ALERT MEMORANDUM

UK Supreme Court Clarifies the Bounds of Continuing Nuisance in Oil Spill Case

The decision firmly rejects the argument that liability in nuisance for oil spills is continuing until the effects of the spill are remediated.

1 June 2023

On 10 May 2023, the UK Supreme Court ("Court") handed down its decision in *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16 ("*Jalla*"). The issue before the Court was whether the effects of a December 2011 oil spill off the coast of Nigeria constituted a continuing private nuisance under English tort law. This issue was addressed as a preliminary matter pre-trial, and was important because it determined whether or not the claim was brought within the limitation period.

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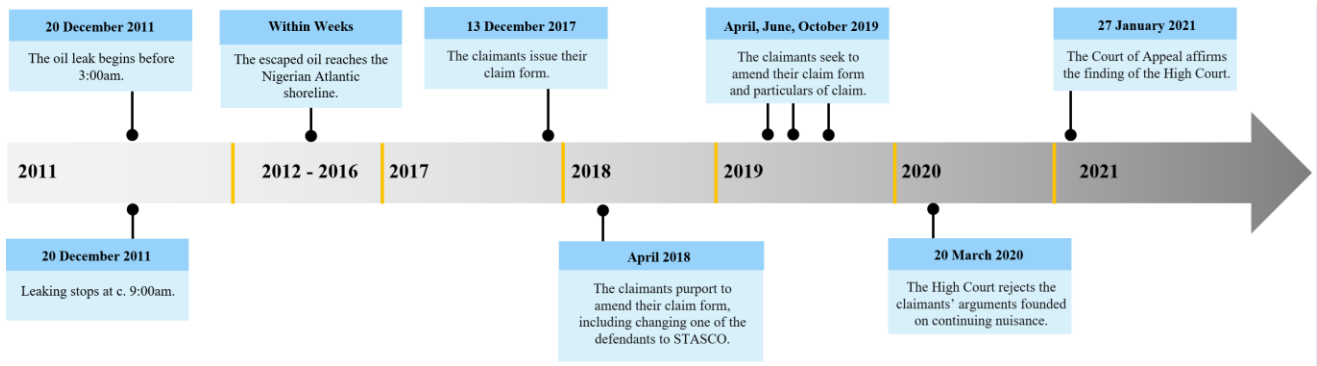
The claim against Shell International Trading and Shipping Co Ltd ("STASCO"), the anchor defendant in England, was brought more than six years after the oil spill. Under English law actions in nuisance are barred by statute six years after the accrual of the cause of action,[1] and the limitation period under Nigerian law (the agreed applicable law) is five years. The claimants argued that the claim was not time-barred, because they had a cause of action in *continuing* nuisance by virtue of the continued presence of oil on their land, such that there was a continuing cause of action.



[1] Section 2, Limitation Act 1980.

I. Background

On 20 December 2011, the Bonga oil field located off the south-eastern coast of Nigeria experienced the spilling of an estimated 40,000 barrels of crude oil. The leakage was caused by a ruptured pipeline, and continued for a duration of approximately six hours.

The claimants, Mr. Jalla and Mr. Chujor, are Nigerian citizens who own land on the Nigerian coast. There was a question as to whether the pair represented 27,830 other individual claimants. For the purposes of their appeal it was accepted that they did not represent a wider class.

The claimants contended that the oil migrated 120km from the Bonga oil field, and within weeks washed up on the Nigerian shore, causing major damage to property – including that of the claimants – in the Delta and Bayelsa States. They further contended that the spillage was neither removed nor cleaned up.

The defendants – both Shell group companies – were Shell Nigeria Exploration and Production Co Ltd ("SNEPCO") and the aforementioned STASCO. SNEPCO is a Nigerian company that was alleged to be directly responsible for the spill, whereas STASCO is an English entity which the claimants argued was vicariously liable for the alleged damage.

It was assumed for the purposes of the appeal that (inter alia) some quantity of oil from the Bonga spill reached the shoreline within weeks, however they argued that the spill was successfully contained, and did not impact the shoreline.

II. The question at issue

The question to be determined by the Court was a narrow one:

"whether on the facts (including those assumed by the parties for the purposes of this appeal) there was a continuing nuisance so that the applications to amend the claim form and particulars of claim fell within the limitation period."[2]

III. The nature of continuing nuisance

The Court recognised that there was no prior case in English law which conclusively ruled on the claimants' argument regarding continuing nuisance. Indeed, the Court stated that it was "*not surprising*" that the claimants "*could cite no case directly supporting*" their position.[3]

Lord Burrows, delivering the unanimous judgment of the Court, provided a useful exposition of the principles of the tort of continuing nuisance.[4] He went on to state that in general terms, a continuing nuisance was comprised of:[5]

1. a repeated activity or ongoing state of affairs for which the defendant is responsible;
2. the activity or state of affairs occurs outside the claimant's land and usually on the defendant's land;
3. the activity or state of affairs causes continuing undue interference with the use and enjoyment of claimant's land; and
4. the interference continues daily or on a regular basis.

The Court cited smoke, noise, smells, and vibrations as examples of continuing nuisances, provided that these interferences are continuing on at least a regular basis. In such cases, the cause of action will accrue on a continuing basis.[6]

IV. The Court's Decision

The Court held that the 2011 Bonga oil field spill was a one-off event and that, as such, there was no continuing nuisance. This was because:

"outside the claimants' land, there was no repeated activity by the defendants or an ongoing state of affairs for which the defendants were responsible that was causing continuing undue interference with the use and enjoyment of the claimants' land."[7]

In particular, the Court distinguished between 'continuing' in a legal sense and 'continuing' as a matter of ordinary language. Lord Burrows explained

[2] [12], *Jalla.*
[3] [40], *Jalla.*
[4] [17], *Jalla.*
[5] [26], *Jalla.*
[6] [26], *Jalla.*
[7] [37], *Jalla.*

that, while the effects of nuisance can persist and therefore be described as continuing as a matter of ordinary language, this does not mean that the nuisance is continuing in a legal sense. Consequently, on the facts of *Jalla* the nuisance did not continue while the effects of the spill continued on claimants' land – the nuisance occurred, and was complete, when the claimants' land was first affected by the oil.[8]

1. Policy implications

It is evident from the judgment that the Court had in mind the policy implications of the claimants' argument, should it succeed.

Lord Burrows stated that the claimants' argument was "*contrary to principle and would have the unfortunate policy consequence of undermining the law of limitation*".[9] This is because the claimants' argument effectively meant that the cause of action in nuisance would refresh repeatedly until the residue from the oil spill was removed, generating new limitation periods until the spill's remediation. Fundamentally, the Court disagreed with the implication of the claimant's position which would effectively convert the tort of private nuisance into the defendants' failure to restore the claimants' land.[10]

Thus, despite the seriousness of the damage alleged by the claimants, and the rising momentum[11] behind environmental litigation against private actors, the Court was unwilling to undermine the certainty guaranteed by strict limitation periods by opting for a broader interpretation of continuing nuisance.

2. Control

An argument raised by the defendants was that they had no 'control' over the oil once it reached the shore and the claimants' properties. According to the defendants, continuing nuisance required the defendants to have control and the corresponding ability to prevent the continuation of the nuisance.[12]

Lord Burrows firmly rejected this argument, reasoning that whilst continuing control will almost always be present in cases of continuing nuisance, continuing control was *not* a necessary element of the tort. [13]

V. Concluding remarks

Jalla poses a clear warning to would-be claimants regarding the importance of limitation periods.

The decision also sheds some welcome light on the question of the rights and protections that private owners have against any interference with the enjoyment of their property. This is proving to be a contentious issue in recent times: the decision follows shortly after *Fearn*,[14] a private nuisance judgement handed down by the Court in February 2023, concerning whether the Tate Gallery's viewing gallery could be considered a 'nuisance' to the flats in the opposing housing development which the gallery overlooked.

Jalla is just one of many cases in recent years seeking to use private law against private actors such as fossil fuel companies. A recent high-profile attempt at doing so is ClientEarth's derivative action against Shell, in which it claimed that the Shell board's mismanagement with regards to its climate change strategy constituted a breach of statutory duties owed to ClientEarth as a shareholder, and imposed by the Companies Act 2006. The High Court rejected this, on the basis that this would be an "*unnecessary and inappropriate elaboration of the statutory duty of care*".[15][16]

In recent years there has been a marked increase in the use of environmental litigation as a tool to hold companies (and governments) to account, and increase ambitions towards reaching Net Zero.[17]

[8] [37], *Jalla.*
[9] [40], *Jalla.*
[10] [36], *Jalla.*
[11] *See for example,* Setzer J and Higham C (2022) Global Trends in Climate Change Litigation: 2022 Snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.
[12] [43], *Jalla.*
[13] [44], *Jalla*. The Court found that *Thompson v Gibson* (1841) 7 M & W 456 stands clearly for the proposition that a person who creates a nuisance may still be liable in nuisance despite their lack of control.
[14] *Fearn and others (Appellants) v Board of Trustees of the Tate Gallery (Respondent)* [2023] UKSC 4.
[15] [18], *ClientEarth v Shell Plc & Ors.* [2023] EWHC 1137 (Ch).
[16] For additional information on this case, please refer to our alert memorandum of 31 May 2023.
[17] *See for example*, here, here and here.

Against this fast-moving environment of strategic litigation, *Jalla* serves as a reminder that there are limitations to using private law actions, and that the courts will not necessarily interpret the requirements (substantive elements of the cause of action and limitation rules in this case) so as to accommodate these claims.

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