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Case No: KB-2023-000252
Case No: KB-2022-005017
Case No: KB-2023-002200
Case No: KB-2023-002201
Case No: KB-2023-000437

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

THE "BILLE AND OGALE GROUP LITIGATION"

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2023

Before :

MRS JUSTICE MAY DBE

- -

Between :

(1) ALAME AND OTHERS

CLAIMANTS: KB-2023-000252 "BILLE INDIVIDUALS"

(2) CHIEF MINAPAKAMA AND OTHERS
CLAIMANTS: KB-2022-005017 "BILLE COMMUNITY"

(3) OKPABI AND OTHERS

CLAIMANTS: KB-2023-002200 "OGALE COMMUNITY"

(4) EJIRE AWALA AND OTHERS

CLAIMANTS: KB-2023-002201 "OGALE INDIVIDUALS"

(5) OKOCHI NWOKO ODODO AND OTHERS
CLAIMANTS: KB-2023-000437 "ADDITIONAL OGALE INDIVIDUALS"

Claimants

- and -

SHELL PLC (formerly known as ROYAL DUTCH SHELL PLC) — **First Defendant**

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD

Second Defendant

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Richard Hermer KC, **Edward Craven**, **Alistair Mackenzie, Kate Boakes, George Molyneaux** (instructed by **Leigh Day**) for the **Claimants**
Lord Peter Goldsmith KC, **Shaheed Fatima KC**, **Dr Conway Blake** and **Tom Cornell** (instructed by Debevoise & Plimpton LLP) for the **Defendants**

Hearing dates: 24th – 28th July 2023

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JUDGMENT

Mrs Justice May DBE:

Introduction

1. This group litigation arises out of oil contamination affecting two distinct areas in the Niger Delta – the Bille and Ogale regions. The Claimants live and/or work in these regions. The pollution is said to be the responsibility of the Defendants ("Shell plc" and "SPDC" respectively, together "Shell"), as emanating from pipelines and other infrastructure operated by SPDC in the Niger Delta.

2. The background to these claims is fully set out in the judgment of O'Farrell J last year ([2022] EWHC 989 – "the April 2022 judgment") and is well known to the parties; I need not repeat it here.

3. There are, in short, four related sets of proceedings (the Bille Individuals Claim, the Bille Community Claim, the Ogale Community Claim and the Ogale Individuals Claim). The Bille and Ogale Individuals Claims are being managed under a Group Litigation Order made by O'Farrell J at the end of May 2022 ("the GLO"); the two Community claims are being case managed together with them.

4. The claims all concern oil pollution, including water and ground contamination, occurring in two distinct areas within the Niger Delta. The Claimants' case is that Shell failed to prevent, mitigate or remediate oil contamination resulting from spills and thefts from Shell's pipelines and associated infrastructure operated in or near to the two regions. It is said that the failures have caused loss and damage to the Claimants for which Shell is liable to compensate them. Shell's defence is that major sources of oil pollution in the areas concerned are crude oil theft (bunkering) and related oil spills, illegal artisanal refining by third parties and oil spills from equipment operated by those

third parties, being matters for which Shell is not responsible and attracting no liability under Nigerian law; further, that certain spills have in any event been fully remediated.

Procedural History

5. The main staging posts so far in this litigation are as follows:

(1) Claim forms for the Ogale Community Claim, the Bille Individuals Claim, the Ogale Individuals Claim and the Bille Community Claim were issued on 16 June 2015, 22 December 2015, 13 June 2016 and 27 January 2017 respectively.

(2) There followed a jurisdiction challenge by Shell, eventually resolved in favour of the Claimants by the Supreme Court, whose judgment was delivered on 12 February 2021: *Okpabi & Ors v Royal Dutch Shell PLC & Anor* [2021] UKSC 3.

(3) Amended Particulars of Claim ("PoCs") were thereafter served in the Bille Individuals and Bille Community Claims on 30 July 2021, and in the Ogale Individuals and Community Claims on 27 August 2021.

(4) Defences were filed and served in all claims on 19 November 2021.

(5) The Claimants applied for a GLO in December 2021; there was a CMC before O'Farrell J on 10 December 2021, giving rise to her April 2022 judgment.

(6) Replies to the Ogale Community, Bille Community and Bille Individual Claims were served on 1 April 2022, and to the Ogale Individual Claims on 22 April 2022.

(7) There was a further CMC before O'Farrell J on 5 May 2022 following which the GLO was made on 31 May 2022, sealed on 8 June 2022. These orders

required, inter alia, individual Claimants to provide schedules of information giving further details pertaining to their case on causation ("SOIs").

(8) On 25 August 2022 the Claimants sent to the Defendants draft re-amended pleadings including new causes of action under the African Charter and Nigerian Constitution ("the Constitutional claims").

(9) On 9 November 2022 the Defendants issued an application for a split trial and trial of certain preliminary issues.

(10) Draft Re-amended PoCs in all four claims were served on 18 November 2022.

(11) Extensions of time for service of the SOIs were sought and granted by consent over the course of 2022-3.

(12) Voluntary Particulars of Claim in Respect of Causation ("VPOCs") were served in respect of the Bille claims on 27 January 2023, and in respect of the Ogale claims on 9 March 2023.

(13) On 27 January 2023 a new claim form was issued for 11,291 additional Ogale individuals, followed by a PoC served on 10 February 2023 ("the new Ogale Individuals PoC").

(14) On 21 March 2023 the Claimants issued an application to re-amend the PoCs in all four claims.

(15) On 31 March 2023 the Defendants issued an application to strike out the new Ogale Individuals PoC.

(16) On 4 April 2023 I heard the Defendants' applications for a trial of preliminary issues, subsequently overtaken by events and effectively adjourned pending the resolution of subsequent applications heard at the CMC in July 2023.

Issues and applications arising at the CMC on 24-28 July 2023

6. The parties sought a 4-day listing for a CMC by their joint letter to the court dated 26 May 2023, having together identified the following 7 issues to be dealt with:

(1) Shell's application dated 31 March 2023 to strike out the Additional Ogale Individuals' PoC.

(2) The Claimants' application dated 21 March 2023 to re-amend the PoCs.

(3) Shell's proposal, based on the state of the Claimants' pleaded case, that the court regard the claims as "global claims" for the purposes of case management.

(4) Shell's preliminary issues application ("the PI application"), initially heard before me at a 2-day hearing in April 2023 and subsequently effectively adjourned, the issues arising on that application largely subsumed into case management considerations arising from decisions to be made at the present CMC.

(5) Shell's application dated 9 November 2022, essentially asking for a split trial in the event that their PI application is successful.

(6) The Claimants' proposal for sequential trials of the Bille and Ogale claims.

(7) Directions to trial, including disclosure.

7. Although I indicated in advance of the CMC that I wished to hear submissions on all of these issues, it became apparent as the hearing progressed that directions for future management would be likely to depend on my decisions in relation to the pleadings, i.e., (1), (2) and (3) above. Accordingly, this judgment deals with those matters, contemplating that a further (shorter) hearing will be required for consequential submissions as to the next steps forward, if the parties are unable to agree what those should be.

8. Since much of the time at the hearing focussed on the state of the pleaded case, following the service of SOIs ordered by O'Farrell J at the time of making the GLOs last year, I start with that issue ((3) above).

The state of the pleaded case

Arguments made to O'Farrell J and her decision

9. In December 2021 O'Farrell J heard argument addressed to the need for further particulars to be given of the pleaded case, specifically in relation to causation. Her April 2022 judgment records the arguments made to her, at [43]-[58]. O'Farrell J rejected the Claimants' case that it was unnecessary and contrary to the overriding objective to require additional information regarding details of the oil spills from each of the individual claimants now. She observed that:

> "The current pleaded case is a global claim, in that the Claimants have identified a number of oil spillages, and described the damage suffered as a result of consequential contamination of the land and waterways, but they have not pleaded any causal nexus between each oil spill and the damage suffered by individual claimants" [65]

10. In going on to require the individual claimants to provide schedules of information giving further particulars of their claims she noted that:

> "The Claimants suggest that it would be disproportionate for this information to be provided in respect of several thousand individual claimants prior to the identification of any lead claimants. But, as submitted by [Shell], if the necessary facts are not pleaded in respect of each individual claimant, there will be no rational basis on which the Defendants will be able to identify their chosen claimants for the pool from which the lead claimants will be selected." [69]

11. The terms of the subsequent GLO dated 31 May 2022 required, inter alia, further information about individual spills to be given: paragraph 27(h) of the GLO required the Claimants in the Bille proceedings to identify

> *"the particular oil spill or oil spills in relation to which each individual claimant seeks compensation and/or damages or, if they are unable to provide such details, confirmation of the nature of the case they will rely on at trial".*

Paragraph 28(h) provided identically for the Ogale individual claimants.

12. Schedules of Information were prepared and served over the course of the following year. By short Voluntary Further Particulars (VPOCs) dated 9 March 2023, drafted in identical terms in both the Bille and Ogale Individuals Claims, the Claimants further clarified their case as follows:

> *"*each of the claimants avers that they have sustained loss and damage which was caused or materially contributed to by one of more of the spills identified [reference to the Annex or paragraph in each PoC] and/or one or more of the Unpublished Spills, as defined [in the relevant paragraph of the Reply]"

13. Shell has undertaken an analysis of the schedules provided to-date, from which the following appears:

(1) 5 of the 2335 Bille claimants have identified the particular event which they say has caused them loss, being a spill at the Awoba manifold alleged to have occurred between June and July 2011. These 5 individuals do not seek to rely on the VPOCs.

(2) 412 of the Bille claimants were able to provide an approximate month and year for the date of the alleged spill causing them damage. A further 175 Bille claimants have provided a 6-month date range and year.

(3) Of the 11,301 individual Ogale claimants just 264 were said to be able to identify a spill which affected their residential property/farmland/fishponds.

14. All of the Ogale claimants were said to rely on the VPOCs; all bar the 5 Bille claimants referred to above were said to do so also.

15. The scale of the endeavour in obtaining the required information is addressed in the 7th witness statement of Matthew Renshaw ("Renshaw 7"): reaching the Claimants in isolated and troubled regions, then seeking to obtain from them the required information has clearly been a herculean task. For reasons given in Renshaw 7, read alongside the evidence of Mrs Dappa from the Bille region and Mr Igwe from the Ogale region (both of them individual Claimants in the Bille and Ogale Individuals claims), the Claimants say that it is simply impracticable to identify particular events causing loss at this stage. In the Bille region, although the pipeline carrying crude oil runs for the most part above ground, the effect of tides and currents has to be factored in; the position in Ogale is further complicated by the fact that the pipeline runs underground such that breaches/leaks are not always visible where they occur and the effects may be experienced some distance away. Mr Hermer told me that for these and other reasons disclosure and expert evidence will be required before it is possible to identify particular spills in individual claimants' cases.

16. In addition to the principal complaint that a case on causation has not been adequately pleaded Shell has identified the following deficiencies:

(1) Over 1,600 Ogale Claimants have not sufficiently identified the location of where they say they have sustained loss. The Claimants say that this is because land is rented and farming is often done on a rotational basis meaning that individuals cannot provide an exhaustive list of all the locations where they have farmed and suffered loss.

(2) Some of the Ogale claimants have not identified the temporal scope of their case, i.e. whether the claims are limited to damage arising from 1988 (the earliest spill currently pleaded) or are relying on earlier spills.

(3) 32 of the Ogale claimants entered onto the group register appear to be bringing claims in a representative capacity.

The parties' submissions on the pleading issue

17. At the hearing, and subsequently in further written submissions on the point, Mr Hermer asserted strongly and repeatedly that each Claimant is making an events-based claim, meaning that each intends to assert and prove a link between their loss and damage and a specific event(s) for which Shell is alleged to be responsible. He accepted, as he had to, that neither the schedules nor the pleadings currently make the case for each Claimant with that specificity but he argued that the necessary information was currently held by Shell and that the case would be developed for each of the lead claimants once disclosure had been provided and expert evidence obtained.

18. Lord Goldsmith KC, for Shell, says that that is to put the cart before the horse. In the first place the Claimants have access to a great deal of information already, in the form of local reports, photos, videos and publicly available material including satellite pictures. If that information has not enabled them to plead the case with the required

specificity then there must be a doubt as to whether that could ever be done. If expert evidence is required then it should already have been obtained. Lord Goldsmith submitted that, as an events-based case the claims (save in relation to the five Bille Claimants mentioned above) must fail for want of particularity and should be struck out. The alternative, Lord Goldsmith argued, is for the cases to proceed as a global claim, as presaged by O'Farrell J in her April 2022 judgment.

19. Mr Hermer, for the Claimants, argued that causation is a matter of Nigerian law and is made out if one or more spills for which Shell is responsible made a material contribution to the damage suffered by a claimant; he says that, following disclosure, the Claimants will seek to prove where, when and in what quantities oil escaped from Shell's infrastructure and thereby to prove their case, whether directly or by necessary inference, that a particular event or events materially contributed to an individual claimant's loss. He pointed out that, even if as a matter of English law the global claim concept does extend outside the construction context, Shell have not established that it applies as a matter of Nigerian law.

20. Mr Hermer referred in his submissions to cases in this jurisdiction involving environmental contamination which he says mirror the Nigerian law on causation, where causation is established if an event is shown to have made a material contribution: *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 and *Pride of Derby & Derbyshire Angling Association v British Celanese Ltd* [1952] 1 All ER 1326.

21. Mr Hermer submitted that, absent full disclosure from Shell including overflight material, satellite images and pipeline pressure data, multi-disciplinary experts will not be in a position to draw conclusions about where and when a spill has occurred, and

how much oil has been spilled, so as to be able to link a specific event or events with the loss that claimants have experienced. It would be manifestly unjust, he submitted, to penalise the majority of claimants for being unable to identify precisely which event(s) has caused their loss by striking out their case or by superimposing a test for causation that is not the one any party suggests is the one provided for by Nigerian law.

How are lead claimants to be selected other than by events in an events-based case?

22. At paragraph 77 of Renshaw7, Mr Renshaw summarised the position as follows:

> *"the claimants in Bille and Ogale are…unable at this stage of the proceedings to identify which particular spills caused which claimants to suffer loss and damage…they intend to prove causation in due course with the benefit of disclosure and expert evidence"*

23. Lord Goldsmith's point, based on a reading of further passages in Renshaw7, is that references to the possibility of unpublished spills, unreported spills, "a substantial (but unknown) number of other spills and leakages…" indicate a highly speculative exercise, involving an interrogation of all of Shell's documentation in a wide-ranging enquiry, before even attempting to make a case connecting (i) acts on the part of Shell to spills and (ii) spills to damage. Even then, he points out, there is no certainty of such connections being able to be made. He stresses that a great deal of information is available to the Claimants now, on which expert input could and should have been obtained in order that an events-based case can properly be pleaded.

24. Lord Goldsmith advanced seven reasons why Mr Hermer's suggested approach was, he said, fundamentally unsound:

(1) It is wrong in principle to plead an incomplete cause of action in the hope that future evidence will allow a claimant to plead a complete cause of action, referring to *Wharf Properties Ltd v Eric Cumine Associates (No 2)* (1991) 52

BLR 1, at 23; *Bernhards Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39, at 76; *Pantelli Associates Ltd v Corporate City Developments Number 2 Ltd* [2011] PNLR 12 at [11] – [19].

(2) The Claimants already proposed this approach and were told that it was unacceptable by O'Farrell J in her April 2022 judgment following the CMC in December 2021. A considerable amount of time at that CMC was taken up with the same arguments that the Claimants repeated at this CMC.

(3) The approach is unworkable in terms of case management as: (a) the court does not know the full scope of the case; (b) it is not possible to organise the individual claims in any logical way; (c) there is no rational basis to select lead claimants for trial; (d) it imposes an enormous burden on court resources in conducting what would effectively be a wide-ranging enquiry into oil pollution; (e) it is difficult to develop a list of issues for disclosure and; (f) the timing of what is proposed is unworkable.

(4) It is unfair to the Defendants: there are hundreds of spills, hundreds of claims, thousands of Claimants spread over a wide area and on the proposed timetable Shell will not know, until shortly before trial, precisely what the claims are: pipeline/non-pipeline, when, where etc. There would be no point in Shell advancing specific defences to specific spills because, on the Claimants' proposal, the claims would never be tied to specific spills. Further, there is the prospect of trying to meet a constantly shifting, evolving case.

(5) The work should have been done before. If expert evidence is needed to enable the Claimants to be more specific about the events giving rise to their loss then why has this not be done already? There is a great deal of information already

available, for instance the NOSDRA website and satellite imagery repositories which are available to all. Lord Goldsmith suggested that the Claimants or their solicitors have not been prepared to do the work, they would rather have wide-ranging orders for disclosure and then try to see what they can make out of that.

(6) The proposal is speculative, it is unrealistic to assume that the Claimants will be able to establish any causal nexus in circumstances where many of the pleaded spills actually occurred decades ago and there have been so many different sources of pollution in the area since then.

(7) Disclosure is unlikely to change the position – information about where and when oil spills have occurred and how much oil was spilled is already known in respect of the 141 pleaded spills. The JIV (Joint Investigation Visit) reports have this information; these reports specifically involved, and were signed off by, members of the affected communities on each occasion. Lord Goldsmith pointed out that it is frequently the locals who identified a breach when it happened. The Claimants have the JIV reports prepared on spills at the time, there were community representatives involved who could give evidence about it, landowners or occupiers likewise. He suggested that none of the disclosure which the Claimants say that they need is going to help to plead the causal nexus. Moreover, disclosure of the wide-ranging nature currently proposed will be extremely onerous – Lord Goldsmith pointed out that, taking overflights alone there were daily flights starting in 2012. SPDC operated thousands of kilometres of pipeline, each flight would have covered hundreds of kilometres, of which some would potentially have included pipelines in the Bille and Ogale

regions. Lord Goldsmith indicated that Shell have 1.3 million surveillance images involving some 16 terabytes of data.

25. Lord Goldsmith emphasised the difficulty with a general time/place selection in that it does not discriminate between the different types of claim: focussing on Bille he identified pipeline breach, non-pipeline breach, criminal acts of third parties, illegal refining, all of which raise different considerations, also other sources and limitation. Pipeline spills give rise to a claim under the Oil Pipelines Act 1956 ("OPA") but if it is a non-pipeline spill, he says, then there are potentially a number of different causes of action giving rise to more complicated issues than a simple claim under the OPA.

26. Mr Hermer, having stressed that the Claimants are all making a case based on specific spill events made the following points against a summary dismissal of the claims where specific spills have not yet been identified:

(1) An application to strike out or for summary judgment has not been made. The usual course is for a party to make an application, with supporting evidence. Shell has not made any such application. In a claim of this magnitude and importance the formalities should be observed. The attempt to strike out made at this hearing is opportunistic and should be rejected. The Claimants have always made it clear that theirs are not global claims.

(2) Shell has not clearly articulated the basis upon which they now invite the court to strike out/give summary judgment on the claims. Instead, in Mr Hermer's words, they have relied on "a little bit of this, a little bit of that, an awful lot of prejudice".

(3) The court should reject Lord Goldsmith's invitation to conduct a mini-trial on the documents, specifically by reference to Mr Renshaw's 7th witness statement suggesting that it does not disclose a cause of action. As an example, Mr Hermer submitted that the accuracy of the JIV reports is very much in issue. He says that these matters go to no identifiable ground under CPR 3.4 or Part 24, that they are just prejudice.

(4) The main particulars of claim set out a generic case and have never, over 8 years of wrangling over jurisdiction, been criticised as inadequate by any court, up to and including the Supreme Court.

(5) The Claimants are not in breach of O'Farrell J's order. They have provided details and where they have been unable to they have confirmed the nature of the case they will rely on at trial, as required by paragraph 27 of the order which she made.

(6) It cannot be said that the answers given in the SOIs and VPOCs, although compliant with the terms of the order, are nevertheless an abuse of the court process. To the contrary, as is evident from Mr Renshaw's statement, the lawyers have gone to quite extraordinary efforts to comply with the order for service of SOIs.

(7) There is nothing in O'Farrell J's April 2022 judgment which drives the court to a conclusion that the claims are an abuse. She was clear that she was making no findings of fact or law.

27. Mr Hermer maintained that, as the managing judge, I am free, unconstrained from anything that has gone on before, to identify what I consider to be the appropriate structure for the fair disposal of the claim and the structure of the trial going forward.

28. In addressing the question of how the case is to progress in light of the current lack of information linking event(s) and loss, Mr Hermer chose his words carefully, putting the question for the court in this way: "what, if any, are the consequences of the fact that most claimants are unable to specify at this juncture which particular spills caused what damage in a case in which any claimant who wishes to recover compensation, and they all do, accepts that they will be required to show that the damage they complain of was caused, or materially contributed to, **by oil for which they can show the defendant is legally responsible."** (Emphasis added).

29. Phrasing it in this way was noteworthy in that it avoided the mention, still less the identification, of any specific event despite Mr Hermer's insistence that this is the type of case that all the Claimants intend to run.

30. Mr Hermer submitted that an order which required every Claimant to set out their case on causation, at least prior to a trial of lead cases, would be unprincipled and disproportionate. He pointed out that a GLO is simply a procedural mechanism for trying to resolve large numbers of claims with common or related issues of law or fact as proportionately as possible. It seeks to absolve the court and the parties from the need to try each individual case, and it does so by the identification of common issues and through the selection of lead claimants. Referring to the observations of the Court of Appeal in *Municipio de Mariana v BHP Group (UK) Ltd* [2022] 1 WLR 4691 at [139] as to the various case-management tools available to the court, Mr Hermer invited the court to focus on selecting lead cases and the adoption of a staged approach. In

general terms the vast majority of claims are stayed pending the resolution of common issues and the determination of lead cases. The cases that are stayed are not fully worked up. In a personal injury case, he said, you would not expect all claimants to provide medical reports nor schedules of loss. He made the point that in general terms orders made in group litigation are designed to give two types of decision of application to the full cohort: decisions as to the law which bind the parties, and then decisions which, whilst not formally binding on all, will nevertheless give a steer for how the remaining issues should be applied to all claims. An example of the first type here would be the meaning and effect of section 11(5)(c) of the OPA relating to criminal acts of third parties. Causation, Mr Hermer suggested, was an issue of the second type, which he characterised as "what spill caused my loss?"

31. Mr Hermer made the following points as to why each and every one of the Claimants should not be expected to make their case on causation now: First, he said, they cannot do it. Pointing to Renshaw7 and to the two statements from Bille/Ogale individuals, he submitted that the Claimants require disclosure and expert evidence in order to identify what events have caused their loss. To complete this task for every member of the cohort would take years. The nature and extent of expert evidence required would cost millions of pounds. He argued that such a step should only be taken if strictly necessary because it would give rise to an injustice to the Defendants, if not taken, that would outweigh the prejudice to the Claimants, which in this case would amount to not being able to carry on with their case. It was unfair to say that the Claimants had had 8 years to do this when for much of that time their case was struck out as a result of Shell's ultimately unsuccessful jurisdictional challenge.

32. Mr Hermer went on to submit that, on a proper analysis, Shell's claim that they would not be able to select lead claimants was without merit. He argued that Shell operated in the Bille and Ogale regions for many years, they hold a vast amount of evidence relevant to spills and pollution and damage, about the condition of their infrastructure, about geology and hydrology, which the Claimants do not. I asked how that information would assist Shell in selecting lead claimants, to which Mr Hermer responded that it would enable them to identify claimants in an area where there is a lot of third-party interference, that being the essence of their defence. From Shell's perspective, allowing them to select lead claimants will cover areas where they are satisfied that the spills were not their responsibility. Choosing claimants spread temporally and geographically will enable those issues of causation to be properly and fairly ventilated.

33. Mr Hermer's suggestion was that the Bille claims be tried first, through a selection of lead claimants made on the basis of date/time and geography, or by reference to Shell's own knowledge. Shell would first give disclosure of everything they have in relation to their operations in Bille during the relevant period (2011-2013). Mr Hermer proposed that, after such disclosure in relation to operations in Bille, a pool of 100 claimants would be worked up and these claimants would provide further information about their claims, in accordance with an agreed questionnaire at that time. From these 100 a smaller selection would be made of lead cases. These claimants would set out their case on causation, having worked their way through disclosure "particularly if we stage it in a way that allows us to get to the spills issue first." He suggested that this would be a far more proportionate and fair approach, taking into account the superior knowledge that Shell has about its operations, other sources of pollution and third-party interference across the two regions concerned in this litigation.

State of pleaded case – conclusion

34. I am not going to strike out the claims. First, as Mr Hermer pointed out, Shell has made no application. I take Lord Goldsmith's point that the court always has an inherent power, but in the context of these thousands of claims made against the backdrop of well-known, widely reported, catastrophically environmentally damaging oil pollution in the Niger Delta, I consider that that would be a draconian and unwarranted exercise of that power.

35. Nevertheless, I remain very concerned at the current state of the pleaded case on the basis of the information provided in the SOIs. In my view Lord Goldsmith's criticisms have much force: if, as Mr Hermer repeatedly said, each individual is making an events-based claim not a global, all-or-nothing case, then taking the generic POCs together with the SOIs and the recently served VPOCs, it is apparent that as regards the vast majority of Claimants the essential element of causation is at best sketchy and at worst missing altogether.

36. The identification of necessary detail on causation is what the order for the provision of SOIs was intended to address. O'Farrell J made that order after hearing extensive argument on the point, argument which plainly covered the same ground as was re-visited before me at the CMC in July. O'Farrell J clearly took the view that, if the individual Claimants were unable to identify which spill or spills were linked to their loss, then their claim could only be run as a global claim.

37. The failure or inability of the vast majority of Claimants in both sets of claims to provide particulars linking their case for action/inaction on the part of Shell to the spill or spills causing loss which they say they have sustained has implications for the way this case is to progress, as progress it must.

38. I am entirely satisfied that, as an events-based claim, the Claimants' cases are not at present sufficiently underpinned by information which enables the court or the parties to link the event(s) to breach and breach to loss, even by inference. Mr Hermer's reliance on the "material contribution" concept of causation applied under Nigerian law does not get over the difficulty of the current lack of particularity, as it begs the question of what spill or spills are said to have made a material contribution in each case. On any view, the route to Shell's liability for a particular individual's loss depends upon first identifying when, where and how that loss occurred. That is a pre-requisite for an examination of the allegation that Shell were responsible for that loss, unless the case is to be understood as one which alleges that Shell's activities in the Bille and Ogale regions are responsible for all loss occasioned by oil pollution wherever, whenever and however that loss was sustained.

39. I cannot accept that Mr Hermer's route to selecting lead claimants will reliably cover all the issues arising on an events-based claim. The legal route to liability will depend on the type of event which occurred: under the OPA (pipeline incidents), for negligence/nuisance or under Rylands v Fletcher (non-pipeline incidents), or negligent failure to protect (pollution caused by criminal third party activities). The shape and scope of each claimant's case on liability, and the defence to it, will be determined by whether the event(s) causing loss are (a) a pipeline malfunction (b) non-pipeline malfunction or (c) third party breach of the pipeline/other non-pipeline malfunction. Each event engages (at least in part) different legal principles. This means that representative lead claimants can only be selected on the basis of type of event, not simply on area or occupation as the Claimants propose.

40. Without identifying the event(s), how are the different issues arising in connection with each of these routes of liability to be resolved? How can the court, or the parties, be confident that a trial is going to address all the possible routes to liability as well as the range of possible defences (including limitation and other sources)? Beyond the trial of the lead claimants, how can the results reliably and confidently be extrapolated to the other claimants, unless the route(s) to liability in each of their cases has been identified? Even if specific events can be identified for lead claimants, how are any findings to be translated to the vast majority of others if each of them has not identified the time, place and nature of the spill event that has affected them? Mr Hermer referred by analogy to a personal injury group action, but in such an action the event or events giving rise to the injury are well-known, indeed it is the event or events that defines the group of claimants; there is no variation in the event(s), or if there is then it is well known and identified. The same is not true here, where the claimant group is currently defined by location of residence/place of work in Bille or Ogale during a specific period. The event(s) causing loss for each of them are a key and as-yet unidentified variable. Mr Hermer posed the question "what spill has caused my loss?", describing this as a causation issue but it is more accurately an identification issue: the identification of the event said to cause loss is not for the court to do at trial, it is a key averment to be established at trial by the party making the claim. The right question in an events-based claim is actually two questions: is <u>that spill/event</u> one for which Shell is liable and did <u>that spill/event</u> cause my loss?

41. The challenge of identifying causative events was discussed by Lord MacFadyen in *John Doyle Construction v Laing Management (Scotland) Ltd* [2002] BLR 393 at [35]*:*

> "35. Ordinarily, in order to make a relevant claim for contractual loss and expense under a construction contract (or a common law claim for damages)

> the pursuer must aver (1) the occurrence of an event for the which the defender bears legal responsibility, (2) that he has suffered loss or incurred expense, and (3) that the loss or expense was caused by the event. In some circumstances, relatively commonly in the context of construction contracts, a whole series of events occur which individually would form the basis of a claim for loss and expense. These events may inter-react with each other in very complex ways, so that it becomes very difficult, if not impossible, to identify what loss and expense each event has caused. **The emergence of such a difficulty does not, however, absolve the pursuer from the need to aver and prove the causal connections between the events and the loss and expense.** However, if all the events are events for which the defender is legally responsible, it is unnecessary to insist on proof of which loss has been caused by each event. In such circumstances, it will suffice for the pursuer to aver and prove that he has suffered a global loss to the causation of which each of the events for which the defender is responsible has contributed. Thus far, provided the pursuer is able to give adequate specification of the events, of the basis of the defender's responsibility for each of them, of the fact of the defenders involvement in causing his global loss, and of the method of computation of that loss, there is no difficulty in principle in permitting a claim to be advanced in that way" (emphasis added).

The key point from this passage, for present purposes, is that the difficulty of identifying causative events does not remove the need to do so, in law, unless all the events are said to be the responsibility of the defendant, in which case the claim can continue as a "global claim".

42. I decline to find a relevant distinction between construction claims and environmental contamination claims, on this point. There is no difference in principle between the requirements of a properly pleaded case in the construction, as opposed to any other, context, as Waksman J observed in *Barthelmy Holdings LLC v. Duet Group Limited* [2019] EWHC 2402 at [127].

43. The two environmental damage authorities to which I was referred – *FCA v Arch Insurance (UK) Ltd* [2021] UKSC 1 and *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] All ER 1326 – do not address Mr Hermer's difficulty: in those cases the various contributors to the pollution were known, as was the nature of the event. Those cases do not assist the Claimants in relation to

the need to identify the spill(s) events, even if the proper law on causation only requires them to show that such event(s) made a material contribution to the loss. Either way, as I see it, a case needs to be made identifying the particular event(s) relied on. Fairness requires that Shell be able to marshal a defence that is targeted to the particular event(s).

44. Despite Mr Hermer's rejection of the Claimants' cases as global claims, therefore, I consider that this is nevertheless what they are, on the present state of the pleadings and associated information, with the exception of the 5 Bille claimants to whom I have referred above. If, in due course, further claimants are able to tie their case sufficiently to enable identification of a specific incident or incidents causing (or possibly only materially contributing) to their loss then there will need to be an application to amend which will be considered on its merits at that time. There seemed to me to be the possible kernel of a sufficiently identifiable case in the date/place identification made by 412 of the Bille claimants, but not unless they were prepared to fix their case to that information, which it seems they do not since they all continue to rely on the VPOCs (see above).

45. For now, therefore, I do not see any practical alternative but to view the cases of all bar the 5 Bille claimants as global claims unless or until a more particular case is identified. I will hear the parties further as to the case management implications of this. I note here, the passage cited by Waksman J from the judgment of Akenhead J in *Lily v Mackay* [2012] EWHC 1773 in which Akenhead J observed, at [486(e)]:

> "The fact that one or a series of events or factors…caused or contributed (or cannot be proved not to have caused or contributed) to the total or global loss does not necessarily mean that the claimant..can recover nothing. It depends on what the impact of those events or factors is."

Re-amendment application

46. Evidence in support of the Claimants' applications to amend was contained in the fourth and fifth statements of Ms Modi (Modi 4 & 5). There were a number of amendments which were not contested, I say no more about those. The contested applications concern amendments which may be summarised as follows:

    (1) New causes of action under the African Charter and Nigerian Constitution (together "the Constitutional claims"). Amendments are sought to make these claims in all existing pleadings, save the additional Ogale Individual claims where the new PoC served earlier this year pleads these causes of action from the outset.

    (2) Damage flowing from illegal third-party refining, again in all pleadings.

    (3) Additional spills in Bille (applies to the Bille Community and Bille Individual claims).

47. Before turning to each individual category of amendment I start by recording general points made by Mr Hermer in opening his applications. He submitted that none of these amendments should be considered late, let alone very late, given that the litigation is still at a relatively early stage, notwithstanding the eight-year hiatus whilst the jurisdiction issue was resolved. A trial structure has not yet been worked out and no trial date has been set. At this still early stage, the concern should be to identify and corral each sides' full case, in Mr Hermer's words "to ensure that all the issues of the parties… which the court should determine are squarely and fairly identified and particularised so that all sides well understand what the targets are on the pleaded case for the purpose of reviewing the generic issues as we go along and lead case selection

and the scope of disclosure and the subject matter of expert reports." (a submission which, I note, may also aptly be applied to the case on causation, above). He also emphasised the overriding objective which seeks to ensure that the parties are on an equal footing, that all can participate and that the court can deal with cases proportionately, without undue cost having regard to the financial position of each party.

Principles relating to amendment – CPR Part 17

48. CPR Part 17.1(2) gives a general power to permit amendments to statements of case. But where amendments are sought after a relevant limitation period has passed, the right to amend is restricted by Part 17.4(2) which relevantly provides that:

> *"(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 are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."*

49. In the recent case of *Geo-Minerals GT Ltd v Downing* [2023] EWCA Civ 648, the court considered and affirmed the classic four-stage approach to rule 17.4(2)(b) as follows (at [25]):

(1) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? If so, proceed to the next question; if not, then rule 17.4 does not apply and the amendment may be allowed under rule 17.1(2).

(2) Do the proposed amendments seek to add or substitute a new cause of action? If so proceed to the next question; if not rule 17.4 does not apply and the amendment may be allowed under rule 17.1(2).

(3) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If so then proceed to the last question; if not then the court has no power to grant permission for the proposed amendment, save by way of the "Mastercard" approach discussed in *Advanced Control Systems Inc v. Efacec Engenharia e Sistemas S.A.* [2021] EWHC 914 (TCC).

(4) Should the court exercise its discretion to allow the amendment?

50. What constitutes a new claim for the purposes of rule 17.4(2) is very much a question of fact and circumstance in each case. In *Geo-Minerals* Males LJ set out the principles as follows, at [27]:

> "(1) The 'cause of action' is that combination of facts which gives rise to a legal right. It is the 'factual situation' rather than a form of action.
> (2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made…(Where it is the same duty and same breach, new or different loss will not be a new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).
> (3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction…
> (4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading…
> (5) the addition or substitution of a new loss is by no means necessarily the addition of a new cause of action…Nor is the addition of a new remedy, particularly where the amendment does not add to the 'factual situation' already pleaded…"

51. In *Berezovsky v Abramovich* [2011] 1 WLR 2290 at 2309 Longmore LJ expressed the concept of a cause of action as "that combination of facts which gives rise to a legal right".

52. If the amendment does amount to a new claim then it is necessary to consider whether it arises out of "the same or substantially the same facts" as the existing claim(s). This requirement was discussed and considered also in the *Geo-Minerals* case, at [28], approving the analysis of Stephen Morris QC (as he then was) in the case of *Diamandis v Willis* [2015] EWHC 312 (Ch) at [49]:

> "As regards Stage 3 *('arising out of the same or substantially the same facts'*) a number of points emerge, particularly from *Ballinger* at [34] to [38]:
> (1) "Same or substantially the same" is not synonymous with "similar".
> (2) Whilst in some borderline cases, the answer to this question is or may be substantially a 'matter of impression', in others it must be a question of analysis.
> (3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.
> (4) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate. At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial.
> …
> (5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the approving defence…"

53. In exercising discretion at Stage 4 of the process referred to above, it is a necessary pre-condition that the claim as amended should have a real prospect of success: *CNM Estates (Tolworth Tower) Limited v Carvill-Biggs* [2023] EWCA Civ 480.

54. Having set out the relevant principles I turn now to each category of amendment. Where I identify the wording of the existing pleadings, or proposed amendments, and where that is identical across all claims, I shall refer to paragraphs in the Bille Community pleading unless otherwise indicated.

The Constitutional Claims

55. Section 33(1) of the Nigerian Constitution recognises the right to life, as does article 4 of the African Charter, to which Nigeria is a signatory. Section 20 of the Nigerian Constitution requires the state to protect and improve the environment, and article 24 of the African Charter states that all peoples shall have the right to a general satisfactory environment.

56. As pleaded, the Constitutional claims involve the following propositions:

(1) Nigerian law recognises as a fundamental right the right to a clean and healthy environment. The rights under the African Charter and Nigerian Constitution are directly enforceable and can be relied upon as against private entities such as Shell.

(2) The damage caused by the spills violates the Claimants' rights under the African Charter and the Nigerian Constitution, giving rise to liability on the part of Shell.

(3) The Claimants seek damages for loss already sustained, and injunctive relief/damages in respect of their ongoing loss and damage.

57. Nigeria has enacted procedural rules relating to the bringing of human rights claims under the Constitution: the Fundamental Rights Enforcement Procedure Rules 2009 ("the FREP Rules"). Order III of the FREP rules in effect provides that limitation periods will not apply to human rights claims brought under the rules.

58. The introduction of these new causes of action relying on the FREP rules, in particular Order III, is of significant utility to the Claimants as it will be argued that these claims are not subject to any applicable limitation period, that they enable the Claimants to

circumvent the ordinary limitation periods which apply to the existing claims in negligence and nuisance and under the OPA.

The arguments

59. Mr Hermer accepted that the Constitutional claims fall to be considered under CPR Rule 17.4. His primary case will be that limitation does not apply to these claims but he recognised that, for the purposes of considering his application to amend, limitation is a live issue and accordingly the application falls to be considered under Rule 17.4.

60. Going through the proposed amendments Mr Hermer stressed that the Constitutional claims involve no new pleaded facts. The same facts and matters already pleaded will be relied upon as giving rise to a distinct cause of action under the African Charter and Nigerian Constitution.

61. Mr Hermer referred to the evidence in Modi 4 & 5 as to how and when the possibility of making the Constitutional claims first came to the attention of the Claimants' representatives. Ms Modi's evidence was that she first appreciated the possibility of making claims under the Constitution in April 2022, after which she notified Shell on 2 August 2022. She states that at the time of first issuing these claims in 2015 the Claimants understood the authoritative position, according to a Nigerian Court of Appeal judgment in the case of *Opara v SPDC and others* (2015) 14 NWLR, to be that oil claims could not be brought under the Constitution; however that understanding changed as a result of a later decision of the Nigerian Supreme Court in *Centre for Oil Pollution Watch v NNPC* [2019] 5 NWLR 518 ("*COPW*").

62. Mr Hermer emphasised that there is a low bar for arguability, citing observations of the Court of Appeal to that effect in *CNM Estates (Tolworth Tower) Limited v Carvill-*

Biggs [2023] EWCA Civ 480, at [89] ("…the pursuit of even weak claims is something that the CPR allows...").

63. Ms Fatima KC, for Shell, spent considerable time at the hearing taking me through the Nigerian case law in some detail, suggesting that, properly understood, the relevant provisions of the African Charter and Nigerian Constitution cannot be made to do the work that the Claimants suggest.

64. Her argument against the new claims may be summarised as follows:

(1) There has been unexplained delay in pleading the claims such that the amendment should be refused. She says that the relevant instruments were in force in Nigeria for at least a decade before the claims were first brought and that there was case law (*Gbemre v SPDC* (2005) FHC/B/CS/53/0558) dating from 2005 which would have alerted the Claimants to the possibility of bringing such claims. The Claimants had sought to justify the delay by referring to "developments" in Nigerian law but an examination of the cases relied on shows that there have been no developments, and that the principles have remained constant.

(2) The claims are abusive as they are brought for the purposes of circumventing an applicable limitation period.

(3) The Constitutional claims have no real prospect of success as a matter of Nigerian law as (a) such claims cannot be brought against private companies (the "horizontal point"), (b) claims in respect of pollution damage fall outside the limited scope of the rights invoked by the Claimants under the Charter and the constitution (the "scope point") and (c) Nigerian courts will not entertain

claims under the Charter/Constitution where such claims are ancillary or incidental to the main grievance or complaint ("the ancillary point").

65. I start with (iii) above, upon which Ms Fatima spent most time at the hearing.

Constitutional claims have no real prospect of success

66. For the purposes of argument at the hearing, and without conceding the horizontal or the scope points, Ms Fatima focussed on the ancillary point.

67. Ms Fatima submitted that I could and should make findings of Nigerian law at this preliminary stage, and moreover that I could do so in the absence of any expert evidence of Nigerian law. She pointed out that Nigeria operates a common law system, indeed the Nigerian Supreme Court has referred to the courts there as legatees of the English common law heritage; she submitted that there is no difficulty, therefore, in an English Court examining Nigerian authority, applying familiar common law principles and rules of statutory construction and proceeding to determine whether the Constitutional claims are properly arguable or, as she suggested, doomed to fail such that they should properly be refused reamendment (in the case of the existing claim) or struck out (in the case of the new claim) now.

68. In support of her case that this court could proceed to consider and determine Nigerian law now, without expert evidence, Ms Fatima pointed to Ms Modi's explanation that it was her associates who had conducted "independent research" and discovered the possibility of making claims relying on the African Charter and Nigerian Constitution. She pointed out that the Claimants have not produced any expert evidence from a Nigerian lawyer purporting to confirm the possibility of a claim and identifying genuine points of dispute arising from the cases.

69. Ms Fatima then proceeded to take me to Nigerian authorities which, she said, clearly and authoritatively establish that the Constitutional claims have no reasonable prospect of success. She argued by reference to these authorities that a claimant cannot benefit from Order III in the FREP Rules where the constitutional or human rights part of the claim is properly characterised as being ancillary or incidental to the main grievance or complaint in the case. Ms Fatima stressed that there was no question here of the Claimants making an untethered constitutional claim, separate from the FREP rules; they needed to bring it within the scope of the rules, in order to benefit from the Order III removal of limitation.

70. Ms Fatima took me to four Nigerian authorities which she said clearly establish the ancillary point: *Sea Trucks (Nig) Unlimited v Anigboro (2010) 2 NWLR (Pt 696)* (a decision of the Nigerian Supreme Court); *Opara (cited above); Yemtet v The Federal University of Agriculture* (2016) LPELR 43815 and *Philip Biokpo v National Drug Law Enforcement Agency* (2021) LPELR 56259 (the last three all being decisions of the Nigerian Court of Appeal).

71. *Sea Trucks* concerned a claim under an earlier version of the FREP rules by an employee against his employer arising out of his dismissal. The case made its way to the Supreme Court on a number of issues, the key one for present purposes being *"Whether in the circumstances of this case respondent's grievance against his summary dismissal by the appellant was or could be validly challenged by way of an action under the [FREP rules]*". The lead judgment is that of Justice Ogudare who dealt with the issue in this way (at p.4428):

> *"I think the proper approach is to examine the reliefs sought by the applicant, the grounds for such reliefs and the facts relied upon. If they disclose that breach of fundamental right is the main plank, redress may be sought through*

> *the Fundamental Rights Rules…But where the alleged breach of fundamental right is incidental or ancillary to the main complaint it is incompetent to proceed under the rules."*

72. The other justices agreed with this as the approach to follow. Justice Ogbuna went on to hold that the courts had no jurisdiction to entertain the employee's application under the rules as it was ancillary or incidental to the principal claim for unfair dismissal:

> *"But here, as in Turkur [an earlier case considering the court's jurisdiction under the rules], the principal claim being wrongful termination of appointment which ought to have been commenced by a Writ of Summons which was not, then all of the claims principal and subsidiary which flow directly from it, are incompetent and ought to be struck out.*
>
> *…*
>
> *Turning to the facts of the present case, there can be no difficulty in ascertaining the principal complaint of the respondent, which is a claim for wrongful dismissal. The principal relief is for his reinstatement which the court below ordered. The alleged breaches of his fundamental rights flowed from the main complaint. In the circumstances, therefore, the proper procedure for him to seek redress is by a writ of summons in the High Court and by application under the [1979 rules]"*

The other justices all agreed, in similar reasoning.

73. Ms Fatima went on to trace the application of the *Sea Trucks* ancillary point by the Nigerian Court of Appeal in subsequent cases.

74. *Opara* was an oil pollution claim in which an issue of jurisdiction arose. The leading judgment was that of Justice Adah who, having cited the above passage from *Sea Trucks*, said this:

> *"A cursory look at the claim filed in this case from the reliefs and the varying affidavits clearly shows that the appellants' main grouse is about pollution generated from gas flaring. This without mincing words is a matter that cannot be knighted as a fundamental right action under Chapter IV…The fundamental rights to life and dignity of human person as prescribed in sections 33 and 34…are very clear, specific and identifiable. The issues of gas flaring, oil exploration and environmental impact assessment, which are the substantive complaint of the appellants in this case, are not issues of fundamental right. There is no legal craftsmanship found in this case that*

> *can weave them into fundamental rights to life and dignity of human persons under Chapter IV…The learned trial judge was therefore on the right path when he struck out this latter on grounds of incompetence."*

75. Ms Fatima argued that the Claimants have misinterpreted this part of the decision in *Opara* as a finding on the scope point (i.e., whether claims arising from oil pollution are properly characterised as human rights claims), rather than as an invocation of the ancillary point.

76. *Yemtet* was an unfair dismissal claim, which the court at first instance struck out on limitation grounds (Nigerian employment law requiring the action to have been started within 3 months). On appeal the employee argued breach of his fundamental right to a fair hearing under the Constitution and sought to invoke Order 3 of the 2009 Rules to counter the employer's limitation point. The Court of Appeal dismissed the appeal. Referring to the case of *Turkur* cited in *Sea Trucks* the court held that the action filed in the lower court was not an application for the enforcement of fundamental rights but rather an action challenging the termination of employment.

77. *Biokpo* was also an employment case. The employee claimed to have been unfairly treated and demoted in breach of the terms of his employment contract. At first instance, as in *Yemtet*, the court dismissed the claim on limitation grounds, deciding inter alia that Order III was inapplicable to the claim since the suit had not been instituted under the procedure provided for by the FREP Rules. The Court of Appeal dismissed the employee's appeal. In the leading judgment Justice Banjoko, having set out the trial court's finding that Order III was not applicable, said this:

> *"The relevant question now becomes, how does the court determine what is a Fundamental Right Application? The courts have held severally in Case Law Authorities that the relief sought, the grounds for such reliefs and the facts relied upon by the claimant are what determine what the claim is all about. …*
> *…*

> *Upon careful study of these reliefs sought by the claimant in the statement of facts, this court finds that the reliefs demonstrate that the questions of posting, unlawful discipline, unjustifiable seizure of salary, and unlawful termination of employment are what birthed the fundamental rights infringement of the appellant.*
> *The justifying grounds and foundational claim of the appellant are all in respect of employment issues. Other claims, which are fundamental rights emanated from these employment claims leading to the irresistible conclusion that the main claim of the appellant is on employment whilst the fundamental rights claims were premised on them, thereby being ancillary to the main issues in the suit…*
> *…*
> *For this action to be qualified as a human rights action, the central question or the main claim must be for the enforcement of human rights or the securing of the enforcement of human rights said to be breached. It must not be the consequential human right issue or question, which emanates or seeks to unravel another question. The human rights claim involved must not be a claim that was birthed or just an offshoot of the main claim but must be the main or principal claim in the suit.*
> *…*
> *When an application is brought under the [1979 FREP rules], a condition precedent to the exercise of the court's jurisdiction is that the enforcement of fundamental rights or the security of the enforcement thereof should be the main claim and not an accessory claim":*

78. Referring to the proposed amendments to the Bille and Ogale pleadings here, Ms Fatima pointed out that the reliefs sought remain exactly the same, all that has been added is the phrase "and for violations of the constitutional claims" as a further justification for the award of damages already pleaded; there is not even any additional plea seeking a declaration. It is apparent, she says, that the Constitutional claims are nothing more than an afterthought, overlapping entirely with the existing claim and, a fortiori, ancillary or incidental to it. The Claimants have sought to make a virtue of the overlap for the purposes of CPR Part 17.4, but this overlap is what is fatal to the Constitutional claims as a matter of Nigerian law. It is not as simple as saying that the mere fact of concurrent claims renders the Constitutional claims incidental or ancillary, it is necessary to analyse the reliefs sought, the grounds for relief and the evidence. Having done that here, Mr Fatima argued, this court is in a position to say that the Constitutional claims cannot succeed as a matter of Nigerian law.

79. Ms Fatima submitted that the subsequent Nigerian Supreme Court decision in *COPW* does not alter the ancillary/condition precedent principle established by *Sea Trucks* and subsequent authority. She submits that *COPW* was about the standing of an NGO to bring a constitutional claim against a state-owned oil concern; the Nigerian Supreme Court did not need to, and did not, address either the horizontal point or the ancillary point. She stressed that *Opara* was not even considered by the Supreme Court in *COPW*, let alone overruled, suggesting that it is fanciful to suppose that the highest court would have overruled a recent Court of Appeal judgment without even referring to it. Ms Fatima suggested that the references by the Supreme Court in *COPW* to the African Charter and the Nigerian Constitution were no more than a recognition that in enacting the OPA the Nigerian government had given effect to those rights. The OPA takes into account the right to a clean environment and its provisions provide a framework for actions to be taken upon that right. In the absence of any discussion of *Sea Trucks*, *Opara* or any of the other authorities dealing with the ancillary point, the passage from the judgment in *COPW* simply cannot be made to do the work for which the Claimants contend. The misinterpretation by the Claimants of *Opara* as dealing with the scope point has led them, wrongly, to suggest that *COPW* is to be taken as having overruled *Opara*. Even on the Claimants' case, the Supreme Court in *COPW* only overruled the scope point, not the ancillary point.

No real prospect of success - conclusion

80. Ms Fatima's presentation of the Nigerian law principles to be drawn from *Sea Trucks* and subsequent cases seemed to me persuasive, making a great deal of sense. As did her submission that *COPW* has not overruled *Opara* on the ancillary point (a proposition with which the Claimants appeared to agree – see paragraph 62(1) of their

skeleton argument prepared for this hearing). Had these been authorities from this jurisdiction then I would have had little hesitation in concluding that *Opara* remains good law and that, applying the ancillary point as she explained it, the Constitutional claims have no real prospect of success.

81. But as sensible and logical as Ms Fatima's elucidation of the Nigerian legal position appeared to me to be, based on the authorities to which she directed me, it is subject to this important reservation: Ms Fatima is not a Nigerian law expert and neither am I. What she says about the likely impact of those decisions on the Constitutional claims as pleaded here may be right, however in the absence of evidence of Nigerian law I am not prepared to apply the ancillary point as she has interpreted it so as to rule the claims devoid of any real prospect of success at this stage. Nigeria is a common law jurisdiction but as Mr Hermer pointed out, these claims are based on the Nigerian Constitution and the African Charter together with Nigeria's procedural rules, none of which instruments have anything to do with the common law or colonial legacy.

82. I agree with Ms Fatima that the ancillary point appears to be key to whether the Claimants can obtain the benefit of Order III of the FREP rules; but without evidence of Nigerian law on whether the factual overlap with the other claims engages the ancillary point I am not prepared to decide conclusively that it does. Ms Fatima argues that the accepted factual overlap makes it a fortiori; Mr Hermer says the opposite, that the synonymity means the ancillary point does not apply. Without Nigerian law evidence I am not prepared to resolve this difference of view.

Abuse/exercise of discretion

83. Ms Fatima's next point was that the new claims are abusive, for a combination of two reasons: first that they have been brought for the purposes of defeating limitation and second that there has been unjustified delay accompanied by an insufficient explanation.

84. In advancing her case that the Constitutional claims are abusive because they are being brought exclusively for the purpose of circumventing a limitation defence Ms Fatima relied on the first instance authority of *Carter Commercial Developments v Bedford BC* [2001] EWHC Admin 669, and Privy Council decisions in *Jaroo v AG of Trinidad and Tobago* [2002] 1 AC 871 and *AG of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328.

85. *Carter* concerned the use of a Part 8 procedure in an attempt to obtain declarations against a local council in relation to a planning decision in circumstances where a planning appeal had been rejected on the grounds of lateness. Jackson J (as he then was) held that the Part 8 proceedings were an abuse. In the course of his judgment he cited the following passage from the judgment of Sedley LJ in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988:

> "…This focusses attention on what in my view is the single important difference between judicial review and civil suit, the differing time limits. To permit what is in substance a public law challenge to be brought as of right up to six years later if the relationship happens also to be contractual will in many cases circumvent the valuable provision of RSC Ord 53…that applications for leave must be made promptly and in any event within three months of when the grounds arose…" (at [17])
>
> Jackson J went on to cite from the judgment of the Master of the Rolls in the same case:

> "If proceedings of a type which would normally be brought by judicial review are instead brought by bringing an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process can take into account whether there has been unjustified delay in initiating the proceedings." (at [35])

Having described the situation pertaining to the option agreement Jackson J observed at [30]

> "The issues which the claimant seeks to raise are plainly public law issues and should properly be dealt with by judicial review proceedings under Part 54. The reason why the claimant has resorted to the Part 8 procedure is obvious. The claimant is seeking to circumvent the time limits contained in Part 54".

And at [34]:

> "In April 2001 it was plainly too late to begin proceedings under Part 24. The delay could not be justified on any of the recognised principles which apply in this jurisdiction. In those circumstances the claimant issued a Part 8 claim form against the council only, without joining the Secretary of State. The claimant's proceedings are plainly an abuse of process. They are brought by an inappropriate procedure, solely for the purpose of circumventing the time limit. Those proceedings must be struck out".

86. *Jaroo* and *Ramanoop* both concerned attempts to bring constitutional claims in Trinidad and Tobago. In both cases the claims were struck out as an abuse, the Privy Council finding that the invoking of the constitutional procedure was an abuse where there existed another route to remedy. It is sufficient to set out the following passages from the judgment of Lord Nicholls in *Ramanoop*, referring to a dictum of Lord Diplock in an earlier case of *Harrikissoon v Attorney-General of Trinidad and Tobago* [1980] AC 265:

> "Speaking in the context of judicial review as a parallel remedy Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action…Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent that his application is an abuse of process because it is made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right. In other words, where there

> is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process…"

87. Referring to Modi 4&5, Ms Fatima pointed out that the only rationale being advanced for the new claims was that of defeating limitation. There can be no doubt, she submitted, that the Claimants are seeking to introduce the claims for the purpose of relying on Order III of the FREP rules thereby avoiding the limitation period which applies to their existing claims. No other rationale is given. The ancillary point appearing in the Nigerian authorities and the observations of the Privy Council in cases like *Ramanoop* are enunciations of the same principle, namely that Constitutional claims will not be permitted to proceed where they add nothing to existing claims.

88. Mr Hermer says that the Claimants notified Shell of their intention to amend to plead the Constitutional claims without undue delay. Ms Modi's evidence is that they understood *Opara* to have ruled out bringing a claim for pollution damage under the African Charter/Nigerian Constitution but when two of her associates did some research they found the *COPW* case which appeared to show that the law had moved on, permitting such claims to be brought. At paragraph 17 of Modi 5 she affirms that "We were advised that the Constitutional Claims are valid and could be pursued against the Defendants."

89. Ms Fatima challenged that presentation of the position. She pointed to the case of *Gbemre*, decided in 2005 and in which SPDC was a defendant, where the first instance judge had granted leave to the claimants in that case to apply for an order enforcing or securing the enforcement of their fundamental rights to life and the dignity of human

persons as provided under sections 33 and 34 of the Constitution and articles 4, 16 and 24 of the African Charter (the same provisions as the claimants in this case seek to rely on). The claimants in *Gbemre* sought and obtained relief by way of declarations and orders in connection with SPDC's gas flaring activities. Ms Fatima noted that *Gbemre* was a scope point case, where the issue for the court had been whether gas flaring activities came within the scope of the rights protected by the Constitution, and that is why the court in *Opara* essentially put the decision to one side, since the issue before them was the ancillary point involving the application of the FREP rules.

90. Ms Fatima next moved to the chronology of the pleading of the Constitutional claims, tracing in the evidence how it was said that these claims had come to the attention of the Claimants as a possible means of advancing a case which would otherwise be caught by limitation. She pointed to correspondence dating from 2021 in which Leigh Day had sought and obtained material from Dutch proceedings making it plain that the Dutch Court had allowed claims by Nigerian claimants against Shell disapplying limitation by application of the FREP rules.

91. Relying on decision of Warby J in *Lokhova v Longmuir* [2017] EMLR 7, Ms Fatima argued that the combination of delay without reasonable explanation, the weakness of the claims in the light of the ancillary point discussed above and prejudice to Shell in defending combined to tell against the exercise of discretion. She suggested that the Constitutional claims represent an unnecessary and disproportionate complication of a relatively straightforward piece of litigation and should not be allowed.

92. Mr Hermer, responding, submitted that it was reasonable for the Claimants not to have included Constitutional claims in the original pleading, given the Court of Appeal decision in *Opara*. Diligent research thereafter turned up the *COPW* decision, on which

the Claimants rely for an argument that the law has moved on from *Opara*, providing them with at least arguable claims that are not subject to limitation. Ms Modi confirms that the Claimants have been advised that these are realistic claims. Moreover, although a considerable time has passed, the litigation is still at a very early stage, with no directions yet having been made for evidence so that the amendments cannot properly be described as late, let alone very late, nor is there any unfair prejudice to Shell by their inclusion at this stage. The fourth point relevant to the exercise of my discretion was this: Mr Hermer pointed out that if the Additional Ogale claim is not struck out, then the Constitutional claims will be live for those Claimants, but not (if I were to refuse the application to amend) for the existing Claimants, which would be unjust.

Abuse/exercise of discretion - conclusion

93. As indicated above, I am satisfied that the Constitutional claims are at this stage arguable, to be resolved by factual evidence from expert Nigerian lawyers. Subject to the question of permission in respect of additional spills (see below) the Constitutional claims plainly arise out of the same facts as existing claims and accordingly fall to be allowed within CPR rule 17.4, subject to the fourth stage, being the exercise of discretion.

94. As to this, I am quite satisfied that that I should exercise my discretion at this stage to permit the amendments: they are not late in the context of this claim, which is still (notwithstanding the years which have passed whilst the jurisdiction issue was resolved) at an early stage with all case and trial management decisions yet to be made and no trial date set. I do not accept that there has been undue delay in pleading the Constitutional claims, in circumstances where, on Ms Modi's evidence, the Claimants' representatives first appreciated the possibility of pleading such claims in 2021,

notifying Shell of their intention to do so immediately. Although Ms Fatima drew my attention to the decision in *Gbemre* and to the correspondence in respect of the Dutch proceedings, she did not go so far as to suggest that I should reject Ms Modi's evidence.

95. I do not regard the cases of *Jaroo* and *Ramanoop* relied on by Ms Fatima as authority for a general proposition that claims which are introduced for the purpose of meeting or avoiding a limitation defence are an abuse of the court's process; those cases appear to me to turn on procedural aspects of making a constitutional claim under the law in Trinidad and Tobago; as Ms Fatima pointed out, the decisions appear to have similarities with the *Opara* line of authority on the ancillary point under Nigerian law. *Carter* was a case in which the court disapproved the use of an inappropriate procedure in order to circumvent a time limit. It may be that, as a matter of fact under Nigerian law, the Constitutional claims founder for a similar reason, but at this stage there is no proper basis for me to find that the amendments are an abuse. There are many examples in the authorities of a party pleading one cause of action in addition, or as an alternative, to another in order to obtain a more favourable position on limitation: see the discussion on concurrent liability in contract and tort in *Henderson v Merrett* [1995] 2 AC 145, per Lord Goff (with whom the other members of the Appellate Committee all agreed) at 191-194, concluding at 193H:

> "My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

Additional Bille spills

96. At trial Mr Hermer will argue that, under Nigerian law, the additional spills are not subject to a limitation defence but for the purposes of this application he accepted that limitation is arguable.

97. Accepting limitation as an issue for these purposes, Mr Hermer submitted that, properly analysed, the further 85 spills relied on by the Bille individuals are simply a further elucidation of the pleaded case, which is that individuals living and/or working in the Bille region have sustained loss by reason of breaches leading to spills causing pollution and loss during the period 2011-2013. He says that the Defendants have been well aware of the case against them, as the pleadings have always included a reference to the period of the alleged spills, namely 2011-2013; moreover they have always been on notice, for example by references in the existing pleadings to the Claimants reserving their rights to provide further details of spills and pleading a "series of spills", that the Claimants intended to rely on further instances within the 3-year period. Indeed, Shell has complained (at paragraph 17 of the Bille Individuals Defence) that the Claimants *"have failed to identify the specific oil spills and/or the geographic areas said to be impacted".* He submitted that amendments which refer to spills "around" Bille, causing pollution within the Bille region should give rise to the same conclusion.

98. Mr Hermer argued that the additional spills did not amount to a new cause of action. He pointed out that no new duty is raised by the amendments, saying that the Claimants wish only to rely on additional consequences flowing from breaches already pleaded. The amendments therefore should be allowed pursuant to CPR rule 17.1. But even if the court were to conclude that the additional spills gave rise to new causes of action then they arise from the same or similar facts as those already in issue and should be

permitted pursuant to rule 17.4: for Shell to make out its defence it will need to investigate and prove the degree to which pollution in the Bille region was caused by spills from SPDC's assets.

99. In response Ms Fatima argued that each additional spill raises a new claim. Each spill gives rise to its own set of facts: the cause, the time and place, the amount spilled, the clean-up and the polluting effect. Each will involve a separate investigation. The law to be applied will differ according to whether the spill is covered by the OPA or not. Ms Fatima compared the proposed addition of new spills with the amendments to plead further publications in defamation claims in *Economou v de Freitas* [2016] EWHC 1218 (QB) and *Komarek v Ramco*, unreported, 21 November 2002. In those cases, the courts held that the essence of a libel claim is the publication itself, accordingly even though the additional publications were very similar to those already pleaded, the additional publications could not be said to arise out of the same facts. In this case the position is a fortiori, Ms Fatima submitted, as each spill involves a <u>different</u> set of facts.

100. In relation to the exercise of discretion, Ms Fatima pointed out that the additional Bille spills are taken from reports and published material which was all available in 2015 at the time of the original pleading. Lastly the additional 85 spills include 64 spills which did not occur within the pleaded Bille region, relating to an area and to assets which do not form part of the original case. The fact that their original case was vague and poorly particularised does not entitle the Claimants to expand the scope of that case eight years after they started it.

Additional spills – conclusion

101. The existing Bille Particulars of Claim identify the case in relation to oil spills in this way: the first sentence of paragraph 1 of the Particulars sets out, in general, the scope of the claim:

> "The Claimants seeks damages arising as a result of serious and ongoing pollution and environmental damage caused by oil spills emanating from the Defendants' oil pipelines and associated infrastructure in and around Bille Kingdom in Nigeria" (emphasis added)

Specific spills are particularised at paragraphs 29 and following:

> "29. In 2011 to 2013 a series of spills from the Bille Pipelines and Infrastructure resulted in the discharge of significant volumes of crude oil into the Creek ("the 2011-13 Spills").
> 30. The repeated oil spillages have resulted in ongoing contamination to the natural environment…The harmful effects of the 2011-13 Spills include…
> 31. In support of the averment above, the Claimants will rely *inter alia* on the following facts and matters [ten specific incidents are set out at (a) to (d)]"

The proposed amendment adds the following further sub-paragraph:

> "(e) As set out in Annex 3, the Second Defendant and/or NOSDRA have reported various other oil spills in and around Bille during the period between 2011 and 2013."

Paragraph 33 goes on to reserve the position as regards other spills in the period 2011-13 (proposed amendment underlined):

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

It is to be noted that of the ten spills identified at paragraph 29, one (at 31(b)(iv)) is a spill occurring just outside the Bille borders.

102. Paragraph 18 of the Defence complains of a lack of particularity in relation to the spills intended to be relied upon and paragraph 30 pleads to the 10 spills identified. At

paragraph 54 of its Defence, responding to paragraph 33 of the Particulars of Claim, Shell specifically reserved the right to plead further when better particulars were given. Responding to these complaints and reservations in their Reply the Claimants made a case in relation to "Unpublished Spills" as follows:

> "The Claimants seek damages, compensation and other relief in respect of the ten spills identified at paragraphs 31(b)-(d) of the Amended Particulars of Claim. However, these ten spills are not (and do not purport to be) an exhaustive list of all oil spills and leakages from the Bille Pipelines and Infrastructure for which the Defendants are liable and for which the Claimants seek damages, compensation and other relief in these proceedings. In particular: (a) As paragraphs 32 and 34 of the Amended Particulars of Claim make clear, the ten spills identified at paragraphs 31(b)-(d) of the Amended Particulars of Claim are all spills whose existence has been publicly acknowledged and recorded by SPDC. As paragraphs 32 and 34 of the Amended Particulars of Claim make clear, those records published by SPDC do not include a substantial (but unknown) number of other spills and leakages which have occurred from the Bille Pipelines and Infrastructure but which are not referred to in the records published by SPDC ("the Unpublished Spills")."

103. Following discussion before O'Farrell J last year the Schedule to the GLO set out an issue in relation to the "Bille Spills" in these terms:

> "What caused (i) the oil spills pleaded at paragraph 31 of the Bille Community Amended Particulars of Claim; and (ii) any Unpublished Spills (as defined in paragraph 13(a) of the Bille Community Reply) (the "Bille Spills")?"

104. Analysing the pleadings and taking account of the GLO issue on this point, above, I conclude that the further spills identified and included by the proposed amendment at Annex 3 fall within the scope of the claim as already pleaded. I accept Mr Hermer's submissions that all parties contemplated claims arising from potentially all spills occurring in the period 2011-2013.

105. I agree with Mr Hermer that subsequent paragraphs could have made the case clearer as to events occurring "around" Bille, causing pollution within it, but I consider nevertheless that the existing pleading has sufficiently identified the case for claims

arising from pollution within the Bille area, caused by spills occurring "around" that area, albeit outside the borders.

106. It follows that, in my view, the identification of further spills is properly seen as a further particularisation of the case already pleaded. Consequently, the provisions of CPR rule 17.4 are not engaged and the amendment falls to be permitted in accordance with the court's general discretion under CPR rule 17.1. The further pleaded spills are "..the addition of further instances.." not a new and distinct cause of action. Mr Hermer made a powerful point when indicating that the amount of oil spilled in the 10 currently particularised spills amounts to little more than the water in a regular-sized swimming pool; clearly this case has always been about more than that.

107. As to the exercise of discretion, the parties spent some time at the hearing reviewing how and when the further spills could have been identified and pleaded. For the reasons I have already identified I do not regard delay as a reason to refuse the amendment. There may come a time when that will be a reason to refuse, but at this still early stage of the case there is no prejudice to Shell, or to the court in case managing, from permitting it. I understand Shell's concerns at the uncertainty of the pleaded reference to "unpublished spills"; what Mr Hermer's case presently amounts to is that all spills (whether yet identified and specified or not) occurring during the 3-year period 2011-2013 are relied upon in general. The prejudice arising from this – whether to Shell or to the court in case-managing - derives essentially from the pleadings/identification issue which I have dealt with above.

Illegal refining claims - arguments

108. Mr Hermer argued that the amendments referring to illegal refining were no more than an extension of the foreseeable loss arising from duties which have already been

pleaded. In oral submissions he clarified that the duty to remediate pleaded by one amendment in particular (at paragraph 88(g)) is to be read as going no further than the duty pleaded in the injunctive relief under EGASPIN (Environmental Guidelines and Standards for the Petroleum Industry in Nigeria). He said that the Claimants would not pursue any amendment that sought to add a free-standing allegation that there was a duty to clear up refining beyond that which had already been pleaded.

109. When I pressed him on my understanding of the currently pleaded case, that the reference to "spills" was to episodes of oil emanating directly from the pipeline and/or associated infrastructure, Mr Hermer invited consideration of two separate duties which he said had already been pleaded. The first is a duty to protect the pipeline and infrastructure from illegal acts of third parties. As to that, Mr Hermer said that the amendments are unobjectionable as all that they are doing is to articulate further what the Claimants say is the foreseeable loss resulting from a breach of that duty.

110. The second duty already alleged at paragraph 88 and elsewhere, is a duty to clean up, to remediate the damage caused. Mr Hermer submitted that, properly understood, the amendments do not enlarge or change the scope of that duty so as to introduce a new claim. He clarified the position (above) but went on to say that even if the amendments were understood to be introducing a new claim, then it is a matter that would arise out of the defence, i.e. out of the same or substantially the same facts. He referred me to paragraph 14 of the Bille Community Defence which pleads:

> "It is denied (if it is so alleged) that the defendants are responsible for the ongoing contamination…Illegal refining is the critical driver of oil pollution in and around the Bille Community"

Then at para 51(a)

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

And at para 137

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

111. The Reply to the Defence, responding to the defendant's plea that pollution was caused by illegal acts of third parties pleads as follows, at para 31(b):

> "It is not admitted that the main source of pollution in the Bille area…was illegal refining. But for the avoidance of doubt, the claimants' case is that the defendants are liable for oil pollution resulting from illegal refining in any event. Illegally refined oil is obtained through, and is a foreseeable consequence of, third party interference and the defendants' liability arises for the reasons pleaded…above."

112. Mr Hermer referred me also to the Bille common issues identified for the court at the time of making the GLOs last year: Schedule 1 to the GLO sets out the issues common to both cases and at paragraph 8 the issue is described as:

> *"To what extent (if any) and in what circumstances can a licence holder be liable under the OPA for damage caused by oil that is removed from a licence holder's oil pipeline or ancillary installation but this party interference and subsequently used in illegal oil refining by third parties?"* (emphasis added)

Mr Hermer also pointed out that, earlier this year, Shell sought to have that issue tried as a preliminary issue, in an application supported by evidence in Boyne 3. At para 61 of Boyne 3 the issue was described as follows:

> *"the defendants deny [the claimants' allegations that Shell is liable for pollution resulting from both (a) oil spills caused by third party interference and (b) illegal refining] and assert…that SPDC can only be liable for pollution not caused by third party interference…Furthermore as to (b), the defendants assert that SPDC*

> *is not responsible for oil pollution caused by illegal refining. If the defendants are right on (a) and (b) as a matter of Nigerian law, and the relevant preliminary issues [are decided in their favour] then this will have two consequences. First it will significantly reduce the scope of the factual investigation…Secondly…in light of the global claim issue, it will likely mean that a significant number of the claims can be dismissed…".*

Although this was said in the context of a suggested preliminary issue addressing the interpretation of specific provisions of the OPA and Petroleum Act, Mr Hermer pointed out that at no point was it being said that there was an antecedent pleading point to the effect that Shell's responsibility for pollution caused by illegal refining was not an issue on the pleadings.

113. In short, therefore, Mr Hermer's position was that the illegal refining amendments are not new causes of action, doing no more than clarifying the extent of the loss which would be said to arise from breaches of duty already pleaded. The issues are plainly already before the court, he said, they do not disrupt the course of the litigation or cause prejudice to any party and should be permitted. To the extent that it may be thought any new cause of action arose, then Mr Hermer relied on the *Goode v Martin* principle as discussed in *Mullaley v Martlet Homes* [2022] EWCA Civ 32, the issues having already squarely been raised, he said, by Shell in its Defences.

114. Ms Fatima's objection was, first, that the currently pleaded case in the Particulars of Claim nowhere mentions any liability for loss arising from illegal refining. She accepted that illegal refining is referred to in the Replies but pointed out that the Replies are simply responsive to Shell's Defence, where the references to illegal refining are of a very different kind to the way in which the Claimants are now seeking to raise the point by way of amendment: the Defences do no more than set the scene, in general, for an understanding of the claims; they do not, for instance, state the source of the oil used in illegal refining. The oil used may or may not have come from Shell's pipeline,

it cannot safely be assumed that is does. That is one instance, Ms Fatima said, of the way in which the amendment differs from the general case made by Shell in its Defence. She pointed out that in Boyne 3 he indicates that there are oilfields operated by others surrounding Bille, which suggests that this is not a binary factual situation of oil coming from Shell's pipes or nothing.

115. Further, referring to the existing pleading, Ms Fatima emphasised that it refers to spills from Shell's assets, whether pipeline or non-pipeline, i.e. third parties breaching the pipeline causing spills directly from it; the amendment seeks to broaden this from someone who comes and spills the oil directly from the installation to someone who takes it away and spills it somewhere else at some other point in time. These are two very different scenarios, Ms Fatima argued, engaging a consideration of very different facts. Regardless of whether the illegal refining claims are labelled foreseeability of loss or free-standing duty, the point is that the currently pleaded case only deals with spills coming directly from Shell's assets. She argued that there is in fact a new and different duty being alleged by the proposed amendments: the existing case pleads a duty to protect against a foreseeable risk that Shell's assets would be tampered with or sabotaged and that oil would spill directly from those assets as a result. By contrast the amendments seek to introduce a duty to protect against the foreseeable risk that oil would be stolen from SPDC's operated assets and whether or not that extraction resulted in an oil spill from the asset itself, it would be transported to an illegal refinery where by-product would then be discharged into the environment.

116. Lastly and in any event, Ms Fatima said, the court should refuse to exercise its discretion to permit the amendments as (i) they are not properly particularised (ii) the

matters could and should have been pleaded when the claims were first issued and the delay since then is unjustified.

Illegal refining - conclusion

117. The term TPI used throughout all pleadings is defined at paragraph 35 of the existing Particulars of Claim as follows:

> "…the Bille pipelines and Infrastructure were vulnerable to interference and unlawful bunkering by third parties ("third party interference" or "TPI")

118. It is not in issue that by "bunkering" the parties mean theft of oil from Shell's pipeline or other assets. Ms Fatima is right that the paragraphs in the Particulars of Claim which follow, referring to losses flowing from TPI, do not explicitly refer to illegal refining. But I consider that, although the existing articulation of a duty to protect assets against TPI and breach of that duty (at paragraph 88) does not in terms refer to illegal refining, the addition of a claim to losses arising from the use made by third parties of oil stolen from the pipeline is not a new cause of action. Attractive though I found Ms Fatima's example of kitchens and knives, on the facts of this case I do not consider that the duty to protect assets from TPI where that includes the theft of oil, will be enlarged or changed by allowing the Claimants to make a case that the failure to protect (inter alia from bunkering) gave rise to foreseeable loss from the use made by third parties of the oil which was taken. Further, given the focus by Shell on pollution caused by illegal refineries as a cornerstone of its Defences I do not consider that these amendments would require Shell to investigate additional facts beyond those which they could reasonably have been expected to investigate for the purposes of defending the claims. The new category of loss will give rise, no doubt, to potentially troublesome questions of foreseeability and remoteness (under Nigerian law) for the Claimants to overcome, but that is no reason to disallow the amendments at this stage.

119. The same cannot be said of the proposed amendment at paragraph 88(g) which refers to a duty to clear up spills "*from illegal refineries or other locations to which oil abstracted from the Bille Pipelines and Infrastructure by TPI was taken"*. Notwithstanding Mr Hermer's oral undertaking given at the hearing to restrict the scope of this to the EGASPIN duty which is already there on the pleadings I consider that this bald averment clearly enlarges the scope of the alleged duty to remediate, opening up a whole new area of investigation. If what is alleged goes no further than the EGASPIN obligation which has already been pleaded then it should not be necessary to add anything further to the pleading so far as remediation is concerned; or, if it is, then the amendment needs to be far more specific as to precisely what Shell was (allegedly) required by EGASPIN to do in respect of the dumping of unwanted by-product from illegal refineries. Nor do I consider that the type of factual enquiry which would be necessitated by the proposed amendment as to remediation is already encompassed by the reliance on illegal refining set out in the Defences.

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

121. As to delay, for the reasons given above in relation to the Constitutional claims – essentially that despite the years that have passed the claims are still at an early stage in the litigation process – I do not regard the lapse of time as a sufficient reason to refuse permission. I cannot see that Shell will be prejudiced by these amendments. Unless or until the Claimants manage to identify the spill or spills causing loss their claims fall to be decided as a global claim (see above). In that case Shell is in no different position by reason of these amendments than it was before, given its defence that the main causes of pollution in the area of Bille (and Ogale) were the actions of third parties, including the dumping from artisanal refineries of the by-product of illegal refining.

122. Accordingly, I allow the amendments insofar as they plead a loss arising from a failure to protect the pipeline from third party interference. The proposed amendment regarding the clear-up of by-product of illegal refining is refused. I considered whether to allow this amendment on the *Mastercard* principle, but the remediation amendment is so unclear as to what is intended to be alleged that it will not be permitted in its current form on that basis.

Additional Ogale Individual's PoC – application to strike out

123. Given my decision allowing the amendment to plead the Constitutional claims the additional Ogale Individuals' Particulars of Claim is no longer needed. This is a cleaner and more straightforward approach to managing the case, where (as was obviously intended at the time of making the GLOs) all claimants would be covered by a single generic pleading.

124. Although the point is now academic, as I have allowed the amendment to plead the Constitutional claims, I should deal briefly with the arguments in relation to Shell's

application to strike out the additional pleading, issued on behalf of the additional Ogale claimants. The application was advanced pursuant to CPR Part 3.4(2)(b) and/or (c) on the ground that the new "Master" particulars are in breach of the terms of the GLOs and/or that they are an abuse of the court's process. There was no objection to the new Ogale individuals being added to the list of claimants in the existing group litigation, the concern was with the filing of new "Master" Particulars of Claim incorporating the Constitutional claims and the illegal refining claims. Ms Fatima's point was that the Master Particulars were not aligned with, and significantly extended the scope of, the existing group particulars (unless or until they were permitted to be amended). As such they were filed in breach of the terms of the GLO, alternatively they are an abuse of the court's process because they run counter to the fundamental purpose of a GLO which is to manage claims which give rise to common or related issues of fact or law.

125. Paragraph 26 of the GLO provides in relation to Ogale claimants as follows:

> "26. The Standard Minimum Requirements for entry of a claim onto the Ogale Group Register are as follows:
> a. a Claim Form (in respect of which the issue fee has been paid) has been issued, on which the individual Claimant is named;
> b. the Claim Form on which the Claimant is named must have been served. The requirement to serve Particulars of Claim in any separate document is hereby dispensed with, subject to further order; and
> c. the Claimant:
> i. must have resided or resides within the area known as Ogale Community as a member of that community; and
> ii. must claim damages against the Defendants as a result of pollution alleged to have been caused by oil from the Ogale Pipelines and Infrastructure

126. Ms Fatima says that there is nothing in the GLO, nor was the matter raised at any point prior to the orders being made, addressing the possibility of filing further group particulars. The terms of paragraph 26(b) in particular do not use the language of "entitlement", used elsewhere. Instead there is reference in that paragraph to "subject to further order of the court", indicating that an application to the court would be

necessary. It is clear from the material that the court and the defendants only wanted to consider the GLO issues when there was clarity on the pleadings and the GLOs were only made after a close analysis of the pleadings that had been filed. Ms Fatima said it was fanciful to suppose that the court and the defendants would have embarked on that detailed process last year had they thought that a further pleading, served on behalf of an entirely new cohort of claimants, was to be forthcoming the following year.

127. Mr Hermer's counter-argument pointed out that the language of paragraph 26 was to dispense with a requirement to serve particulars of claim every time a claimant is added. It cannot be read as a mandatory rule prohibiting a new party issuing a separate particulars of claim, for which clear wording would be needed. The court did not order a generic pleading, nor does the GLO provide, as it might have done, that entry to the group register is only available to those who rely exclusively on its terms. It follows, he says, that there has been no breach by issuing further particulars of claim for the new Ogale claimants.

128. As to abuse, Mr Hermer made three points: first that there was no breach which militated against a finding of abuse, next, that as a foundational principle litigants are entitled to bring whatever case they want before the court as long as it is arguable and is not against the rules. His third point was that the claimants have always made it plain that they served fresh pleadings in order to avoid the need for seeking permission (for the Constitutional claims and illegal refining claims). The GLO provides a management structure for the court to exercise case management powers. Striking out for abuse is the most draconian of these, when an entirely proper and, he argued, more proportionate alternative would be to stay the contentious claims pending the resolution of the existing issues raised by the original group particulars.

129. Had I refused to permit the relevant amendments then I would have had no hesitation in allowing Shell's application to strike out the new "Master" particulars of claim. Whether seen as a breach of the (implicit) terms of the GLO or as an abuse, in my view it is not right that a new cohort of claimants, who qualify as entrants to the group register, can nevertheless pursue additional claims within the group litigation that are different to those arising on the existing group particulars. It goes against the whole exercise of identifying the common issues of fact and law, on the basis of which the GLOs are made. Had the possibility of further claimants making separate claims within the group litigation been raised with O'Farrell J last year then I am quite sure she would have required that it be done by way of amendment of the existing group particulars, so as to ensure that the generic issues were the same for all claimants.

130. Of course I accept Mr Hermer's point that litigants are entitled to bring whatever properly arguable claim they like, but to allow additional claimants to make new claims within existing group litigation on the basis that the new issues raised by those claims can be catered for simply by staying them until after the resolution of the originally-pleaded issues is to remove any possible gateway/access objections which the defendants might otherwise have been able to take: here Ms Fatima identified jurisdiction as a real issue. I think she is right that, in principle, new claimants cannot take the benefit of joining the group litigation whilst seeking to extend for themselves the limits on the issues imposed by the generic pleading. They must issue a new claim, outside the group litigation, and take the risks associated with that.

131. As I have said, it is academic here, where I have allowed the amendments to the generic pleading, but had I not done so then I would have struck out the new "Master Particulars", essentially for the reasons which Ms Fatima advanced.

Conclusion

132. For the reasons given above all amendments barring the addition to paragraph 88(g) and its equivalent in other pleadings will be allowed. In respect of all bar 5 Bille claimants, the claims at present must be viewed as global claims, although the implications of this for onward progression of the case remains very much in issue.