



Neutral Citation Number: [2024] EWHC 578 (TCC)

Case No: HT-2017-000383

Case No: HT-2020-000143

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

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

Date: 14/03/2024

**Before :**

**MRS JUSTICE O'FARRELL DBE**

-----  
**Between :**

**Claim no. HT-2017-000383**

**(1) HARRISON JALLA**  
**(2) ABEL CHUJOR**  
**AND OTHERS**

**Claimants**

**-and-**

**(1) ~~ROYAL DUTCH SHELL PLC~~**  
**(2) SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED**  
**(3) SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED**

**Defendants**

**Claim no. HT-2020-000143**

**THE 27,830 INDIVIDUAL CLAIMANTS LISTED IN SCHEDULE 1 (“THE INDIVIDUAL CLAIMANTS”), on their own behalf and in the representative capacities (CPR r.19.6) set out in the Claim Form dated 20 April 2020**

**THE 479 NIGERIAN COMMUNITIES LISTED IN SCHEDULE 2 (“THE COMMUNITY CLAIMANTS”), represented pursuant to CPR r.19.6 by:**

- (i) their resident INDIVIDUAL CLAIMANTS, as set out in Schedule 1, Column F; or**  
**(ii) where there is no resident INDIVIDUAL CLAIMANT those resident representatives listed in schedule 3; and/or (iii) HARRISON JALLA and ABEL CHUJOR; all as set out in the Claim Form dated 20 April 2020**

**Claimants**

-and-

**(1) SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED  
(2) SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY  
LIMITED**

**Defendants**

-----  
-----

**Oba Nsugbe KC** (instructed by **RBL Law Limited**) for the **Claimants**  
**Robert Marven KC, Dr Conway Blake, Tom Cornell & Mark McCloskey** (instructed by  
**Debevoise & Plimpton**) for the **Defendants**  
**Nicholas Bacon KC** (instructed by **RBL Law Limited**) for **RBL Law Limited**

Hearing dates: 26<sup>th</sup> & 27<sup>th</sup> October 2023

-----  
**Approved Judgment**

This judgment was handed down remotely at 10.30am on Thursday 14<sup>th</sup> March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE O'FARRELL DBE

**Mrs Justice O'Farrell:**

1. The following applications are before the court:
  - i) the defendants' application for costs of and occasioned by the issue whether, as a matter of Nigerian law, RBL Law Limited ("RBL") had the requisite authority to act for the claimants in protective proceedings, claim HT-2020-000143 ("Jalla 2");
  - ii) the defendants' application for disclosure against RBL, issued on 25 June 2021 and now pursued following judgments in the substantive proceedings of both claims.
2. The claimants and RBL are separately represented for the purpose of this hearing. The application for costs is resisted in whole or in part by the claimants. The applications for costs and disclosure are resisted by RBL.

*The claims*

3. The underlying dispute arose out of an oil spill that occurred in the Bonga oilfield off the coast of Nigeria on 20 December 2011 ("the Bonga Spill"). The Bonga Spill emanated from an offshore floating production, storage and off-loading facility ("the Bonga FPSO"), located approximately 120 kilometres off the Nigerian coastline of Bayelsa State and Delta State.
4. The Bonga Spill was caused by a rupture of one of the pipelines connecting the Bonga FPSO to a single point mooring system ("SPM"), both of which were operated and controlled by one of the defendants, Shell Nigeria Exploration and Production Company Limited ("SNEPCo"), a Nigerian company regulated by the Nigerian governmental authorities. The technical manager of the vessel, the MV Northia, that was loading from the Bonga FPSO at the time of the spill was another defendant, Shell International Trading and Shipping Company Limited, ("STASCO"), a company domiciled and registered in the UK.
5. On 13 December 2017 (almost six years after the Bonga Spill), Mr Harrison Jalla and Mr Abel Chujor issued proceedings in claim HT-2017-000383 ("Jalla 1") against SNEPCo and others, purporting to act on their own behalf and/or in a representative capacity on behalf of 27,830 claimants and 457 communities in the Niger Delta, and seeking damages and/or compensation for pollution and environmental degradation caused by the Bonga Spill.
6. On 4 April 2018 the claimants amended the claim form to add STASCO as an anchor defendant and on 2 March 2020 material allegations against STASCO were made in the Jalla 1 proceedings.
7. On 20 April 2020, 27,830 individual claimants (mostly, but not all, the same individuals who were named in Jalla 1), purporting to act on their own behalf and as representatives of 479 communities in the Niger Delta, issued protective proceedings in Jalla 2 against STASCO and SNEPCo, seeking damages and/or compensation for pollution and environmental degradation caused by the Bonga Spill.

8. There have been a number of judgments in these protracted proceedings, including the following:
- i) On 2 March 2020, Stuart-Smith J (as he then was) issued a judgment reported at [2020] EWHC 459 (“the Jurisdiction Judgment”), in which the court determined a number of applications but was unable to dispose of a jurisdiction challenge in Jalla 1, pending resolution of the issue of limitation, which turned on the date on which actionable damage occurred in respect of each claimant and community.
  - ii) As part of the Jurisdiction Judgment, the court determined that the claims for damage caused by the Bonga Spill could not constitute a continuing nuisance until any pollution was remedied, so as to extend the limitation period and defeat the defendants’ limitation defence. The claimants each had a single claim in nuisance in respect of any damage caused by the Bonga Spill, such cause of action accruing when their land and/or water supplies were first impacted by the oil (“the Continuing Nuisance Judgment”).
  - iii) On 14 August 2020 Stuart-Smith J issued a further judgment reported at [2020] EWHC 2211 (“the Strike-Out Judgment”), in which the court struck out the representative action in Jalla 1, leaving Mr Jalla and Mr Chujor as the only remaining claimants in Jalla 1.
  - iv) On 27 January 2021, the Court of Appeal upheld the Continuing Nuisance Judgment that there was no continuing nuisance, as reported at [2021] EWCA Civ 63 (“the Continuing Nuisance Appeal”).
  - v) On 29 September 2021, the Court of Appeal upheld the Strike-Out Judgment, as reported at [2021] EWCA Civ 1389 (“the Strike-Out Appeal”).
  - vi) On 28 February 2023, this court issued a judgment reported at [2023] EWHC 424 (“the Date of Damage Judgment”), including findings that: (a) any Bonga oil would have reached the shoreline between 25 and 28 December 2011; (b) the applicable limitation period for the claims under Nigerian Law was five (as opposed to six) years; and (c) the claimants failed to establish that the date on which any oil from the Bonga Spill first impacted any of the communities was 2014 or later.
  - vii) On 10 May 2023, the Supreme Court handed down judgment reported at [2023] UKSC 16, dismissing the claimants’ appeal and holding that there was no continuing nuisance in this case. The Bonga Spill was a one-off event or isolated escape; the cause of action accrued and was complete once the claimants’ land had been affected by the oil.
9. The cumulative effect of the above judgments was that the claims in Jalla 1 and Jalla 2 were statute-barred for limitation. Accordingly, by order dated 27 June 2023, the claimants’ claims against the defendants in Jalla 1 and Jalla 2 were dismissed.

*Background to the authority issue*

10. Initially, between about 2015 and July 2020, the claimants in Jalla 1 and Jalla 2 were represented by Johnson and Steller (“J&S”). J&S relied on a signed letter of authority from each individual claimant as providing it with authority to conduct the proceedings. The process of collecting the letters of authority and verifying identity was explained in the witness statement of Mr Nicholas Ekhurutomwen, solicitor of J&S, dated 7 June 2019. A steering committee was appointed with delegated authority to provide instructions to J&S and act as a point of communication in respect of the proceedings.
11. Funding for the proceedings was provided by way of a Damages Based Agreement (“DBA”) dated 8 May 2017 (varied by deed dated 18 October 2019), entered into by J&S and Mr Jalla, acting on behalf of the individual claimants in Jalla 1. Under the DBA, if the claim failed, the Jalla claimants would have no liability to pay any legal fees or disbursements; if the claim succeeded, the legal fees and disbursements would be funded through a percentage deduction from the damages.
12. From November 2018, pursuant to an agreement between RBL and J&S (“the Collaboration Agreement”) dated 27 March 2019 (as amended by further agreement dated 21 April 2020), RBL provided litigation services to J&S up to a value of £2.3 million. Further, RBL provided a working capital facility of £2 million for the purpose of the proceedings, which J&S was entitled to draw down in tranches. Under the Collaboration Agreement, J&S agreed to pay to RBL £1 million within 30 days of the agreement. In the event that the claim succeeded and J&S received the DBA payment, J&S agreed to pay to RBL the balance of £1.3 million for legal services, repayment of the loan facility and 40% of the DBA payment received.
13. As early as October 2018, the issue of authority was first raised by Debevoise & Plimpton (“D&P”) with J&S. This was followed by months of correspondence on the issue. J&S produced a number of sample letters of authority, but the validity of the letters was disputed by D&P. Those issues were never resolved and on 15 July 2020 J&S ceased to trade.
14. On 26 August 2020 Rosenblatt, now RBL, filed and served notices of change as the solicitors acting for the claimants in Jalla 1 and Jalla 2.
15. On 24 September 2020 RBL entered into a DBA with (i) Mr Jalla and Mr Chujor; and (ii) the steering committee members. The individual claimants were not signatories to the DBA but Messrs Jalla and Chujor were stated to have authority to act on their behalf and RBL stated its intention to secure confirmatory instructions from them. Provision was made for any new claimants to execute a Deed of Adherence, accepting the terms of the DBA. Under this DBA, if the claim failed, the claimants would have no liability to pay any legal fees or disbursements; if the claim succeeded, the claimants would pay a percentage of any damages received (“the Contingency Fee”) (which included counsel’s fees), plus RBL’s disbursements.
16. A dispute arose between the parties as to whether RBL had authority to issue and conduct proceedings on behalf of all claimants identified as such in the Jalla 2 Proceedings.
17. The issue of authority was raised at a case management conference held on 19 November 2020. The court ordered the claimants to provide evidence as to the basis on

which RBL was authorised to act on behalf of the individual and community claimants in Jalla 2:

“The Claimants in claim HT-2020-000143 shall:

10.1 by 11 February 2021, confirm (with supporting evidence) to the Defendants on what basis it is said that the Community Claimants have validly authorised their purported legal representatives, Rosenblatt Limited, to act for them in the proceedings; and

10.2 by 31 May 2021, confirm (with supporting evidence) to the Defendants on what basis it is said that the Individual Claimants have validly authorised their purported legal representatives, Rosenblatt Limited, to act for them in the proceedings.”

18. On 11 February 2021, the claimants served their evidence as to the basis on which RBL was authorised to act on behalf of the community claimants. This was explained in the witness statement dated 11 February 2021 of Ms Tania MacLeod, Head of Dispute Resolution and Partner at RBL:

“4. ... Rosenblatt’s position is that it has and has always had the requisite authority to act for the Community Claimants, as instructed by the Steering Committee. To explain this position, Rosenblatt has obtained further documentation and witness evidence as set out below in respect of Rosenblatt’s current and retrospective authority.

...

11. The Five Powers of Attorney are exhibited to Mr Aloysius Okerieke’s First Witness Statement dated 10 February 2021 (for the Ijaw Kings) and to Mr Harrison Jalla’s First Witness Statement dated 10 February 2021 (for the Itsekiri King). At paragraph 6 of Mr Jalla’s statement, he explains that the five Kings are the rulers of the 479 communities (as listed in Schedule 2 to the Particulars of Claim in HT-2020-000143) and the communities are divided by tribe, either recognising the Itsekiri King or one of the four Ijaw Kings as monarch. The Power of Attorneys are drafted in a similar format as between Rosenblatt and each King and contain specific reference to the previous Power of Attorney executed between the King and J&S (attached as Appendix A) and reference to the Steering Committee’s authority to appoint solicitors and provide instructions. The latter reference echoes that of the two letters provided previously to the Defendants dated 29 July 2020 ...

12. Two witness statements have been obtained from Elders for each of the Itsekiri and Ijaw tribes ... These two witness statements have been provided by the Honourable Olayjemi Johnson Nanna, an elder of the Koko Community as belonging

to the Itsekiri tribe, and Chief Rumson Victor Baribote, an elder of the Bomadi Community as belonging to the Ijaw tribe.

...

15. We are instructed that a meeting of the 479 community leaders was called to take place on 9 February 2021. At that meeting, statements were executed and arrangements made to send the statements to us. Owing to the difficulties in the logistics of mass document collation and transmission within the environment of the Niger Delta (enhanced only by Covid-19) we are not presently able to say when we will be in a position to provide these documents. The Court is aware that we are embarking on a mass sign-up exercise for individual claimants at the same time as gathering evidence for the Claimants' pleading for date of damage due on 4 June 2021. In relation to authority, the utility of that sign-up exercise is captured at paragraph 10.2 of the Order which provides for submission of evidence on behalf of the Claimants in support of Rosenblatt's authority to act for individual claimants. We would therefore respectfully suggest that any further documents produced in respect of additional evidence to meet paragraph 10.1 of the Order, are provided at the same time as those for the individual claimants, namely 31 May 2021."

19. Witness statements were served by Mr Harrison Jalla, one of the lead claimant, dated 10 February 2021 and Mr Aloysius Okerieke, Steering Committee and OSPIVV secretary, dated 10 February 2021, explaining the process of obtaining new powers of attorney between the Kings (or other rulers) and RBL and exhibiting the Powers of Attorney dated 10 February 2021.
20. Witness statements were also served by Chief Rumson Victor Baribote dated 11 February 2021 and the Honourable Olajemi Johnson Nanna dated 10 February 2021, Elders in their respective communities, who explained the tradition of land ownership in the Niger Delta and authority held by the Kings to take legal action concerning the land that would be binding on the community and individuals.
21. Therefore, RBL's position was that it had authority to act on behalf of the communities through the Powers of Attorney and the Steering Committee. In Jalla 2, the communities were represented by individual claimants who were community leaders. As at 11 February 2021, RBL stated that an exercise was underway to obtain letters of authority from community leaders; the relevant documents were not yet available but would be supplied by 31 May 2021.
22. On 31 May 2021, the claimants served their evidence as to the basis on which RBL was authorised to act on behalf of the individual claimants. This was explained in Ms MacLeod's witness statement dated 31 May 2021:

"7. ... Since Rosenblatt came on to the Court record in the Protective Proceedings on 26 August 2020 it has been and continues to be the Claimants' position that Rosenblatt has, and

has always had, the requisite authority to act for all the Claimants in the Protective Proceedings.”

...

10. When Johnson & Steller ceased trading in July 2020, Rosenblatt was instructed by the Steering Committee to come on the record in its place. This was confirmed in a letter sent by Rosenblatt to the Defendants' Solicitors on 11 September 2020... That letter also enclosed copies of a letter from each of the Steering Committee and the Oil Spill Victims Initiative (“OSPIVV”) dated 29 July 2020. In those letters the Steering Committee on behalf of all Claimants, both individual and community, authorised Rosenblatt to “*prosecute, manage and conduct the proceedings on behalf of the Claimants on the basis of instructions given by the Steering Committee*” ... The Claimants' position has been clearly stated in further correspondence between the parties. We do not propose to repeat here the position set out in our letter dated 24 September 2020 ... which is maintained. For the avoidance of any doubt, it remains Rosenblatt's position that the Steering Committee is validly appointed and therefore that Rosenblatt is validly authorised to act on behalf of all the Claimants in the Protective Proceedings.

12. Accordingly, with the authority derived from five Powers of Attorney between the Kings of the Ijaw tribe and Rosenblatt, and the King of the Itsekeri tribe and Rosenblatt, all dated 10 February 2021, Rosenblatt is satisfied that it is authorised act for the Individual Claimants. Taking instructions from each individual is simply “*optional or for good measure*”...

13. However, following the directions of the Court in paragraph 10.2 of the Order Rosenblatt has, adopting a “*belt and braces*” approach, sought to obtain additional documentation to further support the Claimants' position that Rosenblatt has the requisite authority to act for all 27,830 Individual Claimants in the Protective Proceedings. Rosenblatt has deployed local agents on the ground in Nigeria to seek signed Letters of Authority from the Individual Claimants.

...

18. ... At the date of this statement, given the complexities of operating in such remote areas with difficult terrain and with limited resources on the ground in Nigeria, and the impact that restrictions imposed by the Covid-19 pandemic continue to have, hampering all logistical efforts, we have not yet received a full complement of signed documents for review. This is despite enormous effort on the part of all those involved. As such I am, regretfully, not in a position to exhibit any further documentation



at this stage. Rosenblatt are continuing to work on this and will provide a further update as soon as we are able.

20. ... we have received in the region of 350 witness statements on authority from community leaders which we are working to review. Unfortunately, it appears from an initial review of some of these that when the documents were printed in Nigeria, a portion of the text was cut off from the template provided resulting in some text missing from every completed document that we have received. The missing text should read:

*"I confirm that the ... community is a Claimant in proceedings before the High Court of England and Wales (HT-2017-000383 and HT-2020-000143..."*

We continue to review the documents received and will provide further information about these as soon as we are in a position to do so."

23. Further, a witness statement dated 31 May 2021 was served by Idama Amarun, the CEO of Arthur Ferdinand Ltd, instructed to obtain signed letters of authority from individual claimants. He explained that he visited communities and verified the details/ID of individuals against the schedules to the pleadings and J&S letters:

"11. Given the complexities of operating in a remote and difficult region, with limited resources, together with the fact that the field operation was continuing apace, it was not possible for the documents to be scanned and sent to Rosenblatt contemporaneously. All the documents we have collected have been transported to Warri and are being stored at the OSPIVV office there, which is also being used as a base for processing the thousands of documents.

12. At the OSPIVV office there is now a team of 15 people from Arthur Ferdinand and a further 11 from OSPIVV working with Edewor & Co at the OSPIVV office to cross-check and verify, then scan and send, the documents to Rosenblatt. Given the vast number of Claimants and our limited scanning resources (which enables us only to scan one document at a time) these have to be uploaded, compressed and then sent in small batches by email. There is a backlog of documents which I understand are still being reviewed by Edewor & Co, following which they will be provided to Rosenblatt. "

24. Thus, RBL's position was that it had authority to act on behalf of the individual claimants through the Powers of Attorney and the Steering Committee and did not need a letter of authority from each claimant. However, it confirmed that it had commissioned an exercise to be carried out to obtain individual letters of authority. As at 31 May 2021, the evidence indicated that such exercise was in progress but not complete. Therefore, RBL did not have individual letters of authority from the 27,830 claimants. Ms MacLeod stated that she had reviewed some 350 letters of authority from

community leaders but they were defective in that critical text was missing. What is notable is the evidence RBL did not give; Ms MacLeod did not state that she had reviewed any letters of authority from individual claimants; and she did not state how many, if any, such letters had been received by RBL. Mr Amarun stated that there was a backlog of documents being processed at the OSPIVV office but did not state how many, if any, batches had been sent to RBL.

25. Despite the court's order that any supporting evidence should be served by RBL, no letters of authority from any of the claimants or community leaders were exhibited to the witness statements.
26. The defendants disputed that the evidence served by the claimants was sufficient to establish the necessary authority as set out in the witness statement of Ms Keibi Atemie, Company Secretary for SNEPCo, dated 14 July 2021. In particular, the defendants' position was that the Paramount Rulers did not have authority to bring actions that would bind the individual members of the community:

“A Paramount Ruler cannot therefore validly purport to provide authority or instructions to OSPIVV – and by extension, the Steering Committee, or the Claimants' representatives – on behalf of any legal person who has not given their express authority for the Paramount Ruler to do so.”
27. On 2 July 2021 the claimants served their Date of Damage pleading, together with supporting factual and expert evidence.
28. At a CMC hearing on 20 and 21 July 2021 the court refused any further extension of time for the claimants to provide additional details of the case on date of damage (see transcript of the judgment at [2021] EWHC 2118) (“the Extension Judgment”).
29. Contrary to suggestions in the claimants' evidence filed for the purpose of the applications now before the court, the court did not refuse permission to adduce further factual evidence in relation to the Date of Damage claim or rule that the evidence then filed was to comprise the totality of the claimants' Date of Damage case. At the CMC hearing in July 2021, the claimants did not seek permission to adduce any further factual evidence. The application was limited to a request for an extension of time to produce an amended schedule that would include the asserted date of damage against some 900 of the claimants. They also intimated that there might be further expert evidence, although that was not pursued by the time of the appeal. The claimants expressly stated that they did not intend to produce further factual witness statements in support of the claims.
30. The decision in the Extension Judgment was upheld by the Court of Appeal in a judgment dated 29 September 2021, reported at [2021] EWCA Civ 1559 (“the Extension Appeal”).
31. As a result of the above, the claimants' Date of Damage pleading was limited to:
  - i) the personal claims of Mr Harrison Jalla and Mr Abel Chujor in the Jalla 1 Proceedings;

- ii) the personal claims of Mr Dennis Ojulu, Mr Johnson Agbeyagbe and Ms Elizabeth Ekolokolo in the Jalla 2 Proceedings; and
  - iii) the claims brought on behalf of the communities of Abe-Bateren, Isuku-Gbene, Tonbrapade-Gbene and Ogheye-Uton in the Jalla 2 Proceedings (a further claim was pleaded in respect of a fifth community but ultimately no evidence was adduced at the trial and it was not pursued).
32. Importantly, none of the claims in Jalla 2 was struck out or discontinued. Although the claimants elected not to adduce evidence from further witnesses in support of the Date of Damage issues, they maintained the claims by the 27,830 claimants in Jalla 2, pending the outcome of the Supreme Court's decision on continuing nuisance.
33. At the July 2021 CMC, having regard to the significance of the issue whether RBL had authority to pursue the claims on behalf of thousands of individual claimants (for themselves and potentially their communities), the court ordered that this additional unresolved dispute should be heard at the Date of Damage hearing (see transcript of the judgment at [2021] EWHC 2121) ("the Authority Directions").
34. By the Authority Directions, the court ordered both sides to provide any further factual and/or legal evidence in relation to the issue:
- “1. The defendants in this matter have raised an issue as to whether the claimants' purported legal representatives, Rosenblatt Limited, have authority to act in what is called Jalla 2 Proceedings, HT-2020-000143. The defendants have proposed that the issue should be dealt with by the court at a half-day hearing either in October or more probably next February, during the date of damage trial.
  - 2. The issue of whether or not the claimants' representatives had authority to represent all of the individual claimants set out in the schedule to the particulars of claim, and/or the communities also set out in the schedule to the particulars of claim, was raised before this court at the CMC back in November 2020. As a result of that, in the order dated 18th December 2020, the court ordered the claimants to provide evidence of the basis on which Rosenblatt had authority to act, not only for the lead named claimant, Mr. Jalla, but also the other individual claimants and the communities purportedly included within the claim.
  - 3. The court is satisfied that the claimants have complied with that order in that they have served evidence setting out the basis on which they contend Rosenblatts are authorised to act for the community claimants and the 27,830 individual claimants in the Jalla 2 proceedings.
  - 4. Mr. Nsugbe QC SAN, leading counsel for the claimants, has taken the court to the statements of the Honourable Olayjemi Johnson Nanna and Chief Rumson Victor Baribote, together with the statement of Ms. MacLeod, in which the position is

stated to be that under Nigerian native law or traditional law and custom, the King has paramount authority. The Kings in question (with authority over the communities the subject of the proceedings) have delegated that authority to the Bonga Oil Spill Steering Committee. As a result, it is not necessary under Nigerian law, which recognises traditional law and custom, for individual claimants to give separate authority to their legal representatives. Ms. MacLeod has explained that the Steering Committee, which has the delegated authority from the Kings, has expressly authorised Rosenblatt to act on behalf of all of the individual claimants and the communities.

5. Therefore, I am satisfied that the claimants complied with the order of 18 December 2020 by serving the evidence on which they rely, setting out the basis of their case that there is adequate authority for the Jalla 2 proceedings to continue.

6. The defendants do not accept that the evidence provided by the claimants is adequate and/or would be sufficient to satisfy the relevant requirements for authority for the purposes of Nigerian law. The defendants rely upon, in particular, the witness statement of Ms. Atemie, which states that under Nigerian law, leaders cannot act on behalf of their communities and/or other individual claimants.

7. Therefore, the court is faced with a situation where the claimants and the defendants are in dispute as to whether Rosenblatts have adequate authority in order to act for the many thousands of individuals and communities identified in the Jalla 2 proceedings. It seems to me that issue does need to be grappled with by the court. It is a dispute that could affect the ability of the court to make judgments that would be binding on the many thousands of individuals and communities affected by the court's decisions.

8. It does seem sensible that the matter should be dealt with at the February 2022 hearing, rather than in October 2021. I accept Mr. Nsugbe's submission that October would be too soon. In any event it is unlikely that the court will have sufficient time available to deal with it at the October CMC. It would be very difficult to find another date prior to February, and also I am conscious of the fact that the parties have a huge task ahead of them in order to prepare for the February hearing.

9. Therefore, the sensible course is to order that this issue of disputed authority should be dealt with at the February 2022 hearing, so that preparation is not disrupted prior to the start of that trial.

10. I will order both sides to provide any further factual and/or legal evidence in relation to the issue. It may well be that some

factual evidence might be required when dealing with the matters of delegation and authority, in addition to the issues of traditional law and custom and Nigerian law.

11. In terms of the date for service of that evidence, I am going to invite the parties to indicate what dates they think would be appropriate, but what I have in mind is that both sides will have an opportunity, if they so wish, to put in any further factual and/or expert evidence, perhaps by a date in October. I will then order any legal experts to have a discussion and produce a joint statement for the court setting out the issues of law on which they are agreed or not agreed, together with short reasons for any disagreement. That will enable the parties to identify any issues of law, whether traditional law or Nigerian codified law or common law, in advance and understand where the fighting ground lies.”

35. In accordance with the Authority Directions, further evidence was exhibited to the fourth witness statement of Elizabeth Weeks, Senior Associate at RBL, dated 21 October 2021:
- i) letter of authority dated 10 January 2021 for Mr Harrison Jalla;
  - ii) letter of authority dated 3 June 2021 for Mr Abel Chujor;
  - iii) letter of authority dated 2 February 2021 for Mr Dennis Ojulu;
  - iv) letter of authority dated 2 February 2021 for Ms Elizabeth Ekolokolo;
  - v) letter of authority dated 2 February 2021 for Mr. Johnson Agbeyagbe;
  - vi) letter of authority dated 16 June 2021 for the community of Abe-Bateren, provided by community leader Kai E Oyibo and set out in his witness statement;
  - vii) letter of authority dated 18 June 2021 for the community of Iuku-Gbene, provided by community leader Mackson Ikinbor and set out in his witness statement;
  - viii) letter of authority dated 19 June 2021 for the community of Ogheye-Uton, provided by community leader Felix Demeyin and set out in his witness statement;
  - ix) letter of authority dated 21 June 2021 for the community of Tonbrapade-Gbene provided by community leader Yahere A Emmanuel and set out in his witness statement.
36. Both parties served expert evidence on the issue of authority and the experts produced joint statements as to the matters agreed and not agreed:
- i) Professor Ernest Maduabuchi Ojukwu SAN, a Senior Advocate of Nigeria and a partner in the law firm Ojukwu, Faotu & Yusuf, for the claimants;

- ii) Chief Fedude Zimughan, a practising barrister and founder/principal partner/legal director of Fedude Zimughan & Co, with expertise in Nigerian customary law, for the claimants;
- iii) Babatunde Fagbohunlu SAN, a Senior Advocate of Nigeria and partner in the law firm Aluko & Oyebode, for the defendants.

*The Authority Issue*

37. The issue of authority was defined by the parties as:

“Whether, as a matter of Nigerian law, the claimants’ solicitors have authority to act for the claimants in proceedings HT-2020-000143.”

38. At the Date of Damage hearing, the claimants’ position was that the lead claimants, Mr Jalla and Mr Chujor, had provided witness statements and were active participants in the case. The claimants relied on a principle of customary law, namely, that in the case of community or family owned land, the owner or trustee of the land, whether a king, chief, community, village or family head, has authority to institute legal action to protect or seek compensation for damage to the land on behalf of individual occupants of the land without seeking or receiving their individual consent. In accordance with such customary law, the Five Kings, who signed the Powers of Attorney dated February 2021, conferred on RBL authority to act on behalf of the claimants in Jalla 2. Further, by delegated authority through the Bonga Oil Spill Steering Committee and OSPIVV, representatives of the community claimants were authorised to give evidence in support of the claims.

39. The defendants’ position was that most of the 27,830 individuals named on the claim form in the Jalla 2 proceedings, seeking to bring private, individual claims for damages arising out of the Bonga Spill, had not given consent for the proceedings to be brought in their names. Under Nigerian common law a lawyer is not permitted to bring proceedings on behalf of an individual in respect of that individual’s rights, and bind them in those proceedings, unless the individual has given their consent. Further, the defendants disputed the existence or enforceability of any rule of Nigerian customary law granting community rulers or leaders the ability to bind individuals to proceedings in respect of their private law rights, in circumstances where those individuals have not expressly authorised those claims to be brought in their names.

40. The court’s findings on the issue of authority were as follows:

- i) Under Nigerian common law, a lawyer is not entitled to bring proceedings on behalf of an individual in respect of that individual’s rights, and bind them in those proceedings, where the relevant individual has not given their consent for a claim to be brought in their name.
- ii) The claimants discharged their burden of establishing a customary rule that the rulers or Kings have absolute power in respect of matters concerning communal land, which they hold on trust for the community, entitling them to commence legal proceedings affecting the communal land rights of their constituents, without obtaining their consent.

- iii) The claimants did not establish any customary law whereby the rulers or Kings could give authority to RBL to commence or pursue legal proceedings in respect of the private law rights of individuals without their consent.
41. Accordingly, following the consequential hearing, by order dated 27 June 2023, the court declared that:
- “1. As a matter of Nigerian law, the Claimants’ solicitors have authority to act for the claimants in Jalla 2 to the extent that (a) individual Claimants have given their consent; or (b) the claims are community claims in respect of community land rights; but (c) not otherwise in respect of individual claims or private individual rights.
2. Save for Mr Harrison Jalla, Mr Abel Chujor, Mr Dennis Ojulu, Ms Elizabeth Ekolokolo, and Mr Johnson Agbeyagbe, RBL Law Limited does not have authority to act for the claimants in Jalla 2 in respect of individual claims or private individual rights.”
42. The court ordered the claimants to pay the defendants’ costs of the proceedings, such costs to be the subject of a detailed assessment on the standard basis if not agreed, excluding: (a) costs already awarded and assessed by the court (or the Court of Appeal); and (b) the costs in respect of the authority issue, which were adjourned to be considered at this later hearing.

*Authority Issue costs*

43. The defendants submit that they prevailed on the authority issue and, therefore, they are entitled to their costs. Other than the five named individuals named in the dispositive order above, the claimants did not produce any evidence that there was written authority for the 27,830 individual claims. Their position is that RBL was the true party in respect of the issue, because it did not have authority to represent the vast majority of the claimants. Therefore, the court is invited to make an order for costs in favour of the defendants against the claimants and a wasted costs order against RBL for acting in breach of warranty.
44. The claimants submit that they were at least partially successful on the authority issue. They established at trial that RBL had authority to act for all claimants who were before the court for the purpose of the Date of Damage hearing. Further, reliance is placed on the witness statement of Ms MacLeod dated 15 September 2023, in which she states at paragraph 38 that RBL does in fact have 23,195 individual signed letters of authority, 24,203 individual signed deeds of adherence and 21,295 individual signed terms and conditions. On that basis they invite the court to reflect their partial success by a proportional costs award.
45. RBL submits that there is no proper basis on which to make a wasted costs order against RBL in respect of the authority issue. RBL was not a party to the proceedings. In any event, RBL did in fact have the necessary authority to represent the vast majority of the claimants. No costs which have been incurred by the defendants would not otherwise have been incurred if individual authority had been obtained from each claimant.

Moreover, RBL acted reasonably in relying on the authority that it did have from the community leaders.

*Application for costs against the claimants*

46. The legal consequence of proceedings being issued without authority is that they are defective and liable to be struck out but they are not devoid of legal effect unless and until they are struck out: *Adams v Ford* [2012] EWCA Civ 544 per Toulson LJ at [32]. Therefore, for the purpose of the application for costs, all claimants in Jalla 2 are before the court.
47. The court has a complete discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid as set out in CPR 44.2(1).
48. CPR 44.2(2)(a) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the court may make a different order.
49. CPR 44.2(4) and (5) provide that in deciding what (if any) order to make about costs, the court will have regard to all the circumstances, including: (a) the conduct of all the parties, including whether it was reasonable for a party to raise, pursue, or contest a particular allegation or issue; and (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful.
50. The court may make an issues-based costs order but, before doing so, will consider whether it is practicable to make an order limiting the costs payable to a proportion of the overall costs: CPR 44.2(6) and (7).
51. The key dispute between the parties on the authority issue was whether the claimants could rely on Nigerian customary law in support of their case that the Kings had authority to pursue the proceedings on behalf of the 27,830 claimants in Jalla 2 without seeking or receiving their individual consent. That was the issue on which the Nigerian legal experts produced reports and on which the court heard evidence from factual and expert witnesses at the hearing. That issue was decided in favour of the defendants. Therefore, the defendants were the successful party.
52. It is recognised that the claimants produced written evidence of authority in respect of five individual claimants and four community leaders. However that must be considered against the overall scope of the Jalla 2 proceedings, namely 27,830 claimants and 479 communities. On any view, the extent of authority demonstrated was limited to a tiny percentage of the claimants named in the schedule to the claim form.
53. The claimants have suggested that the vast majority of the claimants in Jalla 2 were not before the court at the Date of Damage hearing, based on an erroneous assumption that their claims had been struck out. Although the representative claims in Jalla 1 were struck out by the Strike-Out Judgment, the court did not hear any application to strike out claimants in the Jalla 2 proceedings and made no such order. As explained when ordering a trial of the authority issue, there was an overriding argument in favour of determining the dispute that had been ongoing for years because it affected more than 27,000 claimants. The authority issue was drafted to cover all claimants in the Jalla 2



proceedings. As at the Date of Damage hearing, all claimants remained parties to the Jalla 2 proceedings, pending the outcome of the Supreme Court ruling on continuing nuisance.

54. In her witness statement dated 31 May 2021, Ms MacLeod explained that she was not then in a position to produce further documentation on the authority issue but that RBL would provide an update when possible. The further evidence that was produced was limited to the letters of authority exhibited to Ms Weeks' statement dated 21 October 2021. The court determined the issue of authority on the evidence that was put before it. It is now asserted that RBL does in fact hold written authority for many, albeit not all, of the claimants in Jalla 2 but RBL has not produced any of these additional documents.
55. There is some force in the claimants' submission that they had a measure of success on the principle of authority for the community claims through the powers of attorney, based on Nigerian customary law. It is said by the defendants that this amounts to no more than a Pyrrhic victory because it is agreed that the communities have no legal status, all claimants in Jalla 2 were individual claimants, and RBL would still require authority from those individuals to pursue any claims on behalf of the communities. The defendants raise a further point, that they do not accept that the claimants are entitled to bring claims on behalf of the communities, but the issue of the right to sue was not included in the scope of the Jalla 2 proceedings; the issue of validity of the claims made is separate from the issue of authority to make the claims. On the issue of authority to act on behalf of the communities, the claimants prevailed as a matter of principle. However, they demonstrated authority to bring the claims only in respect of the four communities for which the community leaders provided witness statements.
56. The court retains a discretion to order costs to be assessed on the indemnity basis, where the conduct of the relevant party is unreasonable to a high degree or otherwise out of the norm: *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879 per Lord Woolf LCJ at [31] and Waller LJ at [34]-[39]. In this case, although the court has found against the claimants on the authority issue, the arguments deployed, based on Nigerian customary law, could not be said to be so unreasonable as to take the claimants' conduct outside the norm.
57. I consider that in the circumstances of this case, a proportional costs order would be appropriate to reflect the claimants' modest success on the authority issue regarding the four community claims and the five individuals in respect of whom written authority was produced. This reflects the fact that the claimants demonstrated authority for those individuals who participated in the Date of Damage hearing. Having regard to all the circumstances, I conclude that the claimants should pay the defendants 90% of the costs of the authority issue, to be the subject of a detailed assessment on the standard basis if not agreed.
58. CPR 44.2(8) provides that where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.
59. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which have been reasonably incurred and are reasonable in amount,

resolving any doubt in favour of the paying party, and the court will only allow costs which are proportionate to the matters in issue: CPR 44.3(1)&(2).

60. In assessing the reasonableness of the incidence and amount of the costs incurred, the court will have regard to all the circumstances, including the conduct of the parties, the value of the claim, the importance of the matter to the parties, the complexity of the issue, and the skill, time and effort spent on the case: CPR 44.4.
61. The court has discretion as to the amount of any order on account of costs. What amounts to a reasonable sum will depend on all the circumstances of the case, taking into account factors such as those identified in *Excalibur Ventures v Texas Keystone* [2015] EWHC 566 per Clarke LJ:

“[23] What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.

[24] In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.”

62. The defendants have filed a schedule of the costs incurred in respect of the authority issue in the sum of £1,166,574.90. For the reasons set out in the earlier ruling on costs at the hearing on 27 June 2023, given the absence of cost budgeting in this case and high level of costs claimed, the appropriate payment on account of costs that the claimants are required to make is 55% of 90% of the defendants' costs, a payment of £577,454.58.

#### *Application for costs against RBL*

63. The defendants seek the costs of the authority issue against RBL on the ground that it was the real party to that issue; alternatively, the defendants seek an order for wasted costs against RBL for acting in breach of warranty of authority pursuant to section 51 of the Senior Courts Act 1981 or the inherent jurisdiction of the court.

64. The defendants' case, that RBL was a party to the proceedings on the authority issue and therefore liable for the costs of such issue, is based on RBL's letter dated 21 June 2023 in which it wrote:

“The authority issue that was determined in the [Date of Damage Judgment] arose as between this firm and your clients, and not as between the Claimants and your clients. Thus, the Claimants are not concerned with the costs of that issue and should not have any liability in respect of it.”

65. The letter on its own is not sufficient to amount to an admission, either that RBL was the true party to that part of the litigation or acceptance of liability for the costs of the authority issue. The court would have to look at the substance of RBL's role in the round, rather than just what was said in correspondence, as a legal representative for the claimants and acting in their interests. This is addressed further when considering the wider application regarding costs against RBL.

66. Section 51 of the Senior Courts Act 1981 provides as follows:-

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –

... (b) the High Court ...

shall be in the discretion of the court.

...

(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.”

(7) In subsection (6), “wasted costs” means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.”

67. CPR 46.8 provides that where the court is considering whether to make an order for wasted costs under section 51 of the Senior Courts Act 1981, the court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order.

68. Practice Direction 46, paragraph 5.3 provides that a court may make a wasted costs order on its own initiative; alternatively a party may apply for a wasted costs order by filing an application in accordance with CPR 23 or by making an application orally in the course of any hearing. The court will give directions about the procedure to be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.
69. Paragraph 5.5 of the practice direction provides that:
- “It is appropriate for the court to make a wasted costs order against a legal representative, only if—
- (a) the legal representative has acted improperly, unreasonably or negligently;
  - (b) the legal representative’s conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted;
  - (c) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs.”
70. Paragraph 5.7 sets out the general procedure that will usually be adopted by the court:
- “As a general rule the court will consider whether to make a wasted costs order in two stages—
- (a) at the first stage the court must be satisfied—
    - (i) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and
    - (ii) the wasted costs proceedings are justified notwithstanding the likely costs involved;
  - (b) at the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above.”
71. In this case no formal application has been issued but the defendants have raised the matter in their written and oral submissions and the court has jurisdiction to consider it.
72. Having considered the matter, I am satisfied that there is evidence and other material before the court which, if unanswered, would be likely to lead to a wasted costs order being made, and that the wasted costs proceedings are justified notwithstanding the likely costs involved for the following reasons.

73. First, the court has found that RBL did not have authority to act on behalf of the vast majority of the claimants in Jalla 2. As accepted by RBL, a solicitor acting without authority is vulnerable to a wasted costs order. Solicitors who issue proceedings thereby warrant that they have authority to do so: *Yonge v Toynbee* [1910] 1 KB 215. As a matter of public policy, it is an abuse of the process of the court for solicitors to issue proceedings in the name of a person who has not given them authority to do so: *Adams v Ford* [2012] 1 WLR 3211 per Toulson LJ at [39]. If they do not in fact have such authority, they are in breach of warranty and may be liable for the costs of such proceedings.
74. Second, if, as is now suggested, RBL did in fact obtain letters of authority from individual claimants, it is arguable that it acted improperly, unreasonably or negligently in failing to notify the defendants of this fact or produce them. In *Bao Xiang International Garment Centre v British Airways plc* [2015] EWHC 3071 Rose J (as she then was) at [31] emphasised the need for transparency on the part of the solicitors issuing the proceedings disclosing to the defendants any problems existing with authorisation by the purported claimants. If such letters had been produced in advance of the Date of Damage hearing, even if not the full complement, the authority issue might have become academic and the costs of the issue could have been avoided.
75. Third, the costs of the authority issue are substantial, in excess of £1 million, justifying a discrete hearing to resolve the costs dispute.
76. In those circumstances, the court will give RBL an opportunity to show cause why a wasted costs order should not be made in respect of the authority issue. Therefore, the court will order that RBL should be added as a defendant to Jalla 2 for the purpose of costs pursuant to CPR 46.2(1).

*The application for disclosure*

77. The defendants seek an order that RBL should provide funding information, disclosure and inspection of documents in support of its contemplated application for a non-party costs order pursuant to section 51 of the Senior Courts Act 1981 and/or CPR 31.17.
78. The defendants have incurred more than £14 million in costs in the substantive proceedings which are now concluded. They have the following costs orders in their favour:
  - i) Order dated 27 March 2020 in respect of Royal Dutch Shell plc's costs of defending the claims until the claimants' discontinuance on 5 September 2019;
  - ii) Order dated 27 January 2021 in respect of the defendants' costs of the Continuing Nuisance Appeal;
  - iii) Order dated 28 October 2021 in respect of the defendants' costs of the Extension Appeal, including an interim payment on account of £135,034.04 due by 11 November 2021;
  - iv) Orders dated 27 June 2023 in respect of the defendants' costs of the jurisdiction application, the claimants' amendment applications, the strike-out application;

the claimants' extension application; and the Date of Damage hearing, including an interim payment on account for £5,601,382.88 due by 31 July 2023;

- v) Order dated 3 October 2023 in respect of the defendants' costs of the Continuing Nuisance Appeal in the Supreme Court, including an interim payment on account of £532,032.10, in respect of which the defendants requested payment by 20 October 2023.
79. The claimants have been ordered to make interim payments on account in the total sum of £6,262,449.02. The claimants have not made any payments.
80. The defendants' position is that it will be extremely difficult to enforce the costs orders made against the claimants, who live in Nigeria. The claimants did not obtain any 'after the event' ("ATE") insurance. The defendants have reasonable belief that RBL (and potentially other entities in the RBG Group) 'crossed the line' in these proceedings by acting as a funder and party to Jalla 1 and Jalla 2, as set out by Mr Mark McCloskey in his witness statements dated 25 June 2021, 29 September 2022 and 13 October 2023.
81. The defendants rely on an agreement between J&S and RBL ("the Collaboration Agreement") as indicating that RBL exerted a high degree of control over the litigation by providing litigation services as agent, while also providing funding to J&S in the form of a working capital facility. RBL's potential return on its investment was a 40% share of the DBA payment negotiated by J&S with the claimants. RBG Group was established as a separate entity to finance its clients' external litigation costs. Since 24 September 2020 RBL has operated under the DBA entered into with Messrs Jalla and Chujor, and the members of the steering committee, pursuant to which it has funded and continues to fund counsel's fees, experts' fees, court fees and disbursements in the proceedings.
82. It is said that the disclosure application will assist the defendants in assessing the basis on which RBL (and potentially other entities in the RBG Group) funded the proceedings; the funding structure facilitating RBL's funding of the proceedings; and the identity of the non-parties against whom the defendants could seek to enforce their costs orders.
83. The application is opposed by RBL. It is disputed that section 51 of the Senior Courts Act 1981 would provide the court with jurisdiction to make an order for costs against solicitors such as RBL where they were acting in claims pursued pursuant to lawful DBA arrangements, regardless of whether or not RBL had to secure funding to do so.
84. RBL relies on the witness statement of Mr Anthony Field, solicitor and director of RBL, dated 15 September 2023. His evidence is that, in the period between 1 November 2018 and 19 August 2020, RBL provided to J&S a combination of legal services (as agent for J&S) and financial assistance by the provision of working capital for the payment of disbursements in the action. In the period from 26 August 2020 to date, when RBL has been the solicitors of record, it has acted pursuant to a DBA entered into with the claimants, through which it has funded and continues to fund counsel's fees, experts' fees, court fees and disbursements in the action.
85. Mr Field explains that RBL raises its working capital from profits generated by legal services and by selling a percentage of its prospective DBA fee to third party investors.

It is not relevant whether the funding is obtained by third party lending from a bank or other investors. The terms of the Collaboration Agreement are permitted by the SRA.

86. RBL's position is that a firm of solicitors funding claims and contributing financial resources and staff through a lawful DBA is not a litigation funder for the purpose of section 51 of the Senior Courts Act 1981. A firm of solicitors providing working capital and litigation services to another firm in return for a share of the principal's DBA payment, such as under the Collaboration Agreement, is not a litigation funder for the purposes of section 51. All solicitors pursuing claims under DBAs fund the case in some way, shape or form but they do not, as a consequence, become liable to pay adverse costs under section 51. It is said that, if the position were to the contrary, and any firm of solicitors acting pursuant to a DBA (and potentially a CFA) were deemed to be a funder, this would be contrary to the principles of access to justice because the inevitable consequence would be that no, or very few, firms would offer a DBA to clients.
87. Section 51 of the Senior Courts Act 1981 provides as follows:-
- “(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –  
  
...  
  
(b) the High Court ...  
  
shall be in the discretion of the court.
  - (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings ...
  - (3) The court shall have full power to determine by whom and to what extent the costs are to be paid.”
88. CPR 46.2 provides that:
- “(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must—
    - (a) be added as a party to the proceedings for the purposes of costs only; and
    - (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.”
89. The power to make costs orders under section 51 extends to making orders against non-parties: *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39 per Lord Brown at [25]:

“(1) Although costs orders against non-parties are to be regarded as “exceptional”, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such “exceptional” case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

(2) Generally speaking the discretion will not be exercised against “pure funders”, described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194 as “those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course”. In their case the court’s usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

(3) Where, however, the non-party not only funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is “the real party” to the litigation, a concept repeatedly invoked throughout the jurisprudence... Nor, indeed, is it necessary that the non-party be “the only real party” to the litigation ... provided that he is “a real party in ... very important and critical respects” ... ”

90. In *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, Moore-Bick LJ warned against the dangers of over-complicating the test to be applied in section 51 cases at [62]:

“As all three members of the court observed in *Petromec v Petrobras*, the exercise of the discretion is in danger of becoming over-complicated by authority. The decision of the Privy Council in *Dymocks*, which contains an authoritative statement of the modern law, explains and interprets the *Symphony* guidelines in a way which reflects the variety of circumstances in which the court is likely to be called upon to exercise the discretion. Thus, the Privy Council has explained that an order of this kind is “exceptional” only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. Similarly, it has made it clear that the absence of a warning is simply one factor which the court will take into account in an



appropriate case when deciding whether, viewed overall, it would be unjust to exercise the discretion in favour of making an order for costs against the third party. We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind.”

91. The mere fact that a legal representative provides funding and has a substantial financial interest in the success of the litigation will not necessarily expose that legal representative to a costs order under section 51: *Willers v Elena Joyce* [2019] EWHC 2183 (Ch) per Rose LJ (as she then was) at [54]:

“In my judgment the principle that emerges clearly from the decisions of this Court in *Tolstoy*, *Floods* and *Hamilton v Al Fayed* is that there is a strong public interest in ensuring that impecunious claimants can have access to justice even if that means that successful defendants are left substantially out of pocket. Because of this, legal representatives should not be at risk of a third party costs order unless they are acting in some way outside the role of legal representative. The nature of the role of the legal representative means that the indicators useful in considering the liability of, for example, a pure funder, such as whether he has been closely involved in making decisions about the conduct of litigation or whether he has a substantial financial interest in the success of the litigation do not work. The legal representative will always be closely involved in taking decisions about the conduct of the litigation and will always have a financial interest in the outcome, particularly where he is working under a conditional fee agreement or because although he is invoicing the client regularly for work done, he knows that in practice he will never be paid unless the client wins the case.”

92. In each case it is necessary to consider whether, by its conduct of the proceedings, including funding, the legal representative in the circumstances of the case ‘crossed the line’ so as to become a real party to the litigation.
93. The defendants make their application for disclosure pursuant to CPR 31.17; alternatively pursuant to the courts ancillary power where a non-party costs order is under consideration.
94. CPR 31.17 applies where an application for disclosure is made against a non-party and provides at (3):

“The court may make an order under this rule only where—

- (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect

the case of one of the other parties to the proceedings;  
and

- (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.”

95. Further, where a party is considering making a non-party application, in order to make the remedy effective, the court has an inherent ancillary power to order another party to the proceedings, or the solicitors who had been on the record for that party, to disclose the names of those who have financed the litigation and other details: *Abraham v Thompson* [1997] 4 All E.R. 362 per Potter LJ at p.367-8; *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2003] EWHC 1381 (Comm) per Morrison J at [7].
96. The principles to be applied by the court when considering an application for disclosure and information in support of a potential application for non-party costs were set out by Blake J in *Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB) (endorsed by Leveson LJ in *Flatman v Germany* [2013] EWCA Civ 278):

“[17] Before considering whether it is necessary to make the orders the defendant seeks, or any orders, the court needs to consider when a third party costs order is likely to be made in cases of this sort. If the case is weak it is inherently improbable that an order would be made. Alternatively, if it is so overwhelming it seems unlikely that ancillary orders for disclosure, inspection cross-examination of otherwise will be considered really necessary.

[18] ...

(i) The order for payment of costs by a non-party would always be exceptional and any application should be treated with considerable caution.

(ii) The application should normally be determined by the trial judge who could give effect to any views he had expressed as to the conduct of the non-party without constituting bias or the appearance of bias.

(iii) The mere fact that someone has funded proceedings would generally be insufficient to support an application that they pay the costs of the successful party. Pure funders, as described at the case of *Hamilton v Al-Fayed No. 2* [2002] EWCA Civ 665 reported [2003] QB 117 at [40], will not normally have the discretion exercised against them. That definition of "pure funders" means those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business and in no way seek to control its course.

(iv) It is relevant but not decisive that the defendant has warned the non-party of the intention to seek costs or that the non-party's

funding has caused the defendant to incur the costs it would not otherwise have had to incur.

(v) The conduct of the non-party in the course of the litigation and other than as a pure witness of material fact is of relevance and potential weight.

(vi) Most of the decided cases on the exercise of the court's discretion under section 51 concerned commercial funders or corporate bodies closely associated with the party who incurred the costs liability which they were unable to satisfy. In the family context, the courts have been reluctant to impose third party costs orders against those family or friends who in the interests of access to justice assist a party to come to court for philanthropic and disinterested reasons.

(vii) In determining these applications the court must exercise its case management powers to ensure that the application does not turn into satellite litigation that results in prolonged, complex and over-extended arguments about costs about costs. For that reason the inherent strength of the application is always a relevant factor.”

“[19] In considering whether, in the light of the particular facts and issues in the case, disclosure is necessary for the fair determination of the application I conclude that I should consider:

(i) The strength of the application as it now appears unassisted by disclosure;

(ii) The potential value to the fair determination of the application of the documents of which the claimant seeks disclosure and whether they are likely to elucidate considerations highly probative of the exercise of the court's discretion, or threaten to drag the application into a side alley of satellite litigation with diminishing returns for the overall issue;

(iii) Whether on a summary assessment it is obvious that the documents for which disclosure is sought will be the subject of proper legal professional privilege;

(iv) Whether the likely effect of any order the court might be minded to make will be proportionate and just in all the circumstances.”

97. In this case, I am satisfied that it would be appropriate to order disclosure for the following reasons.

98. Firstly, having regard to the issues raised by the defendants, namely, RBL's control of the litigation, potential benefit from the litigation, the absence of authority from

individual claimants, the lack of ATE insurance and involvement of third party investors, the application could not be described as fanciful or speculative. Whether it has any real merit is not a matter for the court at this stage.

99. Secondly, the information and documents in respect of which the defendants seek disclosure are likely to shine a light on the control and funding arrangements for the litigation. As such, they are likely to assist the court in determining whether section 51 is engaged; and, if so, the exercise of the court's discretion.
100. Thirdly, where a DBA or similar funding model has been utilised, and a successful party is unable to recover costs from those benefitting from the DBA, it is unsurprising that the successful party will wish to understand the terms of the funding when assessing its options. In this case, most of the original redactions have now been removed from the relevant agreements. Any further issues of privilege can be considered in due course.
101. Fourthly, having regard to the very high level of costs that have been incurred in these protracted proceedings, over a period of more than six years, that are unlikely to be recoverable from the claimants, I consider that an order for relatively modest disclosure is proportionate and just in all the circumstances.
102. Accordingly, RBL should be added as a defendant to the Jalla 1 and Jalla 2 proceedings pursuant to CPR 46.2(1) for the purposes of costs.
103. Turning to the list of documents and information sought, the court orders the following to be disclosed by RBL, as relevant documents evidencing the funding arrangements for the Jalla proceedings and the interests/involvement of those providing such funding in the outcome of the litigation:
  - i) unredacted copies of all collaboration agreements, including any framework agreements governing the agency relationship between RBL and J&S pertaining to any litigation in respect of the Bonga Spill;
  - ii) disclosure of the identity of any person or entity (either within or outside of the RBG Group) that provides or has provided funding to Rosenblatt/RBL, or the claimants, for the purpose of the Jalla proceedings, including funding for the working capital facility provided by Rosenblatt/RBL under the collaboration agreements;
  - iii) disclosure of any RBG Group intergroup facility and/or any grant or loan as between any RBG Group company and Rosenblatt/RBL;
  - iv) in relation to any funding arrangement identified in ii) and iii) above, disclosure of: (a) the amount of the loan or funding; (b) the terms on which such loan or funding was provided; (c) the extent of each lender or funder's involvement in the conduct of the Jalla proceedings; (d) the nature and extent of each lender or funder's interest (financial or otherwise) in the outcome of the Jalla proceedings;
  - v) confirmation whether the Jalla proceedings are 'Project Shango' as mentioned in RBG Group's Report and Financial Statement for the year ended 31 December 2020;

- vi) client care letter between the claimants and Rosenblatt dated 24 August 2020, referred to in clause 4.1 of the DBA between Rosenblatt and the claimants dated 24 September 2020.
- 104. Items 3.2 and 3.12 of the defendants' schedule have already been disclosed, by marked up copies of the relevant documents.
- 105. Item 3.11 of the defendants' schedule is information that is publicly available.
- 106. The other documents are in terms that are too wide and extend beyond disclosure necessary to explain the funding, control and interest of RBL and other entities in the Jalla proceedings.
- 107. The parties are invited to draw up an agreed order for the court's approval.
- 108. The costs of this application should be reserved to the final determination of the outstanding issues on costs.
- 109. The court will hear the parties on all consequential matters arising out of this judgment, including the form of the order (if not agreed) and any application to appeal, on a date to be fixed for the convenience of the parties and the court.