purported to, rely upon the concept of a global claim."

24. The Claimants have provided SOIs in respect of each of the c. 13,000 individual Claimants in the Bille Individuals Claim and the Ogale Individuals Claim (eith the exception of deceased Claimants) at an aggregate cost in the region of £7,000,000. May J rightly described the undertaking of this task as "herculean". We are told that each Claimant's SOI:

    i) Identifies all of the particular spills that they rely upon, with such precision as they are presently able to achieve;

    ii) Indicates that they rely upon the VPOCs; or

    iii) Identifies one or more spills or possible spills without limiting their claim to those spills and while also relying on the VPOCs.

25. Analysis by the Defendants shows that a very small number (5/2335) of the Bille Individual Claimants have identified the particular event which they say has caused them loss. 412/2335 have provided an approximate month and year for the date of the spill alleged to have caused them damage with a further 175/2335 having provided a 6-month date range. Of the Ogale individual claimants 264 (/c 11,000) are said to be able to identify a spill which affected their residential property/farmlands/fishponds. Apart from the 5 Bille Individual Claimants, all other Bille and Ogale individual claimants rely upon the VPOCs.

26. On 21 March 2023 the Claimants issued an application to re-amend the Particulars of Claim in all four actions. The effect of the re-amendments that we have to consider in detail below is that the Bille Claimants now identify just short of 100 spills; but it is quite clear that (a) the Claimants' case is that those 100 spills are not a comprehensive list of all relevant spills and (b) the Claimants assert that they are not in a position to provide more particulars without further disclosure and expert evidence.

27. The proposed re-amendments included two categories that are the subject of this appeal. The first category has been called the "Additional Spills Amendments" and the second "the Illegal Refining Amendments". They were the subject of a hearing in July 2023 which led to judgment being handed down on 22 November 2023 ("the November 2023 Judgment") and the order under appeal being made on 16 January 2024 and sealed on 17 January 2024.

28. At the same time, the "global claims" issue emerged, being referred to by O'Farrell J in the April 2022 Judgment and, thereafter, being considered by May J in the November 2023 Judgment and her subsequent judgment handed down on 8 March 2024 ("the March 2024 Judgment") with the two declarations being included in the second order now under appeal, which was sealed on 15 March 2024.

The November 2023 Judgment – Additional Spills Amendments

29. Before us, the challenge to the Judge's decision is based on the submission that she had no jurisdiction to allow the amendments because of the provisions of CPR 17.4. I shall therefore concentrate primarily on those aspects of the Judge's decision that go to that

issue. It is common ground that the relevant limitation periods had arguably expired in respect of any new claim introduced by the amendments. That said, if the Judge had a discretion to allow or disallow the amendments, the Defendants do not challenge her exercising that discretion in favour of allowing them as she did. The issue for us, therefore, is whether the amendments introduced new claims and, if so, whether the Judge had a discretion to allow them.

30. The Judge recorded the respective submissions of the parties at [17] ff. She recorded that "Mr Hermer asserted strongly and repeatedly that each Claimant is making an events-based claim, meaning that each intended to assert and prove a link between their loss and damage and a specific event for which Shell is alleged to be responsible." Mr Hermer KC, then acting for the Claimants, accepted that neither the pleadings nor the schedules currently made the case with the necessary specificity; but he argued that the necessary information was currently held by Shell and that the case would be developed for each lead claimant once disclosure had been given and expert evidence obtained. For the Defendants, Lord Goldsmith KC submitted that if the information now available to the Claimants did not enable them to plead the case with the required specificity, it should be struck out. (I note, as did the Judge, that no application to strike out had been made. In the circumstances it is not unfair to describe this submission as somewhat opportunistic.) The alternative, he submitted, was for the cases to proceed as a global claim. In opposing Mr Hermer's approach, Lord Goldsmith submitted that it was unfair to the Defendants because Shell would not know until shortly before trial precisely what the individuals' claims were (e.g. whether they related to pipelines or non-pipelines, when and where they happened). In response, Mr Hermer submitted that it would be unjust to require the Claimants to plead a proper case on causation now, not least because (as was recognised on all sides) they could not do so.

31. At [34] ff the Judge declined to strike out the claims. However, she was satisfied that the Claimants' cases were "not at present sufficiently underpinned by information which enables the court or the parties to link the event(s) to breach and breach to loss, even by inference." Having expressed concern (at [39]) that the Claimants' route to selecting cases would not reliably cover all the issues arising on an events-based claim she turned at [41] to the suggestion that the Claimants' claims should proceed as "global claims", tracing some of the relevant authorities as she did so. She concluded (at [42]) that there was no relevant distinction to be drawn between construction claims and environmental claims and that "on the present state of the pleadings and associated information" all bar 5 of the Claimants' cases were "global claims." With that, she turned to the applications to amend.

32. At [48] ff the Judge set out the familiar principles that apply where amendments are sought after a relevant limitation period has passed or arguably may have passed. It is common ground that she identified them correctly, citing CPR 17.4(2) and the convenient summary of principle provided by Males LJ in *Geo-Minerals GT Ltd v Downing* [2023] EWCA Civ 648.

33. The Judge addressed the Additional Spills Amendments at [96] ff. The application was to include reference to a further 85 spills in addition to the references to the originally specified 10. This was to be done by adding a further sub-paragraph to para 25 of the original pleading, thereby increasing the number of specified spills upon which the Claimants said they would rely in support of the case advanced under para 24. The additional spills were recorded either by SPDC or NOSDRA and were specified and set

out in a separate Annex which stated the date of the incident, its reported cause, the incident site and the estimated volume of the spill.

34. The Claimants submitted that no new duty is raised by the amendments and that they merely wished to rely upon additional consequences flowing from the breaches that had already been pleaded. If, however, the additional spills gave rise to new causes of action then they submitted that they arise from the same or similar facts as those already in issue and should be permitted pursuant to rule 17.4. In response, the Defendants submitted that each additional spill raised a new claim because it gave rise to its own set of facts e.g. as to cause, time, place, volume spilled, clean-up and polluting effect. Admission of the new causes of action was precluded by CPR 17.4(2) because the new claims did not arise out of the same or substantially the same facts as were already in issue.

35. The Judge concluded that the further spills that would be included by the proposed amendment fell within the scope of the claim as already pleaded. She accepted the Claimants' submission that all parties contemplated claims arising from potentially all spills occurring in the period 2011-2013. She therefore saw the identification of further spills as a further particularisation of the case already pleaded and not as giving rise to a new cause of action. As already indicated, she exercised her discretion in favour of permitting the Additional Spills Amendments.

The November 2023 Judgment – Illegal Refining Amendments

36. The Judge dealt with the Illegal Refining Amendments at [108] ff of the November 2023 Judgment. The Claimants submitted that the amendments referring to illegal refining were no more than an extension of the foreseeable loss arising from duties which have already been pleaded. They pointed to the terms of the Defence, the Reply and Schedule 1 of the GLO in support of their submission that the amendments did not raise new causes of action and, in any event, submitted that the Defendants had raised the issue of illegal refining in their Defence, relying upon the principle established by *Goode v Martin* as discussed in *Mulalley v Martlet Homes* [2022] EWCA Civ 32.

37. The Defendants submitted that loss arising from illegal refining was not mentioned in the original Particulars of Claim and that the original pleading referred only to spills from the Defendants' assets. By contrast the amendments sought to introduce a duty to protect against the foreseeable risk that oil would be stolen from SPDC's operated assets and would be transported to an illegal refinery where by-product would then be discharged into the environment. Lastly, they submitted that the amendments were not properly particularised and that they could and should have been pleaded from the outset.

38. The Judge held that the addition of a claim to losses arising from the use made by third parties of oil stolen from the pipeline was not a new cause of action. Rather the duty that was already pleaded to protect assets from third party interference where that included the theft of oil would not be enlarged or changed by allowing the Claimants to make a case that the failure to protect (*inter alia* from bunkering) gave rise to foreseeable loss from the use made by third parties of the oil which was taken. Furthermore, she regarded the Defendants' focus on pollution caused by illegal refineries to be a cornerstone of their defences to the action so that the amendments would not require the Defendants to investigate additional facts beyond those which

they could reasonably have been expected to investigate for the purposes of defending the claims. She excluded one amendment on the basis that it clearly enlarged the scope of the alleged duty to remediate but otherwise exercised her discretion in favour of admitting the Illegal Refining Amendments insofar as they plead a loss from a failure to protect the pipeline from third-party interference.

39. In reaching this conclusion the Judge said at [120]:

> "The failure to identify specific incidents of illegal refining is a further instance of the failure of identification which I have discussed above in relation to the state of the pleadings generally. Whilst the claim remains a global claim, as in practice I think it currently must be, then the general pleading of Shell's responsibility for damage resulting from illegal refining is not objectionable on the ground of want of particularity; if and when particular events are sufficiently identified then that will necessarily require the identification of any relevant events of illegal refining, for which permission to amend will be required."

The March 2024 Judgment – Global Claims

40. I have touched on the emergence of "global claims" as a feature of this litigation already. By the time of a three day hearing in December 2023, the Defendants had adopted the notion of global claims as a necessary alternative if the Claimants could not plead or prove a case on the basis of normal principles of causation; and the Claimants had made plain their opposition to the notion of global claims as forming any part of their case by the VPOCs and Mr Hermer's insistence that the Claimants intended to pursue a conventional case on causation once they had the necessary information and expert support to enable them to do so.

41. In the April 2022 Judgment O'Farrell J had said the case was currently pleaded as a global claim "in that the Claimants have identified a number of oil spillages, and described the damage suffered as a result of consequential contamination of the land and waterways, but they have not pleaded any causal nexus between each oil spill and the damage suffered by individual claimants": see [65].

42. In the November 2023 Judgment, May J addressed the need for the Claimants to plead a proper case on causation and, in doing so, concluded that there was no distinction to be drawn between the principles applicable to construction claims and environmental claims, asserting that the need to aver and prove the causal connections between the events and the loss and expense was common to both. She regarded it as essential that "a case needs to be made identifying the particular event(s) relied on. Fairness requires that Shell be able to marshal a defence that is targeted to the particular event(s)": see [43]. She then concluded at [45] that:

> "For now, therefore, I do not see any practical alternative but to view the cases of all bar the 5 Bille claimants as global claims unless or until a more particular case is identified…"

43. In the March 2024 Judgment, the Judge addressed the consequences of her previous finding that the cases were to be regarded as global claims. At [3], she recognised that

the usual course in group litigation such as this is to identify "lead" claimants and to progress from there. But she expressed the view that "the current lack of pleaded detail on causation precludes any sensible identification of lead individuals at this stage. On the present state of the pleaded case, the necessary causal link between event(s) and breach and breach and loss has not been identified." She then repeated what she had said at [45] of the November 2023 Judgment.

44. In addressing the consequences of this state of affairs, the Judge held that the only way to progress at present "is by treating the Claimants' case as an "all-or-nothing" claim and proceeding accordingly. … I do not accept Mr Hermer's suggestion that the result of the July CMC is to be seen as a staging post to an events-based claim, with the consequence that disclosure is to be directed towards permitting the Claimants to identify what specific events have caused their loss and what specific acts of omissions on the part of the Defendants can be linked to such events."

45. The Judge then outlined the way forward. First, there was to be a preliminary issues trial, intended to determine principles of Nigerian law and statutory construction affecting the claims. A list of issues to be determined at the preliminary issues trial had largely been agreed. The Judge decided that two disputed issues, going to whether Nigerian law (if applicable) recognises the concept of a global claim as it is said to be understood in English law should be included in the list.

46. The Judge then held that, after the preliminary issues trial, there should be a factual trial that should address what the parties summarised as "the 3Cs", namely contamination, consequences and causes in the Bille region during 2011-2013. This would be wider than the Defendants' proposal for a global claim trial, which would have focussed only on the existence of causes of pollution for which they were not responsible. Rather, the scope of the 3Cs trial would be "an examination of all contamination of the Bille area over the period 2011-2013." Only then, in the view of the Judge could "the significance or otherwise of particular causes or events be determined together with the possibility or otherwise of disentangling losses arising from polluting events for which the Defendants are not liable (if any)": see [13].

47. In considering disclosure, the Judge took the proposed 3Cs factual trial as the background and the current driver to her decisions on the various disclosure issues that had been raised. Given the decision to have the 3Cs trial, the Claimants relied heavily on the "informational asymmetry" between the parties and submitted that the Defendants should give disclosure of all documents in their hands bearing on their operations in Bille during the relevant period, submitting that their experts need that information to identify particular polluting events sufficiently to allow them to particularise their case on causation.

48. In response, the Defendants submitted that the proper and principled approach to disclosure is by reference to pleaded issues, not those issues that the Claimants might want to plead in the future. Accordingly, the ambit of disclosure should be determined by reference to the fact that the Claimants were "bringing an all-or-nothing, global claim." The Judge accepted that this was the correct approach: see [22]. She therefore approached future case management, including disclosure, on that basis. It followed, in her view, that it would be a classic fishing expedition and wrong in principle to order disclosure of a document or documents on the basis that they *might* have information that *might* assist the Claimants in identifying which event or events had caused an

individual's loss. With that, she turned to categories of documents sought by way of specific disclosure from [33] onwards, allowing most of the categories sought.

49. Turning to standard disclosure, the Claimants submitted that standard disclosure should be progressed side-by-side with specific disclosure. The Judge refused to order standard disclosure at that stage, while leaving open the possibility or reconsideration at a later stage. The core of her reasoning was at [53] where she said:

> "Whilst the case is at its present stage of generalised allegations of breach and loss, where specific events are not tied to particular breaches, I do not see how fault-related disclosure can properly and sensibly be pursued without it ending up as a wide-ranging enquiry of all activity in the region over the pleaded period. I think that this would be wrong both as a matter of proportionality and because it would amount to a fishing exercise."

The issues on these appeals

50. Issue 1 arises from the Defendants' assertion that the Judge erred in allowing the Additional Spills Amendments. The Grounds of Appeal are sub-divided into three elements:

    i) The Judge was wrong to conclude that the Additional Spills Amendments are "further particulars of the case already pleaded" and that the provisions of CPR 17.4 are therefore not engaged;

    ii) Insofar as the Judge considered or applied CPR 17.4 she failed to consider properly or at all the essential facts underpinning the original and amended causes of action;

    iii) The Judge should have reached the conclusion, applying the test under CPR 17.4, that (i) the Additional Spill Amendments are outside the applicable limitation period; (ii) the Additional Spill Amendments seek to add new causes of action; (iii) those new causes of action do not arise out of the same or substantially the same facts as were already in issue; and (iv) there was no jurisdiction for the Court to exercise its discretion.

51. Issue 2 arises from the Defendants' assertion that the Judge erred in allowing the Illegal Refining Amendments. The Grounds of Appeal are sub-divided into two elements:

    i) The Judge misapplied the four-stage test under CPR 17.4 in three ways: (i) she failed to consider the essential facts underpinning the original and amended causes of action; (ii) she wrongly concluded that there was no enlarged/changed pleaded duty to protect as a result of the amendments; and (iii) wrongly concluded that, by reference to the Defences, the Illegal Refining Amendments would not require additional facts to be investigated by Shell;

    ii) The Judge should have concluded that (i) the Illegal Refining Amendments are outside the applicable limitation period; (ii) the Illegal Refining Amendments seek to add new causes of action; (iii) those new causes of action do not arise out of the same or substantially the same facts as were already in issue; and (iv)

there is no jurisdiction for the Court to exercise its discretion and allow the Illegal Refining Amendments.

52. Issue 3 arises from the Claimants' assertions that:

i) The Judge erred in determining that the concept of a "global claim" was capable of applying to a claim for environmental damage;

ii) The Judge erred in determining that the claims were to be regarded as "global claims" in the manner referred to in the November 2023 Judgment; and

iii) The Judge erred in refusing to direct selection or trial of lead claims.

Issue 1 – Additional Spills Amendments: discussion and resolution

53. The nub of this issue is whether the Additional Spills Amendments introduced new causes of action. We are therefore primarily concerned with the second limb of the CPR 17.4 test as explained by Males LJ at [25] of *Geo-Minerals*.

54. The principles are very well known and not substantially in dispute. It is therefore not necessary to set out a citation of authority on all points. I merely pick up some of the points that may be thought to be most relevant for these appeals. First among them is to reiterate that the court only has a discretion to allow an amendment to introduce a new claim (i.e. cause of action) into an existing claim where a limitation period defence will be circumvented by operation of the "relation back" rule when a prior condition has been satisfied, namely that the new claim arises out of the same or substantially the same facts as the already existing claim. This is a substantive question of law, and an important one: see *Mastercard Inc v Deutsche Bahn AG* [2017] EWCA Civ 272 at [35]-[36] per Sales LJ, with whom King and Arden LJJ agreed.

55. A convenient summary of the approach to identifying "a new claim" is provided by Males LJ at [27] of *Geo-Minerals*, endorsing the earlier summary by Mr Stephen Morris QC in *Diamandis v Wills* [2015] EWHC 312 (Ch):

> "(1) The 'cause of action' is that combination of facts which gives rise to a legal right; (it is the 'factual situation' rather than a form of action used as a convenient description of a particular category of factual situation …
>
> (2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made … (Where it is the same duty and same breach, new or different loss will not be [a] new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).
>
> (3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which

> are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction. …
>
> (4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading …
>
> (5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action … Nor is the addition of a new remedy, particularly where the amendment does not add to the 'factual situation' already pleaded …"

56. Applying these principles to the facts of each case will determine the proper outcome. The fact-sensitive nature of the enquiry means that it is seldom helpful to compare the facts of different cases rather than concentrating on the application of established principles to the facts of the case in hand.

57. The third stage of the analysis was also helpfully summarised by Males LJ at [28] of *Geo-Minerals,* where he referred specifically to the need to have regard to the purpose underpinning the rule. Most relevant for present purposes are the following:

> "(3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.
>
> (4) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate … At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial …
>
> (5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the defence … ."

58. These sub-paragraphs may be amplified by reference to *Mulalley & Co v Martlet Homes Ltd* [2022] EWCA Civ 32, [2022] BLR 198. It is only necessary here to refer to [92] of *Mulalley* where Coulson LJ (with whom Baker and Andrews LJJ agreed) observed in applying the principles established in *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828 that Martlet "must be entitled to put in issue what Mulalley say in defence to their original claim; otherwise they would be deprived of a fair trial." To the same effect, because Mulalley "had chosen to put particular facts in issue in

defending themselves, there can be no unfairness in allowing Martlet to turn those matters back on the defendant."

59. The effect of the Defendants' protracted and ultimately unsuccessful challenge to the jurisdiction of the English courts means that any attempt to introduce a new cause of action after the final disposal of the challenge by the Supreme Court in 2021 would be susceptible to the argument that the cause of action would be statute barred and that CPR 17.4 therefore applied. For present purposes, that is an irrelevant consideration which I leave out of account. What matters for the purposes of Issues 1 and 2 is that it is common ground that, if and to the extent that the amendments seek to introduce a new cause of action, the cause of action is arguably statute barred.

60. The resolution of Issue 1 depends upon the true nature of the claim as originally pleaded. The Defendants submit that the bare minimum of essential facts abstracted from the original pleading are "damage caused by oil spills emanating from the Defendants' oil pipelines and associated infrastructure." I disagree. The Defendants' formulation fails to capture two particular elements of the case as originally pleaded. The essential facts should include "damage caused *in and around Bille* by *the 2011-2013 oil spills* emanating from the Defendants' oil pipelines and associated infrastructure", where "the 2011-2013 oil spills" are clearly identified as including published and unpublished spills and not just the 10 originally specified oil spills. The breadth of those bare minimum essential facts is shown by the corresponding breadth of the various routes to liability alleged by the Claimants: see [9]-[10] above. Once the scope of the original bare minimum essential facts is identified, it becomes almost self-evident that the spills listed in the Additional Spills Amendments are further particulars of the original claim rather than an attempt to introduce multiple new causes of action.

61. The legal routes to liability may be different for different oil spills, but it is not and cannot at this stage be asserted or demonstrated that any of the oil spills introduced by the Additional Spills Amendments require liability to be established by another route that has not already been pleaded in respect of the 2011-13 oil spills. In other words, the duty (or duties) being alleged are unchanged as are the breaches which are said to have led to the occurrence of the particular contributions to damage from the additional oil spills. Whether the Claimants will be able to make this case good when the facts come to be decided remains to be seen; but for the moment and for present purposes the Claimants' assertions are sustainable.

62. Equally, the fact that each specified oil spill has its own set of facts, which will differ either fully or partially from the facts of each of the 10 originally specified spills and each of the other additional spills, does not mean or even suggest that the spills now being identified are not included within the very wide scope of the original complaint and pleading. In my judgment they clearly are and, given the breadth of the case as originally pleaded, they are properly to be regarded as further specific instances that provide further particularisation of the case that has been pursued by the Claimants from the outset.

63. Though not essential to the decision, it is worth noting in passing that the Defendants were never in any doubt about the breadth of the case as originally formulated. That is plain from their complaint in the Defence that the Claimants had not identified the specific oil spills or the geographic areas said to be impacted by the various allegations, which would have been a misconceived and irrelevant complaint if the Claimants' case

had been limited to the 10 specified spills rather than to all spills, published and unpublished, constituting the 2011-13 Spills. It is also plain from the terms of the Defence as set out at [14] above, which clearly recognise and take issue with a case that is much more broadly based than just the 10 specified spills.

64. It is equally plain that the Court has long-since recognised that the Claimants' case was not limited to the 10 originally specified spills. That appears from paragraphs 1 and 2 of Schedule 2 to the GLO: see [20] above.

65. For these reasons, I consider that the Judge was plainly right to regard the proposed amendments as providing further particulars of the existing claims. She was also plainly right to hold that the amendments did not introduce a new cause or causes of action. CPR 17.4 was therefore not engaged. That being so, the Judge's exercise of her discretion is not challenged. I would therefore dismiss the Defendants' appeal on Issue 1.

Issue 2 – Illegal Refining Amendments: discussion and resolution

66. The Particulars of Claim as originally pleaded contained multiple references to interference by third parties ("TPI") including theft of oil from Shell's pipeline or other assets ("bunkering"). Those references included that:

i) At all material times the Bille Pipelines and Infrastructure were vulnerable to interference and unlawful bunkering by third parties: para 29;

ii) The Defendants relied upon the Joint Task Force ("JTF"), a combination of the Nigerian army, navy and police, as part of the security arrangements for their oil facilities and personnel when it was widely known that the JTF was extensively involved in organised unlawful bunkering and actively facilitated unlawful bunkering by third parties: para 30;

iii) RDS had detailed knowledge of SPDC's systematic failure to prevent spills occurring, including its failure to protect its oil infrastructure against the risk of damage caused by TPI: para 64(c);

iv) RDS managed or jointly managed SPDC's operations relating to pipeline integrity and security and the prevention and/or detection of TPI: para 67(a);

v) Despite its knowledge of the high risk of TPI, RDS failed to ensure that the Bille Pipelines and Infrastructure were designed and constructed in a way that provided adequate protection against TPI and contained adequate spill detection and control systems to ensure that spills caused by TPI could be swiftly detected and effectively contained and/or failed to ensure that SPDC did the same: para 79(a);

vi) Despite its knowledge of the high risk of TPI, RDS failed to ensure that there was effective surveillance to provide an effective system for managing the risk of TPI and to ensure that incidents of TPI were swiftly detected (whether by contract terms or otherwise): para 79(b);

vii) In so far as any spill falling under the remit of the OPA is demonstrated to have been caused by the criminal acts of a third party, SPDC is liable to the Claimants

under section 11 of the Oil Pipelines Act. The Particulars of Neglect include wide-ranging failures to protect the pipelines from TPI by design, surveillance, monitoring or the provision of security and accepting TPI and consequential oil spills and environmental damage as part of the cost of continuing its operations in the area: paras 85 and 87-89;

viii) SPDC acted in breach of the duty it owed to the Claimants and acted negligently, the Particulars of Negligence including that it failed to protect the Non-Pipeline Oil Installations from the foreseeable risk of TPI: para 92(c);

ix) "By reason of the matters aforesaid" the Claimants have suffered loss and damage as a consequence of the 2011-13 Spills: para 99.

67. What the original pleading did not include was any express reference to damage caused by spills that were the result of TPI. However, the wide expression of the 2011-13 Spills was amply sufficient to include spills that were the result of TPI; and the passages to which I have just referred strongly support the inference that spills caused by TPI were included in the 2011-2013 Spills that were alleged to have caused the Claimants the damage of which they complain.

68. Before us, the Defendants repeat the arguments they previously addressed to the Judge. The starting point is their submission that the essential facts underpinning the original claims in both the Bille and the Ogale Proceedings "relate to an identified number of oil spills from assets operated by SPDC". They seek to contrast those facts with the essential facts underpinning the new claims in respect of illegal refining, which they say are completely different and require the Claimants to establish (at the very least) (i) that crude oil was stolen from oil-producing assets operated by the Appellants (including where and when the theft occurred); (ii) that the stolen oil was transported to illegal refineries in the relevant areas; and (iii) that the stolen oil was refined illegally in the relevant areas and resulted in the discharge of pollution into the environment, which caused loss to the Claimants. They challenge the Judge's conclusion that the Illegal Refining Amendments do not enlarge or change the nature and scope of the originally pleaded duty to protect oil-producing assets from the threat of TPI. They base this on the assertion that the various duties of care in the original case are all pleaded by express reference to oil spills from assets operated by SPDC and not by reference to pollution caused by illegal refineries. If they are wrong about that, they submit that the breaches alleged by the Illegal Refining Amendments are different from those originally pleaded. Thus it is submitted that the Illegal Refining Amendments introduce new causes of action that do not arise out of the same or substantially the same facts as those already in issue.

69. The Claimants support the Judge's conclusion, submitting that the effect of the Illegal Refining Amendments is to allege that illegal refining (and associated damage) was a foreseeable consequence of breaches of the already pleaded duties to take reasonable steps to protect pipelines and other infrastructure against bunkering and other interference. They therefore serve to provide further particulars of the case already pleaded, specifically as to the loss and damage caused by the Defendants' breaches of duty. If they are wrong in that primary submission, then the Claimants submit that any new claim arises out of the same or substantially the same facts as are already in issue in the existing claim. In support of this submission, the Claimants rely upon the terms of the Defence, including the passage set out at [14] above, and paragraphs 8 and 15 of

Schedule 1 to the GLO, which are set out at [19] above. They submit that any additional factual investigations would not be "completely outside the ambit of and unrelated to the facts which the Defendants could reasonably be assumed to have investigated for the purpose of defending the unamended claim", relying on [28] of *Geo-Minerals*, cited at [57] above.

70. I am unable to accept the Defendants' starting point, which is their formulation of the bare minimum essential facts to be derived from the original pleading. As in relation to Issue 1, the Defendants' formulation fails to reflect the breadth of the case advanced by the original pleading. Though it would have been even clearer had the Illegal Refining Amendments been included in the pleading from the outset, a fair reading of the original pleading leads to the conclusion that damage resulting from TPI (and not merely damage caused at the moment of theft or abstraction of the oil) was covered because of the multiple references to TPI including those I have summarised above. There is no express or implied enlargement or change in the duty to protect assets embedded in the Illegal Refining Amendments.

71. I accept the Claimants' submission that what the amendments allowed by the Judge do is two-fold. First, they clarify that the concept of TPI should be understood to include the illegal refining of bunkered oil, bunkering and illegal refining being very closely related (as emphasised in the Defence). Second, they expressly plead that the illegal refining of bunkered oil, and associated damage, was a foreseeable consequence of the Defendants' failures to comply with their duties under Nigerian law. I am not convinced that the amendments were strictly necessary since I am not convinced that the Claimants would have been precluded from submitting that TPI as originally pleaded included the illegal refining of bunkered oil or that damage caused by illegal refining was a foreseeable consequence of bunkering and other TPI. In any event, however, I am satisfied that no enlargement of duty or breach is effected by allowing the Illegal Refining Amendments. In reaching this conclusion I bear in mind that the Judge disallowed an amendment concerning the cleaning up of spills from illegal refineries or other locations to which oil abstracted from the Bille Pipelines and Infrastructure by TPI was taken. I agree with her conclusion that to have allowed that amendment could have enlarged the scope of the duty to remediate, opening up a whole new area of investigation. There is no appeal from that finding or the disallowance of that amendment; but, more importantly, there is no conflict between her conclusion on the amendment she disallowed and her conclusion on the amendments that she allowed.

72. Had I been persuaded that the Illegal Refining Amendments gave rise to a new claim or claims, I would have held that the new claim or claims arose out of the same or substantially the same facts as are already in issue in the existing claim. The Judge was right to characterise pollution caused by illegal refineries as a cornerstone of the Defendants' Defences. The Defendants have chosen to place TPI and its consequences at the heart of their case in opposition to the Claimants' claims. They have thereby put the facts relating to TPI and its consequences in issue in the existing claim. At the moment, the Defendants' cornerstone is unparticularised as to the time, place, scope, cause or effect of such activities; but that only serves to emphasise that it will be necessary for the Defendants to investigate the facts relating to TPI and the foreseeable impact of TPI thoroughly for the purpose of defending the unamended claim. The Illegal Refining Amendments do not, in my judgment, require the Defendants to

investigate facts or obtain evidence of matters materially outside the ambit of or unrelated to the investigations that they will have to carry out in any event.

73. For these reasons, I consider that the Judge was correct to allow the Illegal Refining Amendments that she did. I would dismiss the appeal on Issue 2.

Issue 3 – Global Claims and future case management.

74. The first declaration now under appeal was that "the Claimants' claims are to be progressed on the basis that they are "global claims", i.e. "all-or-nothing" claims." I have summarised how the "global claims" issue progressively came into focus from the April 2022 Judgment, through the November 2023 Judgment and, finally, the March 2024 Judgment which gave the Judge's reasons for making the declaration that she did. The crux of her reasoning is summarised at [42]-[44] above.

75. There is a short and direct route to the conclusion that this declaration must be set aside. No judge or court is entitled to require a party to establish their case by a particular method. A party should be permitted to formulate their claims as they wish, not forced into a straitjacket (or corner or cul-de-sac) of the judge's or their opponent's choosing. It will be for the trial judge to determine whether the party can establish their claim: see *GMTC Tools and Equipment Ltd v Yuasa Warwick Machinery Ltd Const LJ* 1995 11(5) 370, per Leggatt LJ at 374. I attempted to explain the reasoning that underlies this principle in *Pawley v Whitecross Dental Care Ltd* [2022] 1 WLR 2577:

> "32. It is axiomatic that no one may be compelled to bring proceedings to claim damages for injury loss or damage caused by another person's tort. This has two consequences of fundamental importance. First, a person who is competent to litigate is entitled to decide who they will sue. Second, a person who is competent to litigate is entitled to decide what cause or causes of action they will pursue against those they have chosen to sue. The principle applies even (or particularly) where the choice that the claimant makes may expose them to a greater risk of failure than would be the case if every conceivable basis for a claim is pursued. This is not least because the overriding objective encourages claimants (and other litigants) to streamline proceedings where possible, in order to limit the number and complexity of issues to be tried by the court, and thereby to save expense and to generate litigation that is proportionate to the amount of money involved, the importance of the case, the (necessary) complexity of the issues and the financial position of the parties.
>
> 33. It follows that a decision to bring a claim for damages on a particular basis should in all normal circumstances be respected … ."

76. This does not mean that the Court has no control over how a party brings their case: far from it. The primary and most draconian means of control are the availability of summary judgment or striking out a case that can be seen to be hopeless, frivolous or vexatious. At a slightly lower level the Court may refuse to entertain a claim unless its

orders for the conduct of the case are complied with; and so on. It is neither necessary nor desirable to try to summarise the wide array of case management powers that may be available to the Court; nor is it necessary or desirable to refer to the principles upon which such powers are to be exercised other than to refer to the guiding principles of the Overriding Objective. However, unless and until the point is reached where a claim is to be dismissed or stayed, the right of a litigant to bring the claim and the freedom to determine how it intends to prove its claim should be respected in all normal circumstances.

77. In this case, there has been no effective application to strike out and the Defendants did not submit to us that the Claimants' claims were frivolous or vexatious. Both sides have representation of the highest quality and have had throughout. In that context, the Claimants have made absolutely clear that they do not advance a "global claim". They have made this clear both by the VPOCs and by Mr Hermer's unequivocal submissions during the July 2023 hearing that led to the November 2023 Judgment: see [23] and [30] above. In the face of those statements, it is wrong to impose upon the Claimants that their claims are to be progressed on the basis that they are "global claims". As Mr Hermer is recorded as saying during the July 2023 hearing, the Claimants intend to assert and prove a link between their loss and damage and a specific event for which the Defendants are alleged to be responsible. That is their case, for better or worse; and, unless and until they choose and are allowed to change their position in the future, they are entitled to maintain it.

78. The Claimants openly acknowledge and assert that they cannot plead (let alone prove) such a case at the moment. That does not mean that they are pursuing a global claim. What it means is that the Claimants cannot progress this very substantial litigation on the basis of the information they have. They assert that there is reason to believe that there is further information in existence that is not at present available to them but which, if they had it and had the benefit of appropriately supportive expert evidence, would enable them to plead and prove a case adopting conventional principles of causation. It may be that they will never be in a position to do so, in which case this litigation will fail. It is easy to see that there are formidable logistical and evidential difficulties for the Claimants to overcome; but that is the route they have chosen. It is not for the Court to force them to go down what they perceive to be the cul-de-sac of "global claims" against their will.

79. For these reasons I would set aside the first declaration. This means that it is unnecessary and would be inappropriate to spend any time in this judgment on the status of "global claims" in English law and whether such an approach could ever appropriately be applied to environmental claims such as those being brought by the Claimants. Still less would it be appropriate in this judgment to address the question whether such an approach could have validity under Nigerian law. I therefore say nothing about those difficult but, at present, irrelevant issues.

80. That leaves the second declaration. It is plain, as May J recognised, that urgent steps are required to break the impasse that is bedevilling this litigation. In an essentially circular procedural wrangle, the Claimants say that they cannot progress the pleading of their case to a point of sufficient particularity without further information from the Defendants; and the Defendants say that they cannot be required to provide further information unless the Claimants first achieve greater particularity about their case. This has degenerated into a dispute about lead cases and whether it is possible to select

lead cases before the Claimants identify all the spills on which they rely. Underlying this dispute is the serious question whether, and if so how, a procedure and structure that is fair to both the Claimants and the Defendants can and should be achieved.

81. Despite the Claimants having the benefit of legal representation of the highest calibre, there is a substantial inequality of arms in the litigation. Two particular aspects of that inequality can be mentioned specifically here. First, there is a major inequality in access to information. The evidence submitted by the Claimants suggests that the Defendants have considerable quantities of relevant information that are not available to the Claimants. The Defendants' primary response is to shield behind the submission that the Claimants have not particularised their case properly. Ultimately all future case management decisions are for the High Court and not for this Court on these appeals. However, the evidence advanced by the Claimants can be relied on in these appeals as demonstrating significant inequality of arms in access to information. Second, the Claimants cannot fund the litigation out of their own resources and have to rely upon their lawyers being prepared to act on CFA terms. The inequality that flows from this is best illustrated by the £7 million that the Claimants have had to expend on the SOIs. It is a very substantial sum for the Claimants; but it would be relatively (I emphasise the word "relatively") trifling for the Defendants as part of a global organisation such as Shell.

82. What, then, should be the approach that the Court should take? The short answer is that all of its steps should be informed by the overriding objective and, in particular, by the Court's obligation to ensure that the parties are on an equal footing and can participate fully in the proceedings. In that regard, I agree that in cases where there is a significant asymmetry of information between a claimant and a defendant "the process of disclosure is one of the most powerful tools available for achieving justice"; and that "if the scope of disclosure is too tightly confined by the specific facts that the claimant has already been able to plead, the claimant may simply be unable to obtain the material that it needs to plead and make out its case": see *Ventra Investments Ltd v Bank of Scotland plc* [2019] EWHC 2058 (Comm) at [37]-[38]. These observations were made in the context of an action alleging fraud and misconduct; but I take them to be of general application: see, for example, the similar approach of Coulson J (as he then was) in the context of procurement disputes: *Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC) at [20](a) and (b).

83. It follows that, while the Court should always be alert to disallow applications that are nothing more than "fishing expeditions", in a case such as the present where the case that the Claimants wish to bring has been clearly articulated in their pleadings and associated documents, the Court should scrutinise with care any suggestion that the Defendants do not know the nature of the case they have to meet for the purposes of disclosure because it has not yet been pleaded with sufficient particularity. In principle, at least, the Court's approach to the Claimants' assertion that they need further disclosure should be informed more by the explanations they have given about why they need the disclosure before pleading a case with full particularity than by the present state of their pleadings. This is not to cast doubt for a moment upon the equally important principle that, before this litigation or any part of it can be brought to trial, the Claimants will be required to plead their case with sufficient particularity so that the Defendants know what case they have to meet and have a fair opportunity to meet it. That stage has evidently not yet been reached.

84. I am unable to agree with the Judge that the Claimants' pleaded case precludes case management of this litigation being organised by reference to the selection of lead claimants. I consider that this is a paradigm example of a case which can only be progressed by reference to lead cases and that the co-operative selection of lead cases by the parties (with the intervention of the Court if required) is an essential step that is required to break the circularity of the present impasse. It is not necessary to refer expressly to the multiple examples of complex litigation with wide-ranging factual and legal issues in many disparate fields that have been successfully case-managed using lead cases as the vehicles for determining important issues. I echo and endorse what was said by the Court in *Municipio de Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951, [2022] 1 WLR 4691 at [139]:

> "The courts have developed a wide range of case management tools in group litigation including, importantly, the selection of lead cases, the trial of preliminary issues and the adoption of a staged approach, either in parallel with other progress in the litigation or as a stand-alone procedure. These operate in what is now a digitalised environment which includes sophisticated e-disclosure, data sampling and algorithm mechanisms."

85. One of the advantages of the process of selecting lead cases is to concentrate the minds of the parties on the real issues in dispute and how to cover a wide spread of those issues using a proportionate number of lead cases as the vehicles for addressing them. By contrast, the 3Cs trial as presently proposed is reasonably described by the Claimants as "something between a trial of factual preliminary issues and a roving judicial inquiry into the causes of all oil contamination over a three-year period in a 500 square mile region of the Niger Delta." This seems to me to be a recipe for an extremely expensive and insufficiently focussed disaster.

86. The Court should be pursuing a procedural course that is designed to refine issues progressively to the point where their fair resolution will lead to the final disposal of the litigation as a whole or, at least, substantial parts of it. As things stand, that must involve three guiding principles. First, the Court should strive to ensure that the parties are on an equal footing in relation to access to relevant information. To that end, it appears on the information that is available to us that further disclosure is required. Second, lead cases should be selected by a collaborative process, with the Court being involved as necessary. Third, once the Claimants are in possession of a sufficiency of relevant information, they should be required to refine and set out the nature of their case or cases (by reference to the lead cases or otherwise) so that the Defendants have a fair understanding of the case they have to meet and a fair opportunity to meet it at trial. Whether this will be achieved by one further iteration or more than one is for the High Court to decide.

87. This Court should not and does not prescribe in any detail how these principles should be implemented. That is the responsibility of the High Court. In particular:

    i) The Claimants submitted that, before the distraction of global claims emerged, the parties were close to agreeing that standard disclosure should be given. Evidently, there is no agreement at present. It will be for the High Court to decide whether standard disclosure should be given and, if it should, whether it should be tailored in any way and the process by which it should be given.

ii) In the absence of agreement, it will be for the High Court to decide what further disclosure should be ordered to be given;

iii) Both in their evidence and in oral submissions, the Claimants proposed an outline approach to the selection of lead cases. One such suggestion was to select lead cases by reference to the most common fishing sites in Bille. I have taken those proposals into account in forming the view that lead cases are the way forward, but I express no view about the criteria that should be applied in the selection process. That is for the parties to agree if possible or the High Court to determine if they cannot agree;

iv) Equally, it will be for the High Court to determine the order in which procedural steps are taken. I would instinctively hope that lead cases could be chosen (or at least the criteria for their choice be agreed) without having to wait for such disclosure as the High Court may order, since that is likely to lead to swifter progress and earlier refinement of issues. In other substantial litigation, selection of lead cases has been ordered to happen before full disclosure is given, with successful outcomes. And, whatever approach is adopted, it cannot be predicted that there will be no need for further disclosure once lead cases have been selected. I emphasise, however, that these appeals did not lead to full argument on the mechanism and timings of how matters should go forward. That is why I have taken the view that all such matters are for the High Court rather than for us to decide.

88. I would only add that, not least because of the time taken up by the Defendants' jurisdictional challenge and the distraction of the global claims issue, there is a compelling need for this litigation to be progressed promptly from now on. The parties should therefore anticipate that stringent time-limits will be set and will need to explain cogently and clearly how much time they need to comply with the Courts' orders, and why.

89. For these reasons, I would set aside the second declaration.

LORD JUSTICE MALES:

The Additional Spills Amendments

90. I agree with Lord Justice Stuart-Smith that the Additional Spills Amendments do not introduce a new cause of action. This claim was never limited to the 10 specified oil spills initially pleaded at para 25(b) of the Particulars of Claim. The Claimants have always made it clear that they rely on all oil spills from the Defendants' pipelines and infrastructure during the relevant period, even where they are not at present able to identify the particular spill. The Judge was therefore right to regard this amendment as providing additional particularisation of the Claimants' existing claims, so that CPR 17.4 was not engaged.

The Illegal Refining Amendments

91. In my view the position regarding the Illegal Refining Amendments is less clear-cut. Unlawful bunkering may lead to environmental damage in two distinct ways. The first is that oil spills may occur during the process of diverting oil from Shell-operated

pipelines or infrastructure. Such spills will necessarily occur in the vicinity of the pipeline or infrastructure from which the crude oil is diverted. It should therefore be possible, with expert assistance once all relevant spills and the quantity spilled have been identified, to identify the damage likely to have been caused by any particular spill. The second is that waste products may be deliberately dumped after the illegal refining process has taken place. That will not necessarily occur anywhere near Shell-operated pipelines or infrastructure. Where it occurs will depend on the location of the illegal refinery to which the stolen oil is conveyed. I can envisage, particularly if an illegal refinery is receiving stolen crude oil from more than one source, that it may be impossible to identify with precision the source of any particular waste product which is subsequently dumped. Whether that is fatal to the claim will depend upon the facts: for example, it will not necessarily be fatal if all of the oil received by the refinery is ultimately derived from Shell and if the Claimants are able to prove a systemic negligent failure by the Defendants to prevent third-party interference.

92. I agree with Lord Justice Stuart-Smith that the claim as initially pleaded covers oil spills occurring during the process of diverting crude oil from Shell-operated pipelines or infrastructure. That is clear from the many references to spills occurring as a result of third-party interference. However, it is less clear, at least to me, that the claim as initially pleaded extends to the deliberate dumping of waste products by illegal refiners some way downstream (in process terms) from Shell facilities and at some distance from them. Such dumping is not easily described as a "spill", which seems to me to refer to something accidental or unintended, and there is no reference to the deliberate dumping of waste products in the unamended Particulars of Claim.

93. However, it is unnecessary to pursue this point further because, as Lord Justice Stuart-Smith has demonstrated, such deliberate dumping by illegal refiners is the cornerstone of the Defendants' Defence. Thus, even if the amendments do introduce a new claim or claims, those claims arise out of the same or substantially the same facts as are already in issue on the claim. The Judge was therefore entitled to allow these amendments pursuant to CPR 17.4(2) and in accordance with the principles discussed in *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828 and *Mulalley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32, [2022] BLR 198.

The Global Claim Issue

94. The concept of a global claim has been developed and applied by the English and Scottish courts in the context of contractual disputes relating to delay or disruption in the course of building projects. It enables a claimant to recover when loss is caused by multiple events, for all of which the defendant is responsible, but it is impossible or impracticable to identify separately the loss caused by each of those events. To that extent, therefore, it operates to assist a claimant whose case might otherwise fail on causation grounds for want of proof. Thus the global claim concept, as applied in the building cases, gives a claimant an additional weapon in its armoury, but it is not one which a claimant is obliged to deploy. The downside, from a claimant's point of view, is that the global claim will generally fail if any material contribution to the loss is made by an event for which the defendant is not responsible. For an explanation of the circumstances in which the concept applies, and the way in which it operates, see *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] BLR 393 and *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 (TCC).

95. In my judgment the Judge was wrong to order that the Claimants' claims must be progressed "on the basis that they are global claims, i.e. all-or-nothing claims" for three reasons. The first is that the declaration lacks clarity. To say that a claim is a "global claim" or an "all-or-nothing claim" may sometimes be a convenient label, but these are not established terms of art and the declaration fails to spell out the legal consequences of such a characterisation.

96. Second, the Claimants have repeatedly and consistently disavowed the making of a global claim. They cannot be required to advance the claim in this way against their will. The court's task is to adjudicate on the claim which the Claimants have made.

97. Third, this is a claim in tort for breach of common law and statutory duties alleged to arise under Nigerian law. Even though the Judge has directed that the issues to be determined in the preliminary issues trial should include whether Nigerian law recognises the concept of a global claim, there is no pleading that the concept of global claims as applied in English or Scottish law in the context of building disputes is recognised by Nigerian law, let alone that it is recognised in any wider context. There is certainly no pleading that as a matter of Nigerian law a defendant or the court can insist that a claimant advance its case in this way. Absent such a pleading, the concept of global claims should have no place in this litigation.

98. What the Claimants will need to prove in order to make good their claims must depend on the relevant principles of Nigerian law, including the applicable principles relating to causation. There was some debate before us as to the principles of causation which would apply under English law. We were referred, for example, to an interesting article by Professor Jane Stapleton suggesting that in a case where an indivisible loss is caused by multiple factors, an "extended but-for test" may now apply, so that a claimant need only prove that the factor for which the defendant is responsible made a contribution to the loss (*Unnecessary and Insufficient Factual Causes*, Journal of Tort Law (2023)). It is, as I understand it, the Claimants' position that this is all they need to prove in the present case, but whether that position is sound as a matter of Nigerian law remains to be decided.

Lead Claimants

99. I agree with Lord Justice Stuart-Smith that this is a paradigm case for the selection of lead cases. It is difficult to see how else the case could fairly be tried. I agree also that urgent progress now needs to be made. The case has been bogged down for far too long by disputes about jurisdiction, pleadings and disclosure.

Conclusion

100. It was for these reasons that I joined in the decision to dismiss the Defendants' appeal against the Judge's decision to allow the amendments and to allow the Claimants' appeal against the declarations made by the Judge.

LORD JUSTICE BEAN:

101. I agree that, for the reasons given by Lord Justice Stuart-Smith and Lord Justice Males, (a) the Defendants' appeals against the Judge's decision to allow the Additional Spills and Illegal Refining Amendments should be dismissed; (b) the Claimants' appeal

against the declaration that the claims are to be progressed as "global claims" should be allowed; and (c) this is a paradigm case for the selection of lead claimants.

102. I particularly wish to endorse the observations of Lord Justice Stuart-Smith that, in a case such as this where there is both a substantial inequality of arms and asymmetry of information between the parties, all case management decisions should be informed by the overriding objective, in particular by the court's obligation to ensure so far as reasonably practicable that the parties are on an equal footing and can participate fully in the proceedings. I also agree that, because of the time taken up by the Defendants' jurisdictional challenge and the distraction of the global claims issue, there is a compelling need for the litigation to be progressed promptly from now on.