Judgment Approved by the court for handing down.

Neutral Citation Number: [2021] EWCA Civ 63

Case No: A1/2020/0763

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
MR JUSTICE STUART-SMITH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2021

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE COULSON

- -

Between:

HARRISON JALLA AND OTHERS	**Appellants/ Claimants**
- and –	
(1) SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY **(2) SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED**	**Respondents/ Defendants**

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

Hearing Dates: 1st & 2nd December 2020

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Wednesday 27th January 2021."

LORD JUSTICE COULSON:

1 INTRODUCTION

1. The issue that arises on this appeal is whether or not the appellants have a cause of action for a continuing nuisance, which would defeat the respondents' limitation defence, or whether, as the judge found, they have a single claim in nuisance which, for many if not most of the appellants, is likely to be statute-barred.

2. On the appellants' case, the respondents were responsible for an oil spill, 120 km off the shore of Nigeria. It appears that the spill lasted for about 5-6 hours on 20 December 2011, before the relevant pipeline was switched off and the oil stopped leaking into the sea. The oil washed up onto the appellants' land within weeks rather than months thereafter. The primary limitation period in both negligence and nuisance therefore expired six years after that, some time in early 2018. Critical elements of the claim were not commenced until after that time. The appellants' contention is that, despite that, their claims in nuisance are not statute-barred, because the damage caused by the spill has allegedly continued and is continuing, and thereby gives rise to a fresh cause of action in nuisance every day that the oil remained on their land.

3. In his judgment, which dealt with a wide variety of other issues, Stuart-Smith J (as he then was) ("the judge") concluded that this single spill gave rise to a one-off claim in nuisance which crystallised within weeks rather than months of 20 December 2011. He found that the appellants' claims were not, and could not be, claims for continuing nuisance. For the reasons explained below, this had far-reaching consequences for the appellants' claims in these proceedings.

4. In Section 2 below, I set out the factual background and, in Section 3, the procedural background. I summarise the judgment and the consequential order in Section 4. At Section 5, I identify the issue and the context in which it falls to be decided on this appeal. Thereafter, at Section 6, I address five principal authorities on nuisance, and in Section 7, I analyse the appellants' case that claims of continuing nuisance were open to them on the facts of this case. I deal briefly with the other matters that might potentially have affected this appeal in Section 8, and there is a short summary of my conclusions at Section 9. The court is grateful to leading counsel on both sides, and the teams that supported them, for the excellence of their written and oral submissions.

2 THE FACTUAL BACKGROUND

5. I set out the factual background to this case by borrowing heavily from the judge's comprehensive judgment, Neutral Citation Number [2020] EWHC 459 (TCC).

i) The Parties

6. The appellants comprise 27,800 individuals and 457 communities who live and work by or in the hinterland of a stretch of Nigerian coast spanning Bayelsa State and Delta State. Although there are now issues as to whether or not this case is properly constituted as a Representative Action, those issues do not arise for decision on this occasion (although we are told they will arise in an appeal next year).

7. As for the respondents, the original first defendant, Royal Dutch Shell ("RDS"), has now been deleted from these proceedings and I say no more about it. The original second defendant was Shell International Limited ("SIL"). That company, too, no longer plays a part in these proceedings.

8. By an amendment dated 4 April 2018, the appellants sought to amend the claim so as to add a new second defendant, Shell International Trading and Shipping Company Limited ("STASCO"). STASCO is domiciled in the UK. It is the first respondent to this appeal. Prima facie, many of the claims against STASCO were not brought until after the expiry of the primary limitation period in early 2018.

9. The original third defendant (and now second respondent) is and always has been Shell Nigeria Exploration and Production Company Limited ("SNEPCO"). SNEPCO is domiciled in Nigeria. It is, I think, common ground that the English Courts only have jurisdiction to consider the claims against SNEPCO if there are valid claims against STASCO. STASCO is therefore what is commonly known in these cases as the "anchor" defendant. That explains why the strength (or otherwise) of STASCO's limitation defence is so fundamental.

ii) The Spill

10. The Bonga oil field is 120 kms off the coast of Nigeria. It includes a FPSO (a Floating Production Storage and Offloading facility), which is linked to a SPM (Single Point Mooring buoy) by three submersible flexible flowlines. The oil is extracted from the seabed via the FPSO, through the flowlines to the SPM, and then on to vessels and tankers.

11. The detailed circumstances of the spill are set out at [32] of the judgment as follows:

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

iii) The Damage

12. Before the judge, there was evidence (and subsequent debate) about when the damage occurred. He set out the detail at [33] – [34] and [54] – [58]. He was considering when the damage occurred by reference to the date of 4 April 2012, because that was 6 years before the claim was first made against STASCO; if the damage had occurred before 4 April 2012, the claims against STASCO were prima facie statute-barred.

13. The judge's findings on this point were at [59] – [61] in the following terms:

> "59. On the basis of the information before the Court, which I have summarised briefly above, it is safe to conclude without conducting a mini-trial that *if* the oil from the December 2011 Spill was responsible for the damage of which the Claimants complain, then oil reached the shoreline within a few days of 24 December 2011. Evidently, some parts of the shoreline included within the claims in this litigation were more remote than others from the Bonga FPSO and so landfall would not all have occurred at the same time. However, it is clear beyond reasonable argument to the contrary that actionable damage as alleged would have been suffered along most if not all of the affected shoreline within weeks rather than months of the December 2011 Spill. Not only is there actual evidence of oil reaching the shoreline at about the end of December 2011, but also no plausible mechanism has been suggested that would lead to the December 2011 Spill getting as close as it did to the shoreline by 24 December 2011 but then (assuming it did) causing such havoc over the allegedly affected shoreline only after some extended delay. This does not mean that all Claimants living and working along the shoreline were affected as soon as oil first hit land; but the substantial quantities of polluting oil alleged by the Claimants strongly support the conclusion that, where oil hit a particular stretch of the shoreline, many if not all Claimants living and working in that area would have suffered one or more of the effects of which they now complain within a short time. Even without conducting a mini-trial, therefore, the Court can be confident that actionable damage sufficient to start time running in negligence and/or nuisance occurred for many Claimants before 4 April 2012. This is supported primarily by the movement of the Bonga oil slick and the location and timing of the FUGRO samples as summarised in the Appendices to the Brookes Bell report and also by the other evidence summarised above.
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> 60. Because of the almost complete lack of specificity or evidence about the migration of oil and the location of Claimants, it is not clear that all Claimants had suffered actionable damage by 4 April 2012. However, there is no material before the Court to indicate that the Defendants do not have a reasonably arguable case on limitation for the action as a whole, simply based upon the date of the December 2011 Spill, the short time it would have taken to get to the shoreline, and the months that remained before 4 April 2012 for actionable damage to occur over a wide area. The Claimants do not plead when they first suffered damage, either in general terms or specifically. Neither in the pleadings nor in evidence is there any analysis of the location, alleged date of damage, or mechanism of migration and heads of damage caused by migrating oil. The only assumption that can safely be made is that the further from the shoreline and the more remote in time it

> may ultimately be alleged that damage was first suffered, the greater will be the need for the case to be properly pleaded and for evidence, both general and specific, to sustain a claim that the individual Claimants suffered actionable damage by Bonga Oil. In these circumstances, apart from being confident that any Claimants who had not suffered damage by 4 April 2012 but who will ultimately prove that they suffered damage thereafter will have suffered damage progressively depending upon their distance from the coast and the existence of pathways for pollutants to follow, it is not possible to determine which Claimants suffered actionable damage when.
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> 61. In summary, and without conducting a mini-trial of the issue:
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> i) It is clear that many Claimants will have suffered actionable damage before 4 April 2012;
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> ii) On current information the Defendants have a reasonably arguable case on limitation, though it is not certain that all Claimants suffered actionable damage caused by oil from the December 2011 Spill before 4 April 2012;
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> iii) If and to the extent that Claimants had not suffered actionable damage before 4 April 2012, it is arguable (and inherently plausible) that some may have suffered actionable damage between April 2012 and June 2013;
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> iv) On present information it is not possible to exclude the possibility that some Claimants may first have suffered actionable damage after June or even October/November 2013. There is, however, at present no reason to conclude that they did;
>
> v) On present information it is not possible to reach any further conclusions for the purposes of these applications about who suffered damage when."

3 THE PROCEDURAL BACKGROUND

14. Although a claim was intimated against Shell in July 2012, no steps were taken to commence any proceedings concerning the Bonga oil spill until 13 December 2017. That was one week shy of the expiry of the six year limitation period. As the judge rightly noted at [147], these proceedings were therefore issued hard up against the expiry of the limitation period. The difficulties which the appellants now face, and with which this judgment is concerned, stem from that fact alone. I am therefore inclined to agree with Lord Goldsmith when he submitted, on behalf of the respondents, that it is surprising that there is no explanation as to why the appellants waited so long to commence these proceedings.

15. The original Claim Form, the Amended Claim Form and the Particulars of Claim were served on RDS and STASCO on 10 April 2018. On 11 April 2018, the appellants issued an application to serve SNEPCO out of the jurisdiction. On 28 September 2018, RDS, STASCO and SNEPCO each issued applications challenging jurisdiction and applying for reverse summary judgment. There were a variety of other applications and hearings before the main hearing in front of the judge on 19

September 2019 and 7-10 October 2019. It is unnecessary to deal with those in this judgment in any detail.

16. However, it is important to note that, on 3 October 2019, after the first day of the interim hearing before the judge, but before the second day on 10 October 2019, the appellants issued a further application to amend the Claim Form to add claims against STASCO in respect of their responsibility for the MV Northia, the vessel loading oil at the SPM on 20 December 2011. This was a new claim made almost two years after the primary limitation period had expired.

17. The procedural history demonstrates two themes which flow through the judge's judgment. The first is that, because STASCO is the "anchor" defendant, it is the claim against it which allows the appellants to argue that the English courts should accept jurisdiction to consider its claims against SNEPCO as well. Since STASCO was not joined until more than six years after the oil spill at the heart of the case, this poses a potentially fundamental limitation problem for the appellants. If the claims against STASCO are statute-barred, as the Respondents maintain, the English courts would have no jurisdiction to consider the claims against SNEPCO.

18. The second theme is the appellants' delay in making any allegations against STASCO about the conduct or performance of the MV Northia. Those claims were fundamental to the appellants' claim against STASCO because it was the only part of the operation on 20 December 2012 with which STASCO was concerned. As the judge explained (see for example [274]), if there were no arguable claims about the MV Northia's conduct or performance, there were no arguable claims in negligence or nuisance against STASCO. Those claims were not made until part-way through the hearing before the judge, and were subsequently ascribed a commencement date for limitation purposes of 2 March 2020, the date of the judgment. That delay therefore gave rise to its own, even more acute, limitation difficulties.

4 THE JUDGMENT AND THE ORDER

19. The claims against the respondents are pleaded in negligence and nuisance. However, the claims in negligence are not relevant to this appeal because, on the face of it, they accrued against STASCO more than 6 years before the claims against them were made. Although, as the judge noted at [62], the appellants had sought to run a case as to the existence of a continuing duty in negligence, that argument was (rightly) not pursued. The claims in nuisance were also likely to be statute-barred, at least for many appellants, unless the appellants' claim that there was a continuing nuisance could be established. That explains the centrality of the arguments about continuing nuisance in this case.

20. The judge dealt with the appellants' arguments that the limitation period should be extended on the basis of continuing nuisance between [62] – [68]. Since those passages lie at the heart of this appeal, it is appropriate to set them out in full:

> "62. The Claimants submit that "the ongoing and unremedied pollution from the December 2011 Spill that continues to blight their land is a continuing nuisance" so that a fresh cause of action accrues each day against STASCO as damage or interference with the use of land occurs. At one point it appeared that the Claimants might be arguing that there was

also a continuing duty of care arising in negligence so that a new cause of action arose with every day that the pollution continued to blight the Claimants' land. If that was ever part of the argument, it was (rightly) not pursued. The Claimants do not claim that STASCO adopted the nuisance; rather, they assert that STASCO caused and then continued it.

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

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

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

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

> "Approaching the present case in the light of those governing concepts and the judge's findings, I think that there was a continuing nuisance during Flecksun's ownership until at least the completion of the underpinning and the piling in July 1992. It matters not that further cracking of the superstructure may not have occurred after March 1990. The encroachment of the roots was causing continuing damage to the land by dehydrating the soil and inhibiting rehydration. Damage consisting of impairment of the load-bearing qualities of residential land is, in my view, itself a nuisance. This is consistent with the opinions of Talbot J in the Masters case [1978] QB 841 and the Court of Appeal in the instant case, although neither Talbot J nor Pill LJ analysed specifically what they regarded as a continuing nuisance. Cracking in the building was consequential. Having regard to the proximity of the plane tree to Delaware Mansions, a real risk of damage to the land and the foundations was foreseeable on the part of Westminster, as in effect the judge found. It is arguable that the cost of repairs to the cracking could have been recovered as soon as it became manifest. That point need not be decided, although I am disposed to think that a reasonable landowner would notify the controlling local authority or neighbour as soon as tree root damage was suspected. ***It is agreed that if the plane tree had been removed, the need to underpin would have been avoided and the total cost of repair to the building would have been only £14,000***. On the other hand the judge has found that, once the council declined to remove the tree, the underpinning and piling costs were reasonably incurred, despite the council's trench." [Emphasis added]

67. This reasoning does not assist the Claimants. The highlighted passage shows the determining feature of the case, namely that the continuing presence of the tree roots gave rise to a continuing need for underpinning which would have been avoided if the highway authority had abated the (continuing) nuisance at any time by removing the tree (and, hence, the effect of its roots). The highway authority became responsible for that continuing state of affairs on being notified of the problem and when it declined to abate the nuisance. That is analogous to the person who builds and leaves a structure on or overhanging his neighbour's land – the classic "continuing" nuisance in this usage. It is quite different from the "normal" case where there is a release (be it of water, gas, smells, or other detrimental things) and that release causes damage or interferes with user of land. In the latter case, there is one occurrence of nuisance for which all damages must be claimed at once even if the consequences of the nuisance persist. So, for example, if in *Sedleigh-Denfield* the escape of water had formed a lake which caused damage to the plaintiff's land over a period of weeks, that would have been one occurrence of a legal nuisance despite the extent and duration of the consequential damage, for which all damages should be claimed at once. In the present case there was one escape of oil, for which the Claimants seek to impose liability upon STASCO. It is alleged that the

> escape has caused the inundation of the Claimants' land and other heads of damage. Nuisance by polluting oil is no different in principle from nuisance by escape of water, gas smells or other polluting agents. It is in that respect a "normal" case and there is no basis, either in authority or in principle based upon concepts of reasonableness or control to describe the nuisance as "continuing" in the sense contended for by the Claimants or as considered in *Delaware Mansions.* To treat the present escape as giving rise to a continuing nuisance in the sense asserted by the Claimants would, in my judgment, be a major and unwarranted extension of principle.
>
> 68. For these reasons, the limitation period should not be extended by reference to the concept of a continuing nuisance. The Claimants' causes of action accrued when each Claimant first suffered sufficient damage for the purposes of a claim in nuisance."

21. Thereafter in his judgment, the judge addressed an issue which does not arise on appeal, namely whether the limitation period should be extended on the basis of deliberate concealment. He dealt with that between [69] – [85] and rejected the appellants' submission to that effect.

22. Accordingly, as the judge found at [61] (paragraph 13 above), the position on limitation was that there was no continuing nuisance and that the actionable damage happened "within weeks, not months" of 20 December 2011. Accordingly, "many Claimants will have suffered actionable damage before 4 April 2012" and their claims will be statute-barred.

23. The judge dealt with a variety of other issues which do not arise on appeal from [86] – [154]. However, from [155] – [178] he addressed the appellants' application of 3 October 2019 to amend the Claim Form to make the critical allegations against STASCO about the performance of the MV Northia. In that context, it is important to note that, at [171], the judge rejected the submission that the original Claim Form covered a claim based upon the involvement of the vessel. That meant that the claim against STASCO, based on those fundamental allegations, was not deemed to have been made until the date of the judge's judgment (2 March 2020). As to the allegations themselves, the judge said at [194] that he was left in the position that he could not exclude "the reasonable prospect that the circumstances upon which the Claimants rely may give rise to relevant enforceable duties for the purposes of the law of tort." In short, he found an arguable claim, but only if it was not statute-barred.

24. At [273] – [274] the judge set out his "Conclusions and the Way Forward":

> "273. The conclusions I have reached in this judgment have far-reaching implications for the future conduct of this action. The major outstanding problem is how to cope with the possibility that the limitation period may not have expired for some (and possibly many) Claimants when they took the critical procedural steps that are the subject of this judgment. That problem raises questions about the structure of this "representative" action and how to determine whether there is a substantial cohort of Claimants who should be allowed to proceed forward to trial. Of one thing I am certain: it would not be acceptable to proceed to a full trial of this action in circumstances where my rulings in this judgment seem inevitably to mean

that some (and possibly many) Claimants are bound to fail for reasons associated with limitation. It is also to be remembered that, while I have necessarily assumed in this judgment that the relevant period of limitation under Nigerian law is 6 years, there is a live issue (which is entirely dependent on expert evidence) about whether the proper period is 5 years.

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

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

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

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

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

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

c) Any permission to amend the Claim Form as and from the date of handing down this judgment should make clear that it does not apply to those Claimants for whom the relevant period of limitation has expired. Whether this is done by adopting a mechanism such as was used in *Blue Tropic* or by some other means should not matter;

iv) The application to amend the Particulars of Claim should succeed in respect of those Claimants for whom the relevant period of limitation has not expired at the date of handing down this judgment and in respect of whom the Claimants' 3 October 2019 application to amend the Claim Form succeeds. Those for whom the relevant period of limitation has expired at the date of handing down this judgment will fail because permission to amend the Claim Form to permit a claim in relation to STASCO's

> responsibility for the MV Northia has failed. They therefore should not proceed to trial and the question of amending the Particulars of Claim against them becomes moot;
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> v) The jurisdiction of the English court over SNEPCO in these proceedings is dependent upon the presence of STASCO as the anchor defendant. Therefore, to the extent that Claimants are bound to fail against STASCO because of the conclusions I have reached in this judgment, the English court should decline jurisdiction over SNEPCO. Whether this is done by declaration or by setting aside service on SNEPCO in relation to those Claimants may be the subject of further submissions."

25. The judge's conclusions were mirrored in his order. At paragraph 3 the judge declared that the nuisance alleged by the appellants could not be a continuing nuisance. In respect of the application to join STASCO, at paragraphs 4 and 5 he found that, if the relevant period of limitation for a given appellant had not expired on 4 April 2018, the amendment of the Claim Form on that date was effective for that Claimant, but that if it had expired, the amendment was a nullity, the application to join STASCO was dismissed, and service out of the jurisdiction on SNEPCO was set aside. At paragraphs 6 and 7 he made similar orders in respect of the application to amend to add the allegations about the MV Northia, this time with the relevant date for limitation purposes of 2 March 2020.

26. The declaration at paragraph 8 that the court accepted jurisdiction in respect of claims against STASCO and SNEPCO was limited only to those appellants, if any, whose claims were not statute-barred on both of those dates. For all those whose claims were statute-barred on one or both of those dates, jurisdiction was refused. In order to allow the judge to say definitively which claims were statute-barred and which were not, he ordered an exchange of 'date of damage' pleadings.

5 THE ISSUE ON APPEAL AND THE RELEVANT CONTEXT

27. In this way, the sole issue on appeal is a matter of principle. Did the claim in nuisance against STASCO accrue shortly after 20 December 2011 when, as the judge put it at [59], "actionable damage as alleged would have been suffered along most if not all of the affected shoreline within weeks rather than months of the December 2011 Spill"; or was this a continuing nuisance with a fresh cause of action arising every day that the oil remained on an appellants land? The issue is confined to nuisance because, as noted above, the claims in negligence against STASCO were, on any view, statute-barred.

28. The context in which that issue of principle falls to be decided are those parts of the judgment set out in paragraph 13 above. There is no appeal against any of those findings of fact. In addition, I note that the judge answered the question definitively: this was not and could not be a case of continuing nuisance. He did not approach it on the basis of arguability. He found that, if the oil first struck the appellants' land before the dates he identified, the claims were statute-barred. During exchanges with my Lord, Lord Justice Lewison, it became apparent that both parties were agreed that this issue was capable of a definitive answer at this stage.

29. I note this because the appellants had originally sought permission to appeal against the judge's decision to address the limitation issue at all. The appellants had suggested that it was premature, and that the decision should await trial, when all of the evidence was known. The judge rejected that submission and permission to appeal on that point was also refused by this court.

30. In my view, in this case, limitation was a matter which the judge was able to decide at this stage of the proceedings, without conducting a mini-trial. Moreover, as a matter of case management, in view of the number of potential claimants, the size of the claim, and the inter-linked question of jurisdiction, it would have been absurd for the case to lumber on to a trial, only for the appellants to discover at that stage that i) their claims against STASCO had been statute-barred all along, and ii) the court should never have accepted the jurisdiction to consider the claims against SNEPCO.

6 THE LAW

31. During the course of the written and oral submissions, we were reminded of numerous authorities concerned with nuisance. Although I have considered them all, for the purposes of this judgment I have confined my analysis to five of the authorities, the first four being decisions of the House of Lords, with the last being the most recent consideration of nuisance in this court.

32. In *Sedleigh-Denfield v O'Callaghan and Others* [1940] AC 880, the defendant owned land on which a third party/trespasser had laid a pipe for carrying off rainwater. Although the defendants were unaware of the laying of the pipe, they became aware of it and used it to drain their fields. A grating on the pipe was put in the wrong place with the consequence that the pipe became choked with leaves, and water overflowed and caused damage to the appellant's neighbouring property. His claim in nuisance was upheld by the House of Lords.

33. In their speeches, the House of Lords used the words "continued" or "continuing" in a rather different sense to that which is in issue in the present appeal. They used it in the context of a defendant "continuing" – or adopting – a nuisance created by another party. Thus Lord Atkin said at page 897:

> "This conception is implicit in all the decisions which impose liability only where the defendant has "caused or continued" the nuisance. We may eliminate in this case "caused": what is the meaning of "continued"? In the context in which it is used "continued" must indicate mere passive continuance. If a man uses on premises something which he found there, and which itself causes a nuisance by noise, vibration, smell or fumes, he is himself in continuing to bring into existence the noise, vibration, etc., causing a nuisance.
> Continuing in this sense and causing are the same thing. It seems to me clear that if a man permits an offensive thing on his premises to continue to offend, that is if he knows that it is operating offensively, is able to prevent it and omits to prevent it he is permitting the nuisance to continue, in other words he is continuing it."

That was the central issue in the case. It was emphatically *not* the sort of continuing nuisance with which this appeal is concerned.

34. A number of the speeches also deal with some of the wider arguments which arose in this case. Thus Lord Wright said:

> "The forms which nuisance may take are protean. Certain classifications are possible, but many reported cases are no more than illustrations of particular matters of fact which have been held to be nuisances."

And Lord Porter said:

> "However this may be, the true view is, I think, that the occupier of land is liable for a nuisance existing on his property to the extent that he can reasonably abate it, even though he neither created it nor received any benefit from it. It is enough if he permitted it to continue after he knew or ought to have known of its existence. To this extent, but to no greater extent, he must be proved to have adopted the act of the creator of the nuisance...
>
> But the respondents had, as I have indicated, or ought to have had knowledge of the danger, and could have prevented the danger if they had acted reasonably. For this I think they were liable - not because they were negligent, though it may be that they were, but for nuisance because with knowledge that a state of things existed which might at any time give rise to a nuisance they took no steps to remedy that state of affairs."

35. In *Cambridge Water Co v Eastern Counties Leather Plc* [1994] AC 264, the defendant's tannery had allowed a toxic chemical, PCE, to seep from the floor of the premises into the ground below, where it had contaminated the plaintiffs' borehole. The Court of Appeal had found for the plaintiffs on the basis that there was a rule of strict liability where the nuisance was an interference with a natural right, incident to ownership. The House of Lords allowed the appeal, because the plaintiffs were not able to establish that pollution of their water supply by PCE was foreseeable.

36. The case is best known for the speech of Lord Goff in which, at page 306, he found that foreseeability was a prerequisite of liability in nuisance. He went on to deal with the argument about a continuing escape:

> "However there remains for consideration a point adumbrated in the course of argument, which is relevant to liability in nuisance as well as under the rule in *Rylands v. Fletcher*. It appears that, in the present case, pools of neat P.C.E. are still in existence at the base of the chalk aquifer beneath E.C.L.'s premises, and the escape of dissolved phase P.C.E. from E.C.L.'s land is continuing to the present day. On this basis it can be argued that, since it has become known that P.C.E., if it escapes, is capable of causing damage by rendering water available at boreholes unsaleable for domestic purposes, E.C.L. could be held liable, in nuisance or under the rule in *Rylands v. Fletcher*, in respect of damage caused by the continuing escape of P.C.E. from its land occurring at any time after such damage had become foreseeable by E.C.L.

> For my part, I do not consider that such an argument is well founded. Here we are faced with a situation where the substance in question, P.C.E., has so travelled down through the drift and the chalk aquifer beneath E.C.L.'s premises that it has passed beyond the control of E.C.L. To impose strict liability on E.C.L. in these circumstances, either as the creator of a nuisance or under the rule in *Rylands v. Fletcher*, on the ground that it has subsequently become reasonably foreseeable that the P.C.E. may, if it escapes, cause damage, appears to me to go beyond the scope of the regimes imposed under either of these two related heads of liability. This is because when E.C.L. created the conditions which have ultimately led to the present state of affairs - whether by bringing the P.C.E. in question onto its land, or by retaining it there, or by using it in its tanning process - it could not possibly have foreseen that damage of the type now complained of might be caused thereby. Indeed, long before the relevant legislation came into force, the P.C.E. had become irretrievably lost in the ground below. In such circumstances, I do not consider that E.C.L. should be under any greater liability than that imposed for negligence. At best, if the case is regarded as one of nuisance, it should be treated no differently from, for example, the case of the landslip in *Leakey v. National Trust for Places of Historic Interest or National Beauty [1980] Q.B. 485*."

37. In *Hunter and Others v Canary Wharf Limited* [1997] AC 655, the claim in nuisance concerned interference with television reception caused by the erection of buildings at Canary Wharf. In summarising the relevant principles, Lord Hope said:

> "In my opinion the English approach as disclosed by the authorities serves to emphasise the point that we are concerned here essentially with the law of property. The function of the tort, in the context of private nuisance, is to control the activities of the owner or occupier of property within the boundaries of his own land which may harm the interests of the owner or occupier of other land.
>
> The tort of negligence is also, in a very real sense, concerned with the relationship between neighbours. But, as can be seen clearly since the development of this branch of the law in *Donoghue v. Stevenson [1932] A.C. 562*, the answer to the question "who in law is my neighbour?" is a different one from that which would be given in the context of property law…"

38. During the argument on the present appeal, there was considerable focus on the most recent of these four House of Lords authorities, *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 32. The facts were relatively straightforward. The Church Commissioners owned a mansion block of flats. In 1989, following a period of drought, cracking appeared in some of the blocks and, in March 1990, engineers reported that the roots of a plane tree on the adjoining pavement had encroached under the property. They said that if the tree was not removed, underpinning of the blocks would be necessary. In June 1990, the blocks were sold to new owners, Flecksun, a wholly owned subsidiary of the claimant. In August 1990, the defendant Council, who were responsible for the tree, was shown a

copy of the engineer's report but declined to remove it. Subsequently, underpinning work became necessary and the claimants sued the Council for the costs. The judge dismissed the claim on the basis that the damage had occurred before Flecksun became the owners. The Court of Appeal allowed the appeal on the basis that the nuisance by encroachment had continued after completion of the transfer to Flecksun. That decision was upheld by the House of Lords.

39. In his speech, Lord Cooke of Thorndon noted that the judge had found that "all or almost all of the structural damage which is the subject matter of the plaintiffs' claim had occurred as a result of the 1989 drought not later than March 1990." The question was whether, if all the existing damage had occurred before Flecksun acquired the freehold, Flecksun had any claim at all or whether it was only the Church Commissioners who could sue for the damage.

40. Lord Cooke made plain in his speech at [6] that he considered that the dates of the cracking had assumed a disproportionate importance in the argument in the case. Then, having set out the English cases on encroaching tree roots, and some other nuisance cases, he noted at [23] that only one of them was concerned with the argument that remedial expenditure was not recoverable by the current owner for pre-transfer damage (and that was against the argument). This was a point he repeated at [27] when he said that none of the authorities chiefly relied upon by the Council had focused on the content of remedial expenses, whether by distinguishing between pre- and post-proprietorship damage or between making good existing damage and safeguarding against future damage.

41. On my reading of his speech, it was on that point that Lord Cooke then went on to say at [28] that "any decision which your Lordships may give in this case must to some extent break new ground in English law." That is confirmed in the next but one sentence when he dismissed the argument that the plaintiff's claim would amount to double recovery. Thus the 'new ground' related to what loss might be recoverable by the later purchaser. It was not, as Mr Dunning QC suggested in his submissions, an indication that the rest of his speech heralded a departure from the ordinary principles of the law of nuisance.

42. Coming to recovery, at [29] Lord Cooke said that "the answer fell to be found by applying the concepts of reasonableness between neighbours (real or figurative) and reasonable foreseeability which underline much modern tort law and, more particularly, the law of nuisance". Then having had regard, amongst others, to *Sedleigh-Denfield* and *Cambridge Water,* he said at [33]:

> "33. Approaching the present case in the light of those governing concepts and the judge's findings, I think that there was a continuing nuisance during Flecksun's ownership until at least the completion of the underpinning and the piling in July 1992. It matters not that further cracking of the superstructure may not have occurred after March 1990. The encroachment of the roots was causing continuing damage to the land by dehydrating the soil and inhibiting rehydration. Damage consisting of impairment of the load-bearing qualities of residential land is, in my view, itself a nuisance. This is consistent with the opinions of Talbot J in the *Masters* case [1978] 1 QB 841 and the Court of Appeal in the instant case, although neither Talbot J nor Pill LJ analysed specifically what they regarded as a continuing

> nuisance. Cracking in the building was consequential. Having regard to the proximity of the plane tree to Delaware Mansions, a real risk of damage to the land and the foundations was foreseeable on the part of Westminster, as in effect the judge found. It is arguable that the cost of repairs to the cracking could have been recovered as soon as it became manifest. That point need not be decided, although I am disposed to think that a reasonable landowner would notify the controlling local authority or neighbour as soon as tree root damage was suspected. It is agreed that if the plane tree had been removed, the need to underpin would have been avoided and the total cost of repair to the building would have been only £14,000 (joint statement of facts and issues, paragraph 23). On the other hand the judge has found that, once the council declined to remove the tree, the underpinning and piling costs were reasonably incurred, despite the council's trench."

43. In his summary at [38], Lord Cooke said that the law could be summed up in the proposition that "where there is a continuing nuisance of which the defendant knew or ought to have known, reasonable remedial expenditure may be recovered by the owner who has had to incur it. In the present case this was Flecksun." The point about knowledge refers back to [34] where Lord Cooke noted that "it cannot be right to visit the authority or owner responsible for a tree with a large bill for underpinning without giving them notice of the damage and the opportunity of avoiding further damage by removal of the tree." He referred to that matter again in the same paragraph, noting the defendant's entitlement to "a reasonable opportunity of abatement before liability for remedial expenditure can arise."

44. Finally, in this brief review of some of the leading cases on nuisance, mention should be made of *Williams v Network Rail Infrastructure Limited* [2018] EWCA Civ 1514; [2019] QB 601, on which Mr Dunning relied so heavily. This was a case about Japanese knotweed growing on the defendant's land. The principal issue was the defendant's contention that the claimant had not suffered any damage. Sir Terence Etherton MR summarised a number of the general principles of the modern law of nuisance, starting at [39] of his judgment. These were, first, that a private nuisance was a violation of real property rights [40]. Secondly, that although nuisance was sometimes broken down into different categories, those were merely examples of a violation of property rights [41]. He warned of the difficulties with rigid categorisation, because those would not easily accommodate possible examples of nuisance in new social conditions. Thirdly, he said that the proposition that damage was always an essential requirement of the cause of action of nuisance had to be treated with considerable caution [42]. He said that the concept of damage in this context "is a highly elastic one". He added that physical damage was not necessary to complete the cause of action [43]. Fourthly, he said that nuisance could be caused by inaction or omission as well as by some positive activity [44]. Finally, he said at [45] that the broad unifying principle in this area of the law was reasonableness between neighbours (real or figurative) and cited *Delaware Mansions* in support of that proposition.

45. With those authorities and principles in mind, I turn to the central issue in this appeal.

7 WAS THIS A CASE OF CONTINUING NUISANCE?

46. Oil pollution is a significant problem for many inhabitants of West Africa: the recent spate of TCC cases about different pollution events in that region make this all too clear. It is also acknowledged that this is a case in which serious allegations are made by the appellants against the respondents in support of their claims, the substance of which the judge found to be arguable, and that there are also disputes about the extent and efficacy of any subsequent clean-up operation.

47. But the issue for this court on appeal is not concerned with the rights and wrongs of the oil spill in December 2011. The appeal is solely concerned with the operation of the Limitation Act. Occasionally, during his eloquent address, Mr Dunning appeared to forget that, and sought to argue the merits of the appellants' position in emotive terms. For example, when describing the "injustice" of the judge's approach, he took the example of an oil spill which had affected the property in year 1, but which had had a more serious effect in year 7. He said that, on the judge's approach, "the polluter would get off", because the more serious damage emerged after the limitation period expired. Later in his submissions he said that the injustice was a result of "an artificial cut-off".

48. In my view, these submissions were misplaced. This appeal is not a question of anybody "getting off"; on the contrary, the judge found an arguable claim on the merits. It is instead a question of the operation of the applicable limitation period. That might be regarded as an artificial cut-off, particularly by those who may have failed to comply with the relevant statutory period, but it remains the law.

49. So on this issue, what might be thought to be of greater relevance was the appellants' decision to wait so long before commencing these proceedings that they are now obliged to try and extend the ordinary limitation period in order to allow for their mis-steps, in particular the delay in joining STASCO, and the longer delay in making the crucial allegations about the MV Northia. Having correctly abandoned the attempt to extend the limitation period in negligence, that leaves only the appellants' submission that this was a case of continuing nuisance, in order thereby to extend the applicable limitation period in respect of that cause of action.

50. In support of his submissions, Mr Dunning said on a number of occasions that this case was on all fours with the decision in *Delaware Mansions*. Accordingly, he said that, as with the tree roots in that case, the nuisance here continued (and will continue) until the oil is satisfactorily cleaned up.

51. In my view, this is not a case of continuing nuisance. This is not a case in which either the principle or the result in *Delaware Mansions* are of any assistance to the appellants. I therefore consider that the judge's decision was correct. There are a number of reasons for my conclusions.

i) Continuing Causes of Action

52. A cause of action in tort is usually a single, self-contained package of rights, relating to an act or omission which has caused damage and is actionable in law. Thus any claim in negligence in this case, arising out of the event when the oil leaked into the sea on 20 December 2011, gave rise to a single cause of action, which, as a matter of law, was completed when damage occurred. As the judge found, that was likely to have been in the weeks after 20 December, when the oil first hit the appellants' land.

53. A continuing cause of action is more unusual. In *Hull v Chard Union* [1894] 1 Ch 293, Lindley LJ described a continuing cause of action as "a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought." Whilst that was a case about a long-forgotten rule of procedure, the underlying notion, that a continuing cause of action will usually involve a repetition of the acts or omissions which gave rise to the original cause of action, continues to make logical sense in the twenty-first century.

54. The paradigm example of a continuing cause of action in nuisance is the tree-roots case. The roots of a landowner's tree spread, and encroach under the neighbouring land. The roots begin to undermine the foundations of his neighbour's house. Until such time as the landowner cuts down or severely prunes back the tree in question, he is responsible for the continuing encroachment of the roots. The tree roots therefore comprise a continuing nuisance. The landowner's failure to abate the nuisance by dealing with the tree is a continuing one.

ii) A Single or One-Off Event

55. The present case is not about a series of continuing acts or omissions, or a repetition of an original act or omission. It is a case about a single event, a catastrophic one-off leak from the FPSO in December 2011. In the language of some of the older authorities, it is, or gave rise to, "an isolated escape".

56. One of the submissions that Lord Goldsmith wanted to pursue on behalf of the respondents was that a single event could not give rise to a nuisance *at all*. At [18] of his judgment in *Northumbrian Water v Sir Robert McAlpine* [2014] EWCA Civ 685, when summarising the effect of *Cambridge Water* and *Transco PLC v Stockport MBC* [2004] 2 AC 470, Moore-Bick LJ stressed that, unless the case could be brought within the scope of the rule in *Rylands v Fletcher*, the defendant "is not liable for damages caused by an isolated escape". Similar statements to that effect can be found in *AG v PYA Quarries* [1952] 2 QB 169 at 192 and *SCM (UK) Limited v WJ Whittall & Sons Limited* [1971] 1 WLR 1017 at 1031.

57. The appellants objected to this argument, on the grounds that it amounted to a cross-appeal against the judge's judgment, and an attack on the declaration at paragraph 8 of his order. They argued that there was no notice or permission to pursue a cross-appeal in this case, and the point was not therefore something that arose for our decision. In the light of my conclusion as to the substantive point on this appeal, it is unnecessary to consider the matter further. But it does provide a backdrop for a submission that is open to the respondents, namely that, even if a one-off event or an isolated escape can comprise an actionable nuisance, it cannot give rise to a continuing nuisance. There is no authority for the proposition that a one-off event, or an isolated escape, can give rise to a continuing nuisance.

58. Here that event occurred on 20 December 2011 and had been remedied (or abated) by the turning off of the pipeline within 6 hours of the problem first becoming apparent, and its subsequent repair or replacement before the pipeline was reopened. It was a single, one-off event giving rise to a single, one-off cause of action.

iii) Delaware Mansions

59. By contrast, a continuing nuisance occurs where the state of affairs which creates the nuisance is allowed, either deliberately or through omission, to continue. *Delaware Mansions* is a prime example of such a case: the nuisance was created by the ongoing encroachment of the tree roots. That continuing nuisance meant that, although the original owners, the Church Commissioners, would have had a claim against the Council, so too did the new owners, Flecksun. Flecksun had a claim because, after they became the owners, the nuisance was continuing and it continued until the tree was removed.

60. On a proper analysis, *Delaware Mansions* is not a case about the accrual of a cause of action. Instead, the primary issue was whether it could be said that Flecksun had suffered any loss, in circumstances where the Church Commissioners would have had a prior claim for the same loss. That is why Lord Cooke dealt in such detail in his judgment with questions of recovery. As I have said, it is on that aspect of the law that Lord Cooke said that *Delaware Mansions* was breaking new ground. His speech was not breaking any new ground in relation to continuing nuisance, where his analysis adopted an entirely conventional line.

61. In *Delaware Mansions,* there was no ongoing or continuing damage to the mansion blocks following Flecksun's purchase of the freehold, but that was irrelevant as a matter of law because the state of affairs – the nuisance – created by the encroaching tree roots continued. Any ongoing physical damage was limited to the desiccation of the land due to the tree roots. Here, there was no continuing state of affairs: instead, there was a one-off event which, if it was a nuisance, was abated within a few hours. The oil that remained on the appellants' land was the consequence of that single event.

62. During the course of argument, my Lord, Lord Justice Newey, suggested to Mr Dunning that, because in *Delaware Mansions* the tree and its roots were still there, there was – unlike the present case – a continuing event or state of affairs. Mr Dunning appeared to accept that, and he went on to say that this meant that the appellants' case "was not on all fours" with *Delaware Mansions*, after all. However, he submitted that it required only a modest extension of principle for his case to be covered by it. Although he did not identify either the principle or the extension to it that he sought, I do not agree with the underlying proposition, for the reasons I have given. I regard the distinction that my Lord pointed out as critical. *Delaware Mansions* was a completely different kind of case to the present situation. It supports the respondents' analysis, rather than that of the appellants.

iv) The Equation of Nuisance with Damage or Harm

63. Perhaps as a result of these obstacles, Mr Dunning was obliged to argue that, because the presence of oil was a nuisance, there was a fresh nuisance and therefore a fresh cause of action every day that the oil remained on the appellants' land. In this way, he said, a single spill gave rise to a continuing nuisance. As he put it, "once the oil has arrived [on the appellants' land], that is a continuing state of affairs". In my judgment, there are a number of difficulties with that submission.

64. First, the proposition uses the word "nuisance" in a colloquial sense: oil in the water was plainly, at the very least, something which created numerous problems and

difficulties. But that is nothing to do with when (and how often) the cause of action at common law accrued to the appellants.

65. Secondly, I consider that it is wrong in principle to equate nuisance with physical damage or harm. There is no authority which supports the contention that, in a case like this, there is a fresh cause of action every day that the oil remained on the land. It would be a radical departure from the case law to say that a continuing nuisance does not require a continuing event or hazard, but merely continuing harm after the single event has ended, or the hazard has been removed.

66. Furthermore, the ramifications of such an equation would be considerable. It would mean that from a one-off oil leak, companies like STASCO and SNEPCO could be faced with litigation fifty years later. They would be unable to identify their future liabilities with any certainty. The provisions of the Limitation Act would be rendered ineffective.

67. Of course, that does not detract from the judge's finding that the cause of action in nuisance accrued to individual appellants at different times. The oil might have first hit the land of one appellant soon after the spill, because it was carried there directly by the tide, whilst it may not have first struck the land of an appellant far up one of the delta channels until much later in time. That was why the judge sought the provision of pleadings identifying the date of damage: he recognised that some causes of action may have accrued some time after the original spill.

68. Thirdly, any argument which equates the cause of action in nuisance with the occurrence of physical harm or damage, so as to arrive at the submission that continuing damage equates to a continuing cause of action, must be approached with caution. That is because, as *Williams* points out, it is at least open to debate whether physical damage is an ingredient of a cause of action in nuisance. I would therefore be very reluctant to find that the two were effectively synonymous.

69. Finally on this point, I note that in *Jones (Insurance Brokers) Limited v Portsmouth City Council* [2002] EWCA Civ 1723 (another tree roots case, to which I refer again in paragraph 73 below), Dyson LJ (as he then was) referred to the tree roots as "the hazard which constitutes the nuisance". In the present case, the hazard that constituted the nuisance was the defective pipe which caused oil to leak into the sea for 6 hours. Dyson LJ was not suggesting that the hazard which constituted the nuisance was the same as the damage caused by the nuisance, as Mr Dunning sought to argue.

v) Abatement and Remediation

70. Another fundamental difficulty with Mr Dunning's submissions was his approach to the concepts of abatement and remediation. He was obliged to accept that, for the presence of the oil on the appellants' land to constitute a continuing nuisance, the cause of action would continue to accrue until there was what he called "a proper clean-up". This, in turn, suggested that there was an obligation on the respondents to clean up the damage, because on this hypothesis they would be liable to the appellants on a continuing basis until that happened. So whatever the difficulties might be in embarking on and completing a clean-up in these circumstances, Mr Dunning's submission would have the effect that the respondents were liable for a continuing cause of action until such a clean-up had been achieved.

71. There is no authority for these propositions. As noted above, nuisance continues until it is abated (see, for example, *Sedleigh-Denfield* and *Delaware Mansions).* But abatement of the nuisance means dealing with the state of affairs that created the nuisance; it does not involve any obligation to remediate the damage caused by the nuisance. Thus, in *Sedleigh-Denfield*, the nuisance would have been abated by unblocking the pipe and moving the grating. The requirement to abate did not extend to obliging the defendant to go onto the plaintiff's land, drain it of the floodwater and make good the damage caused. Similarly, in *Delaware Mansions*, the Council were liable pursuant to a continuing cause of action until they had cut down the tree, but they were not obliged to go on to Flecksun's property and carry out the underpinning works.

72. I note in passing that, in *Green v Lord Somerleyton* [2003] EWCA Civ 198, Jonathan Parker LJ at [104] – [109] dealt briefly with the claim for continuing nuisance (which had not been particularised or addressed in evidence at the trial) and rejected the claim that in some way the defendants were in breach of their duty in respect of removing or reducing the risk of damage caused by floodwater. These paragraphs make plain the general limitations on a defendant's obligation to abate a nuisance.

73. In his submissions in reply, Mr Dunning said that, whilst he did not resile from the proposition that the cause of action continued until an effective clean-up happened, he did not go as far as to say that it was the respondents obligation to carry out that cleaning up. But in my view, that attempted distinction gives rise to a new level of unreality. If it were right, it would mean that a defendant would be liable for fresh causes of action accruing every day until someone else, whether it be the claimant or a third party, repaired the damage. This may well be in circumstances where the defendant itself may not have the ability or the necessary control to effect any remedial works anyway. So the defendant would have an ongoing legal liability for a situation which, no matter how much it might want to put right, it might be unable to do anything about. That proposition cannot be right in principle, and again no authority was cited in support of it.

74. It is in this connection that Lord Goldsmith's argument about control has particular relevance. A number of the authorities suggest that one factor in the liability of an occupier for nuisance is his ability, his control, to prevent or eliminate that nuisance. 'Control' is expressly referred to in *Sedleigh-Denfield* and *Cambridge Water*, as well as a number of other authorities. In *Jones v Portsmouth*, Dyson LJ referred to what Denning LJ had said in *Mint v Good* [1951] KB 517 about "the degree of control exercised by the owner, in law or in fact" and went on:

> "In my view, the basis for the liability of an occupier for a nuisance on his land is not his occupation as such. Rather it is that, by virtue of his occupation, an owner usually has it in his power to take the measures that are necessary to prevent or eliminate the nuisance. He has sufficient control over the hazard which constitutes the nuisance for it to be reasonable to make him liable for the foreseeable consequence of his failure to exercise that control so as to remove the hazard."

75. Translated to the present case, what was within the respondents' control was the ability to eliminate "the hazard which constitutes the nuisance", namely the pipe leaking oil into the sea. They were able to stop the flow to that pipe, turn it off and

stop the oil spill. They did not have any control over what happened to the oil once it was in the sea. There were, we were told, regulatory issues and approvals which the respondents did not have which practically limited their ability to undertake a clean-up operation. Furthermore, there would inevitably have been difficulties about the respondents being granted access to the land in the delta for the purposes of such an operation.

76. Of course, none of that means that the respondents were not liable in law for the consequences of the oil spill. Limitation and jurisdiction difficulties aside, if the appellants' case was well-founded, the respondents would be liable in damages, which might well include the cost of an effective clean-up operation. But they were not liable to carry out the clean-up themselves: that was beyond their control.

77. Accordingly, the respondents abated the nuisance. They were not liable on a continuing basis for their failure (or the failure of others) to remediate the damage caused by the nuisance.

vi) The Flexibility of the Modern Law of Nuisance

78. Standing back from some of these specific difficulties, Mr Dunning relied generally on *Williams* in order to argue that the modern law of nuisance was unconcerned with past categorisations of nuisance, and that all that mattered was damage to property and the foreseeability of harm caused by and to a real or figurative neighbour. He submitted that, with those principles in mind, this court could extend the law to encompass the claims for continuing nuisance in this case.

79. I accept that the modern law of nuisance is flexible (which may be one of the reasons why it has attracted some criticism in recent years). I also accept that it is wrong for the court to become too concerned about the precise category into which a nuisance claim might fall. But *Williams* does not address the issue that arises in this appeal about continuing accruals of liability. Moreover, there is nothing in *Williams*, or any other authority, which could justify this court concluding that the Limitation Act does not apply, or that the continuing presence of oil on the appellants land 10 years after the spill gave rise to a continuing cause of action. Mr Dunning maintained that there was a new cause of action every day that the oil remained in place, "regardless of when the original event occurred". For the reasons that I have given, I do not accept that the modern law of nuisance has become quite that flexible.

vii) The Particular Properties of Oil

80. Mr Dunning also advanced a discrete point that, because of its particular properties, oil was different to smells, waste, floodwater, fire, chemicals and the other sorts of things which feature in the nuisance or escape cases. The argument was that, because oil is almost impossible to disperse without a proper clean-up operation, its effect lingers for much longer than, say, noise or smells. It has a more permanent set of consequences. Therefore it was said that the very presence of oil gave rise to a continuing nuisance.

81. In my view, the particular properties of oil compared to some of the escapees noted in the nuisance/escape cases cannot give rise to different principles of law. Indeed, Lord Hope in *Hunter* stressed that the only proper approach to a nuisance case is to look at

the underlying principles. But in any event, I cannot see that there is any material difference between oil, and its potentially polluting qualities and, say, the toxic solvents that were allowed to escape in *Cambridge Water*. There is therefore nothing in that point.

viii) The Appellants' Pleading

82. Finally, it is worth considering the nature and form of the appellants' amended particulars of claim. Throughout his submissions, Mr Dunning suggested that the damage was claimed on the basis of a continuing nuisance, and that the losses reflected that continuing claim. In my view, that assertion is at odds with the detail of the pleading itself.

83. It is certainly right that there is a reference to a continuing nuisance at paragraphs 1 and 48 of the particulars of claim, which both say that the spills of 20 December "have caused and continue to cause" loss and damage. But for this purpose, what matters more are the heads of loss and damage themselves. These were set out by the judge in the judgment at [55]:

> "55. The heads of loss and damage for which the Claimants claim damages are set out at [56] – [64] of the Particulars of Claim as follows:
>
> **"Fishing/Fish Trading**
> 56. There has been a dramatic reduction in various species of fish, especially the 'Bonga fish'. Fishing, periwinkle picking and shell fish harvesting industries have been devastated, perhaps irreparably. To the extent that any fish or aquatic life has survived, the majority are contaminated by crude oil, toxic and unfit for human consumption. The effect on subsistence and commercial fishing has been devastating.
> **Farm land**
> 57. It is averred that the Claimants' farmland has been directly impacted by permeating oil from the spills and crop yields have diminished due to soil and environmental toxicity.
> **Drinking water**
> 58. The oil spills have caused pollution to the environment and contaminated the ground and drinking water forcing the Claimants to find alternative sources of water at significant additional cost disproportionately negatively impacting their modest incomes.
> **Mangroves**
> 59. The wood from the mangrove forest which supports the Claimants' domestic energy needs is now covered in oil and unsuitable for cooking fuel and other domestic tasks due to the odour omitted on burning. The Claimants are therefore having to find and utilise more expensive alternative sources of energy.
> 60. Mangrove forest is a natural habitat and ecosystem supporting the large populations of shell-fish and fish. Many hectares of mangrove forest and swamp has been heavily negatively impacted. The Claimants' incomes are diminished and sources of food destroyed.
> 61. It is averred that the damage to the mangrove forests and swamps will have a long term detrimental effect on the Claimants' economic activities and quality of life.

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

84. As I put to Mr Dunning during argument, those heads of loss are not consistent with an ongoing problem. There is no suggestion that, if the oil was properly cleaned up, fishing or other such activities could recommence. Neither is there a claim for the cost of a clean-up operation. Instead, the heads of loss suggest a devastating single event, which had a terminal effect on fishing, fish trading, farmland, drinking water, mangrove swamps and other features of the land. The suggestion in the pleading is that all the damage which could have occurred has occurred, and that compensation is sought for that damage. That is inconsistent with damage which is or could be continuing.

85. For example, the pleading makes plain that the fishing and fish harvesting industries "have been devastated, perhaps irreparably". On that basis, it would be perfectly possible to assess the damages payable in consequence. That is what one would expect for a one-off event that caused irreparable harm. There is nothing uncertain about that; nothing which depends on ongoing causes of action or future events (like a clean-up). In essence, the thrust of the pleading is that these losses have now occurred and are capable of being assessed or quantified. That is consistent with this as a one-off spill giving rise to a single cause of action.

86. So, going back to Mr Dunning's example of the polluter "getting off" because there is some damage in year 1, but much worse damage in year 7 (presumably because the oil has not been cleaned up in the interim), the appellants' pleading does not reflect that sort of claim at all. There is no gradation between the damage suffered at different times. Instead, the claim appears to operate on the basis that all the damage was suffered in year 1.

ix) Summary

87. For all these reasons, therefore, I am satisfied that this is not in law a case of continuing nuisance. The judge was right to find that the cause of action accrued to the appellants when the oil first struck their land, which is why many of the claims are likely to be statute-barred.

8 OTHER MATTERS

88. On behalf of the respondents, Lord Goldsmith raised in his Respondent's Notice a separate argument, to the effect that the respondents could have no liability in any event, because a necessary ingredient of a cause of action in nuisance was the defendant's use of his land, and this event happened at sea. He called this the 'land user requirement'.

89. I also note that there was a procedural dispute about the 'land user requirement' and whether it was properly before this court. The appellants maintain that there was no cross appeal and submit that in any event the issue was not raised before the judge. But it is unnecessary to deal with either the procedural or the substantive arguments since, if my Lords agree, this appeal will be dismissed in any event.

90. The same is also true of the argument to which I have referred in passing at paragraphs 56 – 57 above, namely that it was not possible for the respondents to be liable in nuisance as a result of a one-off event or isolated escape. Of course, for the reasons I have made clear, that does not affect the respondents' alternative submission that, even if they were liable in nuisance for a one-off event, that event could not give rise to a continuing nuisance.

9 CONCLUSIONS

91. For the reasons set out in Section 7 above, I consider that the judge was right to find that this was not a case of continuing nuisance. If my Lords agree, I would therefore dismiss this appeal.

LORD JUSTICE NEWEY:

92. I agree.

LORD JUSTICE LEWISON:

93. I also agree.