Neutral Citation Number: [2020] EWHC 459 (TCC)

Case No: HT-2017-000383

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2020

Before :

MR JUSTICE STUART-SMITH

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Between :

HARRISON JALLA AND OTHERS	**Claimants**
- and -	
(1) ROYAL DUTCH SHELL PLC	**Defendants**
(2) SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED	
(3) SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED	

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Graham Dunning QC, Stuart Cribb, Wei Jian Chan, Phillip Aliker (instructed by Johnson & Steller) for the Claimants
Lord Goldsmith QC, Dr Conway Blake (instructed by Debevoise & Plimpton) for the Second and Third Defendants

Hearing dates: 19th September, 7th – 10th October 2019

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Approved Judgment

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

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MR JUSTICE STUART-SMITH

Stuart-Smith J :

Introduction

1. The First and Second Claimants bring this action on their own behalf and on behalf of a very large number of individuals (in excess of 27,500) who live by or in the hinterland of a stretch of the coast of Nigeria that spans two States, Bayelsa State and Delta State. I shall refer to all those individuals who claim by the action generically as "the Claimants". In addition, the claim is said to be brought on behalf of 457 villages and communities that are alleged to have been affected by the oil spill that is the subject of the action. I shall refer to them as "the 457 Communities".

2. About 120 kms off the coastline of Bayelsa State and Delta State lies the Bonga oil field, the infrastructure and facilities for which include a FPSO ["Floating Production Storage and Offloading"] facility which is linked to a SPM ["Single Point Mooring"] buoy by three submersible flexible flowlines. It is common ground that on 20 December 2011 there was a leak from one of the flexible flowlines between the FPSO

and the SPM. The leak occurred while oil was being transferred from the FPSO, through the SPM, and thence onto the MV Northia ["the December 2011 Spill"]. Estimates vary but the quantity may be taken for present purposes as being over 40,000 barrels. The Claimants describe it as one of the largest spills in the history of Nigerian oil exploration. The Claimants allege that oil from the December 2011 Spill has devastated their shoreline and caused serious and extensive damage to their land and water supplies, and to the fishing waters in and around the Claimants' villages; and that, because it has not been cleaned up properly, it continues to cause damage.

3. In general terms, the Claimants allege that responsibility for the December 2011 Spill lies with companies forming part of the Shell group. The action is resisted on numerous grounds, including that the Defendants have not accepted and do not accept that any oil from the December 2011 Spill reached the Claimants' coastline or caused the damage that the Claimants allege.

4. I shall have to outline the background and procedural history in a little detail later. By way of preliminary introduction, the Claimants issued proceedings on 12 December 2017. The Claim Form named three defendants: (1) Royal Dutch Shell ["RDS"], (2) Shell International Limited ["SIL"], and (3) Shell Nigeria Exploration and Production Company Limited ["SNEPCO"]. The Claim Form asserted claims in respect of the December 2011 Spill and another spill that was alleged to have occurred on 15 July 2012 ["the July 2012 Spill"]. The original three Defendants were and are members of the Shell group. RDS and SIL are domiciled in England. SNEPCO is domiciled in Nigeria. Whatever the other merits of the proceedings, jurisdiction over SNEPCO required the presence of one or both of the English "anchor" defendants. By notice of discontinuance dated 5 September 2019, the Claimants have discontinued against RDS.

5. The Claimants amended the Claim Form on 4 April 2018. They relied on the provisions of CPR r 17.1 which, if applicable, permits an amendment of a statement of case without the permission of the Court before it has been served on the opposite party. The name of the second Defendant was amended by the addition of the words "Trading and Shipping Company" so that the second Defendant was now named as Shell International Trading and Shipping Company Limited ["STASCO"]. STASCO is domiciled in England and is another company within the Shell group of companies. At one point Mr Dunning QC for the Claimants submitted that there was no practical difference between SIL and STASCO and that they were "closely related" members of the Shell group. On being pressed, he backed away from that submission, which was unsubstantiated, and submitted instead that they were part of the same economic entity, namely the Shell group of companies. On the evidence it appears, and I find for the purposes of the present applications, that SIL and STASCO were separate legal entities within the overall Shell group and that they have separate functions: SIL provides legal and HR services to other companies in the Shell group but has no operations in the shipping industry, whether in the management of ships or otherwise; STASCO is, as its name suggests, a company that has some involvement with shipping operations (the extent of which is controversial). STASCO is now alleged to be directly responsible for the safe operation of the MV Northia and to be vicariously liable for the torts of its crew.

6. The original Claim Form, the Amended Claim Form and Particulars of Claim were served on RDS and STASCO on 10 April 2018. This was the first communication

between the Claimants and STASCO. The Amended Claim Form and Particulars of Claim asserted claims in relation to the December 2011 Spill and the July 2012 Spill.

Permission to serve SNEPCO outside the jurisdiction

7. On 11 April 2018 the Claimants issued an application to serve SNEPCO out of the jurisdiction. The application was made by the Claimants with the intention that it should be decided *ex parte*. Fraser J first ordered that there should be a hearing at which the First Defendant should be heard, and then made the order for service out after a hearing attended by the Claimants and the First and Second Defendants on 9 July 2018. SNEPCO was not served with the application and was not represented at the hearing.

The Defendants' Jurisdiction Application – 28 September 2018

8. RDS, STASCO and SNEPCO each issued applications on 28 September 2018 challenging jurisdiction ["the Jurisdiction Application"] and applying for reverse summary judgment. In the absence of RDS, the Defendants now apply for:

    i) A declaration that the Court does not have jurisdiction to try the claims, or alternatively, that the Court should not exercise any jurisdiction which it may have to try this claim (alternatively, specific claims), pursuant to CPR Part 11(1)(a) and/or (b);

    ii) An order setting aside the Claim Form, the service of the Claim Form and the Order of Fraser J, which gave the Claimants permission to serve the Claim Form on SNEPCO out of the jurisdiction, pursuant to CPR Part 11(6)(a) and/or (b);

    iii) In the event that the Court finds that there is no real issue against STASCO, an order striking out the claims against STASCO as having no real prospect of success pursuant to CPR Part 3.4(2)(a) and/or 24.2;

    iv) In the alternative, an order that the proceedings be stayed pursuant to Article 34 of the Recast Brussels Regulation and/or CPR Part 11(6)(d) and/or CPR 3.1(2)(f) and/or section 49(3) of the Senior Courts Act 1981 and/or pursuant to the Court's inherent jurisdiction;

    v) Further or consequential relief.

9. For reasons which I will touch on later, the Defendants' Jurisdiction Applications were ultimately listed to be heard in October 2019.

The Claimants' 3 April 2019 Application to Amend the Particulars of Claim

10. On 3 April 2019 the Claimants issued an application for permission to amend the Particulars of Claim. The amendments for which permission is sought are extensive and require detailed consideration later. At this stage it is sufficient to note two points. First, the draft Amended Particulars of Claim continued to advance claims in relation to the December 2011 Spill and the July 2012 Spill; but, by the time of the hearing of the Claimants' applications to amend, the Court was told that "the Claimants no longer pursue their allegations in respect of the July 2012 spill." It is

not clear whether this means that the Claimants now accept that (as the Defendants assert) there was no spill in July 2012 as previously alleged or simply that the Claimants have simply abandoned any claims arising out of it. The difference might be material at a later stage in proceedings but is immaterial now. Second, the basis for the claim against RDS was extensively re-vamped; but it is no longer pursued since all claims against RDS have been discontinued since 5 September 2019.

The Claimants' STASCO and Brookes Bell Applications – 7 June 2019

11. The Claimants issued two notices of application on 7 June 2019:

    i) By the first ["the STASCO Application"] the Claimants ask for permission, pursuant to CPR 17.4.(3) and/or CPR 19.5(3)(a), to amend the Claimants' Claim Form dated 13 December 2017 and/or the Amended Claim Form dated 4 April 2018 to correct the name of the Second Defendant in these proceedings to Shell International Trading and Shipping Company Limited ("STASCO")"; and

    ii) By the second ["the Brookes Bell Application"] the Claimants ask for permission to rely upon two experts reports, namely a report of Captain Roaf and Mr Gifford ("the Loading Operations Report") and a report of Mr Sheard and Mr Ward (the "Chemical Analysis Report").

12. The Claimants' applications were listed for separate hearing on 19 September 2019 pursuant to the order of O'Farrell J who (correctly, in my respectful opinion) took the view on the papers that the issues they raised were discrete and should (at least arguably) be determined before the hearing of the Defendants' Jurisdiction Application.

13. At the September hearing a consensual resolution of the Brookes Bell Application was reached. The Defendants explained that, for the purpose of the Jurisdiction Application, the Court is not required to (and cannot) resolve the question whether the Bonga Oil reached the shoreline; and that the issue of what the crew did or did not do on board the vessel is irrelevant to the question whether STASCO was directly or vicariously liable for the December 2011 Spill. On the basis of these explanations, the Claimants' asserted need to rely upon the two reports for the hearing of the Jurisdiction Application fell away. It was therefore agreed that permission was not to be granted but that the reports should be available at the hearing of the Jurisdiction Application in case the Defendants' explanation proved to be wrong and the Defendants' arguments on the Jurisdiction Application rendered one or both of the reports relevant for that hearing.

14. The hearing of the STASCO Application gave rise to questions on which the Court required further clarification; and it became apparent that it was not critical to resolve the STASCO Application before hearing the Defendants' Jurisdiction Application. As a result, the STASCO Application was adjourned part heard to the date of hearing of the Jurisdiction Application in October.

15. The circumstances surrounding the issuing of the STASCO Application are unusual, if not unique. At present, subject to the possibility that the amendment under CPR r. 17.1 is either wholly or in part a nullity, STASCO is joined and is the Second

Defendant. If a Defendant considered the joinder of STASCO to be objectionable or irregular for any reason, it was open to it to object and, if it thought fit, to issue an application to set aside the joinder. A valid reason for an objection or application would be that the joinder of STASCO had occurred outside the limitation period and without the requisite permission of the Court. Equally, it would be open to the Defendants to decide not to take objection (for any number of reasons) even if they thought they had a potentially good reason for taking one. As a matter of fact, they have not done so at any stage. The Court does not know why they have not done so; but it is reasonable to note that the Defendants have had representation of the highest repute and competence throughout and have raised multiple challenges to the Claimants' claims, exemplified by the Jurisdiction Application.

16. Why then has the STASCO application been issued, given that STASCO is joined and the Defendant had not taken any point on the joinder? The only factual explanation has been provided by the 4th witness statement of the Claimants' solicitor, Mr Ekhorutomwen, and was reiterated by Mr Dunning QC:

> "We don't accept that the claims were time-barred or were all time-barred but out of an abundance of caution, we thought it was right that this matter should be brought before the court, in order to regularise the position. But the point I stress is it's not because the defendants said that the pleading was invalid or ineffective when it replaced STASCO in place of SIL."

Later he reaffirmed that the Defendants did not complain about the joinder of STASCO until the Claimants issued the STASCO Application, whereupon the Defendants have opposed the application with all means and arguments at their disposal.

17. There is a second peculiarity about the bringing of the STASCO Application. The Application is brought pursuant to CPR 17.4 and/or CPR 19.5, which apply where a party wishes to amend a statement of case or to substitute a party after the expiry of the limitation period. But the Claimants do not accept that the limitation period has expired. Hence their case is that the STASCO Application is inappropriate and unnecessary. The STASCO Application, if it is appropriate at all, therefore requires the Court either to assume or to determine that the Limitation Period has expired in some material respect that makes the provisions of CPR 17.4.(3) and/or CPR 19.5(3)(a) relevant and applicable, or to adopt a solution which is contingent upon later resolution of limitation issues.

The Claimants' 3 October 2019 Amendment Application

18. On 3 October 2019, between the September and October hearing dates, the Claimants issued a further application, which was for a declaration that the Defendants are estopped from denying that the claims against STASCO set out in the amended Particulars of Claim are within the scope of the Claim Form as originally issued or, alternatively, for permission to amend the Claim Form. The effect of this (re-)amendment of the Claim Form would be to add reference to the MV Northia loading at the SPM (which is not mentioned in the original or amended Claim Forms) "for which [STASCO] was responsible" at the time of the December 2011 Spill and to add

an allegation that the Defendants failed to contain or remediate the December 2011 Spill.

The Claimants' 28 October 2019 application to adduce further evidence

19. On 28 October 2019, over two weeks after the conclusion of the hearing, the Claimants issued a further application, which was for permission to adduce new evidence contained in three witness statements. The new evidence was intended to go to the date upon which actionable damage was suffered by Claimants who lived at a distance from the coastal shoreline. Unsurprisingly, the Defendant objected to the admission of this evidence at this stage in the proceedings.

Limitation

The Court's Approach

20. The question of limitation hangs over all the applications before the Court and is a nettle to be grasped at the outset. In doing so, I remind myself (as I was frequently reminded by Claimants during the hearing) that it is not open to the Court to perform a mini-trial of disputed facts where those facts can only be resolved properly and fairly after hearing the evidence that underpins the disputes between the parties. That said, many of the relevant facts are uncontroversial or based upon documents that do not require explanation by additional evidence, or both. It is therefore convenient and relevant to outline the basic facts of the December 2011 Spill, the steps that were taken by the Claimants before issuing proceedings, and the facts upon the basis of which estoppel by convention and deliberate concealment are submitted to be brought into play.

21. Because the Court is precluded from conducting a trial of controversial and uncertain facts, it is often necessary to take decisions on applications to amend when it is not clear whether the proposed amendment should be held to be statute barred or not. The normal approach of the Court in such cases is set out in *Chandra v Brooke North* [2013] EWCA Civ 1559 at [66]-[69]. Jackson LJ, with whom the other members of the court agreed, said:

> "66. If a claimant seeks to raise a new claim by amendment and the defendant objects that it is barred by limitation, the court must decide how to proceed. There are two options. First the court could deal with the matter as a conventional amendment application. Alternatively, the court could direct that the question of limitation be determined as a preliminary issue.
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> 67. If, as is usually the case, the court adopts the first option, it will not descend into factual issues which are seriously in dispute. The court will limit itself to considering whether the defendant has a "reasonably arguable case on limitation": see WDA at 1425 H. If so, the court will refuse the claimant's application. If not, the court will have a discretion to allow the amendment if it sees fit in all the circumstances.

> 68. If the court refuses permission to amend, the claimant's remedy will be to issue separate proceedings in respect of the new claim. The defendant can plead its limitation defence. The limitation issue will then be determined at trial and the defendant will not be prejudiced by the operation of relation back under section 35 (1) of the 1980 Act.
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> 69. This leads on to a separate and important point. If a claimant applies for permission to amend and the amendment arguably adds a new claim which is statute barred, then the claimant should take steps to protect itself. The obvious step is to issue separate proceedings in respect of the new claim. This will have the advantage of stopping the limitation clock on the date of the new claim form. If permission to amend is granted, then the second action can be allowed to lapse. If permission to amend is refused, the claimant can pursue his new claim in the second action. The two actions will probably be consolidated and the question of limitation can be determined at trial."

22. The reasoning underlying these principles applies equally where a Claimant wishes to amend not simply to add a new claim but to add or substitute a new party.

23. An alternative approach, which includes elements of both the *Chandra* options was adopted by the trial judge and endorsed by the Court of Appeal in *Blue Tropic v Chkhartishvili* [2016] EWCA Civ 1259. The claimant made an application to amend its claim shortly before trial. By that time (as the judge subsequently found at trial) the foreign limitation period had expired. Thus, if the amendment sought to add a new claim, the Court only had jurisdiction to allow it if it arose out of the same or substantially the same facts, pursuant to CPR 17.4(2). However, the Court did not determine whether the amendment was time barred on the Claimants' application to amend. The approach it took instead was summarised with approval by Henderson LJ at [26]:

> "After some further debate, the judge said that he would grant permission to amend, but without prejudice to any argument that might be raised at trial that the amendment should be disallowed because it was time-barred. Both parties were content for the judge to proceed in this way, and neither counsel requested the judge to give a formal ruling when he offered them the opportunity to do so. In my judgment this was clearly a sensible way to proceed, because the question whether or not the claim was time-barred could not be determined until the evidence had been heard at trial, and neither side was suggesting that the trial would have to be adjourned if permission to amend were granted on that provisional basis."

24. The rationale for this approach was that it could not be determined until the evidence had been heard at trial on whether or not the claim was time barred. A final decision that an amendment is time barred depended upon determination of factual issues, namely whether or not (a) a relevant limitation period had expired before the application is decided, (b) the amendment raised a new claim, and (c) if the

amendment raised a new claim, it arose from the same or substantially the same facts. Only if those factual questions were answered in favour of the applicant would the court have a discretion to allow the amendment.

25. I make two observations about these contrasting approaches at this stage. First, the *Blue Tropic* approach should not be adopted unless there are material issues that cannot be decided before trial: it should not be used simply as means of putting off the day of decision. Where there are issues that can be determined without resort to a trial, they should be. Second, neither *Chandra* nor *Blue Tropic* (nor any other authority of which I am aware) addresses the specific questions which may arise in the context of a representative action constituted as the present one. The *Chandra* approach is ideally suited to a claim by an individual claimant against an individual defendant where refusing the application and leaving the claimant to protect himself by issuing separate proceedings is straightforward. Arguably different considerations apply in a case such as the present which is the vehicle for 27,000 individual claims each of which is dependent upon proof of actionable damage specific to that claim. At least the theoretical possibility exists, therefore, of time running from different times for different claims and claimants. No submissions were made on this point, and no one appears to have given thought to the appropriateness of using a representative action when, at least arguably, the Claimants cannot be said to have the same interest: see, for example, the discussion in *Lloyd v Google LLC* [2019] EWCA Civ 1599 at [73]-[81]. The requirement of a common interest as a necessary prerequisite appears to be in accordance with Nigerian Law as explained by the Defendants' expert who says that "the essential condition for sustaining a representative action is that the persons who are to be represented have the same interest as the plaintiff in one and the same cause or matter".

26. In their written submissions for the September hearing, the Claimants accepted that the Defendants' position on limitation (namely that the limitation period had expired by 4 April 2018) was arguable. This concession was made before the Claimants had formulated their new submission (to which I refer below) that some claimants may not have suffered actionable damage until after 4 April 2012. It is therefore not clear to what extent the Claimants maintain their concession and so it is necessary for the Court to review the position. As will become apparent, I consider that the concession was properly made, though the enormous number of claimants gives rise to some complexity.

Limitation and the Claimants' approach

27. The brief chronology set out above shows that these proceedings were issued just under 6 years after the December 2011 Oil Spill. It is common ground that the law that applies to the Claimants' claims in tort (including the law of limitation) is Nigerian Law, which is assumed to be the same as English law unless proved to be different. The Claimants contend that the applicable primary limitation period for the claims in tort that they wish to bring is six years. The Defendants contend for a primary limitation period of five years. Each side relies upon expert evidence to support their position. This is not a dispute that the Court can resolve in the context of the present applications. I therefore assume for present purposes, in favour of the Claimants, that the primary period is six years. The Court must, however, bear in mind that this assumption may be wrong and that the primary period may later be proved to be five years. I also assume that the primary limitation period for a claim in

tort would generally run from the date upon which actionable damage is first suffered by the claimant.

28. The evidence of the Claimants' solicitor makes plain the obvious truth that proceedings were issued on 13 December 2017 because of the perceived risk that the primary limitation period would expire on 20 December 2017, six years after the December 2011 Spill, or very soon thereafter. In one of his witness statements Mr Ekhorutomwen asserts that the limitation period is 6 years from 20 December 2011; in another he states that he had the impending limitation period in mind in and from about August 2017. If this approach be correct, then the primary limitation period for some or all of the claims arising out of the December 2011 Spill would have expired shortly after the issue of the original Claim Form in these proceedings and before its amendment and the service of the original Particulars of Claim in April 2018.

29. Before the hearing of these applications, the Claimants advanced two reasons why time should not run from about 20 December 2011. In summary, those reasons were that:

    i) Time did not start to run against any of them until 2017 because of deliberate concealment by the Defendants until then of a document known as the FUGRO Report;

    ii) The Defendants are in breach of continuing duties in tort because of their failure to clean up or remediate the consequences of the December 2011 Spill. The Claimants submitted that, as a result, "a fresh cause of action accrues each day so long as the pollution and/or nuisance continues".

30. However, at the hearing on 19 September 2019 Mr Dunning advanced the new submission that at least some of the Claimants may have suffered no actionable damage until after 4 April 2012, so that time would not have started running either in nuisance or in negligence until then, with the result that both the amendment of the Claim Form on 4 April 2018 and the service of the original Particulars of Claim on 10 April 2018 took place within the primary limitation period as it affected those Claimants. The Claimants have not pleaded a case about when damage occurred and this new submission was not even foreshadowed in their written skeleton argument for the September hearing. However, the Claimants submitted that it was for the Defendant to demonstrate the existence of a limitation defence and that "the court should not proceed on an assumption that all claims of every claimant were necessarily time-barred as at 4 April 2012."

31. Despite the obvious relevance to this submission of the date from which time ran, the Claimants do not appear to have given any thought to whether there was or should be evidence to back it up. As I set out below, this has led to a piecemeal and partial approach to the basis of the Claimants' submission, culminating in the application made nearly three weeks after the hearing that the Court should admit three witness statements going to the date of damage. It is something of an understatement to say that this is an unsatisfactory way of conducting significant litigation, not least because it risks significant unfairness to the Defendant.

The factual background to the limitation arguments

32. The Claimants' case is that the MV Northia moored at the SPM on 19 December 2011 in order to load just under 1 million barrels of crude oil from the Bonga FPSO. Loading operations commenced that evening. Some time before 3 a.m. on 20 December, one of the flexible flowlines between the FPSO and the SPM ruptured and the spill started. During the loading operation the ship/shore volume differential was being determined on an hourly basis on board both the Bonga FPSO and the MV Northia, which the Claimants say accords with best practice. At about 3 a.m. and hourly thereafter an inexplicable difference was recorded between the amount transferred from the FPSO and the amount received by the MV Northia. The Claimants allege that this should have led to loading being stopped immediately as it was indicative of leakage between the FPSO and the vessel; but it was not. At about 7 a.m. an oil sheen was seen on the water by the crew of the vessel; but it was not until about 8 a.m. that the FPSO's loading master directed that loading should stop; and loading did not cease until 8.24 a.m. It is the essence of the complaint and case that the Claimants now wish to advance that legal responsibility for failure to prevent the continued spillage after 3 a.m. rests jointly with those operating the FPSO and the master and crew of the MV Northia and those responsible for their actions[1]. There is no doubt that SNEPCO was the operator of the FPSO. The question of STASCO's responsibility for the master and crew is much more contentious, as appears below.

33. I have outlined the nature of the damage alleged by the Claimants at [1] above and set out the pleaded heads of claim at [55] below. In the light of the Claimants' new submission that actionable damage may not have been suffered by some claimants before 4 April 2012, it is necessary to review the available material, bearing in mind that it is not appropriate or possible to conduct a mini-trial of the issue either generally or specifically in relation to individual claimants. There are, in my view, three findings that could in theory be open to the Court without conducting a mini-trial and which may affect the determination of the various applications. The first would be a conclusion that it was clear that actionable damage had *not* occurred more than six years before a particular step was taken in the litigation. The second would be that it was arguable that actionable damage had occurred more than six years before a particular step was taken. The third would be that it is clear that actionable damage had occurred more than six years before a particular step was taken. The clear lines of these three possibilities are blurred by the prospect that different Claimants suffered damage at different times.

34. At the conclusion of the hearing, the relevant evidence about the timing of actionable damage identified by the Court or the Claimants may be summarised as follows:

    i) A journalistic report dated 1 January 2012 quoted the Chairman of the Nigerian Senate Committee on the Environment as saying "We have also witnessed a third party oil spill but we cannot say if it from Bonga or not but the third party oil spill has reached the shore line.";

    ii) The FUGRO report, which is dated 22 February 2012, lists soil and water samples that were taken on various dates between 10 January and 9 February 2012. The descriptions in the report indicate that some soil samples are likely

[1] This summary is drawn largely from [10] and [468] of the Claimants' October Skeleton.

to have come from the shoreline while others have come from creeks and rivers or some way inland. There is no map in the FUGRO report itself, but see (vi) below;

iii) A SNEPCO report entitled "BONGA FPSO Oil Leak Update" dated 18 May 2012 stated that the clean up process on land started on 6 January 2012 and included photographs showing the "before" and "after" state of an unidentified beach which appear to have been taken on or about 25 January 2012;

iv) A report by the Director General of the Nigerian Maritime Administration and Safety Agency dated 16 July 2012 contains photographs showing crude oil pollution of the foreshore with the caption "Scene of Spilled Crude and Its impact as it hits the shore-line at Beneboye, Bayelsa State, 27th December 2011". It stated that 76 communities had forwarded petitions (asserting damage by crude oil pollution), of which 6 were visited. Photographs purporting to show pollution of soil and watercourses are exhibited. The effects of the oil pollution on communities are said to include water contamination, death of aquatic life and the onset of diseases. The Court does not know precisely where these photographs were taken, but they appear to be remote from the foreshore;

v) A SNEPCO post-impact assessment report dated January 2014 recorded (in chapter 4) differential measurements as between data held from 2003 and measurements taken in 2013 for numerous parameters for the assessment of water and air quality. It also included (at Table 6.1) a plan for measuring impact going forward. I have read the full report. It says nothing about when damage was first suffered and nothing to suggest that damage was first suffered after April 2012 in the area being reported on. At its highest it may support a submission that the residual effects of pollution from the December 2011 Spill had not fully resolved by the time of the report;

vi) The Claimants relied upon [4.1]-[4.19] of the Brookes Bell report. Although these passages give some qualitative information about the behaviour of spilt oils, they do not provide any detail as to time-frames. Much more relevant, in my judgment, are two pairs of appendices to the report. Appendices 11 and 12 indicate the location of sample sites in the FUGRO report, while Appendices 14 and 15 show (a) the spill position on 21, 22 and 24 December 2011 and (b) the location of samples included in the FUGRO report which provide evidence of a match with Bonga oil. If, contrary to the Defendants' case, Bonga oil was the cause of pollution, the evidence of the FUGRO report as interpreted by the appendices to the Brookes Bell report, support a conclusion that the oil reached the shoreline within a few days of 24 December 2011;

vii) Apart from listing the communities said to have been affected in Schedule 2 to the Particulars of Claim, the Claimants made no attempt until issuing the application dated 29 October 2019 to identify the position of those affected communities or when it is said that such communities were affected. The only geographical guidance of which I am aware is to be deduced from Appendices 14 and 15 of the Brookes Bell report taken together with a map provided by the Defendants to show the Local Government Area location of

the Claimant communities listed in Schedule 2 to the Particulars of Claim[2]. By a very rough scaling exercise, it appears that the communities said to have been affected stretch inland for up to about 50 kms or so. On the information available to the Court at present it is not possible to form any view about how polluting oil is said to have reached particular communities: although there are numerous rivers shown on the various plans that are before the Court, it is not clear what relationship there may be between such rivers and all affected communities and no mechanism for the spread inland is suggested other than percolation or carriage of oil along rivers, creeks and areas of mangrove. In the absence of any such evidence, it is simply not possible for the Court to speculate about realistic mechanisms or time-frames for alleged inland pollution: I simply note that at a trial, such issues are likely to be highly contentious, particularly if an extended time-frame before first infliction of polluting damage is asserted; and that this is likely to be an area where expert evidence is likely to be as influential as assertion by lay witnesses – if not more so.

Should the 28 October 2019 evidence be admitted?

35. It is in this context that the Claimants' post-hearing application to adduce further evidence must be considered. Before considering the substance of the evidence that the Claimants now wish to adduce, two preliminary points arise:

    i) The application is supported by the Eighth witness statement of Mr Ekhorutomwen, the Claimants' solicitor. He says that the additional evidence is advanced in response to the Court raising during the October hearing the question when damage from the Bonga Spill would first have occurred in each community and that the Court's comments made him think it would be "helpful to provide the Court with an indication of the sort of evidence on this issue that would be placed before it at trial". In fact, the timing of actionable damage was raised at the September hearing, as Mr Ekhorutomwen's evidence elsewhere recognises; and it should not have required an observation from the Court for the relevance of this question to be apparent to the Claimants. The fact that the Court said it would need to take into account the Claimants' new submission that some people might not have been statute barred by April 2018 takes the Claimants' position no further;

    ii) It appears from his evidence that Mr Ekhorutomwen started the process of obtaining the evidence on or about 7/8 October 2019. Yet no suggestion was made at any stage during the October hearing that the Claimants would or might wish to submit further evidence on this issue. The Court was given no warning that such evidence might be forthcoming until service of the application; and it appears that the Defendant was not given any warning either.

36. There are three witness statements that the Claimants wish to adduce:

    i) Dr Joseph Enakemuabdullahi is a medical doctor practising in Delta State. Although he notes that no Claimants have advanced claims for personal injury

[2] C5/182/8561

(which, I note in passing, could itself have had a significant effect for limitation arguments), he divides "the affected communities" into three groups. He defines the first set as "those that lie right on the shorelines of the Atlantic Ocean"; the second as "those that lie further and/or deeper into the mangroves" taking about 4-5 hours to reach by boat from the shoreline communities; and the third as "those that lie further north very far away from the shoreline" and which would take at least 8 hours to reach by boat from the shoreline communities. He gives no actual distances; nor does he say whether his evidence relates solely to communities in Delta State; nor does he identify the communities either by name or by reference to a map to show where they are. He then gives evidence about when individuals in each of the three sets of communities first started to complain of personal injuries that he would attribute to inhaling or ingesting or otherwise coming into contact with hydrocarbons. He says that patients in the first set required "full blown" treatment between about March 2012 and December 2012. Patients in the second set were provided with treatment between around September 2013 and June 2014. Patients in the third set were not treated until between August 2014 and July 2015. He therefore uses personal injury as a form of proxy for the occurrence of actionable damage. So far as the Court is aware, this approach has not previously been foreshadowed and the division into these 3 "sets" of Claimants is new;

ii) The Hon. Boro Akpasipeletei comes from the Ogba-Gbene Community in Delta State, which he says is some 40 kms north of the shoreline, deep in the mangroves and creeks of Warri North local government area. The distance to the shoreline as the crow flies is "perhaps 15kms" and takes 4-5 hours by boat. He and his family are fishermen on the local rivers and creeks as well as owning land abutting creeks. He says that the Bonga Oil reached his community and began to affect him and the other Claimants in his community in mid-June 2014. He says that he reported matters to his chief on the day he was first affected and that his chief took matters up with SNEPCO, that he tried unsuccessfully to telephone SNEPCO on or about 22 December 2014 and that he wrote to SNEPCO on 24 December 2014. He exhibits a copy of that letter;

iii) Tuoyo Moses Opawole comes from the Gbokada Community, in the north of the Warri North Local Government Area. He is a fisherman by vocation, working the waterways in his community which consist of a network of channels or estuaries, creeks, mangroves and other natural features, all of which eventually lead to the sea. He says that he saw dead fish and that his traps had been coated with a black viscous substance on 21 November 2014; and that his community was first affected more generally on 22 November 2014 when a well became polluted with oil. Those in his community had heard about the Bonga spill but had not expected it to affect them. They contacted SNEPCO by telephone on 22 November 2014. He was told by his village head that SNEPCO eventually responded denying that it could be Bonga oil but offering to build new wells or boreholes. He exhibits a letter from SNEPCO to a different community in April 2015.

37. This brief summary of the evidence demonstrates how unfair it would be to admit it at this stage. If it was to be admitted it could and should have been placed before the Court at a time which enabled the Defendants to deal with it for the purposes of these amendment and jurisdiction applications. To admit it now would require a further adjournment to enable the Defendants to respond to the evidence and make submissions about it and any evidence they might be able to muster in response. Given the nature of the Claimants' evidence, I would anticipate a substantial response including both lay and expert evidence. There is, in my judgment, no justification for yet further delay in the absence of compelling reason, which has not been shown.

38. I am also influenced by the nature of the evidence. If the Claimants claimed damages for personal injuries, it could have been relevant to identify the dates on which the claimants sustained those personal injuries. But the Claimants have chosen not to claim damages for personal injuries. In those circumstances, to admit Dr Enakemuabdullahi's evidence of his treating patterns as proxies for the types of damage for which claims have been made in various (unspecific) areas, would be wrong in principle without other evidence providing some link to the claims that have been made. The evidence of each witness is unspecific as to location and therefore limited in its direct relevance even assuming that the pollution of which they speak derived from the December 2011 Spill.

39. For these reasons, the Claimants' 28 October 2019 application to adduce the further evidence is refused. Having read the witness evidence *de bene esse*, I exclude it from further consideration.

Pre-action Correspondence

40. The solicitor acting for the Claimants, Mr Ekhorutomwen, has been the same throughout though he has moved firms during the relevant period.

41. The solicitors' first correspondence was by letters dated 8 August 2012 addressed in identical terms to RDS and to Shell Development Company of Nigeria Limited. The letters were written on behalf of members of the Bonga Community and advanced a claim for damages as a result of the incident "which occurred on 20 December 2011 when crude oil spilled from your pipelines into our client's territorial water." It was alleged that the crude oil had also permeated the clients' soil "thereby rendering it impossible for [the clients] to farm and fish within the areas affected by the oil spills". The basis of the claim was said to be that RDS and SNEPCO jointly operated a crude oil license block and that "during the transfer of crude oil from your platform to a waiting oil tanker, there was a leakage in your export hose as a result of which approximately 40,0000 barrels of crude oil (roughly 1.68 million gallons) was discharged into the claimants' environment." The letters alleged that, due to RDS and SNEPCO's inability swiftly to contain the leakage, it continued unabated and spread beyond the Defendants' immediate vicinity to the Claimants' shoreline causing extensive damage to the existing wildlife. The letters noted that RDS and SNEPCO contested the fact that the crude oil (from the spill) reached the claimants' shoreline but asserted that it had in fact done so and that a report from the Nigerian National Oil Spillage and Response Agency ["NOSDRA"] supported the Claimants' position. The letters alleged that RDS and Shell Development Company of Nigeria Limited were negligent and that their negligence had caused loss of income and destruction of the environment. The letters identified three groups of claimants: fishermen who could

not fish as the crude oil had made it practically impossible for fish to survive in the territorial waters; farmers whose top and subsoil had been inundated; and those whose daily activities had been affected by the pollution of their water-sources. The claimants' environment was said to be in a terrible state. It was said that the evidence against RDS and SNEPCO was overwhelming; and a response admitting liability or proposing settlement within 21 days was required. It is clear from these letters that the pollution was alleged not to be limited to the foreshore and that it had spread inland at least to some extent and had affected many people. It is not possible to identify from the letters or other sources either (a) how far the pollution had spread and/or (b) how many people were said to have suffered damage by August 2012.

42. SNEPCO replied on 17 September 2012 saying that the letter to RDS had been referred to it "as the operator of the OML 118 Production Sharing Contract" and that it was replying in that capacity. It rejected the allegation that Bonga oil had impacted the Claimants and referred to a "Mystery Spill" that is said to have occurred at or about the same time for which the Bonga facility was not responsible.

43. The Claimants' solicitors wrote again (separately) to RDS and SNEPCO on 22 October 2012. Referring to the terms of SNEPCO's letter of 17 September 2012, the solicitors asked for further information about the containment operation and the Mystery Spill and for further information about the impact of the Mystery Spill on the communities it affected. In reply, by a letter dated 7 November 2012 RDS referred the solicitors to SNEPCO and, by a letter dated 12 November 2012, SNEPCO said it had provided "requisite and composite information regarding the Bonga Spill and the management thereof and [has] no further comments to make on the issue" and requested that all further correspondence about the spill be directed to it.

44. On 20 December 2012 the solicitors wrote to SNEPCO saying that "a comprehensive site visit" had not substantiated the assertions made by SNEPCO in its letter of 17 September 2012 and giving SNEPCO one last opportunity to "set the record straight" in order to avoid long and costly litigation and inviting an indication that SNEPCO was prepared to negotiate settlement. There was no reply to this letter.

45. There was then a gap of over three years until 12 January 2016, by which time the Claimants' solicitor had moved firms. On that date the solicitors wrote a joint letter to RDS and SNEPCO. The letter said that the assertion in the letter of 17 September 2012 (which was, as noted above, from SNEPCO and not from RDS) that "you have essentially cleaned-up all the affected areas could not be objectively verified"; and that site visits revealed quite the opposite. The solicitors again invited settlement and, if the recipients were not prepared to mediate, reiterated the questions that had been asked in the solicitors letter of 22 October 2012.

46. On 29 January 2016 RDS replied, saying that all further correspondence should be directed to SNEPCO as operator of the Bonga facility. There is no record of any separate response from SNEPCO. Nothing further happened until 12 August 2017, over 18 months later, when the solicitors wrote yet again to RDS. On this occasion the Solicitors asked RDS for documents recording "the exact or extent [sic] of your supervisory relationship and control over your Nigerian subsidiary, [SNEPCO]" and "any and all internal reports that you may have directly or indirectly commissioned and continue to hold in respect of the Bonga spills of 20 December 2011 and 15 July

2012." The request was said to be urgent. A further copy was sent on 21 August 2017. There is no recorded response to those letters.

47. The next communication between the parties was on 16 October 2017 when the solicitors wrote again to RDS with another request for the documents requested on 12 August 2017. This time the solicitors put RDS on notice "that we will be lodging an application to the Court to compel you to make the documents available to us pursuant to CPR Part 31.6." No such application was ever made. On 27 October 2017 SIL replied to the letter to RDS of 16 October 2017. SIL rejected the request for documents on the basis that no basis for the request had been laid and no proceedings issued. They referred to RDS's letter of 29 January 2016 and repeated that SNEPCO was the operator of the Bonga facility and that all future correspondence should be directed to SNEPCO. The letter concluded by reserving all of RDS's rights and was signed by the writer as "Legal Counsel – Global Litigation". It did not state or imply any involvement on the part of SIL except as legal counsel replying on behalf of RDS and redirecting the Claimants to SNEPCO.

48. Undaunted, and apparently not heeding the content of SIL's letter or the earlier letters from RDS, the solicitors wrote again to RDS direct (by its legal department) on 1 November 2017 in apparent response to the SIL letter (which was wrongly described as RDS' letter) of 27 October 2017. The solicitors asserted that RDS was likely to be named as a party to any claim that the claimants might bring in the United Kingdom concerning the Bonga oil spills and that RDS, "as a responsible company registered and operating in the UK", was under a duty to make the requested documents available to them.

49. On 15 November 2017, SIL wrote to the solicitors again, this time by email, informing them that their letter of 1 November to RDS had been copied to SIL. SIL requested that any further correspondence to RDS on the matter should be directed to SIL. SIL said that it would respond to the letter of 1 November "as appropriate in due course". It concluded that RDS's rights were reserved and was signed by Ms Nicholls as "Senior Legal Counsel". Once again, SIL's response neither stated nor implied any involvement save as legal counsel to RDS.

50. As promised, SIL wrote again on 5 December 2017. Once again they made clear that they were writing as legal counsel acting for RDS, including by reserving all RDS's rights. On RDS's behalf they rejected the request for documentation on multiple grounds including that no information had been provided about the identity of the claimants, that any request should be directed to SNEPCO as operator of the Bonga facility, and that the requirements of CPR part 31.6 were not met. SIL also pointed out that no detail of any cause of action against RDS had been provided and that the complaints were continuing to be made against RDS "in the present circumstances where there are several proceedings on foot in Nigeria".

51. There was no further pre-action correspondence. Five points emerge from the correspondence summarised above. First, the correspondence was characterised by long gaps (a) between December 2012 and January 2016 and (b) between January 2016 and August 2017. Second, the attempts to obtain information and documentation were sporadic and not followed up with any degree of competence or urgency. Third, there was no mention of the tanker into which the oil was being loaded after the first letter in 2012, which merely referred to "a waiting tanker"

without any suggestion (then or later) that the tanker might have any responsibility for the spill. Fourth, there was nothing in the correspondence to suggest that SIL had any involvement except as legal counsel to RDS. Fifth, the Claimants' continued writing to RDS must now be seen in the light of their recent discontinuance of all claims brought against RDS in this litigation.

52. Two other letters were referred to at the hearing as providing information about the Claimants' state of mind and understanding before issuing proceedings. First, on 14 September 2019 (less than a week before the September hearing) Mr Jalla made a witness statement which disclosed a letter from the solicitors to their clients dated 22 September 2017, which was annotated by Mr Jalla to say that he had received it on 13 October 2017 and which described "a breakthrough". The features of interest for present purposes are, first, that a whistleblower had provided information that (a) there was a report "commissioned by Shell which confirms that the spill reached shore despite what Shell has been telling you for years"; and (b) "the controller and possible owner of the ship that was loading when the first Spill occurred in 2011 is a Shell company …, the name of that company is Shell International and it is a company registered in the UK". Second, during the September hearing the Claimants produced a letter from Mr Jalla addressed to the managing director of SNEPCO dated 20 October 2017 in which he asserted that (a) SNEPCO was "in possession of certain reports which you commissioned in respect of the 2011 Spill and that that report [sic] shows that the Spill reached shore despite your insistence that the Spill did not reach shore", and (b) asserted that the ship that was loading was controlled by a Shell subsidiary identified as SIL. Mr Jalla invited settlement negotiations, failing which he said that the Claimants would have no alternative but to start an action against SNEPCO, SIL and RDS in England.

53. The Defendants put in evidence to cast doubt on the authenticity of this letter, and referred to another letter apparently sent by Mr Jalla to NOSDRA and dated 18 October 2017. There are a number of peculiarities about that letter, not least that it states that the Claimants (through Mr Jalla and the Claimants' solicitors) had already issued proceedings in the TCC in London, which seems inexplicable if, as I am told, they had not done so. However, it would be inappropriate for me to try to resolve the doubts surrounding these letters on current information. I therefore approach these applications on the basis that the letters dated 14 September and 20 October 2017 have not been shown to be inauthentic. What may be noted, however, is that the solicitors did not at any stage before issuing proceedings write to SIL suggesting that it had a responsibility for the Spills, either as a result of involvement with the MV Northia or otherwise. Furthermore, even assuming that Mr Jalla sent his letter to SNEPCO, there is no basis for assuming that it reached the controlling mind(s) of SNEPCO; and it was not sent to SIL or RDS (or, for that matter, to STASCO). Finally, even with the information acquired from the whistleblower on or before 22 September 2017, no steps were made to compel early disclosure of such a report by RDS, SIL or anyone else.

Issue 1: When did Actionable Damage Occur?

54. The Claims are now brought in negligence and nuisance, other causes of action having been abandoned. The Particulars of Claim at [46] plead a case in private (but not public) nuisance. What may constitute actionable damage in negligence or undue interference with the use or enjoyment of land in nuisance may be acutely fact

sensitive in a given case, an exercise which is well beyond the scope of this judgment on the limited information that is now available.

55. The heads of loss and damage for which the Claimants claim damages are set out at [56]-[64] of the Particulars of Claim as follows:

> **"Fishing/Fish Trading**
>
> 56. There has been a dramatic reduction in various species of fish, especially the 'Bonga fish'. Fishing, periwinkle picking and shell fish harvesting industries have been devastated, perhaps irreparably. To the extent that any fish or aquatic life has survived, the majority are contaminated by crude oil, toxic and unfit for human consumption. The effect on subsistence and commercial fishing has been devastating.
>
> **Farm land**
>
> 57. It is averred that the Claimants' farmland has been directly impacted by permeating oil from the spills and crop yields have diminished due to soil and environmental toxicity.
>
> **Drinking water**
>
> 58. The oil spills have caused pollution to the environment and contaminated the ground and drinking water forcing the Claimants to find alternative sources of water at significant additional cost disproportionately negatively impacting their modest incomes.
>
> **Mangroves**
>
> 59. The wood from the mangrove forest which supports the Claimants' domestic energy needs is now covered in oil and unsuitable for cooking fuel and other domestic tasks due to the odour omitted on burning. The Claimants are therefore having to find and utilise more expensive alternative sources of energy.
>
> 60. Mangrove forest is a natural habitat and ecosystem supporting the large populations of shell-fish and fish. Many hectares of mangrove forest and swamp has been heavily negatively impacted. The Claimants' incomes are diminished and sources of food destroyed.
>
> 61. It is averred that the damage to the mangrove forests and swamps will have a long term detrimental effect on the Claimants' economic activities and quality of life.

> **Shrines**
>
> 62. Various traditional shrines and objects of traditional religious veneration have been destroyed by the oil spills which has caused the Claimants great distress, shock, fear and anxiety.
>
> **Landowners**
>
> 63. The Claimants have suffered diminution in the value of their land as a result of the spills.
>
> **Associated industry**
>
> 64. Industry associated with fishing and farming has been devastated by the effects of the spill. The significant reduction in fishing activity has reduced demand for services relating to the fishing industry including the sale of fishing paraphernalia, mending of fishing nets and traps, hiring of boats, maintenance of boats, the maintenance and preservation of fish pools and so on. This list does not purport to be an exhaustive list of all those whose businesses and lives have been blighted by the oil spills."

56. No attention has yet been paid to potential questions about:

    i) Whether all heads of claim are recoverable in negligence and/or private nuisance respectively;

    ii) Whether some of the heads of claim amount to pure economic loss for the purposes of a claim in negligence;

    iii) Whether, if some heads of claim are to be regarded as pure economic loss, the Defendants owed any duty of care in negligence to the Claimants in respect of such losses;

    iv) Whether and to what extent any claims for economic loss are consequential upon physical damage.

57. For the purposes of this application, I concentrate upon the time when polluting oil (assumed to have come from the December 2011 Spill) first adversely affected the Claimants, without further analysis or elaboration of the type of adverse effect. I leave the question of continuing nuisance over to [62] below.

58. The potentially relevant dates for limitation periods are:

    i) 20 December 2011, the date of the December 2011 Spill;

    ii) Six years before the amendment of the Claim Form on 4 April 2018;

    iii) Six years before 11 April 2018, the date of the application to serve SNEPCO out of the jurisdiction;

iv) Six years before 3 April 2019, the date of the application to amend the Particulars of Claim;

v) Six years before 7 June 2019, the date of the STASCO application.

59. On the basis of the information before the Court, which I have summarised briefly above, it is safe to conclude without conducting a mini-trial that *if* the oil from the December 2011 Spill was responsible for the damage of which the Claimants complain, then oil reached the shoreline within a few days of 24 December 2011. Evidently, some parts of the shoreline included within the claims in this litigation were more remote than others from the Bonga FPSO and so landfall would not all have occurred at the same time. However, it is clear beyond reasonable argument to the contrary that actionable damage as alleged would have been suffered along most if not all of the affected shoreline within weeks rather than months of the December 2011 Spill. Not only is there actual evidence of oil reaching the shoreline at about the end of December 2011, but also no plausible mechanism has been suggested that would lead to the December 2011 Spill getting as close as it did to the shoreline by 24 December 2011 but then (assuming it did) causing such havoc over the allegedly affected shoreline only after some extended delay. This does not mean that all Claimants living and working along the shoreline were affected as soon as oil first hit land; but the substantial quantities of polluting oil alleged by the Claimants strongly support the conclusion that, where oil hit a particular stretch of the shoreline, many if not all Claimants living and working in that area would have suffered one or more of the effects of which they now complain within a short time. Even without conducting a mini-trial, therefore, the Court can be confident that actionable damage sufficient to start time running in negligence and/or nuisance occurred for many Claimants before 4 April 2012. This is supported primarily by the movement of the Bonga oil slick and the location and timing of the FUGRO samples as summarised in the Appendices to the Brookes Bell report and also by the other evidence summarised above.

60. Because of the almost complete lack of specificity or evidence about the migration of oil and the location of Claimants, it is not clear that all Claimants had suffered actionable damage by 4 April 2012. However, there is no material before the Court to indicate that the Defendants do not have a reasonably arguable case on limitation for the action as a whole, simply based upon the date of the December 2011 Spill, the short time it would have taken to get to the shoreline, and the months that remained before 4 April 2012 for actionable damage to occur over a wide area. The Claimants do not plead when they first suffered damage, either in general terms or specifically. Neither in the pleadings nor in evidence is there any analysis of the location, alleged date of damage, or mechanism of migration and heads of damage caused by migrating oil. The only assumption that can safely be made is that the further from the shoreline and the more remote in time it may ultimately be alleged that damage was first suffered, the greater will be the need for the case to be properly pleaded and for evidence, both general and specific, to sustain a claim that the individual Claimants suffered actionable damage by Bonga Oil. In these circumstances, apart from being confident that any Claimants who had not suffered damage by 4 April 2012 but who will ultimately prove that they suffered damage thereafter will have suffered damage progressively depending upon their distance from the coast and the existence of pathways for pollutants to follow, it is not possible to determine which Claimants suffered actionable damage when.

61. In summary, and without conducting a mini-trial of the issue:

    i) It is clear that many Claimants will have suffered actionable damage before 4 April 2012;

    ii) On current information the Defendants have a reasonably arguable case on limitation, though it is not certain that all Claimants suffered actionable damage caused by oil from the December 2011 Spill before 4 April 2012;

    iii) If and to the extent that Claimants had not suffered actionable damage before 4 April 2012, it is arguable (and inherently plausible) that some may have suffered actionable damage between April 2012 and June 2013;

    iv) On present information it is not possible to exclude the possibility that some Claimants may first have suffered actionable damage after June or even October/November 2013. There is, however, at present no reason to conclude that they did;

    v) On present information it is not possible to reach any further conclusions for the purposes of these applications about who suffered damage when.

Issue 2: Should the Limitation Period be Extended on the Basis of Continuing Nuisance?

62. The Claimants submit that "the ongoing and unremedied pollution from the December 2011 Spill that continues to blight their land is a continuing nuisance" so that a fresh cause of action accrues each day against STASCO as damage or interference with the use of land occurs. At one point it appeared that the Claimants might be arguing that there was also a continuing duty of care arising in negligence so that a new cause of action arose with every day that the pollution continued to blight the Claimants' land. If that was ever part of the argument, it was (rightly) not pursued. The Claimants do not claim that STASCO adopted the nuisance; rather, they assert that STASCO caused and then continued it.

63. In my judgment this issue having been raised by the Claimants, it can and should be resolved now for the reasons set out below: it does not need to be left over to a full trial.

64. There is no doubt that a nuisance can be a "continuing" one such that every fresh continuance may give rise to a fresh cause of action. The classic example of a continuing nuisance is provided by *Battishill v Reed* (1856) 18 CB 696 where the Defendant built (and subsequently kept in place) an erection higher than the Plaintiff's and, having removed tiles from the Plaintiff's eaves, had placed his own eaves so as to overhang the Plaintiff's premises. This nuisance was held to continue from day to day. "Continuing" a nuisance is also used in a different context to describe the circumstances in which responsibility for a nuisance will be imposed upon an occupier of land who, with knowledge or presumed knowledge of its existence, fails to take reasonable means to bring it to an end when he has ample time to do so. This usage is contrasted with "adopting" a nuisance by making use of an erection or artificial structure which constitutes the nuisance: see *Sedleigh-Denfield v O'Callaghan* [1940] AC 880. As Lord Atkin pointed out (at 896) there is a risk of imprecise language in referring to a state of affairs that has the potential to cause

damage as itself being a nuisance. What is clear is that the cause of action in nuisance is dependent upon the occurrence of damage.

65. The Claimants rely upon *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 as authority for the proposition that failure to remediate a single event can be a continuing nuisance for this purpose. The first claimant was incorporated to provide the maintenance and service company for leaseholders in a block of flats, the freeholder being the Church Commissioners. In 1989 cracking appeared following a period of drought. In March 1990 engineers reported that the roots of a plane tree on the adjoining pavement had encroached under the property and that if the tree were not removed underpinning of the property would be necessary. In June 1990 the freeholders sold their freehold reversion to the second claimant, Flecksun, which was a wholly owned subsidiary of the first claimant. There was no assignment to Flecksun of any cause of action against the highway authority in respect of any damage caused by the tree. In August 1990 the highway authority was given the engineer's report and requested to remove the tree, which it declined to do. The first claimant then undertook the necessary underpinning works and the claimants sued the highway authority for the cost of those works, some £570,000. If the tree had been removed, the need to underpin would have been avoided and the cost of cracking to the building would have been £14,000. The House of Lords held that Flecksun was entitled to recover the costs of carrying out the underpinning works.

66. The central passage in the judgment of Lord Cooke (with whom the other members of the House agreed) is at [33]:

> "Approaching the present case in the light of those governing concepts and the judge's findings, I think that there was a continuing nuisance during Flecksun's ownership until at least the completion of the underpinning and the piling in July 1992. It matters not that further cracking of the superstructure may not have occurred after March 1990. The encroachment of the roots was causing continuing damage to the land by dehydrating the soil and inhibiting rehydration. Damage consisting of impairment of the load-bearing qualities of residential land is, in my view, itself a nuisance. This is consistent with the opinions of Talbot J in the Masters case [1978] QB 841 and the Court of Appeal in the instant case, although neither Talbot J nor Pill LJ analysed specifically what they regarded as a continuing nuisance. Cracking in the building was consequential. Having regard to the proximity of the plane tree to Delaware Mansions, a real risk of damage to the land and the foundations was foreseeable on the part of Westminster, as in effect the judge found. It is arguable that the cost of repairs to the cracking could have been recovered as soon as it became manifest. That point need not be decided, although I am disposed to think that a reasonable landowner would notify the controlling local authority or neighbour as soon as tree root damage was suspected. ***It is agreed that if the plane tree had been removed, the need to underpin would have been avoided and the total cost of repair to the building***

> ***would have been only £14,000***. On the other hand the judge has found that, once the council declined to remove the tree, the underpinning and piling costs were reasonably incurred, despite the council's trench." [Emphasis added]

67. This reasoning does not assist the Claimants. The highlighted passage shows the determining feature of the case, namely that the continuing presence of the tree roots gave rise to a continuing need for underpinning which would have been avoided if the highway authority had abated the (continuing) nuisance at any time by removing the tree (and, hence, the effect of its roots). The highway authority became responsible for that continuing state of affairs on being notified of the problem and when it declined to abate the nuisance. That is analogous to the person who builds and leaves a structure on or overhanging his neighbour's land – the classic "continuing" nuisance in this usage. It is quite different from the "normal" case where there is a release (be it of water, gas, smells, or other detrimental things) and that release causes damage or interferes with user of land. In the latter case, there is one occurrence of nuisance for which all damages must be claimed at once even if the consequences of the nuisance persist. So, for example, if in *Sedleigh-Denfield* the escape of water had formed a lake which caused damage to the plaintiff's land over a period of weeks, that would have been one occurrence of a legal nuisance despite the extent and duration of the consequential damage, for which all damages should be claimed at once. In the present case there was one escape of oil, for which the Claimants seek to impose liability upon STASCO. It is alleged that the escape has caused the inundation of the Claimants' land and other heads of damage. Nuisance by polluting oil is no different in principle from nuisance by escape of water, gas smells or other polluting agents. It is in that respect a "normal" case and there is no basis, either in authority or in principle based upon concepts of reasonableness or control to describe the nuisance as "continuing" in the sense contended for by the Claimants or as considered in *Delaware Mansions.* To treat the present escape as giving rise to a continuing nuisance in the sense asserted by the Claimants would, in my judgment, be a major and unwarranted extension of principle.

68. For these reasons, the limitation period should not be extended by reference to the concept of a continuing nuisance. The Claimants' causes of action accrued when each Claimant first suffered sufficient damage for the purposes of a claim in nuisance.

Issue 3: Should the Limitation Period be extended on the basis of Deliberate Concealment?

69. The Claimants submit that "the limitation period for their claims against STASCO has not expired, because the Defendants have deliberately concealed facts relevant to their claims, namely the FUGRO Report and its conclusions." The submission is supported by evidence from Mr Ekhorutomwen in his fourth and fifth witness statements. Having raised the issue, the Claimants submit that it cannot be resolved now and must await a full trial for determination. For the reasons set out below, I disagree.

Applicable principles

70. The relevant Nigerian Statutes are in terms that are similar to those of s. 32 of the Limitation Act 1980. Section 33 of the Federal Limitation Act provides as follows:

> (1) Where, in the case of an action for which a period of limitation is fixed by this Act, either –
>
> (a) the action is based on the fraud of the defendant or his agent or of a person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of the person,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

Section 33 of the Delta State Limitation Statute provides:

> "(1) … where in the case of any action for which the period of limitation is prescribed by this law; either
>
> a. the action is based upon the fraud of the defendant; or
>
> b. any fact relevant to the Plaintiffs right of action has been deliberately concealed from him by the defendant; or
>
> c. the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> (2) References in subsection (1) of this section, to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (3) For the purposes of subsection (1) of this section, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in the breach of duty."

It is the evidence of the Claimants' expert on Nigerian Law, Chief Mike Ozekhome SAN, that the terms of the Limitation Statutes of Bayelsa State and Rivers State are "in pari materia with the Delta Limitation Statute".

71. S. 32(1) of the English Limitation Act 1980, so far as relevant, provides:

> "(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either –
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;

> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

72. The most obvious difference in the terms of the various statutes is that s. 33(1)(b) of the Federal Limitation Act stipulates that "the right of action is concealed by the fraud of the person" whereas s. 33(1)(b) of the Delta State Limitation Statute is congruent with s. 31(1)(b) of the English statute in stipulating that "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant." The Claimants' expert does not suggest that these differing stipulations make any material difference in application. He cites a passage from *Ajibona v Kolwole* (1996) 45 LRCN 2514, 2532 where Ogwugbu JSC said:

> "In order to constitute such fraudulent concealment as would in equity, take a case out of the law of limitation, it is not enough that there should be merely a tortious act unknown to the injured party or the enjoyment of his property without title where the rightful owner is ignorant of his right, there has to be some abuse of confidential position some intention at imposition, or some deliberate concealment of the facts."

73. This indicates that the touchstones for the application of the doctrine of deliberate concealment under Nigerian Law include that (a) the injured party must be ignorant of the existence of a tortious act having been committed against him and (b) there must be deliberate concealment of the facts that would alert the injured party to the existence of a tortious act having been committed against him. That is, in my judgment entirely consistent with English Law, for the reasons set out below. The Claimants' expert evidence about the principled application of the doctrine of deliberate concealment under Nigerian Law does not show any material difference from English Law principles. I therefore approach this issue on the assumption that Nigerian Law is materially the same as English Law.

74. Two principles are important in addressing this issue. First, what must be concealed must be a *fact* relevant to the existence of the injured party's cause of action, not simply *evidence* that will strengthen the injured party's claim. In *Cave v Robinson* [2002] UKHL 18 at [60], Lord Scott, with whom the other members of the House agreed, stated that a claimant could bring a case within s. 31(1)(b) of the Limitation Act 1980:

> "if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question."

75. In *The Kriti Palm* [2006] EWCA Civ 1601 Rix LJ said at [321]:

> "It appears therefore that there must be either active and intentional concealment of a fact relevant to a cause of action, or at least the intentional concealment by omission to speak of a fact relevant to a cause of action which the Defendant knew himself to be under a duty to disclose. There is no decision that anything less than a duty to disclose will suffice in the absence of active concealment."

It is implicit in this passage that the duty to disclose must be a duty to disclose to the claimant. In my judgment this flows equally from the wording of the English and Delta State statutes which require the plaintiff to show that the relevant fact has been "concealed *from him*". The inference is less clear on the wording of the Federal Limitation Act, but is still to be drawn since the critical question is whether and when the plaintiff came to know that he had a right of action.

76. At [453] of *The Kriti Palm*, Buxton LJ referred to the judgment of Rose LJ in *Johnson v Chief Constable of Surrey* (unreported, 18 October 1992) and said:

> "… *Johnson* stands as authority for the proposition that what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it. The court therefore has to look for the gist of the cause of action that is asserted, to see if that was available to the claimant without knowledge of the concealed material."

These principles have been relied on and repeated frequently: see, for example, *Arcadia Group Brands v Visa* [2015] EWCA Civ 883 at [49] per Sir Terence Etherton MR.

77. Second, where deliberate concealment is demonstrated, it will only prevent time running against the Defendant who carried it out. Thus, in order to prevent time running against STASCO, the Claimants must show deliberate concealment by STASCO. Deliberate concealment by SNEPCO (or, *a fortiori*, by RDS) would not stop time running against STASCO: see *JD Wetherspoon PLC v Van de Berg & Co Ltd and Others* [2009] EWHC 639 (Ch) at [630], with which I respectfully agree. There can be no justification for depriving a defendant of a limitation defence that would otherwise have accrued because someone else (not acting on his behalf or as his agent) has deliberately concealed relevant facts from the claimant.

Application of principles to the facts of this case

78. The Claimants' submissions and the evidence from Mr Ekhorutomwen on this issue fail to discriminate between different companies within the Shell group, referring to them generically as "the Defendants" or simply "Shell". This can be seen in the reference to "the Defendants" in the summary formulation of their submission set out at [69] above and elsewhere. It is a pervasive failing of Mr Ekhorutomwen's evidence on this issue. In addition, his evidence makes sweeping claims about the pre-action correspondence which are simply not justified. Thus, there is no sound basis for his assertion that "in my preparation and conduct of these claims on behalf

of Claimants, I made repeated requests (over many years), of the Defendants or one or more of them, for information relevant to the December 2011 Spill (see for example my letters dated 8 August 2012, 12 January 2016 and 21 August 2017)." Those letters are summarised at [41] to [51] above. A more accurate summary of the position is that Mr Ekhorutomwen (a) did not write to STASCO at all before service of proceedings in April 2018, (b) did not write to SIL at all before issue of proceedings, (c) did not request documents from SNEPCO, despite being referred repeatedly to SNEPCO by RDS and SIL, (d) did not request any documents in his letter of 8 August 2012, (e) did not ask any question relevant to the FUGRO report in his letters to RDS and SNEPCO of 22 October 2012, (f) after a gap of three years, reiterated the terms of his letters dated 22 October 2012 when he wrote again on 26 January 2016 to RDS and SNEPCO jointly, and (g) wrote to RDS (but not SNEPCO) on 12 August 2017 requesting "internal" reports that RDS "may have directly or indirectly commissioned and continue to hold" in respect of the two Spills then being alleged.

79. The tenor of Mr Ekhorutomwen's evidence is reflected in the Claimants' written submission that the Defendants are persisting in "the falsehood that Bonga oil never reached the shore" and that "in order to maintain this false position, the Defendants have deliberately concealed the Fugro report. … In the circumstances, the limitation period did not begin to run until 2017 at the earliest, when the Claimants first became aware of the existence of the Fugro Report, or more likely early 2019, when they actually managed to obtain a copy of it". Leaving aside all other objections, this would have the surprising result that the Claimants issued proceedings before their causes of action had accrued.

80. Turning specifically to the position of STASCO, the FUGRO report itself does not state who commissioned it or for whose benefit and use it was produced. However, an invoice dated 31 January 2012 from FUGRO Nigeria Limited, addressed to the Shell Petroleum Development Company Nigeria Limited ["SPDC"], appears to relate to the FUGRO report. The evidence of Ms Olafimihan is consistent with that document and is that the report "was commissioned by … SPDC … as the provider of technical support services under the Shell Companies in Nigeria Oil Spill Contingency Plan. …. RDS did not commission the FUGRO Report (nor did any other entity outside Nigeria). The FUGRO Report was commissioned and paid for by SPDC, for the use and benefit of SNEPCO". While I do not exclude the possibility that this evidence might be challenged at a trial, there is no evidence to support a speculation that STASCO commissioned the FUGRO Report or had it.

81. Furthermore, the Claimants have not shown any basis for the existence of a duty on STASCO to disclose a copy of the FUGRO Report (assuming for these purposes that it had a copy) either to the Claimants or to the Nigerian Authorities. The Claimants did not communicate with STASCO at all before amendment of the Claim Form and service in April 2018. By then, the Claimants had pleaded the material fact of Bonga oil reaching the shoreline. Since then the obligations of the parties have been governed by the Court's procedural rules and, because of the pace at which things have progressed, no obligation to give either specific or general disclosure has arisen. Given that what the Claimants complain of is the omission to disclose the document, the absence of any duty to do so is fatal to the Claimants' submissions: see [321] of *The Kriti Palm* cited above.

82. Finally on this issue, the FUGRO Report is not "a fact relevant to the Claimants' right of action" and withholding of the report (if it were to be proved) would not amount to concealment of "the right of action" within the meaning of the relevant statutes. At its highest it is evidence that may enhance the Claimants' claim. It is of course necessary for the Claimants in due course to prove that Bonga oil from the December 2011 Spill reached their land (and waters); but that is a fact which they have always asserted vigorously so that it cannot be said they were unaware of it. Nor can it be said that the FUGRO report was necessary to enable the Claimants to advance and, ultimately, plead their case, because it is clear that they had other evidence upon which they relied from the outset. By way of example, the initial letters dated 8 August 2012 asserted that oil from the spill spread to the Claimants' shoreline and rejected any suggestion to the contrary, relying on the NOSDRA report: the evidence against RDS and SNEPCO was said to be overwhelming. It is clear that the Claimants could plead all relevant facts without the FUGRO report, because they did so by the original Claim Form and Particulars of Claim, both of which alleged that the December 2011 Spill had caused pollution to land.

83. Amongst the mass of other evidence submitted by the parties for these applications, the Claimants have exhibited other documents bearing on the relevant fact, including a report by Dan Ekotogbo & Co to NOSDRA dated 7 July 2014 and the presentation by the Nigeran Maritime Administration and Safety Agency to the House of Representatives Committee on Environment dated 16 July 2012. These documents may, like the FUGRO Report, also enhance the Claimants' claim in relation to the question whether the Bonga oil reached land; but I reach my conclusion without reference to them as it is not entirely clear when they became or could reasonably have become available to the Claimants.

84. For these reasons I accept the substance of the Defendants' submission that "the FUGRO report is no more than a piece of evidence which may or may not be relevant to the Claimants' longstanding allegation that oil from the Bonga FPSO impacted their land and waterways."

85. The submission that time should be extended against STASCO on the grounds of deliberate concealment of the FUGRO report is therefore rejected. For the avoidance of doubt, because the FUGRO report is *evidence* and not a *fact relevant to the Claimants' right of action*, I would reject an equivalent submission if made against SNEPCO or (while it remained a Defendant) RDS even if all other prerequisites to a finding of deliberate concealment were to be proved. For completeness I also record that, if it were material, the Claimants have not shown that either RDS or SNEPCO was under a duty to disclose the FUGRO report to the Claimants. Because of my conclusion on other aspects of this issue, I say no more on that point.

The STASCO Application

86. The STASCO Application falls to be determined in the light of my conclusions on limitation as set out in the preceding section of this judgment. The essential backdrop is provided by my conclusions at [61] above. In particular, (a) the Defendants' case on limitation is arguable; and (b) it is clear that many Claimants will have suffered actionable damage before 4 April 2012.

87. Two issues now fall to be determined, namely:

i) Whether the Defendants are precluded by an estoppel by convention from challenging the correction of the name of the Second Defendant to STASCO in the amended Claim Form dated 4 April 2018; and, if not,

ii) Whether the Claimants should now be granted permission to amend the name of the Second Defendant from SIL to STASCO pursuant to CPR r. 17.4(3) and/or r. 19.5(3)(a) and, if so, on what terms permission should be granted.

88. It is now common ground that if a party wishes to amend a statement of case (a) to correct a mistake or (b) to add or substitute a party after the expiry of the limitation period, the proper procedure to be adopted is as set out in CPR r. 17.4(3) and r. 19.5(3)(a) respectively; and that a purported amendment under CPR r. 17.1 (which is the procedure adopted by the Claimants in the present case) is not merely an irregularity but is a nullity. It follows from my conclusions thus far that amendment of the Claim Form on 4 April to join STASCO would have been a nullity in respect of many and, arguably, all Claimants' claims if brought by separate actions. I consider later in this judgment quite how this works in the context of a representative action.

Issue 4: Are the Defendants Precluded by an Estoppel by Convention from challenging the correction of the name of the Second Defendant to STASCO in the Amended Claim Form?

89. The Claimants submit that the Defendants are precluded by an estoppel by convention from challenging the correction of the name of the Second Defendant to STASCO in the amended Claim Form dated 4 April 2018.

Applicable principles

90. The principles are well known and not substantially in dispute. In *The Indian Endurance* [1998] AC 878, 913E Lord Steyn, with whom the other members of the House agreed, said:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. … It is not enough that each of the two parties acts on an assumption not communicated to the other. …"

91. A slightly fuller statement of principle is provided by Spencer Bower, "Reliance-Based Estoppel", (5th Edition, March 2017) at [8.6]:

> "i) it is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly, or implicitly by words or conduct from which the necessary sharing can properly be inferred, shared between them.
>
> ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be

> said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party of rely upon it.
>
> iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
>
> iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

92. In the absence of a duty to speak, "mere silence, inactivity or failure to take a point cannot be enough to found an estoppel by convention.": see *HIH Casualty v Axa* [2002] EWCA Civ 1253 at [30]. This is because, in the absence of a duty to speak, silence or inactivity will not be unequivocal, which is an essential prerequisite to the existence of an estoppel by convention. This was made clear in *Fortisbank SA v Trenwick International Ltd v Others* [2005] EWHC 399 (Comm) at [30] per Gloster J:

> "i) The claimant must show that "there [is] a clear, unequivocal, unambiguous and unconditional promise by the insurers that they will not raise the defence that the action is statute [or otherwise time-] barred. The focus has to be on whether or not they were giving up that right"; see per Ward LJ in *Seechurn - v - Ace* [2002] 2 Lloyds Rep 390 at paragraph 26.
>
> ii) The claimant must establish that the conduct relied upon is not capable of more than one explanation, since such conduct is indeed equivocal. Mere silence and inaction are of their nature equivocal. As Goff LJ said in *Allied Marine Transport Limited -v- Vale do Rio Doce Navegacao SA [1985]* 2 Lloyds Rep 18 at page 20:
>
> "It is well settled that the principle [of equitable estoppel] requires that one person should have made an unequivocal representation that the does not intend to enforce his strict legal rights against the other; it is difficult to imagine how silence and inaction can be anything but equivocal …
>
> But silence and inaction are of their nature equivocal, for the simple reason that there can be more than once reason why the person concerned has been silent or inactive.""

93. Two further strands of authority are relevant. First, it is trite law that the English Limitation Act bars the remedy and not the right; and, furthermore, that they do not

even have this effect unless and until pleaded. Second, it is axiomatic that a party who is challenging the jurisdiction must exercise very great caution lest it be said that they have waived their challenge and submitted to the jurisdiction: see, for example, *Newland Shipping & Forwarding v Toba Trading* [2017] EWHC 1416 (Comm) at [18], per Cockerill J. See also, for a convenient summary of the position, *Briggs, Civil Jurisdiction and Judgments* at 5-27:

> "Having issued an application to challenge the jurisdiction of the court, the defendant must take care not to jeopardise it by appearing to submit to the jurisdiction of the court after all. … It is advisable to take only steps which are consistent with the contention that the court does not have jurisdiction and should so declare, and that the technical jurisdiction invoked by service should be annulled by the setting aside of service. If he does anything which goes beyond this, he risks being held to have taken a step in the proceedings to decide the merits, and he will have thrown away his right to dispute the jurisdiction....
>
> But the defendant would do well to refrain from participation, even incidentally, in the procedure for resolution of the merits of the case. On the face of it, if he does take part in any such process, it will risk looking like a submission…"

94. The Claimants referred to and relied upon *Hiscox v Outhwaite* [1991] 2 WLR 1321. That case provides a clear example of a shared assumption being communicated by an exchange of letters between the parties: see 1325G-1326B. It does not raise any separate point of principle that needs to be mentioned here.

Application of principles to the facts of this litigation

95. The Claimants rely upon the fact that limitation was not raised by the Defendants (and then only obliquely) until service of evidence in April 2019 in relation to the Defendants' jurisdiction applications and the Claimants' application to amend the Particulars of Claim. They rely upon the Defendants' failure to take limitation points at CMCs held on 27 April 2018, 29 June 2018 and 5 October 2018 or when the Claimants' first round of evidence was served on March 2019.

96. The relevant procedural history from 4 April 2018 includes the fact that the Amended Claim form alleged claims in relation to the December 2011 Spill and to the July 2012 Spill, the latter of which would have been less than six years before the date of the purported amendment. On 25 April 2018 RDS and STASCO acknowledged service, indicating their intention to contest jurisdiction. The CMC on 27 April 2018 was held on the direction of the Court in the light of the Claimants' application to serve SNEPCO out of the jurisdiction and because of a concern that RDS might not be a suitable anchor defendant. Fraser J directed that RDS should attend. The order made on that CMC makes plain that RDS and STASCO were represented and that the hearing was concerned with the application to serve out. The order made after the hearing on 29 June 2018 includes permission for the Claimants to serve SNEPCO out of the jurisdiction and for RDS and STASCO to file and serve any application to challenge jurisdiction by 28 September 2018. The jurisdiction applications were issued on 28 September 2018, with supporting evidence. The CMC on 5 October

2018 was for the court to give directions for the jurisdiction applications, which it duly did. The Claimants served their first round of evidence in response to the Defendants' jurisdiction applications on 11 March 2019. Their application to amend the Particulars of Claim followed on 3 April 2019. On 26 April 2019 the Defendants served their evidence in reply, including Mr McQuitty's third witness statement which the Claimants took as raising limitation for the first time. For obvious reasons, no question of the Defendants serving defences has yet arisen.

97. I accept that an estoppel by convention could operate even in relation to an act which is a nullity. However, in my judgment the Claimants' submission that the Defendants are precluded from challenging the validity of the amendment to join STASCO because of an estoppel by convention cannot succeed, for three main reasons. First, there is no evidence from which a relevant joint assumption could be inferred. Second, there was no unequivocal communication of any such assumption from one party to another. Third, the Claimants have not shown detriment.

98. At its highest, what the Claimants can identify is silence – a failure to take limitation as a point before April 2019. Yet the Claimants cannot identify a duty upon the Defendants to raise limitation sooner if they wished to rely upon it. In the absence of special circumstances, none of which apply here, limitation is a point which may remain moot until it is pleaded. That time has not yet come. More positively, what the Defendants did was to indicate by their Acknowledgements of Service that they intended to challenge jurisdiction, which they did by issuing their applications within the time limited by the order of the Court. There was no moment between service of the Acknowledgements of Service and service of the jurisdiction applications when the Claimants could reasonably have assumed that the Defendants would not take limitation as a point in relation to the joinder of STASCO; and after service of the jurisdiction applications there was no moment before April 2019 when the Defendants were obliged to raise the limitation point if they were going to rely upon it.

99. Nor can the Claimants draw any comfort from the attendance of RDS and STASCO at the three CMCs. Each of those three hearings was concerned with the Claimants' applications to serve SNEPCO out of the jurisdiction and, later, giving directions for the jurisdiction applications. None was concerned with substantive defences such as limitation. Far from being occasions when the Defendants were under an obligation to raise limitation, it would have been surprising if they had chosen to do so. To the contrary, the Defendants having indicated their intention to contest jurisdiction were likely to do as little as possible in the course of hearings concerned with an application to serve SNEPCO out of the jurisdiction for fear of it being said that they had waived their jurisdiction challenges.

100. In these circumstances there is no basis for a conclusion that there was a shared assumption that the Defendants would not take a limitation point in relation to the joinder of STASCO. Equally, there is no basis for a conclusion that any such assumption was communicated either by the Defendants to the Claimants or by the Claimants to the Defendants.

101. Furthermore, even if all other prerequisites were met, the Claimants have not shown that they have suffered any detriment as a consequence of the Defendants not taking the limitation point until April 2019. What would have happened if they had taken the point earlier? In my judgment it is overwhelmingly probable that the outcome

would have been essentially the same. First, the need for the three CMCs would not have been obviated. Second, if the Defendants had taken the limitation point at about the time of the Acknowledgement of Service, which is the earliest feasible moment in this procedural history, it is likely (on the basis of what happened subsequently) that the Claimants would have issued the STASCO application for retrospective permission earlier. The Court would then have been faced with the need to case-manage and determine the STASCO application and the Defendants' jurisdiction applications. The Court would have had to case-manage the applications with a view to hearing them in the most effective and expeditious way possible. In pursuit of that objective I consider it supremely unlikely that the Court would have taken the STASCO application separately and in advance of the Defendants' jurisdiction application, because of the obvious potential overlap. This approach is one that the Claimants should certainly have supported, for the reasons they set out in letters to the Court on 26 June 2019 and 1 July 2019 in relation to the listing of the present hearings: "the issues raised by the STASCO Amendment Application naturally arise out of the facts and matters already before the Court at the main hearing in October" (i.e. the issues raised by the Defendants' jurisdiction applications and the Claimants' application to amend the Particulars of Claim). Once that approach was adopted, the STASCO application would have become procedurally bound to the Defendants' jurisdiction applications and, in due course, to the Claimants' subsequent application to amend the Particulars of Claim. Had the issues been case managed together from an early date, the considerations that led O'Farrell J to list the STASCO Application in September and in advance of the hearings of the other applications in October would not, in my judgment, have arisen. Even if they had and the STASCO Application had been listed separately, the result would have been the same and the Court would have delayed deciding it in isolation, as has happened. The procedural outcome would therefore have been the same. There is no reason to think that progress would have been any quicker if limitation had been taken sooner. Thus it is extremely unlikely that the limitation issue and the STASCO Application which it generated would have been decided before now in any event. I therefore reject the submission that the Claimants have suffered detriment because the limitation point was not taken earlier.

102. The procedural history and the factual basis for the proposed estoppel by convention are clear on the information before the Court and do not require a mini-trial. For the reasons I have given, the Claimants have failed to establish the existence of an estoppel by convention precluding the Defendants from challenging the validity of the joinder of STASCO.

The Claimants' 7 June 2019 STASCO Application

Issue 5: Does the STASCO Application satisfy the requirements of CPR r.17.4(3) and/or CPR r. 19.5(3)(a)?

103. The Notice of Application for the STASCO Application relied upon CPR r. 17.4(3) and CPR r. 19.5(3)(a) in the alternative. The Claimants' original skeleton for the September hearing stated that the application was made under r. 17.4(3). However, by the time of the hearing, the Claimants had shifted their position and made the application under r. 19.5(3)(a). Whatever the motivation, I consider that the Claimants' ultimate reliance upon r. 19.5(3)(a) was correct, for the reasons I outline below.

The relevant provisions

104. The starting point is s. 35 of the Limitation Act 1980, which provides as follows:

> "**New claims in pending actions: rules of court.**
>
> (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
>
> (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
>
> (b) in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—
>
> (a) the addition or substitution of a new cause of action; or
>
> (b) the addition or substitution of a new party;
>
> …
>
> (3) Except as provided … by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim. …
>
> (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following—
>
> (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
>
> (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

> (6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—
>
> (a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; …"

105. The relevant provisions of the CPR are CPR r. 17.1(1) (under which the Claimants purported to amend the Claim Form on 4 April 2018), and CPR r.17.4(3) and CPR r. 19.5(3)(a) (which are relied upon by the Claimants for the STASCO Application). As appears below, CPR r. 17.1(1) is applicable before while CPR r.17.4(3) and CPR r.19.5(3)(a) are applicable after the expiry of a relevant limitation period.

106. CPR r. 17.1(1) provides:

> "A party may amend his statement of case at any time before it has been served on any other party."

107. CPR r 17.4 provides:

> "(1) This rule applies where –
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980;
>
> (ii) the Foreign Limitation Periods Act 1984; or
>
> (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.
>
> (3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.
>
> …"

108. CPR r. 19.5 provides:

> "(1) This rule applies to a change of parties after the end of a period of limitation under –
>
> (a) the Limitation Act 1980;
>
> (b) the Foreign Limitation Periods Act 1984; or
>
> (c) any other enactment which allows such a change, or under which such a change is allowed.
>
> (2) The court may add or substitute a party only if –
>
> (a) the relevant limitation period was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that –
>
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
>
> …"

109. These provisions of the CPR are similar but not identical to RSC Order 20(5), which provided:

> "(1) … The Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so. …
>
> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the party intending to sue or, as the case may be, intended to be sued.
>
> (4) …

> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

Principles

110. RSC O. 20 r. 5 was apt to cover situations that would now be covered by either CPR r. 17.4(3) or r. 19.5(3)(a). *Adelson v Associated Newspapers Ltd* [2008] 1 WLR 585 at [26] confirms that when interpreting the provisions of the CPR in respect of the substitution of parties, it is necessary to have regard to the jurisprudence in relation to RSC O. 20 r. 5. When considering the type of mistake being envisaged under RSC O. 20 r. 5, the Court of Appeal in *Adelson* said at [31]-[33]:

> "31. The rule presupposes that there is a person intending to sue. The mistake envisaged in relation to the name of the claimant is one under which the name used for the claimant is not the name of the person wishing to sue. Such a mistake is likely to be made by an agent of the person intending to sue. Where the claimant is a company the mistake will always be that of an agent, but identifying the person intending to sue may create difficulties.
>
> 32. The rule also envisages that there will be a person intended to be sued. The mistake envisaged in relation to the defendant will be one under which the name used for the defendant is not the appropriate name to describe the person that the claimant intends to sue. Thus the rule envisages a defendant identified by the claimant but described by a name which is not correct.
>
> 33. In either case the mistake that the rule envisages is one of nomenclature, not of identification. …"

111. The distinction between the two CPR rules was explained in *Gregson v Channel Four Television Corporation* [2000] C.P. Rep. 60 by May L.J. at [18]:

> "Rule 19.5 applies where the application is to substitute a new party for a party who was named in the claim form in mistake for the new party. By contrast, rule 17.4(3) applies where the intended party was named in the claim form but there was a genuine mistake as to the name of the party and no one was misled. As Mr David Foskett Q.C., sitting as a Deputy High Court Judge, said in International Distillers and Vintners Ltd v. Hillebrand and Others (17th December 1999):
>
> "Part [19.5] deals with cases where the Claimant mistakenly names the wrong party as Defendant. Part 17.4 deals with cases where the Claimant misnames the Defendant.""

112. A similar explanation is to be found in the White Book in section 17.4.5:

> "Although r.17.4(3) and r.19.5(3)(a) are alike in the principles to be applied they differ as to the type of cases they cover. Most of the cases in which r.17.4(3) is appropriate are cases in which the mistake relates to a defendant upon whom the claim form has been served even though that defendant is misnamed therein. … Cases in which r.19.5(3)(a) is appropriate are those in which, if an amendment is allowed, a new person will be joined to the proceedings. If that person is joined as a defendant the claim form must subsequently be served upon him and he will then be required to acknowledge service or file a defence; a defendant for whom he is to be substituted will cease to be a party to the proceedings."

I respectfully agree with this summary, though choice of the appropriate rule does not depend upon whether or not the claim form has been served.

113. It is now well established that r. 17.4(3) indicates three stages of an enquiry:

> "(1) was the mistake genuine, (2) was it a mistake which would not have caused reasonable doubt as to the identity of the claimant, and (3) if those questions were answered in favour of the applicant, should the court exercise its discretion in favour of the applicant: the discretion being explicit from the use of the work "may"?": see *Best Friends Group and anor v Barclays Bank plc* [2018] EWCA Civ 601 at [3].

Best was a case where the mistake was said to relate to the naming of the claimant. The reference to the "identity of the claimant" applies *mutatis mutandis* to the identity of the intended defendant where the application relates to the name of the defendant.

114. By contrast, in an application under CPR r. 19.5(3)(a) there is no formal jurisdictional requirement that the mistake would not have caused reasonable doubt as to the identity of the party who was intending to sue or intended to be sued, as the case may be. But the question whether there was potential for the mistake to mislead may be relevant to the Court's exercise of its discretion: see *Lockheed Martin Corpn v Willis Group Ltd* [2010] EWCA Civ 927 at [37].

Proving mistake

115. The Claimants submit that because Mr Ekhorutomwen has stated unequivocally that he genuinely but mistakenly did believe that the name of the Shell entity responsible for the vessel the MV Northia was "Shell International Limited" and he is a solicitor of the Court of England and Wales who has verified his fourth statement with a statement of truth, "that is the end of it". That submission is wrong in principle. The Claimants must satisfy the Court that a relevant mistake was made, and the Court must consider their submissions on the basis of all available evidence. There are numerous cases where the Court has not accepted the word of a solicitor that he made a relevant mistake: see, for example, *Adelson* at [67]-[74] and *Best* at [40].

116. In *Kesslar v Moore & Tibbits* [2005] PNLR 286 at [23] Buxton LJ said: "The best source for what the claimant actually intended is to be found in the points of claim." However, provided the evidence is relevant, there is no principled basis for limiting the evidence upon which the Court may rely when considering whether or not to accept the assertion that a mistake was made.

When is a mistake "misleading" or "one which would cause reasonable doubt as to the identity of the party in question"?

117. The question whether a mistake was "misleading" within the meaning of RSC O. 20 r. 5 was one of four specific questions addressed by the Court of Appeal in *Adelson*. At [28] the questions posed by the Court in relation to RSC O. 20 r. 5 included:

> "(iii) What criteria govern whether the mistake is misleading and, in particular must the court be satisfied that, despite the mistake the person intended to be sued should have been aware of the true identity of the person intending to sue and that he was the person intended to be sued?"

The answer given at [43 (iii)] was:

> "The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used."

118. The phrase used in CPR r. 17.4(3) does not appear in RSC O. 20 r. 5(3). However it is not clear (or, so far as I am aware, established by authority) what the difference, if any, is between the RSC O. 20 r 5(3) words "not misleading" and the CPR r. 17.4(3) phrase "not one which would cause reasonable doubt as to the identity of the party in question." In *Adelson* at [44] the Court of Appeal appears to have treated them as having materially the same meaning when it observed that:

> "… section 35 and CPR r. 19.5(3), in contrast to CPR r. 17.4(3) and Ord 20 r.5, do not specify that the mistake must not be such as to cause any reasonable doubt as to the party intending to sue or be sued."

With the benefit of this limited guidance, and in the absence of any submission that there is a material difference between the two provisions, I shall treat them as being materially the same. I merely note that neither phrase specifies that the other party must have been misled or that the mistake actually caused reasonable doubt. Neither phrase is used in CPR r. 19.5(3) and the question whether the Defendants were or would have been misled or left in reasonable doubt goes to the question of discretion, which, in my judgment, does not require such detailed analysis of precise terms.

119. In my judgment, when considering the exercise of discretion it may be relevant both (a) that the mistake was misleading or such as could cause reasonable doubt and (b) that the mistake actually misled or caused reasonable doubt in the mind of the other party.

120. The authorities demonstrate that the Court can, where appropriate, look beyond the formal court documents to extraneous circumstances when deciding whether a mistake was misleading. In *The Sardinia Sulcis* the proceedings were brought in the name of "the owners of the Sardinia Sulcis" and the Defendants had admitted the paragraph of the Statement of Claim which alleged that the Plaintiffs were at all material times the owners of the *Sardinia Sulcis*; but in reaching the conclusion that the mistake was not misleading, the Court of Appeal referred to and evidently relied upon the facts that the Plaintiff's solicitors had told the Defendants before proceedings were issued that the real plaintiffs were the time charterers, that the time charterers would be suing in the name of the owners, and that the vessel had been sold: see 206 col. 1.

121. *Best* differs from the present litigation in that the change was to the name of the person intending to sue and not the person intending to be sued. However, it is instructive because, as in the present case, the amendment was purportedly made outside the limitation period pursuant to CPR r. 17(1) before service of proceedings so that the first the other party knew of the action was when the Claimants served the original claim form, the amended claim form and the particulars of claim upon them: see [8]. So, in one sense, the original "mistake" in naming the Claimant in the Claim Form could not have actually misled the Defendants because it had been "corrected" before service on them; and the Particulars of Claim that were served with the original and amended Claim Forms were evidently intended to take the case forward in the light of the amended Claim Form. Despite this, the Judge at first instance concluded that the mistake was such as to cause reasonable doubt as to the identity of the party in question.

122. The approach adopted by the Judge was summarised by the Court of Appeal at [36] as follows:

> "… the Judge then went on to consider the second question: if there were a genuine mistake, was it such as to cause reasonable doubt as to the identity of the party in question? On the one hand, it was clearly stated on the Claim Form that the claimant was the party that entered into the swaps, which was known by both parties to be Mr Bennett. However, the name 'Best Friends Group' was so close to BFVG that there could be reasonable doubt and a possibility of an alleged agency. The fact that the Particulars of Claim sought damages which were suffered by BFVG and not by Mr Bennett further demonstrated the reasonableness of the doubt as to the true identity of the claimant."

123. The Court of Appeal held that the Judge was entitled to the view he took on this point (as well as his rejection of the submission that there was a relevant "mistake"): see [40]. It is therefore evident that, at least for the purposes of CPR r. 17.4 a mistake may be such as to cause reasonable doubt as to the identity of an intended defendant, even though the Claimant has attempted to correct the error before service on the Defendant.

Exercising discretion under CPR r. 19.5(3)(a)

124. Three cases that were cited to the Court appear to me to be relevant to the exercise of discretion that may have to be made in the present case.

125. In *Horne-Roberts v SmithKline Beecham plc* [2002] 1 WLR 1662, the Claimant issued proceedings against Merck in the mistaken belief that the batch number of an MMR vaccine indicated that Merck had been the manufacturer when, as later became clear, the manufacturer had been SmithKline Beecham. Proceedings had been issued in August 1999. A letter of claim was sent to Merck in January 2000 which quoted the correct batch number (that being the mechanism for advancing individual claims in the MMR litigation rather than starting and serving separate claimant-specific proceedings). The letter of response accepted that the Claimant had been vaccinated with vaccine from that batch but said that Merck could not confirm that it was their product. Only on 22 August 2002, more than 10 years after vaccination, did Merck's solicitors tell the Claimant's solicitors that the batch number was most unlikely to be a Merck batch. The Claimant's solicitors then issued an application under CPR r. 19.5(a) to substitute SmithKline Beecham for Merck as defendant. As appears from the first instance judgment (26 February 2001), the Judge was satisfied that there had been a genuine mistake about the identity of the defendant within the meaning of the rule because "those representing the Claimant … always intended to sue the producer of the vaccine which was administered to him". When it came to the exercise of his discretion, the Judge accepted that there was no evidence that SmithKline Beecham had been aware of the original letter to Merck and that SmithKline Beecham had not been notified of a claim by this claimant before the expiry of the 10 year long-stop limitation period after vaccination. However, he exercised his discretion in favour of permitting the amendment (with its consequential relating back) identifying the most cogent factor as being that SmithKline Beecham would suffer no prejudice (other than a potential liability for one further individual claim) because it had for some time been aware of a number of other very similar claims against it and had been preparing to defend them. On the other hand, if permission was refused, the young Claimant would be deprived of any remedy under the 1987 Act.

126. The Court of Appeal upheld the Judge's approach to "mistake" under CPR r. 19.5(a). Keene LJ (with whom the other members of the court agreed) continued at [44]:

> "Instinctively one is reluctant to accept an interpretation of section 35(6) of the 1980 Act which might allow the substitution of a new defendant unconnected with the original defendant and unaware of the claim until after the expiry of the limitation period. Such a reaction initially led me to doubt the conclusion reached by Bell J. But on further consideration it seems to me that any potential injustice can be successfully avoided by the exercise of the court's discretion under section 35. It is perhaps not without significance that there is no appeal in the present case against the exercise by Bell J of his discretion against SK"

127. *Horne-Roberts* was considered by the Court of Appeal in *Adelson* at [57]:

> "Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In the *SmithKline* case …, however, Keene LJ accepted that the *Sardinia Sulcis* test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the court will be likely to exercise its discretion against giving permission to make the amendment."

128. In *Best*, the Court of Appeal also upheld the Judge's indication that he would not have exercised his discretion in favour of granting the application even if he had been satisfied in relation to the first two issues under CPR r. 17.4(3). The Court of Appeal identified as relevant factors that (a) there had been delay in making the application and (b) that the claimants had made an unwarranted allegation of deliberate concealment: see [42].

129. I take these authorities to mean that in a case under CPR r. 19.5(a), even where a claimant demonstrates relevant mistake, the exercise of the Court's discretion may take into account broad considerations of justice and prejudice. Whether the mistake was misleading or such as would cause reasonable doubt as to the identity of the party in question may be material considerations in exercising the discretion. The fact that a party is not notified of a claim against it until after the expiry of the limitation period is also likely to be material and, in such a case, the Court is likely (but not bound) to exercise its discretion against giving leave.

The Claimants' evidence

130. The burden of proving that the requirements of the rules are satisfied rests upon the Claimants. Their evidence in support of the application is provided by [36]-[54] of Mr Ekhorutomwen's fourth witness statement. It is seriously deficient, not least in making assertions for which there is no apparent justification. Specifically:

    i) At [38] Mr Ekhorutomwen states that "my firm(s) sought to identify the Shell entity responsible for the vessel (which I now know to be the MV Northia). My initial enquiries led me to believe the name of this entity was simply "Shell International Limited"." He says that the information and enquiries which substantiated his understanding are described in subsequent paragraphs of his witness statement. I deal with them seriatim below. The Claimants did not at any stage during the pre-action correspondence, which I have summarised at [41]-[51] above, ask for any information about the vessel or who was responsible for it;

    ii) At [40] of his witness statement Mr Ekhorutomwen states that "at the outset, I note the DPR Memorandum dated 21 December 2011 refers to "Shell International" as the entity responsible for the vessel concerned with the December 2011 Spill; which would appear to reflect the common

understanding amongst those concerned with the December 2011 Spill, at that time." The following points arise:

a) This evidence implies that the Claimants had and relied upon the DPR Memorandum before issuing proceedings;

b) The DPR Memorandum does not refer to "Shell International" as the entity responsible for the vessel or imply that it was. What it in fact says is:

i) "At about 1500 Hrs, Tuesday, December 20, 2011, the DPR received a report from SNEPCO, of an oil spill which was observed at 0715 Hrs same day, while a ship, Northia, was being loaded at the deep offshore Bonga Terminal … located 120 Km offshore."; and

ii) "Initial observation did not necessitate action beyond 1st tier intervention by SNEPCO, …. . Quantification of oil unaccounted for, the following day, December 21, 2011 prompted notification of Shell International Office, scale up of response action from 1st tier to 3rd tier (highest) intervention … ."

There is no other mention in the DPR Memorandum of either the Northia or of Shell International Limited;

c) The DPR Memorandum therefore does not appear to reflect anything about who was responsible for the vessel; nor does it suggest or imply that the vessel had any responsibility for the December 2011 Spill; nor does it state, imply or provide any basis for a suggestion that SIL had any involvement with the vessel;

d) Mr Ekhorutomwen is therefore wrong in his characterisation of what the DPR says. He is so obviously wrong as to suggest that his evidence on this point is retrospective reconstruction rather than being an accurate reflection of his thought processes at the time. If his evidence accurately reflects what he thought at the time, it shows a startling lack of attention to what was actually written.

iii) At [41] Mr Ekhorutomwen states that he "commenced pre-action correspondence including to ensure that any claim subsequently issued would be appropriately comprehensive and correct. … I referred in [the letter of 8 August 2012] to the 2011 Spill "*during the transfer of crude oil from the platform to a waiting oil tanker."* In short, the Defendants have understood for years that each was in the Claimants' sights as a potential defendant to the issued proceedings. My approach to these proceedings has been consistent and straightforward." This evidence cannot be accepted:

a) Mr Ekhorutomwen misquotes his letter. What he actually wrote (to RDS and SNEPCO) was: "We are instructed that during the transfer of crude oil from *your* platform to *a* waiting tanker, there was leakage in

your export hose as a result of which approximately 40,000 barrels of crude oil ... was discharged into the Claimants' environment." [Emphasis added];

b) The letter drew a clear distinction between the platform and the hose, which were said to be the responsibility of RDS and/or SNEPCO, and "*a* waiting tanker", which was not and of which nothing more was said in the letter;

c) The leakage is said to have come from the export hose without any suggestion of involvement or responsibility on the part of the tanker that was down-stream of the leak;

d) There is nothing in the letter that states, implies or suggests that the Claimants might have the tanker "in their sights";

e) None of the pre-action correspondence states, implies or suggests that the Claimants had the tanker "in their sights": the tanker was not mentioned again;

f) There is therefore no basis in the pre-action correspondence for the assertion that "the Defendants have understood for years that the tanker was in the Claimants' sights as a potential defendant to the issued proceedings" or that whoever might be responsible for the tanker might be a potential defendant;

g) To the contrary, a fair reading of the pre-action correspondence would lead support the conclusion that the tanker and whoever was responsible for it was *not* in the Claimants' sights;

iv) At [42] Mr Ekhorutomwen describes the correspondence in 2012 as being "characterised by the Defendants' lack of provision of information, an evasiveness on the part of RDS, and a transparent attempt to wholly shield Shell entities other than SNEPCO." However:

a) A fair reading of the correspondence shows that the Claimants did not ask for any information about the tanker or who was responsible for it;

b) RDS's referral of the Claimants to SNEPCO as operator of the Bonga FPSO was not unreasonable given (a) the absence of any requests about the tanker and (b) the Claimants' belated realisation that they have no case against RDS;

v) At [43] Mr Ekhorutomwen refers to his correspondence in pre-action correspondence in 2016 and complains that "again, the Defendants were not forthcoming." Whether or not this has any justification in relation to the operation of the FPSO (about which I make no finding), it misses the mark completely in relation to the vessel since, once more, the Claimants did not mention it or request information about it;

vi) At [44] Mr Ekhorutomwen complains that "the Defendants continued to refuse to engage constructively on the cause of the spill"; and he refers to his August 2017 letter to RDS requesting internal reports. However, he fails to acknowledge that none of his correspondence mentions or implicates the vessel. Thereafter, having referred to his follow up letter of 16 October 2017, he refers to the response from "Shell International London" which he says had the effect of "leading me to believe that the Shell entity with responsibility for the vessel had responded." He then asserts that SIL "responded on behalf of itself and RDS, by email on 15 November 2017 … followed by a letter of 5 December 2017" and concludes "In short, the correspondence from Shell International Limited (based in the UK) reinforced my understanding that it was the entity responsible for the vessel." This evidence is bizarre, coming as it does from a solicitor who holds himself out as competent to conduct major litigation such as this. As outlined above at [47]-[50]:

a) SIL's response on 27 October 2017, its email on 15 November 2017 and its letter dated 5 December 2017 were all in terms which made clear that it was corresponding as legal counsel on behalf of RDS and not on its own behalf;

b) None of the correspondence from SIL mentioned the vessel or responsibility for the vessel. Nothing in their letters and email either stated, implied or suggested that SIL had any connection with the vessel;

c) There was no rational basis upon which it could be inferred that SIL had any connection because they replied to the solicitors' letter of 16 October 2017 since that letter had not mentioned the vessel;

d) The Claimants' solicitors did not write to SIL before issuing proceedings;

e) The correspondence from SIL provided no basis or support for an understanding that SIL was the party responsible for the vessel;

vii) At [45] Mr Ekhorutomwen states: "As noted above, the Claimants, for whom I act, have always intended to claim against the following Defendants: RDS as the parent company and tortfeasor; the Shell company responsible for the vessel (which I later learned to be the MV Northia); and SNEPCO, whom they consider to be collectively responsible for the 2011 Spill. I had understood that the vessel involved in the transhipment was operated by a Shell company and which I was told by a contact of mine in Nigeria was "Shell International". I understood its full name to be Shell International Limited ("SIL"). I believed that SIL was the Shell entity with responsibility for the vessel. As I explain in paragraph 44 above, it was Shell International Limited who initiated the correspondence in reply to my letters to RDS of 12 August 2017 and 16 October 2017. There was no other reason for corresponding with Shell International Limited." This evidence is also problematic:

a) I do not know what Mr Ekhorutomwen means when he says that he and the Claimants have "always" intended to claim against the Shell

company responsible for the vessel. If he intends to refer to the period between August 2012 and the issuing of proceedings, I can only conclude that there is no sign of such an intention in the inter-party correspondence;

b) While I note the assertions set out, Mr Ekhorutomwen's evidence advances only three possible bases for his stated belief that SIL was responsible for the MV Northia, namely (a) the DPR Memorandum, (b) the correspondence with SIL and (c) what he was told by an unidentified contact in Nigeria;

c) I have dealt with the DPR Memorandum and the correspondence with SIL above. Neither provides any basis for a belief that SIL was responsible for the Northia. I will return to the unidentified contact below;

d) It is not clear what Mr Ekhorutomwen means when he says that there was "no other reason for corresponding with" SIL. He did not correspond with SIL as he did not write to them. If he means that SIL wrote to him, and had no reason for doing so other than to demonstrate its responsibility for the MV Northia, it is contradicted by the terms of what SIL wrote, for the reasons already explained. If he does not mean that SIL's writing to him demonstrated a connection with the MV Northia, I am unable to attribute any coherent meaning to it at all.

131. The only evidence which provides any possible corroboration or consistency with Mr Ekhorutomwen's asserted belief that SIL was responsible for the vessel is provided by the letters dated 22 September 2017 and 20 October 2017, to which I refer at [52] above and which have not been shown to be inauthentic.

132. The letter from the solicitors to their clients dated 22 September 2017 is consistent with Mr Ekhorutomwen's evidence that he received information from a whistleblower to the effect that Shell International was "the controller and possible owner of the ship that was loading when the first Spill occurred in 2011". Later in the letter, the solicitors wrote:

> "*Subject to the documents that we receive from the whistleblower*, it is now clear that your claim should be filed against: (i) RDS for being the overall controller of the FPSO and being the parent company of the other Shell entities involved in the first Spill (ii) Shell International for being the controller of the loading Ship and (iii) SNEPCO for being the company at the other end of the pipeline." [Emphasis added]

The highlighted words are important, and the solicitors reiterated in the letter that:

> "we have not had sight of these documents and must therefore reserve our judgment until such time as we receive them. But in the interim, we will be writing to Shell and inviting them to make available to us, all reports that they may have commissioned in respect of the first Bonga Spill."

133. There is no evidence that the whistleblower provided any documents before proceedings were issued. Furthermore, this letter does not fit easily with the pre-action correspondence. The solicitors had already written to RDS on 21 August 2017 requesting any and all internal reports that RDS had commissioned and continued to hold. After 22 September 2017, despite the rapidly approaching limitation deadline, the solicitors did not in fact write again until 16 October 2017 when they wrote again to RDS, merely reiterating their August letter and request, with no specific request about the vessel. And, inexplicably, if they were interested in pursuing the information provided by the whistleblower, the solicitors still did not write to SIL, either about the vessel or at all.

134. Turning to Mr Jalla's letter to SNEPCO dated 20 October 2017, it stated that the Claimants' lawyers had now confirmed that the ship that was loading was controlled by a "sister subsidiary of your company called Shell International" and that the operation was supervised by "your parent company, Royal Dutch Shell". It said that, in the absence of settlement, the Claimants would have no other choice than to start an action in England which would of necessity be against Shell International and Royal Dutch Shell; and it included a request that SNEPCO make available "all the information and particulars, details, addresses, reports that you hold concerning Shell International and Royal Dutch Shell."

135. Returning to Mr Ekhorutomwen's evidence:

i) At [46] he states that his contact provided him with a copy of the Master's Letter of Protest after proceedings had been issued but before they were served. That letter of protest was written on STASCO headed paper. He says this was a surprise as he had expected it to come from SIL. He also states that this was the first time he had been aware of the name of the vessel. He therefore made internet searches to clarify and confirm the precise name of the company which had responsibility for the MV Northia, which revealed (wrongly as it transpires) that the vessel was on bareboat charter to STASCO. He therefore amended the Claim Form to name STASCO as the Second Defendant. Two points arise:

a) If he had the DPR Memorandum dated 21 December 2011, as his evidence suggests, he already knew the name of the MV Northia;

b) It was accepted at the hearing (and I would in any event have concluded on the evidence) that the name of the vessel that was loading would have been obtainable by diligent enquiries from publicly available sources at any time from shortly after the December 2011 Spill. There was therefore no good reason why Mr Ekhorutomwen had not been aware of the identity of the MV Northia until receipt of the Master's Letter of Protest.

ii) At [47] he says that the Particulars of Claim were then drafted, to which I refer below;

iii) At [48] he reiterates his assertions that he "had made inquiries of the Defendants for all information relevant to the Spill yet, save the identity of SNEPCO to whom they insisted on directing me, they refused to confirm the

> name of the Shell companies involved in the December 2011 Spill. I was not informed of the name of the vessel or the Shell company with responsibility for the vessel." For the reasons set out above, I consider this to be a partial and unjustified characterisation of the pre-action correspondence;

iv) At [54] he concludes his evidence in support by stating that "In short, the error (as to the name of the Shell company responsible for the MV Northia, rather than the entity the Claimants intended to sue), was a genuine mistake, promptly corrected. It was not one which would cause reasonable doubt as to the identity of the party in question, and indeed the Defendants were (given the history of my communications above, and the fact that the error was corrected prior to service of the amended Claim Form and Particulars of Claim) under no misapprehension about the intended claims as against each of them." For the reasons set out above and below, I consider that this evidence cannot be taken at anything like face value. Subject only to Mr Jalla's letter dated 20 October 2017 (as to which see [52]-[53] above) nothing before service of the original and Amended Claim Forms and the Particulars of Claim gave either SIL or STASCO any indication of an intention to bring claims against them. It is regrettable that the Claimants never sent a formal letter of claim before issuing proceedings; it is both regrettable and very surprising (assuming reasonable levels of competence) that, if the Claimants had in mind to pursue a claim by reference to the acts or omissions of the Northia, the Solicitors never mentioned it in correspondence before or even after issuing the proceedings by the original Claim Form.

136. The Claim Form and Particulars of Claim themselves provide relevant evidence on this issue.

137. The Claim Form gave as the brief details of the claim that:

> "The Claimants claim damages/compensation, interest and costs from the Defendants for (1) negligence, (2) nuisance, (3) breach of statutory duty, … under Nigerian law arising from inter alia two oil spills emanating from a floating production, storage and off-loading (FPSO) oil and gas facility owned, controlled and operated by the Defendants situate in and known as the Bonga oil field off-shore … Federal Republic of Nigeria which occurred on 20 December 2011 and 15 July 2012 causing pollution to land, pecuniary loss and damage to the Claimants"

These details expressly identify that the claims are brought against the Defendants on the basis of their ownership, control and operation of the FPSO. The vessel is not mentioned and no claim is brought against any of the Defendants in relation to either ownership, control or operation of any vessel. In this respect the Claim Form remained unchanged when amended on 4 April 2018.

138. The Particulars of Claim included a Statement of Truth signed by Mr Ekhorutomwen. [1] of the Particulars of Claim alleged (at least in the alternative) that STASCO owned or controlled the Bonga facilities. [7] of the Particulars of Claim alleges that STASCO was the bareboat charterer of the MV Northia and the agent of RDS charged

with transporting crude oil from the Bonga Oil Field. None of these allegations are now pursued, but they were present when proceedings were served on the Defendants in 2018.

Is the application properly pursued under CPR r. 19(5)?

139. Whatever else may be said, Mr Ekhorutomwen's evidence makes clear that the Claimants intended to sue SIL when they first issued proceedings. This is not a case where the Claimants intended to sue STASCO and simply got the name wrong. Put another way, the STASCO Application is an application to substitute one party (STASCO) for another (SIL). It is not a case where the intended party was named in the original Claim Form but there was a genuine mistake as to the name of the party. Accordingly, the STASCO Application is properly brought under CPR r. 19.5(3)(a) and not under CPR r. 17.4(3).

Was SIL named in the claim form in mistake for STASCO?

140. The Claimants accept in their written submissions that this issue can and should be determined at this stage.

141. Mr Ekhorutomwen's evidence, repeated on more than one occasion in his 4th Witness Statement, is to the effect that, at the time of issuing proceedings, the Claimants intended to sue the Shell entity responsible for the vessel MV Northia. I give considerable weight to the word of a solicitor on a question of fact such as this. However, having analysed the available material, I am not satisfied that his evidence can be accepted; and I am not satisfied that the Claimants have proved that a mistake falling within CPR r. 19(5) was made. It is because of the seriousness (a) of rejecting the word of a solicitor when his evidence is backed by a statement of truth, and (b) of the potential implications of this finding that I have spent so much time reviewing the evidence as set out above.

142. My conclusion in the light of this review is that it is not possible to rely upon Mr Ekhorutomwen's evidence in support of the application unless it is corroborated by other evidence that is either independent or objective or both. While I make it clear that I am not making a finding that he has deliberately misled the Court, I am driven to conclude that his evidence is unreliable because of his demonstrable, consistent and persistent misrepresentation of the true position as disclosed by his correspondence.

143. I give substantial weight to the fact that nothing in the pre-action correspondence suggests that the Claimants were at any stage before issue of proceedings intending to bring a claim arising out of the involvement of the waiting tanker. Had that been the Claimants' intention, basic competence would have demanded that their intention be foreshadowed by the solicitors in the pre-action correspondence, for example by a request for information relevant to making a claim in relation to the tanker or, as a bare minimum, by referring to the tanker in the course of the correspondence in terms which could suggest that it was considered to be relevant to potential claims. But there was nothing in the pre-action correspondence that fulfils even the bare minimum requirement: the only mention of "a waiting tanker" came in the August 2012 letter and was not in terms to suggest that the actions of the tanker were of any interest. The pre-action correspondence therefore supports a conclusion that the Claimants did

not intend to sue a party on the basis that it was responsible for acts or omissions of those on the tanker.

144. Mr Ekhorutomwen places reliance upon the communications from SIL. However, there is nothing in SIL's communications to suggest that it was doing anything other than replying on behalf of RDS. If Mr Ekhorutomwen had really harboured a belief that SIL was responsible for the tanker and was therefore in the Claimants' sights, his failure ever to write to them is inexplicable. This is true whether, as he says, he formed the view that SIL was responsible for the tanker on the basis of what SIL wrote or because that is what he was told by an unidentified contact.

145. On the assumption that the letter from the solicitors to their clients dated 22 September 2017 is authentic (as to which I make no finding save that it has not been shown to be inauthentic at this stage) it provides corroboration for Mr Ekhorutomwen's evidence that he received information that "Shell International" was the controller and possible owner of the vessel. However, reference to "Shell International" is imprecise and does not necessarily or even probably mean that it is a shorthand for SIL. Furthermore, even if the letter is taken as corroboration that someone spoke to him about the tanker, his letter to his clients suggesting that a claim should be filed against "Shell International for being the controller of the loading Ship" is heavily qualified by the words indicating the need for documents from the whistleblower. On Mr Ekhorutomwen's evidence he first received any relevant documents *after* proceedings were issued. His stated intention to reserve judgment until he received documents therefore reduces the weight to be placed upon that letter as evidence in support of an intention on 13 December 2017 to sue SIL as the party responsible for the vessel. The weight is further reduced by the absence of any evidence that the solicitors took proactive steps to confirm the identity of the company responsible for the vessel before issuing protective proceedings on 13 December 2017. Mr Ekhorutomwen says that he carried out internet searches after issuing proceedings which, together with the Master's Letter of Protest, led him to STASCO. Had he carried out the same searches before issuing proceedings, it must be assumed he would have obtained the same results. As it is, the only explanation for not carrying out searches earlier appears to be that he did not know the identity of the MV Northia. That is difficult to credit given his evidence that indicates he had the DPR Memorandum and the fact that the name of the vessel would have been publicly available had he been interested in it.

146. The letter from Mr Jalla to SNEPCO dated 20 October 2017 is also to be treated as authentic for the purposes of the present application. It contains a threat to sue "Shell International" in England and is to that extent supportive of the Claimants' position. However, the weight to be attached to it is again reduced by the fact that the threat was not followed up by any correspondence from the solicitors which, for reasons I have already given, is extraordinary if their intention at any time before 13 December 2017 was to sue those responsible for the vessel.

147. The original Claim Form provides evidence of the Claimants' intentions on 13 December 2017: see [137] above. Bearing in mind the observation of Buxton LJ in *Kesslar* I take the formulation of the original Claim Form as positive evidence that the Claimants did *not* intend to sue SIL because of any association with the vessel. Once again, the fact that the proceedings were issued hard up against the perceived expiry of the limitation period is relevant: basic competence required the Claim Form to

give a clear (if brief) indication of any and all intended bases of claim, if only to avoid the suggestion later that new claims have been added. The fact that no mention of the vessel was included in the Amended Claim Form does little to reduce the weight to be attached to this point: there were tactical reasons why the Claimants would not wish to flag up the change in their case by more extensive amendment of the Claim Form; and the Particulars of Claim may have been thought to be a satisfactory alternative route to pursue.

148. Before reaching a conclusion on the evidence that I have summarised, it is necessary to consider whether it is realistic to suppose that SIL was joined for a reason other than that it was responsible for the vessel. In my judgment it is realistic. Because there is no reliable evidence on the actual process by which SIL came to be joined, what follows is inevitably speculation. But it appears feasible that, when issuing proceedings, these solicitors had SIL's correspondence in mind and (wrongly) took it as indicative of involvement and shared responsibility with RDS. It is then equally feasible that, by the time the solicitors received the Master's letter of protest and had undertaken the searches indicated by Mr Ekhorutomwen, the Claimants then considered that they might have enough to join STASCO as having responsibility for the vessel and chose to join it in place of SIL, giving the appearance that they were altering the name of the company by amendment.

149. Whatever the true explanation, I conclude that the absence of any good evidence of an intention to issue against SIL on the basis of its involvement with a vessel combined with (a) the pre-action correspondence being inconsistent with any such intention and (b) the positive evidence provided by the original Claim Form as to the basis of the claim that was then being advanced leaves me some considerable distance short of being satisfied that there was a relevant mistake within the meaning of CPR r. 19(5).

Discretion

150. It follows that I have no discretion to allow the amendment of the Claim Form to join STASCO if and to the extent that the application is made after the expiry of the relevant limitation period.

151. Had I found that I had a discretion I would not have exercised it in favour of the Claimants. Since the question is hypothetical I can give my reasons shortly. First, the Claimants have not explained why they amended the Claim Form without reference to the Court in April 2018 when they must have known that there were significant limitation issues that required them to use the procedures under CPR r. 17.4 or r. 19.5: they knew they had limitation difficulties because they had issued protective proceedings and the amendment was being made well over six years after the December 2011 Spill. Second, the effect of the amendment was that STASCO was first notified of its alleged involvement well over six years after the December 2011 Spill. Neither STASCO nor SIL, RDS or SNEPCO had any reason to investigate the facts of the Northia's involvement until the claim was in fact statute barred for many, if not all, of the Claimants. This constitutes substantial prejudice which is not eliminated if it were subsequently to be shown that some Claimants first suffered actionable damage after April 2012. Third, the mistake (if such it was) led to the naming of SIL which was misleading and such as to cause reasonable doubt as to an intention to sue STASCO. Although the Claimants purported to correct this mistake before service of proceedings, this remains a matter that may be taken into

consideration when exercising the Court's discretion: see the reference to *Best* at [121] above. Fourth, the Claimants then delayed until June 2019 to issue the STASCO Application. Although it is true that the Defendants had not raised the issue with them, the primary responsibility for regularising the position rested with the Claimants who had inappropriately relied upon the CPR r. 17.1 procedure in the first place. Fifth, in an attempt to stave off inevitable findings to the effect that the Defendants had an accrued limitation defence for many (and possibly all) of the individual claims being brought, the Claimants raised an unwarranted deliberate concealment argument that was unjustified both on the facts and the appropriate legal principles. It may be said that this is to "double-count" because the existence of a discretion might have arisen if the deliberate concealment argument had succeeded. I therefore make clear that I would have declined to exercise my discretion in favour of the Claimants even if giving this point no weight.

CPR r. 17.4(3)

152. If I were wrong in my conclusion that CPR r. 17.4(3) is not the appropriate provision, I would hold that an application under that provision should fail because (a) no relevant mistake has been shown, for the reasons given above, and (b) the mistake (if proved) was one which would cause reasonable doubt as to the identity of the party in question: there was nothing in the Claim Form bearing the mistaken name of SIL or any other extraneous circumstance that would have made clear that STASCO was intended to be named and not SIL.

Interim conclusion on the STASCO Application

153. For the reasons given above, if this were a conventional action brought by one Claimant known to live close to the foreshore, I would dismiss the STASCO Application on the basis that the absence of a relevant mistake leaves the Court with no discretion to allow it. However, as I have already indicated, the fact that this action is brought as a representative action raises difficult questions which are best considered at the end of this judgment having considered the various other applications first. At this stage, the overriding principle can best be illustrated by imagining that the Claimants had brought two separate actions, for one of which ("Action A") the limitation period had expired by 4 April 2018 and for the other ("Action B") it had not. Assuming that the Claimants had in each action amended their claim form to join STASCO on 4 April 2018 pursuant to CPR r. 17.1 and had in June 2019 issued applications pursuant to CPR r. 19.5, the end result should be that:

    i) In Action A the April 2018 amendment was a nullity and permission to join STASCO would not be granted pursuant to CPR r. 19.5. The involvement of STASCO as a party would therefore cease; but

    ii) In Action B the April 2018 amendment was effective and permission pursuant to CPR r. 19.5 would not be needed. STASCO would remain a party to the action.

154. I will, for convenience, refer back to the hypothetical Actions A and B for illustrative purposes later in this judgment.

The Claimants' 3 October 2019 Claim Form Application

155. The Claimants say that they have brought this application out of abundance of caution and in response to the arguments raised by the Defendants in their skeleton arguments for the September and October hearings.

156. The Defendants submit that:

i) The Claim Form as originally issued did not cover a claim based on the involvement of the vessel. The original Particulars of Claim articulated such a claim on or about 10 April 2018. The original Particulars of Claim were therefore introducing a new claim (within the meaning of CPR 17.4) that was not covered by the terms of the Claim Form;

ii) The new claim based on the involvement of the vessel should be struck out because it is not covered by the terms of the claim form;

iii) The situation cannot (or should not) be remedied by allowing amendment of the Claim Form to cover claims based on involvement of the vessel because both in April 2018 (when the original particulars of claim were issued) and in October 2019 (when the application to amend the claim form was made) time had expired for bringing such a claim and a claim based on the involvement of the vessel is not based upon the same or substantially the same facts as those that would have been covered by the original claim form.

157. The Claimants submit that:

i) Time has not run in relation to a claim based on the involvement of the vessel because of deliberate concealment of the FUGRO report and/or the existence of a cause or causes of action in continuing nuisance;

ii) The Defendants may not take the point because of an estoppel by convention, the basis of which mirrors the Claimants' arguments on the joinder of STASCO i.e that the Defendants did not take the point until too late;

iii) The claim based on the involvement of the vessel arises out of the same or substantially the same facts as the claim based on the operation of the FPSO which was included in the original Claim Form;

Applicable Principles

158. The basic principles are not in dispute and need not be set out extensively or with great citation of authority here. If an amendment has realistic prospects of success and does not cause prejudice which cannot be compensated in costs, then it should generally be allowed so that the real dispute between the parties can be decided. Conversely, if an amendment has no realistic prospect of success it may be refused. If an application gives rise to a short point of law or construction then, if the court is satisfied that it has before it all the evidence necessary for the proper determination and the parties have had an adequate opportunity to address it in argument, it should "grasp the nettle". Otherwise the Court should not attempt the summary determination of issues that can only be fairly determined at a trial. Also, the Court

should be wary of attempting to resolve controversial issues of law in a developing area.

159. More complicated issues arise where it is arguable that a limitation period has expired: see [20] to [26] above. The Court's jurisdiction to allow an amendment which involves the addition or substitution of a new cause of action or claim after the relevant limitation period has expired is limited by s. 35(3) of the Limitation Act 1980 and CPR r. 17.4(2), which I have set out at [104] and [107] above.

A new claim?

160. In order to decide whether a party's amendments raise a new cause of action it is normally sufficient to compare the existing statements of case with the statements of case that are proposed by the party amending. Numerous statements of high authority have provided descriptions or definitions of what constitutes a cause of action in this context. One such was provided by Millett LJ in *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 405:

> "The classic definition of a cause of action was given by Brett J in *Cooke v Gill* (1873) LR 8 CP 107 at p. 116:-
>
> "Cause of action" has been held from the earliest times to mean every fact *which is material to be proved* to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse" (my emphasis).
>
> In the *Thakerar* case Chadwick J cited the more recent definition offered by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 CA at pp. 242-3 and approved in *Steamship Mutual Underwriting Association v Trollop & Colls* [1986] 33 BLR 77 at p. 92:-
>
> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person"
>
> I do not think that Diplock LJ was intending a different definition from that of Brett J. However it is formulated, 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 or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction."

161. The reference to "the highest level of abstraction" indicates that a broad approach should be taken; but there are limits that are set down or illustrated by authority. Thus the mere fact that an existing claim is pleaded in negligence does not of itself mean that a different set of facts that would entitle a claimant to obtain a remedy in negligence is not a new cause of action for the purposes of s. 35 and the rule: see *Steamship Mutual v Trollope & Colls*. An evaluative judgment must be made to

discriminate between, on the one hand, an amendment that is no more than particularisation of an existing claim and, on the other, an amendment that is properly to be regarded as advancing a new claim. In doing so, it is necessary to look at the basis for any duty that is alleged, as well as the breach and the consequences that are said to flow from that breach. "What needs to be identified is the bare minimum of essential facts giving rise to the original and the amended cause of action": see *Tatneft v Bogolyubov and others* [2017] EWCA Civ 1581 at [47]. The amendment will introduce a new cause of action if there is a material change in the essential features of the factual basis of the old cause of action and the new.

The same or substantially the same facts

162. The two stages of the enquiry are illustrated by the decision of the Court of Appeal in *Stockwell v Society of Lloyds* [2007] EWCA Civ 930 at [53]-[54];

> "53. … The new claim does not arise out of the facts on which the old claim was based if, in order to prove it, new facts have to be added. That is why this court has said that the basic test is whether the plea introduces new facts: *Goode v Martin [2002] 1 WLR 1828* , para 42.
>
> 54. The additional possibility that the new facts are substantially the same as those already relied on is limited *P & O Nedlloyd BV v Arab Metals Co [2005] 1 WLR 3733* , para 42, per Colman J, to:
>
> "something going no further than minor differences likely to be the subject of inquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success."

163. The policy underlying the statutory requirement that a new claim should arise out of the same facts or substantially the same facts as are already in issue between the parties was explained by Colman J in *BP v Aon* [2006] 1 Lloyd's Rep 549, in a passage later approved by the Court of Appeal in *Ballinger v Mercer* [2014] 1 W.L.R. 3597 per Tomlinson LJ. Colman J said:

> "52. At first instance in *Goode v Martin* [2001] 3 All ER 562 I considered the purpose of section 35(5) in the following passage: 'Whether one factual basis is "substantially the same" as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.'

> 53. In *Lloyd's Bank plc v Rogers* [1997] TLR 154 Hobhouse LJ said of section 35: 'The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts.'
>
> 54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts."

164. In *Goode v Martin* the claimant suffered injury whilst a guest on the defendant's yacht. She issued a claim for negligence based upon the factual account of a fellow guest. The defence pleaded a different factual account of the accident. After the limitation period had expired, the claimant sought to amend her statement of claim to plead an alternative case, based on the defendant's version of the facts. The Court of Appeal held that she could do so. At [46]-[47] Brooke LJ (with whom the other members of the Court agreed) interpreted the rule as if the words "*are already in issue on*" in the corresponding passage in subsection 35(5)(a) of the Limitation Act were also present in CPR 17.4(2): see 46-47. At [42] he said:

> "The 1998 Act, however, does in my judgment alter the position. I can detect no sound policy reason why the claimant should not add to her claim, in the present action, the alternative plea which she now proposes. No new facts are being introduced: she merely wants to say that if the defendant succeeds in establishing his version of the facts, she will still win because those facts too show that he was negligent and should pay her compensation."

165. This approach was explained by Sales LJ in *Mastercard Inc v Deutsche Bahn AG* [2017] CP Rep 26, at [42]:

> "The important feature of *Goode v Martin* is that in order to make out her newly formulated claim, the claimant did not need or propose to introduce any additional facts or matters beyond those which the defendant himself had raised in his pleaded defence. In effect, the claimant was allowed to say, "Well, if you are going to defend yourself against my existing claim by reference to those facts you have now pleaded in your defence, I rely on those very facts (if established at trial) to say that you are liable to me". In such a case, the defendant has chosen to put those facts in issue in relation to the claimant's existing claim and there is no unfairness and no subversion of the intended effect of the limitation defence introduced by Parliament to allow the claimant to rely on the defendant's own case as part of her claim against him."

166. Normally the evaluation of what has been put in issue by a Defendant will be confined to examination of the pleadings. However, it is now established that, albeit in rare cases, the same result may follow where there has been an extensive evidential battle on a summary judgment application or on a jurisdictional question because it may be possible to discern that facts are already in issue in a case prior to being crystallised in formal pleadings: see *Samba Financial Group v Mark Byers* [2019] EWCA Civ 416 at [49] per McCombe LJ. I take the policy underlying this approach to be the same as before: the critical question is whether a Defendant will be prejudiced by having to investigate facts for the first time outside the limitation period. If he has already volunteered them, he is not subject to that particular prejudice.

Exercising the Court's discretion

167. It does not follow that, if the threshold requirements laid down by s. 35 and CPR r. 17.4 are satisfied, the Court's discretion will be exercised in a claimant's favour. First, the Court must consider whether the new claim appears tenable or is merely fanciful. Second, and of equal importance, the Court must bear in mind that it is being called upon to exercise its discretion in circumstances where allowing an amendment will or may deprive the defendant of an accrued limitation defence. That being so, the factors bearing on the exercise of the Court's discretion are substantially encompassed in the terms of s. 32A of the Limitation Act and include matters such as (a) the length of and reasons for the delay on the part of the claimant, and (b) the extent to which relevant evidence is likely to be unavailable or lacking in cogency having regard to the delay: see *Wood v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1638 at [84].

Issue 6: Does the Claimants' Claim Form Application Satisfy the Requirements of s. 35(3) of the Limitation Act and CPR r 17.4?

Application of Principles to the Facts of this Application

168. I reject the Claimants' submission that time has not run because of the existence of a cause or causes of action in continuing nuisance or because of deliberate concealment for the reasons set out above at [62] ff and [69] ff. Though the alleged estoppel is not identical, I reject the submission based on estoppel by convention for the same reasons as set out at [89] ff above.

169. For the purposes of this application, I leave over the question whether a claim against STASCO based on the presence of the vessel has reasonable prospects of success: see [193] below.

170. The real questions arising on this application are therefore:

    i) Is the claim in the Particulars of Claim based upon the involvement of the vessel covered by the terms of the original Claim Form?

    ii) If not, is it a new claim within the meaning of s. 35 of the Limitation Act 1980 and CPR 17.4(2)?

iii) If so, is it reasonably arguable that the proposed amendment is being sought outside the applicable limitation period?

iv) If so, does it arise out of the same or substantially the same matters as are already in issue in the proceedings?

v) If so, should the Court's discretion be exercised in favour of the Claimants and, if so, how and in what terms?

Is the claim based on the presence of the vessel covered by the original Claim Form?

171. I reject the submission that the original Claim Form covered a claim based upon the involvement of the vessel, for the reasons summarised at [137] above. It is no answer to submit (as the Claimants do) that the FPSO was at one end of the operation and the vessel at the other. The December 2011 Spill came directly from the pipework that formed part of the Bonga facility before it had reached either the SPM or the pipework between the SPM and the vessel or the vessel itself. It was open to the Claimants to mount a claim on the basis of the Defendants' responsibility as owners, operators and controllers of the FPSO without shouldering the additional burdens of implicating the vessel at all; and they did so unequivocally by their Claim Form. Therefore the claim in the original Particulars of Claim based upon the presence of the vessel is liable to be struck out unless the Claim Form is amended to cover it.

Is the claim based upon the presence of the vessel a new claim within the meaning of s. 35 and CPR r. 17.4?

172. Yes. Apart from the fact that the December 2011 Spill occurred and the allegations of causation and damage, there is no overlap between the facts necessary to prove the original claim based on operation and control of the FPSO and the new claim based upon the presence of the vessel. The fact that the oil was being transferred on beyond the SPM to load the vessel is not a necessary fact for the purposes of the claim based on operation of the FPSO. Although it may be said that there is a prospective claim in negligence arising from the presence of the vessel and that there is also a claim in negligence based on the operation of FPSO, the facts giving rise to the existence of a duty on those responsible for the FPSO are different from those giving rise to the existence of a duty on those responsible for the vessel. As now put, the Claimants wish to allege that both those responsible for the FPSO and those responsible for the vessel should have noticed the differential between the shore and ship volumes; but these are separate allegations in each case. The source of the obligations to keep watch on the respective volumes is not the same; and the fact (if proved) that the differential was observable by and should have been acted on by those responsible for the FPSO does not overlap with the separate question whether the discrepancy should have been observed by those responsible for the vessel.

173. Put shortly, the claim advanced by the original Claim Form did not require any investigation of the actions of the vessel and those responsible for it. The facts alleged in the Particulars of Claim against STASCO as a Defendant responsible for the vessel included the following main points that formed no part of a claim against those responsible for the FPSO:

i) STASCO was the bareboat charterer of the vessel: [7(b)];

ii) STASCO was the agent of RDS charged with transporting crude oil from the Bonga Oil Field: [7(d)];

iii) The Northia was manned and controlled by STASCO, its servants or agents: [10];

iv) STASCO was responsible for the rupture of the export line, in respect of which the Claimants pleaded Res Ipsa Loquitur: [10, 11];

v) STASCO (as the party responsible for the vessel) made no reasonable or adequate attempt to contain the spill, reduce the flow of crude oil, to cap the spill or to restrict the dispersion of crude oil: [13];

vi) STASCO (as bareboat charterer) owed a duty of care to take reasonable steps to ensure that the Claimants did not suffer loss or damage as a result of spilt oil: [42];

vii) STASCO (as bareboat charterer) owed a duty of care to deploy adequate steps and methods to prevent, contain and clean up any oil spills and to clean up and remediate the impacted land and waterways: [43];

viii) STASCO acted in breach of the duties it owed in negligence. The particulars of negligence are set out at [44] though it is not clear which of (a)-(f) were aimed at STASCO;

ix) STASCO is liable in private nuisance and under the rule in *Rylands v Fletcher*: [46], [49].

Is it reasonably arguable that the proposed amendment is being sought outside the applicable limitation period?

174. Yes. The Claimants' concession in relation to the position on amendment of the Claim Form on 4 April 2018 must apply (with the addition of a further six days) to the position on 10 April 2018, when the need to amend the Claim Form to cover the claim based on the presence of the vessel first arose, and October 2019 when the application to amend the Claim Form was made and heard. My conclusions on the running of time, summarised at [61] above, are equally applicable here.

Does the new cause of action arise out of the same or substantially the same matters as are already in issue in the proceedings?

175. It cannot reasonably be said that introducing a claim based on the presence of the vessel would introduce "something going no further than minor differences likely to be the subject of inquiry but not involving any major investigation." While not treating this as if it were a statutory test, the virtually complete lack of essential factual overlap between a claim against those responsible for the FPSO and a claim against those responsible for the vessel means that the facts essential to the proof of a claim against those responsible for the vessel cannot be described as substantially the same as those already in issue or covered by the original Claim Form.

176. The Claimants submit that this conclusion should be avoided because the Defendants have now put in issue the fact that STASCO was the Technical Manager of the MV

Northia. However, this is the wrong way around, because the introduction of the fact that STASCO was the Technical Manager was a response to the Claimants' introduction of a claim against the vessel by the Particulars of Claim and not the reason for that introduction out of time. It cannot be said that the fact that STASCO was the Technical Manager was a matter that was going to be in issue in any event: it was irrelevant to the claim as contained in the original Claim Form. Furthermore, the submission confuses (a) the statutory requirement that the new claim should arise out of the same or substantially the same facts as are already in issue on any claim previously made in the original action with (b) the policy underlying that requirement as explained in *Goode v Martin*. The fact that the Defendants have raised certain matters in response to a new claim does not assist in deciding whether the new claim arises from the same or substantially the same matters as were already in issue on the terms of the original Claim Form before the new claim was raised.

Discretion

177. It follows that there is no discretion to allow the amendment to the extent that it is and was statute barred. If I had concluded that the claim based upon the presence of the vessel had arisen from the same or substantially the same facts as had already been in issue between the parties, the absence of prejudice to the Defendants in investigating the new claim would have weighed in favour of exercising the Court's discretion in favour of allowing the amendment, as would the adverse effect upon some or all of the Claimants of terminating their claim against STASCO based upon the presence of the vessel. However, there would have been factors that militated strongly against allowing the amendment. First, it would deprive STASCO of an accrued limitation defence against some (and, arguably, all) Claimants. Second, no explanation has been provided for the failure to mount a claim based on the presence of the vessel from the outset. Third, the Claimants have delayed from April 2018 to October 2019 before seeking the necessary leave to amend. Fourth, this delay is in the context of an action issued at the very end of what is alleged to be the six year limitation period after years of sporadic and ineffective pre-action conduct, including the absence of a formal letter of claim articulating the Claimants' case and the absence of any significant efforts to obtain relevant documentation either from the Defendants or from publicly available sources. If this were a single action, I would be inclined to refuse the application, leaving it to the individual Claimant to have protected themselves by issuing protective proceedings, if that had not already been done. The alternative, giving permission but subject and without prejudice to the Defendant having permission to plead and prove all matters of limitation at the trial, would also have its attractions.

Interim conclusion on the Application to amend the Claim Form

178. For the reasons given above, if this were a conventional action brought by one Claimant known to live close to the foreshore, I would dismiss this application on the basis that the amendment of the Claim Form introduces a new claim that does not arise from the same or substantially the same facts as were or would be in issue on the original Claim Form. This application differs from the STASCO Application because no amendment of the Claim Form to include the claim based on the presence of the vessel is yet in place, whereas the substitution of the name of STASCO would have been effective in the context of a conventional "Action B". However, the basic problem is the same: how to do justice between the Claimants and the Defendants

when, although it is reasonably arguable that the proposed amendment is being sought outside the applicable limitation period for all Claimants, that issue cannot be determined now and there could, at least in theory, be some Claimants for whom a six-year limitation period has not yet expired since they first suffered actionable damage. In the context of this application, the relevant date is the date on which the Court makes its order on the application to amend rather than the date in April 2018 when the inadequacy of the original Claim Form became material. Adopting the approach by analogy with "Action A" and "Action B" (but taking the date of making the order consequent upon this judgment as the operative date):

i) In Action A, permission to amend the original Claim Form so that it covers a claim based upon the presence of the vessel would be refused. The claim against STASCO based on the presence of the vessel would therefore cease; but

ii) In Action B permission would be granted because the limitation period had not expired and no useful purpose would be served by requiring the Claimants to issue a new Claim Form solely for the purpose of covering the claim against STASCO based on the presence of the vessel.

The Claimants' 3 April 2019 Application to Amend the Particulars of Claim

179. The draft Amended Particulars of Claim makes amendments relating to both SNEPCO and STASCO. Although this application was issued before the application to amend the Claim Form, it is convenient and logical to deal with the amendment of the Particulars of Claim after dealing with the application to amend the Claim Form. I shall first deal with the present application to amend the Particulars of Claim without regard to the problems arising from my conclusions on amendment of the Claim Form, bringing those into account later in this judgment.

180. The principles arising on this application are the same as set out at [158] above. The Claimants concede that it is reasonably arguable that the amendments are outside the applicable limitation period; and my conclusions on limitation remain apposite and applicable. The Claimants submit that the Court should adopt an approach similar to that adopted in *Blue Tropic* and, if the position is not clear cut, allow the amendments as set out in the draft Amended Particulars of Claim but without prejudice to the Defendants' entitlement to argue at trial that the amendments are time barred.

181. The Claimants submit that:

i) The amendments do no more than add further particulars to the claim that has already been pleaded – they do not introduce a new cause of action;

ii) If the amendments introduce a new cause of action, it is based on the same or substantially the same facts as are already in issue between the parties;

iii) The claims as reformulated have a realistic prospect of success;

iv) No prejudice would be suffered by the Defendants if the amendments are allowed; and therefore

v) The Court should exercise its discretion in favour of allowing the amendments.

182. The Defendants contest each of these propositions.

183. This application to amend the Particulars of Claim must be read subject to my conclusions about amending the Claim Form. However, with that qualification, the real questions arising on this application are therefore:

i) Do the Draft Amended Particulars of Claim disclose the basis for a claim that has reasonable prospects of success?

ii) Is the claim as articulated in the draft Amended Particulars of Claim a new claim within the meaning of s. 35 of the Limitation Act 1980 and CPR 17.4(2) when compared with the claim in the original Particulars of Claim?

iii) If so, is it reasonably arguable that the proposed amendment is being sought outside the applicable limitation period?

iv) If so, does it arise out of the same or substantially the same matters as are already in issue in the proceedings?

v) If so, should the Court's discretion be exercised in favour of the Claimants and, if so, how and in what terms?

Background to the proposed amendments against STASCO

184. I have outlined the essential elements of the claim against STASCO as pleaded in the original Particulars of Claim at [173] above. The original pleading was extremely vague to the extent of being embarrassing in its lack of precision in critical respects, including:

i) The reference in [10] of the original pleading to the MV Northia being "manned" by STASCO, presumably in its capacity as bareboat charterer. The reference to it being manned by STASCO's "servants or agents" most naturally implies a relationship of employer and employee; if any other relationship is intended, it is not specified. The implication of [10] is therefore that STASCO as bareboat charterer employed the master and crew of the Northia;

ii) No details were provided of how STASCO could be responsible for the rupture of the export line: there is simply an assertion that it was;

iii) The original pleading did not specify which facts were relied upon to justify the pleading of the duties alleged at [42] and [43];

iv) The original pleading made no attempt to identify whether the allegations of negligence were alleged to be breaches of a direct duty owed by STASCO or particulars of negligence on the part of the servants or agents referred to in [10]. This deficiency was compounded by the fact that STASCO (together with RDS and SNEPCO) was alleged to have owned and/or controlled the Bonga facilities and the particulars of negligence at [44] were all framed by reference to "its facilities", leaving it entirely unclear what role it was

suggested that STASCO as bareboat charterer (or its servants or agents who were alleged to be manning the vessel) was alleged to have played;

v) The most that could be said with any confidence is that the Claimants intended to allege that STASCO as bareboat charterer and its servants or agents who were manning the vessel (who were by implication employees) contributed to the rupturing of the pipeline in an unspecified manner. It is also possible to identify a separate allegation that STASCO owed a duty to contain and clean up the December 2011 Spill.

185. The Claimants submit that, because they are Nigerian individuals and communities affected by the spills, they did not have access to the wealth of historical technical information at the Defendants' disposal. That is true. However, it does not begin to justify the Claimants' consequential submission that "in those circumstances, it was inevitable that [the Claimants'] original POC were pleaded at a high level of generality, … ." On the information that is available to the Court on these applications, it appears clear that the Claimants, with the benefit of competent representation from relatively soon after the spill, could and should have been able to identify the vessel, STASCO's existence, the nature of STASCO's involvement with the vessel, and the basis of a claim that is now advanced by the Draft Amended Particulars of Claim well before the expiry of 6 years after the date of the spill. Instead, the analysis I have set out earlier in this judgment shows that the Claimants simply did not apply their minds to the role of the MV Northia and made no concerted or effective efforts to investigate it or questions of responsibility for the conduct of those involved with the vessel. I reject the factual submission that it was inevitable that the original POC was pleaded as it was or "at a high level of generality" rather than as now proposed. The identity of the MV Northia and STASCO's involvement as the "Technical Manager", the "Company", the "Operator" and the "Document Holder" could and should have been investigated well within the limitation period if they were matters of interest to the Claimants.

186. In support of their jurisdiction application, the Defendants submitted witness statements in September 2018 from Mr Taylor, Ms Olafimihan and Mr Somoye taking issue with the claim as presented in the original Particulars of Claim. Specifically:

i) Mr Somoye explained the configuration of the FPSO, the SPM and the risers connecting those facilities, and that the rupture happened between the FPSO and the SPM;

ii) Ms Olafimihan explained that SNEPCO was not the licence holder but was the contracted operator of the Bonga facility;

iii) Mr Taylor gave evidence that

a) STASCO was not the bareboat charterer of the vessel. It had been appointed Technical Manager by Front Thor Inc, the Bermudan owners of the vessel;

b) When acting as Technical Manager, STASCO acted as agent for Front Thor Inc.;

c) The long-term charterer of the MV Northia was Shell Western Supply and Trading Limited ("SWST"), a Shell group company incorporated in Barbados;

d) The voyage charterer of the MV Northia was Sahara Energy Resource Limited, which is not a Shell group company;

e) The master and crew were not employed by STASCO. They were employed by Shell International Shipping Services Pte Ltd, a Singaporean Company. A significant number of the ratings were employed by the Philippines Transmarine Carriers;

f) STASCO was not responsible for the selection of the crew, which was the responsibility of Shell Ship Management Ltd;

g) STASCO did not exercise direct control over the specific actions of the MV Northia during its daily operations;

h) STASCO did not own, operate or control any equipment located in the Bonga oil field, did not have any operations at the Bonga oil field and did not operate the Bonga FPSO (which was the role of SNEPCO as the contracted operator).

The contractual documents underpinning the arrangements about which Mr Taylor gave this evidence were not disclosed at this stage.

187. It is clear that the Claimants re-assessed their case against STASCO in the light of this evidence. The product of their re-assessment was the draft Amended Particulars of Claim and Mr Ekhorutomwen's explanatory third witness statement, which he made on 11 March 2019. It is apparent from that witness statement that the Claimants had by then accumulated various documents though the dates on which most were obtained is unknown. For example, Mr Ekhorutomwen states that "further enquiries" were made of the relevant P&I club and that the Certificate of Entry shows STASCO to be the Technical Manager: but there is no detail about what enquiries had been made previously or the results of such enquiries: nor is there any explanation why the Certificate of Entry could not have been obtained at any time previously. Similarly, an extract from the Lloyds Register showed STASCO to be the "Document of Compliance Holder", "Operator" and "Company" for the MV Northia at all material times. No evidence is given about when the extract was obtained and no evidence has been given to suggest that such documents might not have been available before. However, Mr Ekhorutomwen sets out the Claimants' stall about the implications of STASCO holding these positions and the regulatory framework to which it would, as such, become subject. In particular, he identifies that, as the "Company", STASCO would have responsibility for the development and implementation of the vessel's Safety Management System ("SMS"). Mr Ekhorutomwen identifies the discrepancy between the shore and ship volumes as a critical feature in seeking to establish liability against STASCO. However, the document upon which he primarily relies to show the discrepancy is the DPR memorandum, as to which see [130(ii)] above.

188. The Draft Amended Particulars of Claim includes the following allegations that are essential to the case and claim that the Claimants now wish to bring:

i) STASCO was the "Technical Manager", "Company", "Operator" and "DOC Holder" of the MV Northia: [6(b)];

ii) As such STASCO had statutory responsibility pursuant to the provisions of SOLAS (the International Convention for the Safety of Life at Sea 1974) to implement a SMS;

iii) "In the circumstances" (i.e. including those pleaded in [6(b)]) STASCO was the person responsible for the safe and pollution-free operation of the MV Northia: [6(c)];

iv) STASCO owed the Claimants a duty of care "in all the circumstances" (i.e. including those pleaded in [6(b)] and [6(c)]) "to exercise proper skill, care, competence and diligence so as to (a) establish a proper system such as would prevent or minimise oil spills during the loading of MV Northia (b) carry out proper, careful and timely remediation of any oil spills or pollution that did occur and (c) to exercise through those it controlled or for whom it is vicariously liable (such as the officers and crew of MV Northia, for the reasons set out in (c) above), proper skill, care, competence and diligence when loading cargos of crude oil so as to avoid or minimise marine pollution: [6(i)];

v) Further or alternatively STASCO "was under a statutory duty pursuant to SOLAS as Technical Manager/Company of an oil tanker to achieve the objectives of the ISM Code to ensure safety at sea, prevention of human injury or loss of life, and the avoidance of damage to the environment, in particular to the marine environment and to property": [52];

vi) STASCO had responsibility for a failure to inspect the flowline which is alleged to have caused its failure (in ways that are still not particularised): [15];

vii) STASCO was concerned with the emergency response to the spill and its clean-up pursuant to the Defendants' Spill Response Plan "quite apart from its role as Technical Manager/Operator of the MV Northia for which it is jointly responsible for *causing* the spill and/or *exacerbating* the devastation of the spill": [19]; (Emphasis added to identify two separate allegations)

viii) STASCO "as the lead Shell Group entity in an oil pollution situation, owed the Claimants a duty of care to promptly assess the potential impact of the oil spill on the Claimants, to take immediate measures to safeguard the Claimants and/or to minimise the impact on the Claimants and the environment of effects of the oil spill": [56];

ix) STASCO was vicariously liable for the acts and/or omissions of the Master and crew on board the vessel: [55];

x) STASCO "(or those for whom they were responsible and/or vicariously liable, who were supposed to constantly monitor the loading process both on board … the MV Northia) were aware of the FPSO/MV Northia differential, but did not immediately cease loading the MV Northia to investigate the cause of the FPSO/MV Northia differential as is mandated by ISGOTT". STASCO

"recklessly or negligently continued to load the MV Northia aware of the very real likelihood of the spillage of oil": [24].

189. In summary, the duties alleged to be owed by STASCO are now said to arise as a result of its status as Technical Manager, Operator, Company and Document Holder and not as bareboat charterer. Similarly, STASCO's liability for the acts or omissions of those concerned with operation of the MV Northia is no longer based upon the implication of a relationship of employment by a bareboat charterer but from the new allegations of STASCO's status and the operation of international codes.

190. The Defendants provided a further witness statement from Mr Taylor made on 25 April 2019 in the course of which he addressed (i) STASCO's role as Technical Manager, (ii) the relevance of international maritime standards and conventions, and (iii) STASCO's maritime emergency response role within the Shell group of companies. In the course of that evidence:

i) He exhibited the Management Agreement between Front Thor Inc and STASCO;

ii) He did not exhibit the SMS established by STASCO for the MV Northia but did exhibit Certificates of Compliance, as establishing that all was as it should have been;

iii) While accepting that, as Technical Manager, STASCO accepted a contractual obligation to provide certain crewing services as agent on behalf of the owner, he exhibited a Manning Agreement, by which STASCO engaged Shell International Shipping Service Pte Ltd ("SISS") to provide services. He asserts that SISS acted as an independent contractor and not as agent for STASCO. On the basis of the Manning Agreement, Mr Taylor contends that the effect of the Manning Agreement is that SISS, not STASCO, was the crew manager and the employer of the crew and Master of the MV Northia, apart from some ratings employed by the Philippines crewing agency. He also referred to the Certificate of Entry (previously exhibited by Mr Ekhorutomwen) as supporting that view;

iv) He pointed to the fact that SISS had insurance with the P&I club (as previously exhibited by Mr Ekhorutomwen) for liabilities incurred as employer of the Master and crew of the vessel; and the Certificate of Entry lists SISS as "Crew Manager";

v) He exhibited the contract of employment of the Master (who the Claimants accept would generally have overall responsibility for and charge of the vessel), which was entered into by SISS acting by an Indian agent;

vi) He submitted that the overall responsibility of the Master would include responsibility for execution (as opposed to devising or implementation) of the SMS;

vii) He reviewed the various international conventions and guides referred to by the Claimants in the draft Amended Particulars of Claim and explained why, in his view, there was no basis for criticising STASCO for non-compliance;

viii) He exhibited a note of inspection on 6 September 2011 by the office of the Maritime Administrator of the Marshall Islands (the vessel's flag state) which recorded that the vessel was found to be in good order and that the officers and crew were "very familiar with vessel and operation and SMS";

ix) He explained that STASCO's only involvement in relation to the response to the December 2011 Spill was to authorise the engagement of Oil Spill Response Limited ("OSRL"), as a purely administrative act at the request of SNEPCO.

Do the Draft Amended Particulars of Claim disclose the basis for a claim against STASCO that has reasonable prospects of success?

191. The Defendants' central submission is that its involvement with the MV Northia arose from a contractual agreement with the owner of the vessel to act as Technical Manager and that it was entitled to and did sub-contract its responsibilities to others so that it had no residual responsibility that could found the existence of a duty of care to third parties such as the Claimants. It did not employ those on the MV Northia and was not in a relationship with them that could give rise to either direct or vicarious liability for their acts or omissions.

192. The Claimants' central submission is that STASCO's positions as "Technical Manager", the "Company", the "Operator" and the "Document Holder" for the vessel, even though derived from a contractual agreement between STASCO and the Owner, gave rise to non-delegable responsibilities and duties under detailed and extensive international provisions that underpin the law of obligations for those engaged with international maritime trade. By way of example only, the Claimants submit that:

i) STASCO was the "Company" for the purposes of SOLAS and, as such was responsible for compliance with the mandatory requirements of the ISM Code, which in turn went beyond an obligation to devise an effective SMS and included an obligation to ensure that the policy is implemented and maintained at all levels of the organisation;

ii) Similarly, as the "Company", STASCO was obliged to ensure that the Master was properly qualified for command;

iii) As the "Company", STASCO was by definition the person who had assumed the responsibility for operation of the ship from the owner, for the purposes of multiple international codes;

iv) The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW) and the STCW Code impose responsibility upon the "Company" to ensure that the obligations relating to watch-keeping, environmental protection and emergency procedures and arrangements are given full and complete effect;

v) The International Safety Guide for Oil Tankers and Terminals ("ISGOTT") imposes joint responsibility for safe loading on the FPSO and the vessel. It expressly stipulates that cargo and shore-based volumes should be checked and compared at least hourly during loading and any unexplained discrepancy

> "could indicate pipeline or hose leaks, particularly in submarine pipelines, and require that cargo operations be stopped until investigations have been made."

193. Despite the weight of evidence adduced for these applications and the quality of the submissions on both sides for and against the existence of a duty of care owed by STASCO to the Claimants and for or against the imposition of direct or vicarious liability for the operation of the MV Northia, these are not issues that should or can be resolved in the context of interim applications to strike out or amend. The circumstances in which direct or vicarious liability may be imposed upon a person either (a) who assumes a role to which responsibilities may be attached or (b) for the acts or omissions of persons with whom they are not in an employer/employee relationship are among the most unsettled, important and difficult in the modern law of tort, as is amply demonstrated by recent cases of the highest authority including *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510, *Various Claimants v The Institute of the Brothers of the Christian Schools* [2013] 2 AC 1, *Cox v Ministry of Justice* [2016] AC 660 and *Armes v Nottinghamshire County Council* [2018] AC 335. Notoriously, the existence and scope of an asserted duty of care is intensely fact sensitive. Despite the quantity of the evidence that has been put in for these applications, there are obvious gaps – quite apart from the fact that none of the evidence has yet been tested. To give one example only: the Claimants' case focuses intently upon STASCO's obligation to devise and implement the SMS for the vessel. The Defendants have put in evidence to suggest that they complied with their obligations in respect of the SMS because they have certificates which say that they did. But the actual SMS is not before the court. It is therefore quite impossible for the court to form an independent judgment about its contents and whether it was sufficient. Furthermore, I have already referred to the fact that the Claimants have not yet addressed the extent to which their claims are or may be claims for pure economic loss: see [56] above. That being so, warning bells ring loud when it is suggested that the Court should make definitive rulings on the existence or scope of duties of care in tort based on either assumed or pleaded facts. Further warning bells ring when the Court is told that no Technical Manager of a vessel has previously been held liable for damage caused to third party Claimants.

194. I do not exclude the possibility that, in some cases, the facts so clearly lie within or well outside established areas and categories of duty that questions of duty and liability may be resolved on interim applications; but in my judgment the interrelationship of the international codes and provisions upon which the Claimants rely and the "merely" contractual basis which the Defendants trenchantly emphasise do not fall within those categories of case. I am left in the position that I cannot exclude the reasonable prospect that the circumstances upon which the Claimants rely may give rise to relevant enforceable duties for the purposes of the law of tort. I therefore proceed on that basis.

Is the claim as articulated in the draft Amended Particulars of Claim against STASCO a new claim within the meaning of s. 35 of the Limitation Act 1980 and CPR 17.4(2) when compared with the claim in the original Particulars of Claim?

195. Yes. The scope of the new facts that are essential to found the claim as articulated in the Amended Particulars of Claim is the primary indicator. Those new facts go to the root of the claim as now advanced that a duty of care was owed by STASCO in tort. In summary, the original Particulars of Claim were based upon the incorrect

allegation that STASCO was the bareboat charterer of the vessel, from which all else appeared to follow. Now, the existence of a duty of care is said to result from STASCO's status as Technical Manager, Company, DOC Holder and Operator of the vessel and a complex scheme of international provisions that are said to be the consequence of that status. The proposed amended claim cannot properly be regarded as mere particularisation of the original formulation and claim because STASCO's status (other than as bareboat charterer) formed no part (let alone an essential part) of the original formulation. The material change in the essential features of the claim as originally pleaded and as now set out in the proposed Amended Particulars of Claim demonstrate that the new pleading introduces a new cause (or new causes) of action.

Is it reasonably arguable that the proposed amendment is being sought outside the applicable limitation period?

196. Yes, as is rightly conceded for the reasons set out above. The only question, as before, is whether there are any Claimants for whom the proposed amendment is *not* being brought outside the applicable limitation period and, if so, how many they may be.

Does the new cause of action (or do the new causes of action) arise out of the same or substantially the same matters as are already in issue in the proceedings?

197. Subject to the question whether the principles explained in *Goode v Martin* assist the Claimants, I would hold that the new cause (or causes) of action alleged against STASCO in the draft Amended Particulars of Claim do not arise out of the same or substantially the same facts as those previously pleaded in the original Particulars of Claim. First, as identified above, the essential facts that must be proved to establish the case as now proposed go far beyond the essential facts that were originally pleaded. Second, the disparity between the essential facts that must be proved to establish the case as now pleaded cannot reasonably be described as "minor differences likely to be the subject of enquiry but not involving any major investigation" or inessential differences that are merely collateral to the success of the new case: see [162] above. Furthermore, the new case requires STASCO after the expiry of the limitation period to engage in a detailed enquiry of the conduct of those on board the MV Northia that goes well beyond what was required by the original pleading: see [163] above.

198. It may be argued that the reassessment of the Claimants' case against STASCO was provoked by Mr Taylor putting in evidence that STASCO was not the bareboat charterer of the vessel and that its only involvement was as the contractually engaged "Technical Manager" for the owner. Since the draft Amended Particulars of Claim followed that reassessment, it may be said (though more tenuously) that the new facts "arise from" his statement that STASCO was the Technical Manager.

199. However, if one considers the principles underlying *Goode v Martin*, I would not accept that they are intended to cover the present case. In *Goode v Martin* itself, no new facts were being introduced by the Claimant over and above what had been introduced by the Defendant: "she merely wants to say that if the defendant succeeds in establishing his version of the facts, she will still win because those facts too show that he was negligent … .": see [164] above. Here the Claimants wish to go well

beyond Mr Taylor's statement that STASCO contracted to act as Technical Manager and, when acting in that capacity, acted as the owner's agent. Nor can it be said that STASCO put more than a small fraction of the facts upon which the Claimants now wish to rely in issue: see [165] above. The subversion of the intended effect of the limitation defence that follows is at least arguably unfair when what has happened can best be characterised as a wholesale reassessment (at least arguably out of time) of a previously misconceived basis of claim.

200. I would therefore hold that the new cause(s) of action that the Claimants set out in the proposed Amended Particulars of Claim do not arise out of the same or substantially the same facts as those pleaded in the original Particulars of Claim.

Discretion

201. It follows that there is no discretion to allow the amendments against STASCO to the extent that they are statute barred. If I had concluded that Mr Taylor's evidence had effectively put all or substantially all facts in issue, so that the Court had a discretion to allow the amendments even if statute barred, the absence of unfairness as described by Sales LJ would support an exercise of discretion in the Claimants' favour to allow the amendments. However, there are other features that militate against allowing the amendments. First is their sheer extent. Second, no good reason has been given for the failure to identify the new case well before the expiry of the limitation period. Third, more generally, is the absence of any significant efforts to obtain relevant information or documents from the Defendants or publicly available sources before the expiry of the limitation period. Fourth, it would deprive STASCO of an accrued limitation defence against some (and, arguably, all) Claimants. On balance, therefore, I would be inclined to refuse the application, leaving it to the individual Claimants to have protected themselves in the ways identified by the Court of Appeal in *Chandra v Brooke*. Once again the alternative - giving permission but subject and without prejudice to the Defendant having permission to plead and prove all matters of limitation at the trial - would also have its attractions.

Interim Conclusion on the Application to amend the Particulars of Claim against STASCO

202. The same problem exists as before: how to do justice between the Claimants and the Defendants when, although it is reasonably arguable that the proposed amendments are being sought outside the applicable limitation period for all Claimants, that issue cannot be determined now and there could, at least in theory, be some Claimants for whom a six-year limitation period has not yet expired. Adopting the same approach by reference to notional Action A and Action B (with suitable adjustment of dates), permission would be refused in Action A but granted in Action B.

The Amendments to the Claim Form proposed against SNEPCO

203. The application to amend the Particulars of Claim as against SNEPCO can be addressed more shortly. The original Particulars of Claim alleged that SNEPCO owned or controlled the Bonga facilities: [1] and [3]. It asserted claims in negligence, nuisance, trespass and *Rylands v Fletcher* on the basis of SNEPCO's control of and responsibility for the facilities, with alternative claims, based on SNEPCO's alleged position as licence holder, under Nigerian statutory provisions: [2], [10], [13], [37], [41]

204. The draft Amended Particulars of Claim maintains the allegation that the facilities including the flexible flowline are owned and/or controlled by SNEPCO: [1]. It abandons the claim alleging that SNEPCO was the licence holder, which leads to extensive deletions of provisions that were previously alleged to be relevant: [2] et seq. Instead, it adopts the evidence of Ms Olafimihan that SNEPCO was the contracted operator of the Bonga facility and therefore responsible for health and environmental safety and stopping the spread of oil slicks: [7]. On this basis it is alleged that SNEPCO owed the Claimants a duty of care to prevent or minimise oil spills during the loading of oil onto tankers: [7(h)], [58].

205. When pleading particulars of negligence against SNEPCO at [73(1)], allegations in the original Particulars of Claim that SNEPCO (a) failed to maintain the Bonga facilities in good repair, (b) failed to safeguard against carelessness on the part of staff engaged in the transfer of oil and (c) failed to provide adequate supervision and equipment are all deleted. In their place are newly formulated allegations that SNEPCO (a) failed to carry out checks or inspections on the flexible flowline immediately before loading, (b) failed to undertake annual or routine maintenance of the flexible flowline, (c) failed to ensure the flexible flowline was properly used, handled or stored, and (d) failed to pressure test the flexible flowline. Further allegations from the original Particulars of Claim that SNEPCO failed to cap and contain the flow of spilled oil or to limit or contain the extent of the leakage are broadly retained. New allegations are added, namely that SNEPCO failed to implement a safe management system as required under the ISM Code and failed to provide adequate training and supervision for its operatives.

206. Adopting the same approach as before, I would answer the relevant questions as follows:

    i) The draft Amended Particulars of Claim disclose the basis for a claim against SNEPCO that has reasonable prospects of success. The Defendants, rightly in my view, did not argue the contrary. SNEPCO's operational control of the Bonga facilities, including the flexible flowline, at least arguably gives rise to a duty of care on the part of SNEPCO to prevent physical loss and damage caused by failure of its equipment;

    ii) The claim as articulated in the draft Amended Particulars of Claim against SNEPCO differs from the original claim because it abandons the claim based on proving that SNEPCO was the licence holder and replaces it with the claim based on proving that SNEPCO was the operator of the facility. That said, both the original and draft amended Particulars of Claim have in common the allegation that SNEPCO "controlled" the Bonga facility. To my mind, that is the dominant allegation, because both the original and draft amended formulations of the case against SNEPCO are founded on the notion that SNEPCO controlled the Bonga facility and was therefore responsible for its safe operation. Both as originally formulated and in the draft amended formulation, the essential fact is that SNEPCO had operational control of the Bonga facility: whether it had that control as owner, licence holder or operator is of secondary importance, though different legal consequences might flow from one basis of control rather than another. I would therefore, with some hesitation, hold that the change in the alleged role of SNEPCO can be regarded

as particularisation of the existing case, in contrast to the position in relation to STASCO where the change is much more fundamental;

iii) It is reasonably arguable that the proposed amendment is being sought outside the applicable limitation period. The Claimants' concession and my reasons set out above apply equally to the proposed SNEPCO amendments;

iv) If I were wrong in my conclusion that the draft Amended Particulars of Claim does not introduce a new claim, I would hold that the new claim arises from the same or substantially the same matters as are already in issue in the proceedings, for two reasons. First, no major investigation by SNEPCO would be occasioned by the change, since it would have to investigate the underlying allegation of control in any event. Second, the change to plead that SNEPCO was the operator appears to arise directly from the evidence of Ms Olafimihan that SNEPCO, though not the licence holder, was the contractual operator and, for that reason, in control of the Bonga facilities. It can reasonably be said, therefore, that SNEPCO's position as operator has been put in issue in the proceedings by SNEPCO itself;

v) On this basis, the Court would have a discretion to permit the amendments against SNEPCO and I would do so. The main substance of the claim is the same as before and, if the amendments were disallowed, the Claimants would still be entitled to pursue their original plea that SNEPCO controlled the Bonga facilities and therefore owed a duty of care to the Claimants;

vi) This conclusion is of course subject and without prejudice to the other objections that the Defendants wish to place in the path of a claim against SNEPCO being pursued in the United Kingdom, to which I will turn in due course.

The Defendants' Jurisdiction Applications

207. This and the following sections of this judgment are subject and without prejudice to the findings I have already made about limitation, its consequences and whether or to what extent amendments should be allowed.

208. The central tenets on which the Defendants rest their jurisdiction applications are that:

i) There is no real issue to be tried against STASCO for the purposes of service out of the jurisdiction upon SNEPCO. Accordingly the order for service out should be set aside; it would also follow that there should be reverse summary judgment in favour of STASCO;

ii) The Claimants' reliance on the Recast Brussels Regulation to found jurisdiction in England and Wales is an abuse of EU Law and should therefore not be allowed;

iii) The Court should exercise its jurisdiction to impose a stay on these proceedings pursuant to Article 34 of the Recast Brussels Regulation; and

iv) There was material non-disclosure in the application to serve out, as a result of which the order for service out should be set aside.

Founding Jurisdiction

209. Article 4(1) of the Recast Brussels Regulation provides that:

> "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

STASCO is domiciled in England. The English Court therefore has jurisdiction over the Claimant's claims against STASCO. The effect of the mandatory terms of Article 4(1) is that jurisdiction that is vested in the English Court by the article may not be challenged on *forum non conveniens* grounds: see *Owusu v Jackson and Others* (Case C-281/02) [2005] QB 801, *Vedanta Resources PLC v Lungowe* [2019] UKSC 20 at [16].

210. Article 6(1) of the Recast Brussels Regulation provides:

> "If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall … be determined by the law of that Member State."

SNEPCO is domiciled in Nigeria, which is not a Member State. The jurisdiction of the English Court is therefore to be determined by the law of England.

211. The relevant applicable law is now set out at paragraph 3.1(3) of Practice Direction 6(B), which provides:

> "The claimant may serve a claim form out of the jurisdiction without the permission of the court under rule 6.36 where –
>
> …
>
> (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

212. The general approach to be adopted by the Court on an application for permission to serve a foreign defendant out of the jurisdiction was summarised by the Privy Council in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [71]:

> "On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: *Seaconsar Far East Ltd v Bank Markazi*

> *Jomhouri Islami Iran* [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i e a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e g *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457, para 24. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: … . Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. "

213. More recently, the position where a claimant relies upon the "necessary or proper party" test was summarised by Lord Briggs (with whom the other members of the Supreme Court agreed) in *Vedanta* at [20]:

> "The express terms of the Practice Direction set out only part of what a claimant relying upon the necessary or proper party gateway must show. It is common ground that, by reference to those terms and well-settled authority, the claimant must demonstrate as follows:
>
> (i) that the claims against the anchor defendant involve a real issue to be tried;
>
> (ii) if so, that it is reasonable for the court to try that issue;
>
> (iii) that the foreign defendant is a necessary or proper party to the claims against the anchor defendant;
>
> (iv) that the claims against the foreign defendant have a real prospect of success;
>
> (v) that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum."

214. When considering whether there is "a real issue to be tried" the test to be applied is effectively the same as the test for summary judgment: see *Altimo* at [71], cited above. In *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191 at [33] Simon LJ posed the same question slightly differently: "is the claim bound to fail, which is essentially the Part 24 test, whether the claimants have no real prospect of succeeding on the claim?"

215. The second requirement identified by Lord Briggs, that it is reasonable for the court to try that issue, has been widely debated. However, provided the claimant can show a good arguable case, it is clear that the fact that the anchor defendant is sued for the sole or predominant purpose of bringing the foreign defendant into the action within the jurisdiction is not fatal to an application to serve the foreign defendant out of the jurisdiction, though it may be relevant at a later stage when the Court comes to exercise its discretion: see *Altimo* at [79] and *Erste Group Bank AC v JSC "VMZ Red October" and others* [2015] EWCA Civ 379 at [43]. Equally, where jurisdiction against the anchor defendant is founded on Article 4 of the Recast Brussels Regulation, it would be inappropriate and wrong to allow an argument that this second requirement is not satisfied if the argument is founded on what would in other circumstances be *forum non conveniens* grounds. To allow such an argument would subvert the principle established by *Owusu* and *Vedanta*: see [209] above.

216. For the purposes of these applications the Defendants accept that, if their other arguments fail, SNEPCO would be a proper party to the claim against STASCO. In my judgment that concession is correct and I say no more about this requirement. Equally, while reserving their position for later, they accept that, subject to limitation questions, the claims against SNEPCO have a real prospect of success on the merits. Once again, that concession is correct and I say no more about the fourth requirement.

217. The fifth requirement was considered at length in *Vedanta* at [66]-[87], having recorded at [16] that Article 4(1) as explained by *Owusu* "conferred a right on any claimant (regardless of their domicile) to sue an English domiciled defendant in England, free from jurisdictional challenge upon *forum non conveniens* grounds, even where the competing candidates for jurisdiction were England (part of a member state) and some other non-member state such as, here, Zambia." In such circumstances:

> "In cases were the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction." [See [70]]

Later in his speech, at [84], Lord Briggs referred to the risk of irreconcilable judgments in a case where jurisdiction against the anchor defendant is founded on Article 4 of the Recast Brussels Regulation as being "a trump card" when the court comes to consider the question whether to permit service out of the jurisdiction on a foreign defendant.

Abuse of EU Law

218. The Defendants' submission that reliance on the Recast Brussels Regulation to found jurisdiction in England and Wales is an abuse of EU Law and should therefore not be allowed is materially identical to a submission made to and rejected by the Supreme Court in *Vedanta*. At [40], Lord Briggs addressed the consequences of the decision in *Owusu*:

> "The first is that, leaving aside those cases where the claimant has no genuine intention to seek a remedy against the anchor defendant, the fact that Article 4 fetters and paralyses the English forum conveniens jurisprudence in this way in a necessary or proper party case cannot itself be said to be an abuse of EU law, in a context where those difficulties were expressly recognised by the Court of Justice when providing that forum conveniens arguments could not be used by way of derogation from what is now Article 4 . The second is that to allow those very real concerns to serve as the basis for an assertion of abuse of EU law would be to erect a forum conveniens argument as the basis for a derogation from Article 4, which is the very thing that the Court of Justice held in *Owusu v Jackson* to be impermissible"

Article 34 of the Recast Brussels Regulation

219. The provisions of the Regulation that are most relevant to the Defendants' application for a stay are Recitals 23 and 24 and Articles 4(1), 29, 30, 33 and 34, of which I have already set out Article 4(1) at [209] above.

220. Recitals 23 and 24 state:

> "(23) This Regulation should provide for a flexible mechanism allowing the court of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.
>
> (24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time."

221. Articles 29, 30, 33 and 34 provide:

> "SECTION 9
>
> ***Lis Pendens – related actions***
>
> *Article 29*
>
> 1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same

parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Article 30

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

…

Article 33

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member state may stay the proceedings if:

(a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;

(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or

(c) the continuation of the proceedings is required for the proper administration of justice.

> …
>
> *Article 34*
>
> 1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
>
> 2. The court of the Member State may continue the proceedings at any time if:
>
> (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
>
> (b) the proceedings in the court of the third State are themselves stayed or discontinued;
>
> (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
>
> (d) the continuation of the proceedings is required for the proper administration of justice."

222. Articles 29 and 33 apply where proceedings in different jurisdictions involve the same cause of action and are between the same parties. Articles 30 and 34 apply where proceedings in different jurisdictions are "related" without satisfying the additional prerequisites for the application of Articles 29 and 33 (i.e. the same cause of action and between the same parties). Article 30(3) provides a definition of when actions shall be deemed to be "related" for the purposes of that article: they are related where they are "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from different proceedings." There is no such definition of "related actions" for the purposes of Article 34, but the discretion to stay an action under that article does not arise unless "it is expedient to hear and determine the related actions to avoid the risk of irreconcilable judgment resulting from separate proceedings": see Article 34(1)(a). Although there is a semantic argument that this means that cases falling within Article 34(1)(a) are a subset of "related actions", I cannot conceive of circumstances where this would

matter: the expediency criterion is a pre-requisite for the exercise of the court's discretion both under Article 29 and under Article 34.

223. Because Articles 30 and 34 do not require the proceedings to involve the same cause of action and to be between the same parties, it is plain that the "risk of irreconcilable judgments" to which Articles 30(3) and 34(1)(a) refer cannot require that there be a risk that one judgment may give rise to an issue estoppel affecting the other. I am not aware of any binding authority that defines what would and would not amount to "irreconcilable judgments" for the purposes of Articles 30 and 34. In *Blomqvist v Zavarco* [2016] Ch 128, Mr David Donaldson QC (sitting as a Deputy High Court Judge) said obiter that:

> "The premise of the first pre-condition is that the actions are related in the sense that they may result in irreconcilable judgments if allowed to proceed in parallel. Though that may arise from findings of fact as well as decisions of law: see *Gascoigne v Pyrah [1994] IL Pr 82* , para 42, they would have to be points which would or might form an essential part of the basis of the judgments, effectively part of their res judicata effect, absent which they would not be irreconcilable."

224. I think this passage means that not all points of difference would render judgments "irreconcilable" within the meaning of the Article; rather, the points of difference (whether arising from findings of fact or of law) would have to "form an essential part of the basis of the judgments", such as would (if all other prerequisites were satisfied) be capable of giving rise to an issue estoppel by operation of res judicata. Although I would not exclude the possibility that there might at least in theory be points of difference which do not meet this standard but which would be so significant as to make it expedient to hear the related actions together, I would adopt the approach advocated in *Zavarco* as a useful starting point when considering whether there is a risk of irreconcilable judgments within the meaning of the article. What appears clear from the different language used for Articles 29 and 33 on the one hand and for Article 30 and 34 on the other is that there may be a risk of irreconcilable judgments within the meaning of Article 34 even though the parties and the causes of action are not the same in the separate proceedings being considered on an application to stay.

225. The decision of the Court of Appeal in *PJSC Commercial Bank Privatbank v Kolomoisky* [2019] EWCA Civ 1708 was handed down just after the hearing of the present applications. It establishes that "expedient" in Article 34(1)(a) means that it is desirable that the actions should be heard together and does not mean or imply that the actions must be capable of being consolidated or heard together in one jurisdiction: see [191]. However, the fact that actions could not be consolidated and heard together is relevant to the exercise of the Court's discretion and, in the absence of some strong countervailing factor, will be a compelling reason for refusing a stay: see [192], [210]. This is not least because, if the proceedings will not be heard together in the third state, there remains the risk of irreconcilable judgments: see [210].

Issue 7: Does the English Court Have Jurisdiction to Try the Case Against STASCO and, if so, Should There Be Reverse Summary Judgment in its Favour?

226. It is common ground that Article 4(1) founds jurisdiction for the claim against STASCO. In the light of *Vedanta*, it is not an abuse of the process or of EU Law for the Claimants to bring the claim against STASCO within the jurisdiction of its domicile and reliance on the Article cannot be challenged on *forum non conveniens* grounds.

227. The Defendant submits that there is no real issue to be tried against STASCO. I have explained, albeit briefly, why I do not consider that it is possible to reach reliable conclusions at this stage on whether or not STASCO owed a duty of care to the Claimants and, if so, what the scope of that duty might be: see [191] above. Whether or not STASCO had or retained legal responsibility for the operation of the Northia goes to the heart of all of the claims that the Claimants now wish to bring against STASCO. It is therefore impossible for the Court at this stage to reach a valid conclusion that there should be reverse summary judgment in its favour. Subject to questions of limitation, therefore, the English court has jurisdiction to try the claims against STASCO.

Issue 8: Should the Claim Against STASCO be Stayed Pursuant to Article 34 of the Recast Brussels Regulation?

228. In their written submissions the Defendants rely upon a number of claims brought by groups of claimants or communities before various courts in Nigeria and one action of rather different complexion, known as the Federal Enforcement Action ["FEA"]. They submit that the English proceedings against STASCO should be stayed, at least temporarily, in order to avoid the risk of irreconcilable judgments being reached in England and in one or more of the Nigerian proceedings by waiting for the determinations of the Nigerian Courts and then taking proper account of those determinations in disposing of the English proceedings. The Defendants submit that, by the imposition of a stay, the court would avoid "a course of conflict with the courts of a friendly state" and avoid "cutting across executive actions of the Nigerian State in relation to property situated within its territory" which the Defendants submit would be in breach of the act of state doctrine and considerations of comity.

229. The Defendants do not submit that the Claimants should now bring their claims against STASCO in Nigeria or that, if they were able to do so, the claims against STASCO could and would be consolidated or heard together with existing claims and proceedings now pending in Nigeria. Quite apart from the limitation difficulties that the Claimants would inevitably now face if they were to institute proceedings in Nigeria, that seems to me to be an entirely realistic stance for the Defendants to adopt. I therefore merely mention in passing that no detailed argument was advanced as to whether the Nigerian courts could or would accept jurisdiction over claims by these Claimants against STASCO and that I am not in a position to decide that question one way or another. Subject to one point, the jurisdiction of the Nigerian courts over STASCO is both moot and irrelevant because of the way in which the Defendants seek to justify the imposition of a stay of the present proceedings. The one exception is that STASCO is a named defendant in one Nigerian action where the claim has been struck out without STASCO having to take any steps. I accept that it is at least plausible that STASCO would seek to challenge jurisdiction if the strike-out were to

be reversed on appeal. This is, however, a point of limited significance in the overall context of this application.

230. The Defendants' oral submissions on this issue were clearly and cogently advanced by Dr Blake. He concentrated his submissions on the FEA, without abandoning reliance upon the other actions. I therefore deal with and take into account all the actions upon which the Defendants have relied. However, for reasons that appear below, I consider that Dr Blake was right to concentrate on the FEA.

231. The present state of the various Nigerian proceedings upon which the Defendants rely is as follows:

i) *The FEA*:

a) This action is before the Federal High Court in Abuja and was issued on 8 April 2016. It has a number of characteristics that distinguish it from the other actions upon which the Defendants rely;

b) The First Plaintiff is the Federal Republic of Nigeria, which sues as the sovereign state "vested with powers to make laws for the peace, order and good governance of the Federation of Nigeria." The Second Plaintiff is the Attorney General of Nigeria who sues as "the Chief Law officer of the 1st Plaintiff, constitutionally empowered to institute, undertake and defend the 1st Plaintiff and its agencies, including the 3rd Plaintiff, in matters relating to the functions, power and duties bestowed on them by an act of the National Assembly." The Third Plaintiff is NOSDRA, which sues for itself and also on behalf of 285,000 persons/Nigerian citizens from 350 communities and satellite villages said to be affected by Bonga Oil Spills of December 2011. The Third Plaintiff sues "as a statutory agency of the 1st Plaintiff with responsibility for preparedness, detection and response to all oil spillages within the territorial jurisdiction of Nigeria." It is said to have power "to assess damage and to ensure that appropriate remedial action is taken for payment of compensation by owner and/or operator of an oil spill facility for the damage caused to the environment, the communities, persons, businesses and properties."

c) There is inevitable overlap between the 350 communities for whose benefit the FEA is brought and the 457 Communities in the present action. Both cohorts are widely spread across the Delta and Bayelsa States such that remediation and compensation as sought by the FEA is likely to benefit at least some of the 457 Communities. No detailed analysis of the duplication of communities has been carried out.

d) The Defendants are SNEPCO and three other Shell companies (but not STASCO) and a Dutch company that is alleged to hold a share in SNEPCO;

e) The FEA involves claims for:

i) Declarations that the Plaintiffs (acting through the Third Plaintiff) are vested with powers to ensure compliance with environmental legislation, and "for the assessment of damage caused by oil spillage for appropriate remedial action to be taken for restoration of the environment and compensation paid by and owner/operator of an oil spill facility for the damage caused to persons, business or property in the affected communities and satellite villages."

ii) An order directing the payment of over US$ 3.6 billion to the Plaintiffs against the Defendants "which sum represents compensation to the affected persons in the communicates and satellite villages ... for the damage and impacted ecological resources by the [December 2011 Spill] as well as punitive damage in accordance with international best practice as quantified in the valuation report on damage prepared by Chartered Valuers, Messrs Dan Ekotogbo and Co.";

iii) An order for administrative costs in the sum of US$360 million;

iv) An order for the US$ 2.5 billion "for restitution and restoration of the damage, desecration and devastation of the exclusive Economic Zone … occasioned by the negligent conduct of the Defendants during the operation of the Bonga Oil Field …";

v) Determination of various questions including whether the Plaintiffs operating through NOSDRA have the power to assess and require payment of damages and costs as outlined above.

f) Causes of action in negligence and *Rylands v Fletcher* are referred to in the originating process and supporting affidavit.

g) As this summary suggests, what underlies the FEA is that NOSDRA commissioned Chartered Surveyors to assess the damage caused by the December 2011 Spill. Those surveyors came up with a figure of US$ 3.6 billion representing compensation to the 350 communities and satellite villages identified as having been impacted or liable to be impacted. Accordingly, the Third Plaintiff notified the Defendants by letter dated 19 December 2014 that they were required to pay US$ 3.6 billion "representing compensation to the 350 communities and satellite villages impacted by the Bonga oil Spill disaster and punitive damage (which is to be paid to the plaintiffs as sanction totalling $1.8 Billion Dollars from the said sum) to deter future occurrence of such dastardly act." Elsewhere this sum is referred to as a fine levied by NOSDRA;

h) SNEPCO filed its defence with supporting witness statements on 29 April 2019. The defence challenges the claim on both procedural and substantive grounds. It challenges the locus standi of the Plaintiffs to maintain the action, the vires of the Court to entertain the action, and submits that the action is an abuse of process. For some unexplained

reason, it appears that the Court Bailiff had not served SNEPCO's defence upon the Plaintiffs by the time of the hearing of the present applications, though there is a disagreement between the parties (which I am not in a position to resolve) about whether it is usual for a party to serve the other parties directly or to rely upon the Court Bailiff. A hearing was due to be held on 14 October 2019 but, on the assumption that it occurred, there is no information before the court about what happened. At best it appears that SNEPCO's defence will have been served some 3 ½ years after the FEA was commenced;

i) SNEPCO brought a separate constitutional motion before the Federal High Court of Nigeria in Lagos, challenging NOSDRA's power to issue penalties. On 24 May 2018 the Federal High Court held that NOSDRA's power to issue penalties does not violate the provisions of the Nigerian Constitution. That decision is now subject to an appeal to the Court of Appeal in Lagos. There is a dispute about how long such an appeal will take to come on. In the meantime, it is not clear what impact the fact of the impending appeal will have on the progress of the FEA, if any. It is Mr Obisike's evidence that the two actions are separate and distinct and that there has been no suggestion that the FEA should be halted or slowed down because of the separate judicial review proceedings.

ii) *The "HRH Victor Disi Action":*

a) This action is before the Federal High Court of Warri and was commenced on 19 December 2016. It is brought by three named plaintiffs representing numerous individuals and communities said to be affected by the December 2011 Spill. The individual plaintiffs are not individual Claimants in the present proceedings. It is the evidence of Mr McQuitty for the Defendant that 80% of the 350 communities on behalf of whom the HRH Victor Disi Action is brought are also among the 457 Communities. The Claimants accept that there is some overlap but not to the extent of 80%. I make no finding about the proper percentage. According to the evidence of Mr McQuitty, which I accept for present purposes on this point, there is a substantial geographical overlap between the areas within which the communities whose interests are represented in each action, both groups of communities being located in the Delta and Bayelsa States;

b) Both SNEPCO and STASCO are named as Defendants. This is the only Nigerian action in which STASCO is named as a Defendant;

c) The HRH Victor Disi Action seeks damages allegedly arising from: (i) loss of fishing and economic rights, despoliation of ancestral fishing grounds, destruction of farmlands, fishing ponds, man-made canals, sacred objects and fishing utensils; and (ii) exemplary damages for alleged failure to remediate;

d) The cause of action relied upon in the HRH Victor Disi Action appears to be a claim in negligence that is primarily directed against SNEPCO.

It does not appear from the Statement of Claim what STASCO's involvement or responsibility for the spill may have been;

e) SNEPCO contested jurisdiction on the ground that the case was an abuse of process in light of other pending actions brought by the plaintiff communities in other actions. On 4 July 2018 the claims were struck out by the Federal High Court of Warri because of (i) the Plaintiffs' failure to obtain the Warri High Court's leave to issue and serve the Writ of Summons out of the jurisdiction on SNEPCO and (ii) defective signature of the Writ of Summons by the Plaintiffs. STASCO had been served with the proceedings but had not been required to take any step by the time the action was struck out;

f) By 26 April 2019, the Plaintiffs had issued an appeal against the strike-out of the action but the appeal was at a preliminary stage. I have no further information about the progress of that appeal. As I have noted above, I accept the Claimants' submission that, if the appeal against the current strike-out is successful, it is plausible that STASCO will take any jurisdiction point that is open to it.

iii) *The "Ogunu Action":*

a) This action is before the Yenagoa Division of the Federal High Court. It was issued on 19 December 2016. It is brought by 24 named plaintiffs representing 125 communities said to be affected by the December 2011 Spill. The individual claimants are not individual Claimants in the present proceedings. It is the evidence of Mr McQuitty that at least 6 of the communities on behalf of which the Ogunu Action is brought are also amongst the 457 Communities. According to the evidence of Mr McQuitty, which I accept for present purposes on this point, there is substantial geographical overlap between the areas within which the communities whose interests are represented in each action, both actions including communities located in the Delta State;

b) SNEPCO is the sole Defendant;

c) The Ogunu Action claims Naira 850 Billion as special, punitive and general damages;

d) The cause of action relied upon is negligence in the operation of the Bonga facility, in failing to take sufficient precautionary measures to prevent spilled crude oil being carried into creeks and swamps, and in failing to clean up the spillage;

e) The Ogunu action was struck out on 26 February 2019 for want of diligent prosecution. The Plaintiffs did not appear on the application and it appeared to the Court that they had abandoned the proceedings. There is no indication that the Plaintiffs have appealed or have any intention of doing so.

iv) *The "Spiff Action"*:

a) This action is before the Federal High Court of Port Harcourt and was commenced by originating summons dated 26 August 2015. It is brought by 65 named plaintiffs representing 51 communities and co-operative societies said to be affected by the December 2011 Spill. It is the evidence of Mr McQuitty that at least 1 of the communities claiming in the present proceedings is a claimant in the Spiff Action;

b) SNEPCO is a defendant, named as a joint venturer in the operation leading to the December 2011 Spill. Other Shell companies are also joined as defendants on the basis of alleged control of SNEPCO or as being the ultimate parent company. STASCO is not a defendant;

c) The Spiff Action is framed as a claim for a declaration that the first Defendant (NOSDRA) is the statutory body having the power to ensure compliance with all existing legislation and having the power to ensure that appropriate restoration of the environment is undertaken by the owner of an operator responsible for an oil spill. Apparently on that basis it also claims US$ 1,800,095,603 from SNEPCO and the other Shell company defendants (and other defendants) "as compensation assessed by [NOSDRA]" arising out of the 2011 spill and an order compelling the SNEPCO, the other Shell defendants (and other defendants) to restore the environment. In the alternative the Claimants claim an order fixing the amount of compensation payable by the defendants. It is apparent that this action is not a conventional claim for damages, being more in the form of a public law claim for declarations arising out of NOSDRA's alleged power to assess compensation;

d) It appears that this claim is based on the non-punitive element of compensation assessed and imposed by NOSDRA, though this is not entirely clear. If this is right, it seems entirely duplicative of the FEA with the added complication that the action is brought by private individuals rather than by the FEA plaintiffs ;

e) At the time of the hearing the Court was told that the Spiff Action was reserved for judgment on 7 October 2019, though it was not clear whether this was to be a judgment on all issues or on preliminary objections only. No details of the preliminary objections have been provided, though Mr Ekhorutomwen has been informed that SNEPCO and other Defendants objected on the basis that the December 2011 Spill did not reach land; nor is the result of the judgment scheduled for 7 October 2019 known to this court.

v) *The "Mark Action"*:

a) This action was commenced by writ of summons issued in the Yenagoa Division of the Federal Court on 25 February 2015. It is consolidated with six other actions. It is brought by eight named plaintiffs representing eleven fishing co-operative societies said to be affected by

the December 2011 Spill. One of those communities is included in the 457 Communities. The communities that are the subject of the Mark Action are located at the South-eastern tip of Delta State;

b) SNEPCO is named as a Defendant to the Mark Action, the other defendant being the Nigerian National Petroleum Corporation;

c) The Mark Action and other consolidated actions seek, in total, US$ 252.5 billion compensation and remediation. The writ in the Mark Action claims the Naira equivalent of £1.6 billion sterling;

d) The cause of action upon which the Claimants rely does not appear from the copy of the writ included in the papers for these applications;

e) The main pleadings in the Mark Action have been exchanged. There was a hearing scheduled for 6 May 2019 on the Claimants' application to adduce additional environmental evidence and SNEPCO's objection. Judgment was due on SNEPCO's objection on 5 November 2019. No further information is available to the Court.

vi) *The "Ogheye-Eghoroke Action"*:

a) This suit is before the Abuja Division of the Federal High Court and was commenced by writ on 19 December 2016. It is brought by various communities and one individual (acting on their own and in a representative capacity for others) concerned with the fishing industry who allege that they were affected by the December 2011 Spill. According to Mr McQuitty's evidence at least one of the communities involved in the Ogheye-Eghoroke Action is also named in the present proceedings. It is not suggested that there is any overlap of individual claimants;

b) SNEPCO and four other Shell companies (not including STASCO) are named as defendants. SNEPCO was never served with these proceedings;

c) The Ogheye-Eghoroke Action seeks, *inter alia*, US$ 31 billion as compensation for alleged damage resulting from the December 2011 Spill;

d) The cause of action relied on is breach of Nigerian statutory law and alleges failure to take adequate precautions to prevent pollution, contain pollution or to restore the area damaged by the spill;

e) On 10 December 2018 the Ogheye-Eghoroke Action was struck out for want of prosecution. There is no information to suggest that the Plaintiffs have tried or are trying to appeal against that strike-out.

vii) *The"Ekiozidijonathandiekedie Action"*:

a) This action is before the Yenagoa Division of the Federal High Court and was commenced by writ of summons on 10 September 2015. It is

brought by six named plaintiffs representing 113 communities located in the Bayelsa State and said to be affected by the December 2011 Spill and the July 2012 Spill. It is not alleged that any of the six named plaintiffs are individual Claimants in the present proceedings. According to Mr McQuitty at least 9 of the 457 Communities are also communities named in the Ekiozidijonathandiekedie Action;

b) SNEPCO is named as a Defendant, as are four other Shell companies (but not STASCO). SNEPCO has not been served with these proceedings;

c) The Ekiozidijonathandiekedie Action claims Naira 34.6 Billion in compensation for the damage caused by the two spills;

d) The Writ of Summons does not disclose the cause of action on which the Plaintiffs rely in the Ekiozidijonathandiekedie Action;

e) The Ekiozidijonathandiekedie Action was struck out for want of prosecution on 10 December 2018. There is no information before the Court to suggest that the Plaintiffs have tried or are trying to appeal that strike-out.

viii) *The "Churchill Action"*:

a) This action is before the Federal High Court of Port Harcourt and was commenced on 25 March 2015. It is brought by three named plaintiffs said to be affected by the December 2011 Spill. They are resident in Bayelsa State and involved in the fishing industry. It is not alleged that they are Claimants in the present proceedings;

b) SNEPCO is the sole Defendant;

c) The endorsement on the writ claims Naira 708 million in damages;

d) The writ states that the Plaintiffs base their claim to damages on "the relevant laws inforce (sic) and the Provisions of the Oil Pipelines Act, Laws of the Federation 2004 and other such Regulations";

e) It is apparent that the Plaintiffs needed an order to serve out of the jurisdiction of the Port Harcourt Court because SNEPCO's place of residence is in Lagos. The latest available information is that the Churchill Action was struck out "on jurisdictional grounds" on 10 April 2019. There is no information available to the Court to suggest that the Plaintiffs either have tried or are trying to appeal the strike-out.

ix) *The "Joshua Action"*:

a) This action is before the Federal High Court of Port Harcourt and was commenced on 25 March 2015. It is brought by two named plaintiffs said to be affected by the December 2011 Spill. It is not alleged that the Plaintiffs in the Joshua Action are Claimants in the present proceedings;

b) The Claim was for Naira 647 million in damages;

c) The endorsement on the writ of the Plaintiffs' cause of action was in identical terms to the endorsement in the Churchill Action as set out above;

d) It appears from the available Court documents and evidence about this action that it followed the same course as the Churchill Action, being struck out on jurisdictional grounds on 10 April 2019. There is no information available to the Court to suggest that the Plaintiffs either have tried or are trying to appeal the strike-out.

x) *The "Sanderson Action"*:

a) This action was before the Federal High Court of Port Harcourt and was commenced by writ of summons on 18 April 2013. It was brought by two named plaintiffs on behalf of 1,500 individuals said to be affected by the December 2011 Spill;

b) The claim was for Naira 16 million in damages;

c) The cause of action endorsed on the writ was that damages were payable "in line with the provisions of the Oil Pipeline Act, Laws of the Federation, 2004 and other such Laws and Regulations";

d) On 14 January 2019 the Court dismissed the Sanderson Action on the basis that it was not properly constituted as a representative action; but the Court went on to consider the outcome if its conclusion on the first issue was wrong and held that the claim also failed on its merits. There is no information available to the Court to suggest that the Plaintiffs either have tried or are trying to appeal the judgment.

xi) *The "Johnson Action"*:

a) This action is before the Federal High Court of Port Harcourt and was commenced by writ of summons on 25 March 2015. It is brought by two named plaintiffs said to be affected by the December 2011 Spill. It is not suggested that they are Claimants in the present proceedings. They are resident in Bayelsa State;

b) SNEPCO is the sole Defendant;

c) The endorsement on the writ claims Naira 3.3 billion in damages;

d) The endorsement on the writ of the Plaintiffs' cause of action was in identical terms to the endorsement in the Churchill and Joshua Action as set out above;

e) It is apparent that the Plaintiffs needed an order to serve out of the jurisdiction of the Port Harcourt Court because SNEPCO is resident in Lagos. The latest available information is that the Johnson Action was struck out for want of prosecution on 3 November 2016. There is no

information available to the Court to suggest that the Plaintiffs either have tried or are trying to appeal the strike-out.

xii) *The "Adason Action*":

a) This action is before the Federal High Court of Port Harcourt and was commenced by writ of summons dated 25 March 2015. It is brought by two named plaintiffs said to be affected by the December 2011 Spill;

b) SNEPCO is the sole Defendant;

c) The endorsement on the writ claims Naira 720 million in damages;

d) The endorsement on the writ of the Plaintiffs' cause of action was in identical terms to the endorsement in the Churchill, Joshua and Johnson Actions as set out above;

e) The evidence of Mr Obisike is that the Adason Claim was struck out on 16 March 2016 as the Court upheld SNEPCO's preliminary objection "as to the validity of the plaintiffs' representative suit". No supporting documents to evidence the reason for the strike-out are provided. The reason given by Mr Obisike appears suspect as it does not appear from the writ of summons that the Plaintiffs sued in anything other than their personal capacity: there is no sign that they acted in a representative capacity. However, for present purposes I accept that the action was struck out in March 2016. There is no information available to the Court to suggest that the Plaintiffs either have tried or are trying to appeal the strike-out.

232. Leaving on one side the FEA for the moment, the situation of the other 11 actions may be summarised as follows:

i) 9 of the 11 actions have been struck out or dismissed on their merits. Only the Spiff Action and the Mark Action have not been struck out or dismissed;

ii) Of the 9 actions that have been struck out, there is no information to suggest that the Plaintiffs in 8 of them have tried or are trying to appeal the dismissal of their actions. The exception is the HRH Victor Disi Action where an appeal had been issued by 26 April 2019 but there is no information about the timing or outcome of that appeal;

iii) 4 of the actions that have been struck out (Churchill, Joshua, Johnson and Adason) appear to be related in that they were all issued in Port Harcourt and all adopt identical endorsements on the writ to outline the cause of action upon which they rely. No further inference can be drawn about the extent of any connection between the actions;

iv) While it may be technically correct to treat the actions that have been struck out or dismissed as "pending", there are degrees of plausibility to be attached to the likelihood of different actions being reinstated, simply because of passage of time. Thus the HRH Victor Disi Action is known to be subject to

appeal which may reinstate it. Of the other 8 struck out or dismissed claims, 4 (Ogunu, Churchill, Joshua, Sanderson) were struck out in 2019, 2 (Ogheye-Eghoroke, Ekiozidijonathandiekedie) in 2018, and 2 (Johnson, Adason) in 2016 and there is no information to suggest that steps are being taken to try to reinstate them. While that may be understandable in relation to actions that were struck out in 2019, the inference that actions are not being pursued increases with the passage of time since the actions were struck out;

v) It does not appear that any of the 11 actions were or are set up to be the equivalent of "lead" cases as understood in English procedural law. The Spiff, Mark and HRH Victor Disi Actions are brought in different divisions of the Federal High Court. The Spiff action appears to be based upon the NOSDRA determination rather than being constituted as a normal claim for damages that would necessarily involve investigation of all underlying facts. The risk of a judgment after full enquiry being irreconcilable with a judgment in the Spiff Action would therefore tend to be reduced. If and to the extent that the Spiff or the Mark Actions proceed to trial or any of the actions that are presently struck out are reinstated and proceed to trial, the prospect of irreconcilable judgments exists within the context of Nigerian litigation even leaving aside the future outcome of the FEA;

vi) In the HRH Victor Disi Action, SNEPCO challenged jurisdiction on the grounds that the case was an abuse of process in light of other pending actions brought by plaintiff communities;

vii) The HRH Victor Disi Action is the only action in which STASCO is named as a Defendant;

viii) None of the individual claimants in the 11 Nigerian proceedings are individual Claimants in the present proceedings;

ix) Of the 457 Communities listed as Claimants in these proceedings:

a) only six have been identified as claimants in the Ogunu Action;

b) only one has been identified as a claimant in the Spiff Action;

c) only one has been identified as a claimant in the Mark Action;

d) only one has been identified as a claimant in the Ogheye-Eghoroke Action;

e) only nine have been identified as claimants in the Ekiozidijonathandiekedie Action.

x) For these reasons the overlap between the other Nigerian cases and the English proceedings are relatively limited and the risk of the English court reaching a judgment that is irreconcilable with those of a Nigerian court or courts is reduced.

233. Turning to the FEA Action:

i) The action is primarily constituted as an action founded on the decision of NOSDRA to impose the compensatory and punitive "fine" of US$ 3.6 billion on SNEPCO. It is not clear to what extent determination of that action would involve an investigation of the facts surrounding the December 2011 Spill and its consequences; however

ii) So far as I can judge, SNEPCO's Defence challenges every conceivable aspect of the claim against it including (a) challenging the power of NOSDRA to impose the sanctions it did and the vires of the Plaintiffs to bring the claim and (b) challenging the factual basis of the assessment of damage. Specifically, the Defence denies the allegations of devastation and degradation of marine life and avers that the spill was quickly dispersed offshore without causing damage to the plaintiff communities. I therefore assume for the purposes of these present applications that SNEPCO will, if permitted by the Nigerian Court to do so, challenge the basic assertion that the December 2011 Spill caused damage to individuals and communities. To that extent there will be a factual overlap with the facts alleged in the present proceedings;

iii) On the information that is presently before the Court, the FEA does not require any consideration of STASCO's role since STASCO is not a party and the claim is based upon SNEPCO's failings and the imposition of the fine upon SNEPCO;

iv) On any view, therefore, the overlap between the FEA and the present proceedings (and consequently the risk of irreconcilable judgments) is limited.

234. It is a fact material to the exercise of the court's discretion on these applications that the Defendants in these proceedings rely upon the existence of the FEA as grounds for imposing a stay pursuant to Article 34 while at the same time SNEPCO is maintaining its root and branch opposition to the validity (as well as the factual merits) of the FEA. That is apparent both from the terms of SNEPCO's Defence in the FEA and also from the separate proceedings in Lagos challenging the right of NOSDRA to impose penalties.

235. There is a dispute between the experts on Nigerian Law in the present proceedings about whether or not the FEA is lawfully constituted. It would not be appropriate for the English court on these applications to try to reach a binding conclusion on this issue (even on an interim basis) given that (a) the evidence of the experts on Nigerian law in these proceedings has not been tested and (b) this is a fundamental issue on which the Nigerian Courts are going to have to reach a binding conclusion, either in the context of the FEA or in the context of the Lagos proceedings, or both. However, it is material to the exercise of the Court's discretion on the Defendants' application for a stay pursuant to Article 34 that the Defendants' expert, Mr Fagbohnulu, says that:

> "[the FEA] is a novel claim – of a type never before brought in Nigeria. It raises a number of difficult questions of both substantive law and procedure, which have never before been adjudicated by the Nigerian Courts. … However, it remains for the Abuja High Court (and any appellate courts subsequently seized) to determine whether the [FEA] is unmeritorious.

> Given the novelty of the issues raised, and the lack of any Nigerian law precedent in this area, I cannot (nor can any other expert) say definitively whether the Attorney General's claim will succeed. That being said … I do not believe that the Attorney General's case is so manifestly unarguable that the action should be disregarded by a foreign court. … In my opinion, the Attorney General has at least a *prima facie* case. If it were otherwise, I would expect the sophisticated defendants involved in that case would have applied for strike out of the action, which they have not."

Later he expresses the opinion that "I do not consider the Government's position [in the FEA] is so perverse or so manifestly unarguable as to be disregarded."

236. I have reservations about the last sentence of the first passage because of the combination of the root and branch opposition demonstrated by SNEPCO's defence in the FEA and the bringing of the constitutional motion in the Lagos court. Subject to that I accept it as a reasonable summation of the current standing of the FEA. Consequently, I would not disregard its existence; but I do not assume it to be by any means established that the FEA will proceed to a trial of issues that include the substantive factual issues about the December 2011 Spill that underpin the decision by NOSDRA to impose sanctions.

237. Subject to those reservations, there is identifiable overlap between the FEA and the present proceedings:

i) Though there is no identified overlap of individual Claimants, there is overlap of communities alleged to have been affected;

ii) SNEPCO is a common defendant, but STASCO is not. As I have already made clear, lack of congruence of parties or issues is not an obstacle to an application pursuant to Article 34, though it may be a matter going to the exercise of discretion;

iii) The underlying facts about the happening of the December 2011 Spill and its consequences *may* be the subject of both proceedings. But there is no basis for a detailed consideration in the FEA of STASCO's role because it is not a party and its actions are not in issue;

iv) While allegations of negligence and *Rylands v Fletcher* appear in both actions, the FEA allegations are not directed at STASCO;

v) It seems plausible that, if the Plaintiffs were to succeed in the FEA and were to distribute the proceeds of the FEA Action by reference to the compensatory needs of the represented communities in that action, some benefit would accrue to at least some of the communities identified in the present proceedings. Questions of double recovery might therefore arise in due course; but that is inevitable given that the Defendants' application is merely for a temporary stay to enable the English court to take into account any relevant findings of the Nigerian court. Since there is no apparent mechanism (and no application) for the present proceedings to be reconstituted and heard

together with the FEA (or the other actions) the potential problem of double recovery is simply an issue with which the English and Nigerian courts may have to grapple in due course.

238. I note in passing that one side-issue raised by the parties is whether the Claimants in the present proceedings are associated with the FEA. To avoid such a possibility, the Claimants have attempted to disavow the FEA Action by letters to the Attorney General of Nigeria dated 21 November 2018 and to the Registrar of the Federal High Court in Abuja dated 4 March 2019. Apparently there has been no reply to those letters and their effect is disputed by the Defendant. Once again there is a dispute between the experts on Nigerian law, which this court is not at present in a position to resolve, about the effectiveness of the Claimants' disavowal of the FEA. It will be a matter for the Nigerian courts in due course to determine whether the English Claimants (or any of them) are parties to or affected by the FEA. Apart from the possibility that either SNEPCO or others might raise a plea of issue estoppel arising as between one action and another, the real significance of this dispute, once again, is that it may go to the question of double recovery. However, the determination of such issues is at present a distant prospect and one that cannot be resolved now.

239. It is, however, material to note that the Defendants' application for a stay, so far as it is based upon the FEA, is based upon an action which is disavowed by the Claimants and the validity of which is challenged root and branch (at least in Nigeria) by the Defendant.

240. Taking these factors into account, I now consider whether the criteria for granting a stay of the English proceedings against STASCO are satisfied so that the Defendants' application should be granted. It is common ground that the English court's jurisdiction over STASCO is founded on Article 4 and that the judgment of the Nigerian Courts will be capable of recognition and enforcement in England. The remaining questions that arise under Article 34 are therefore:

i) Is a related action pending before the court of a third party?

ii) Is it expedient to determine the related actions together to avoid the risk?

iii) Is a stay necessary for the proper administration of justice?

241. In theory, it would obviously be desirable for all issues relating to the December 2011 Spill to be resolved in one forum for a number of reasons, including the procedural efficiency of having one such enquiry. Applying the test established by the Court of Appeal in *PJSC Commercial Bank Privatbank*, the general test of expediency is satisfied. However, the Article 34 test is specific in requiring expediency "to avoid the risk of irreconcilable judgment resulting from different proceedings." That is not so straightforward on the facts of these proceedings because the risk of irreconcilable judgments will not be obviated by the stay. It seems to be the Defendants' working assumption that the Nigerian Court should deliver judgment first, with a view to then lifting the Article 34 stay on the English proceedings. That will not avoid the risk of irreconcilable judgments because, although the English court would afford due attention and respect to the findings of the Nigerian courts, the findings of the Nigerian courts in the FEA and the other actions would not bind the English court to make equivalent findings even on the most basic matters such as whether the

December 2011 Spill reached land. In practice, therefore, the risk of irreconcilable judgments would remain, though it might be somewhat reduced if the English court waited until after the Nigerian courts had given judgment. However, in the light of the ruling by the Court of Appeal that expediency is a theoretical concept, I will proceed on the assumptions (without deciding) that, for the purposes of Article 34, (a) the actions in Nigeria are related actions and (b) it is expedient to determine the related actions together to avoid the risk of irreconcilable judgment resulting from different proceedings.

242. It is common ground that, when considering whether a stay is necessary for the proper administration of justice, the court should have regard to Recital 24 of the Regulation, which I have set out above at [220]. Taking the elements of Recital 24 in turn:

i) The facts of the case against STASCO include the facts that occurred in and off the coast of Nigeria; but they also include the international elements that are alleged to give rise to a duty of care owed by STASCO to the Claimants;

ii) By the time that these proceedings were commenced on 12 December 2017, the FEA and all the other actions upon which the Defendants rely had already been commenced. None had made very substantial progress and two (the Johnson and Adason Actions) had been struck out;

iii) There is substantial dispute about how long it may take for the courts of Nigeria to give judgment. The Claimants raise the spectre that actions can take as long as 12 years to come to trial and that an appeal to the Nigerian Supreme Court could take anything between 5-12 years. The Defendants submit that this is scaremongering and that the Nigerian courts will prosecute these claims diligently. Without passing any qualitative judgment on the legal system of Nigeria, at present the progress appears slow, with SNEPCO's defence in the FEA only recently served after some 3 ½ years and no other action having got beyond the stage of exchange of pleadings and preliminary objections. It must however be acknowledged that the progress in this English action has also been slow and that, as this judgment shows, there are significant problems to be overcome to get the action on track and to trial within a reasonable time, a subject to which I will return. I note, however, that what the Defendants propose is putting the English proceedings on ice for an indeterminate period, while recognising the possibility that they may then be reactivated. Even if I were satisfied that it was desirable not to resolve the substantive issues of fact and legal responsibility until after the Nigerian courts had reached their decision on those matters, I would instinctively look to see if there were steps that could be taken in the meantime to ensure that, if and when the stay is lifted, the action would be in proper shape to enable it to proceed swiftly to final resolution.

243. In *PJSC Commercial Bank Privatbank* at first instance ([2018] EWHC 3308 (Ch)) Fancourt J considered whether a stay was necessary for the proper administration of justice. He noted at [54] that this "*overlaps with the discretion implicit in the phrase 'the court of the Member State may stay the proceedings*"' in Article 34. He then said:

> "*Given the separate criterion under Article 34 that a stay is necessary for the proper administration of justice, it may be that there is no such strong*

> *presumption of a stay as there is in the case of another Member State where Article 30 applies. Nevertheless, the conclusion that the proceedings are sufficiently closely related to make it expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments does point in the direction of granting a stay, subject to the satisfaction of the other two criteria.*"

244. Subject to one gloss, I respectfully agree. The gloss is that the lower the bar is set for the expediency test, the less strong the pointer for the purposes of the separate criterion that a stay is necessary for the proper administration of justice. If, for example, the alternative interpretation of the expediency test had been adopted, so that it was only satisfied if it was feasible to consolidate or hear the actions together and it was regarded as desirable to do so, that would be a relatively strong pointer to the outcome of the "proper administration of justice" test. Where, however, the expediency test may be satisfied on the theoretical basis that it would be desirable for there to be consolidated or simultaneous hearings but there is no practical prospect of a single hearing happening, the pointer is relatively weak because the "proper administration of justice" should concentrate on what is feasible and practical rather than on what is only theoretical.

245. Balancing these various considerations together, I am not satisfied that a stay is necessary for the proper administration of justice. I start with the fact that jurisdiction is based on Article 4 and that it is contemplated that the proceedings against STASCO may continue after a temporary stay to await the progress of the Nigerian actions. Second, the length of that stay is indeterminate whether one looks at the FEA or the other actions; but on any view it is likely to be measured in years rather than months, thereby rendering these Claimants' claims (which were issued late) almost intolerably stale. Third, a stay would prevent any steps being taken towards the resolution of the difficult limitation and other issues which the earlier parts of this judgment identify; and it would prevent any other steps being taken to ensure the swift and just progression of the English action if and when the stay is removed. That is, in my judgment, a major drawback: if and to the extent that there are valid (i.e. not statute-barred) claims to be pursued, there is a compelling interest of justice in their being pursued quickly. Otherwise, as is well known, there is a risk that valid claims may fall by the wayside simply because of the exorbitant passage of time. Fourth, although the factual connection with Nigeria is almost complete, the English court's jurisdiction is not to be ousted on forum non conveniens grounds and, that being so, there is no reason to assume that imposing a stay until after the Nigerian courts have reached their conclusions will either cause the English proceedings to be abandoned or determine the outcome of the English proceedings or eliminate the risk of irreconcilable findings altogether. I am certain that the English court would and will, if no stay is imposed at this stage, remain vigilant to the need to respect the Nigerian courts and their proceedings; and I do not exclude the possibility that circumstances might arise at a later stage when a pause in the English proceedings might become desirable in the interest of judicial comity and respect for Nigeria's sovereign legal system. Fifth, I bear in mind the fact that the scope of the FEA action is not clear, so that it is not clear what issues will be determined, save that the issue of STASCO's responsibility and actions will not be as they are not before the Nigerian Court. Turning to the other actions, STASCO is only a party to the HRH Victor Disi Action which, though technically pending, cannot be assumed to be certain to come to trial.

The status of the remaining actions, where STASCO is not a party, is as set out above but does not give confidence that one or more of those actions will emerge as a suitable vehicle for determining issues relating to the spill so as to fetter the freedom and resolve of the English court to reach a different conclusion on behalf of different claimants and in an action against STASCO if that is the proper result. Sixth, in my judgment, the proper administration of justice is better served by taking interim steps to bring order to the English proceedings, specifically by addressing the issues of limitation and, potentially, existence and scope of duty, which are disclosed in the earlier parts of this judgment. The outcome of those steps should determine whether and to what extent STASCO is available as an anchor defendant.

246. These same considerations would lead me to refuse to exercise my discretion to impose a stay on the proceedings at present. Although there is significant overlap with the issues raised in the actions now before the Nigerian courts, it is far from complete. A consolidated hearing is not possible, which the Court of Appeal in *PJSC Commercial Bank Privatbank* described as a compelling reason for refusing a stay in the absence of some strong countervailing factor: see [225] above. The circumstances of the present case are not the same as those in *PJSC Commercial Bank Privatbank* so that it could be argued that the observations of the Court of Appeal have relatively less force in present circumstances. However, at its lowest, I would accept that the Defendants' application would be stronger if consolidation or hearing actions together had been feasible.

247. The application for a stay of proceedings against STASCO is therefore refused.

Issue 9: Does the English Court Have Jurisdiction to Try the Case Against SNEPCO?

248. I have set out the criteria that have to be satisfied and the principles to be applied at [213]-[217] above. And I have already concluded that:

    i) The claims against STASCO involve a real issue to be tried;

    ii) SNEPCO is a necessary or proper party to the claims against STASCO; and

    iii) The claims against SNEPCO have a real prospect of success.

249. Applying the principles summarised at [215] above, I conclude that it is reasonable for the English court to try the issue against STASCO for two main reasons. First, jurisdiction is founded on Article 4 and the main arguments that might be raised against trying the issue in England are essentially *forum non conveniens* arguments that are inadmissible. Second, it is not obvious that any of the Nigerian cases will proceed to an examination of STASCO's role or legal responsibility for the December 2011 Spill.

250. That leaves the question whether England is the proper place to bring the claim against SNEPCO. Applying the principles outlined at [217] above, I conclude that it is. First, the claim against STASCO will be continuing in any event. That would, in my judgment, be sufficient reason in itself because, to transpose words from a different context, it is expedient for there to be one enquiry and feasible to achieve it by STASCO and SNEPCO being parties to the English proceedings. As the Claimants submit, STASCO is alleged to be responsible for one end of the loading

operation and SNEPCO is responsible for the other. Having both parties before the Court therefore allows a full enquiry into and understanding of what happened and where legal responsibility should lie. In addition, although there is substantial factual and litigation connection with Nigeria, the balance is not all on one side since some or all of STASCO's witnesses (both expert and of fact) are likely not to be Nigerian.

251. I therefore conclude that the necessary criteria are satisfied and find that the court has jurisdiction over SNEPCO. As already indicated, this conclusion is subject to my conclusions on limitation issues earlier in this judgment. If and to the extent that the claim against STASCO falls away for limitation reasons, the first prerequisite for jurisdiction over SNEPCO also goes.

Issue 10: Has There Been a Failure to Give Full and Frank Disclosure When Applying for Permission to Serve SNEPCO Out of the Jurisdiction?

The principles to be applied

252. The principles are very well known and have been frequently reiterated, typically in the context of the obtaining of an injunction or an order to serve proceedings out of the jurisdiction.

253. In *Brink's Mat Ltd v Elcombe* [1988] 1 WLR [1350] at 1356F Ralph Gibson LJ summarised the principles as follows:

> "(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486* , 514, *per* Scrutton L.J.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners* , per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231 , 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289* , 295.
>
> (3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour [1985] F.S.R. 87* . The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in

> *Columbia Picture Industries Inc. v. Robinson [1987] Ch 38* ; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour [1985] F.S.R. 87* , 92–93.
>
> (5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see *per* Donaldson L.J. in *Bank Mellat v. Nikpour* , at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'; case [1917] 1 K.B. 486* , 509.
>
> (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" *per* Lord Denning M.R. in *Bank Mellat v. Nikpour [1985] F.S.R. 87* , 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.
>
> "when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" *per* Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.* , ante, pp. 1343H–1344A."

254. In *Kazakhstan Kagazy PLC and ors v Baglan Abdullayevich Zhunus and ors* [2013] EWHC 3618 (Comm), HHJ Mackie QC provided a tour of relevant principles and authorities in the course of which he addressed the question of materiality at [27], citing *Brink's Mat*:

> "The test for "materiality" of a matter not disclosed (or misrepresented) is whether it was relevant to the exercise of the Court's discretion: a fact is material if it would have influenced the Judge when deciding whether to make the Order at all or in deciding upon the terms in which to make it: …"

255. At [30] he cited from the judgment of Mr Alan Boyle QC in *The Arena Corporation Limited v Schroeder* [2993] EWHC 1089 (Ch) at [213]

> "(5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance. "
>
> (6) …
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

256. A similar emphasis on the need to retain a sense of proportion was provided by Toulson J in *Crown Resources AG v Vinogradsky & Ors* (unreported 15 June 2001 and cited by HHJ Mackie QC at [32]):

> "Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion." (page 6)
>
> "I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees." (page 7)
>
> "In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion." (page 24)

257. A succinct summary was provided by Christopher Clarke J in *Linsen International Ltd v Elspeth Shipping Corporation* [2010] EWHC 303 (Comm):

> "Whether or not such a sanction should be imposed depends on the circumstances including
>
> (a) the seriousness of the breach;

> (b) whether it was intentional, or resulted from indifference, inadvertence, or a thought-out but erroneous decision;
>
> (c) whether disclosure would have made any material difference to the outcome of the application;
>
> (d) whether the material before the Court taken as a whole makes it inequitable to continue or renew the order (in which case any question as to the effect of ?non-?disclosure is likely to merge with the question whether, in the light of all the material the injunction should be continued);
>
> (e) general considerations of equity."

258. I respectfully agree with and adopt these statements of principle.

The Defendants' submission

259. The Defendants submit that the Claimants' application to serve SNEPCO out of the jurisdiction was made ex parte on 29 June 2018 and led to the order of the Court which was dated 9 July 2018. The application was supported by the first witness statement of Mr Ekhorutomwen. The Defendants submit that the Claimants failed to make full and frank disclosure in two material respects, namely:

i) They did not disclose the facts that:

a) STASCO had a potential limitation defence as a result of the fact that it was added to the proceedings after the expiry of the applicable limitation period, or

b) That all three Defendants had a potential defence based on the five year limitation period under Nigerian Law;

ii) The Claimants failed to disclose the existence of the Related Actions (i.e. the FEA and the other Nigerian actions) identified above.

260. It is not disputed that the facts upon which the Defendants now rely were not disclosed to the Court. The questions to be answered are therefore:

i) Was the application made ex parte so as to engage the obligation of full and frank disclosure? And, if it was:

ii) Were the facts upon which the Defendants now rely material to be disclosed pursuant to the Claimants obligation of full and frank disclosure? And, if they were:

iii) Should the order for service out now be set aside?

I deal with these questions in turn.

Was the application made ex parte so as to engage the obligation of full and frank disclosure?

261. The Claimants submit that RDS and STASCO were represented at the hearing on 29 June 2018 by Debevoise & Plimpton who now act for SNEPCO as well. In my judgment, this makes the point for which the Defendants contend: SNEPCO was not represented. Nor had it been served with the application. SNEPCO was not represented at the hearing and had not been served with the application. The fact that other Defendants were represented is beside the point, even if the solicitors who represented the other Defendants on 29 June 2018 later came to act for SNEPCO as well.

262. The position was made entirely clear in advance by a letter that Debevoise & Plimpton wrote to the Claimants' solicitors on 25 April 2018 stating that they acted for RDS. Referring to the future hearing of the application to serve out, Debevoise & Plimpton wrote:

> "We will not take the liberty of commenting on the substance of the Learned Judge's order, or his case management decision to adjourn the application for service outside the jurisdiction, not least because *the order relates to what are formally ex parte proceedings which concern an application to serve SNEPCo. The question of jurisdiction over SNEPCo is a matter for that company.*" [Emphasis added]

263. That letter made clear that Debevoise & Plimpton were not representing SNEPCO in relation to the application to serve out. Nothing happened thereafter to change that position in relation to SNEPCO, though Debevoise & Plimpton also represented STASCO on 29 June 2018. The position is put beyond argument by the terms of the court's order made after the hearing which records that Counsel appeared for the Claimants, RDS and STASCO but does not record any attendance for SNEPCO.

264. I therefore find that the application was made and determined *ex parte*, so that the Claimants owed to SNEPCO the obligation of full and frank disclosure as generally owed in such circumstances.

Were the facts upon which the Defendants now rely material to be disclosed?

265. The Claimants must have been aware of the fact of the amendment to join STASCO even if they didn't think to mention it on the application to serve out. The Claim Form had been amended on 4 April 2018; and the application to serve out was issued one week later supported by the witness statement of Mr Ekhorutomwen which he had made two days earlier, on 9 April 2018. The Witness Statement exhibited the Claim Form, which must have been as amended to join STASCO. That Claim Form said on its face that it had been "amended on 4 April 2018 pursuant to CPR 1998 Part 17 rule 17.1". If the Court had been astute to note that endorsement it would have carried the positive implication that the claim against STASCO was not statute barred on that date.

266. The Claimants submit that the non-disclosure of the late amendment to join STASCO could not have been a breach of the duty to make full and frank disclosure of material

facts because neither the Claimants nor the Defendants had raised it as a matter of significance by the time of the order to serve out. That does not determine or even suggest that the information was immaterial for the court to know. What is clear is that the Claimants believed that limitation was a problem even on the basis of a six year period running from the date of the December 2011 Spill: see [28] above. There is no evidence that they were considering a five year period at the time; nor am I satisfied that if they had made reasonable enquiries they would have been informed that five years was the relevant period on the facts of this spill, though it is possible that they might have been, depending upon who they consulted.

267. However, I think that the Defendants put their case too high on the question of limitation. The Claimants now assert that, even if some may have been statute barred by April 2018, others had not suffered damage by then and so were not. This leads back directly to the structure of these proceedings as a collection of 27,000 individual claims and the fact that the Court is not even now in a position to form a concluded view on limitation: see [59] above.

268. I therefore do not accept that the Claimants should have provided information to the Court about limitation in the terms for which the Defendants contend. Rather, if they were to say anything, they could reasonably have said that, although the limitation period was six years, the cohort of Claimants was so large and their circumstances so disparate that there would be some who were not statute barred by the time of the issuing of these proceedings, the amendment of the claim form or the determination of the application to serve out.

269. Turning to the existence of the Nigerian actions, Mr Ekhorutomwen's evidence is that he made enquiries in 2013 which did not reveal the existence of other actions but that he did not repeat his enquiries thereafter. There is a dispute about whether he knew of some or all of the Nigerian actions, which it is not necessary to resolve. He was told by SIL on 7 December 2017 of the existence of "several proceedings on foot in Nigeria"; and I am confident that reasonable enquiries would have revealed the existence of the FEA and, probably, of some or all of the other Nigerian actions as well.

270. However, on the findings made and conclusions I have reached in this judgment, if the Claimants were going to address this issue at all, what they could and should have said was that (a) jurisdiction against STASCO was founded on Article 4, (b) some of the actions had been struck out even if they were still technically pending, (c) the FEA was not concerned with the role of STASCO, (d) the HRH Victor Disi action was the only Nigerian action to which STASCO was a party and did not appear to be set up in any sense as a "lead" action, (e) the claim against STASCO was likely to be pursued in any event, and (f) SNEPCO was a necessary or proper party to the English proceedings.

271. For these reasons I am not satisfied that there was any obligation upon the Claimants to make the disclosures for which the Defendants contend. And, if they had made the more limited disclosures that I consider would have been reasonable, they would not (either singly or in aggregate) have caused the Court to make an order on the application to serve out that would have been different from the one it in fact made.

272. I therefore reject the application to set aside the order for service out on SNEPCO.

Conclusions and the Way Forward

273. The conclusions I have reached in this judgment have far-reaching implications for the future conduct of this action. The major outstanding problem is how to cope with the possibility that the limitation period may not have expired for some (and possibly many) Claimants when they took the critical procedural steps that are the subject of this judgment. That problem raises questions about the structure of this "representative" action and how to determine whether there is a substantial cohort of Claimants who should be allowed to proceed forward to trial. Of one thing I am certain: it would not be acceptable to proceed to a full trial of this action in circumstances where my rulings in this judgment seem inevitably to mean that some (and possibly many) Claimants are bound to fail for reasons associated with limitation. It is also to be remembered that, while I have necessarily assumed in this judgment that the relevant period of limitation under Nigerian law is 6 years, there is a live issue (which is entirely dependent on expert evidence) about whether the proper period is 5 years.

274. I have not heard argument on consequential orders, but the effect of my conclusions on the various issues appears at present to be as follows:

i) If the relevant period of limitation for a given Claimant had not expired on 4 April 2018, the amendment of the Claim Form on that date pursuant to CPR r.17.1 by which STASCO was joined to the action was and is effective;

ii) If the relevant period of limitation for a given Claimant had expired on 4 April 2018, the amendment on that date by which STASCO was purportedly joined was (or should be treated as) a nullity and ineffective. Claimants falling within this category should cease to be Claimants in this action;

iii) If and to the extent that the joinder of STASCO on 4 April 2018 was effective, the claim against STASCO cannot proceed on the basis of an allegation that STASCO was responsible for the operation of the MV Northia except to the extent that the Claimants' 3 October 2019 application to amend the Claim Form succeeds. As to that:

a) If the relevant period of limitation for a given Claimant had expired by the date of handing down this judgment (which should be taken as the date of the order on the application to amend the Claim Form) the application to amend the Claim Form should fail. Those Claimants' claims against STASCO should fail as there is no other reasonable basis for a claim against STASCO disclosed by the Particulars of Claim or the draft Amended Particulars of Claim;

b) If the relevant period of limitation for a given Claimant had not expired by the date of handing down this judgment the application to amend the Claim Form should succeed;

c) Any permission to amend the Claim Form as and from the date of handing down this judgment should make clear that it does not apply to those Claimants for whom the relevant period of limitation has expired.

Whether this is done by adopting a mechanism such as was used in *Blue Tropic* or by some other means should not matter;

iv) The application to amend the Particulars of Claim should succeed in respect of those Claimants for whom the relevant period of limitation has not expired at the date of handing down this judgment and in respect of whom the Claimants' 3 October 2019 application to amend the Claim Form succeeds. Those for whom the relevant period of limitation has expired at the date of handing down this judgment will fail because permission to amend the Claim Form to permit a claim in relation to STASCO's responsibility for the MV Northia has failed. They therefore should not proceed to trial and the question of amending the Particulars of Claim against them becomes moot;

v) The jurisdiction of the English court over SNEPCO in these proceedings is dependent upon the presence of STASCO as the anchor defendant. Therefore, to the extent that Claimants are bound to fail against STASCO because of the conclusions I have reached in this judgment, the English court should decline jurisdiction over SNEPCO. Whether this is done by declaration or by setting aside service on SNEPCO in relation to those Claimants may be the subject of further submissions.

275. I direct that there shall be a further half-day hearing after hand-down of this judgment to address (a) the "representative" nature of this action and whether its structure needs to be adjusted; (b) how to determine which Claimants can and cannot go forward to a trial in the light of the findings I have made in this judgment; and (c) any other consequential orders.

276. My present and provisional view is that the following steps need to be taken:

i) The Claimants must identify and plead their case on when their causes of action accrued with a view to trying that issue as a preliminary issue for all Claimants where the issue is live;

ii) Either before or at the same time as the preliminary issue on when causes of action accrued, there should be a trial of a second preliminary issue, namely whether the applicable period of limitation for the Claimants is 6 years or 5.

277. I will hear counsel on all consequential matters before reaching a concluded view and giving further directions. I thank them for their assistance thus far.