Neutral Citation Number: [2018] EWHC 1377 (TCC)

Case No: HQ12X04933, HT-2013-000028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2018

Before :

THE HON MRS JUSTICE COCKERILL

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Between :

King Felix Sunday Bebor Berebon & Others	**Claimants**
- and -	
The Shell Petroleum Development Company of Nigeria Limited	**Defendant**

- -
- -

Richard Hermer QC, Piers Feltham and Chris Buttler (instructed by **Leigh Day**) for the **Claimant**
Geraint Webb QC, Adam Heppinstall and Ognjen Miletic (instructed by **Hogan Lovells International LLP**) for the **Defendant**

Hearing dates: 22 May 2018

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Approved Judgment

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

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Mrs Justice Cockerill:

Introduction

1. These proceedings are the same as proceedings which came before Coulson J, as he then was, in case [2017] EWHC 1579. They concern land in and around Bodo Creek, in Nigeria, which was the subject of two oil spills in 2008.

2. So far as concerns the background to the claim I summarise this below - borrowing heavily and with gratitude from the summary in that case.

3. Prior to the commencement of these proceedings, the defendant, SPDC, who operated a pipeline in the area as part of a joint venture with the Nigerian National Petroleum Corporation, admitted liability in respect of those spills under the Nigerian Oil Pipelines Act 1990 ("the OPA"). The procedural history is somewhat complex, but in essence, 18 claimants brought claims in these proceedings on a representative basis. They originally sought damages and a mandatory injunction requiring the defendant to clean-up the area, or damages in lieu of an injunction.

4. On 20 June 2014, Akenhead J handed down a judgment which resolved a variety of preliminary issues between the parties, in particular as to the availability of relief at common law ([2014] EWHC 1973 (TCC)). Thereafter, in October 2014, the parties reached an agreement, referred to as the Narrowing Agreement, pursuant to which a settlement agreement was outlined for all claims, save in respect of the clean-up claim (i.e. the claim for a mandatory injunction or damages in lieu). Following a four day mediation, all but the clean-up claim was settled by an agreed payment by the defendant of £55 million. That final settlement was reflected in a Consent Order approved by Akenhead J in January 2015.

5. The clean-up claim was stayed for two years and was to be struck out in October 2016, although the claimants had liberty to apply to restore that claim before that date. The stay was to allow the remedial scheme to be put in hand under the auspices of the Bodo Mediation Initiative ("BMI").

6. An application was made to restore the claim and lift the stay in October 2016. That was initially opposed by SPDC essentially on grounds described as nullity and abuse of process/obstruction, but by the time of the hearing it was SPDC's submission that the application should be adjourned.

7. That application, as Coulson J notes, was supported by full evidence running to 7 lever arch files and giving rise to costs bills of hundreds of thousands of pounds.

8. Coulson J adjourned the Restoration Application. The Court ordered:

   i) the Restoration Application to be adjourned to a date to be fixed;

   ii) that the Defendant was to inform the Claimants and the Court (after receipt of further information) as to whether the Defendant was to continue to contend that the Restoration Application was a nullity; and if so

   iii) the Substitution Application and the nullity issue were to be heard before Coulson J (if possible) on the first open date after 1 October 2017;

iv) Costs were reserved.

9. It is that adjourned application, with some additions, which is before me today.

10. So far as the relevant chronology is concerned I again borrow heavily below from Coulson J's summary at paragraphs 6 to 21 of his judgment.

11. The starting point for present purposes is the Narrowing Agreement which was dated 22 October 2014. Recital E removed a variety of issues from the litigation including the volume of oil released in the spills and allegations in respect of the defendant's conduct prior to, during, and since the spills. Recitals F and G were in the following terms:

> "F. In circumstances in which the issues of clean-up and remediation of the Bodo Creek (as defined in accordance with paragraph 1 below) are the subject of an independent mediation led by the former Dutch Ambassador to Nigeria, the Claimants' Clean-up Claims as defined in paragraph 16 below shall be stayed and shall be struck out if not restored in accordance with paragraph 16.
>
> G. The parties enter into and will implement this Agreement in a spirit of cooperation and good faith in the expectation that it will reduce the work that is required for the trial set down for May 2015 (the "trial") and, if possible, facilitate an early resolution of those Claims. This Agreement shall be interpreted and enforced so as to ensure that the Parties abide by the intentions and objectives, set out herein, upon which this Agreement is based."

As Coulson J noted, the establishment of the BMI was the driving force behind the Narrowing Agreement.

12. Clauses 16 and 17 of the Narrowing Agreement provided:

> "Claim for injunctive relief or damages in lieu of clean-up and remediation
>
> 16. The Claimants shall not pursue their claims in relation to clean-up and remediation of the Bodo Creek and in particular their claims for injunctive relief or damages in lieu of the same (the "**Clean-up Claims**") and the Clean-up Claims shall be stayed until further order and shall be struck out automatically at 4:00pm on the date two calendar years from the date of this Agreement (the "Strike Out Date"). This Agreement is subject to the Claimants being at liberty to apply to the Court to restore the Clean-up Claims for trial by 4:00pm on the date seven days prior to the Strike Out Date.
>
> 17. Save for paragraph 16 above and this paragraph 17 the Clean-up Claims shall not be subject to this Agreement."

As noted above, the Narrowing Agreement then set out an agreement by the defendant to pay substantial compensation to the claimants in respect of their other claims.

13. There was a 'Consent Order To Go With The Narrowing Agreement', dated 31 October 2014, but not sealed until 19 December 2014. Clause 6 of that Consent Order provided as follows:

> "That part of the New Bodo Community Claim relating to clean-up and remediation … will be stayed until further order and shall be struck out automatically at 4:00pm on the date two calendar years from the date of the Narrowing Agreement (the "Strike Out Date"); the Claimants being at liberty to apply to the Court to restore for trial those parts of the New Bodo Community Claim …, any such an application to be issued and served by 4:00pm on the date seven days prior to the Strike Out Date."

14. The BMI involved not only the defendant and 'the Bodo Community' (which is not a legal entity in its own right and a deleted claimant in these proceedings), but also various other stakeholders, including the Rivers State Sustainable Development Agency, the National Coalition on Gas Flaring and Oil Spills in the Niger Delta, the Embassy of the Kingdom of the Netherlands, and the United Nations Environment Programme. Nigerian Federal and State Government Institutions were also involved in the BMI, including the National Petroleum Investment Management Services, the National Oil Spill Response and Detection Agency, and the Rivers State Ministry of Environment. Each of these stakeholders agreed to operate together under the umbrella of the BMI. The BMI has its own chairman, called and continues to call regular meetings which are minuted (see further the disclosure issue mentioned below), and issues regular reports.

15. Pursuant to a Memorandum of Understanding ("MoU") made on 30 April 2015, the way forward under the BMI was set out in some detail. All the stakeholders identified in the previous paragraph were named in the MoU, though the agreement is one between SPDC and the Bodo Community. The MoU provided that:

> " Recital C … The Parties agreed to the [BMI] … to find mutually acceptable basis for BODO to grant SPDC access to clean-up and remediate oil polluted areas in BOB without prejudice to the existing litigations in local and foreign courts … The Parties agreed to collaborate and partner in order to achieve the following aims:
>
> (i) clean-up remediate and restore the agreed oil polluted areas ….
>
> (iv) building trust and confidence between the Parties through mutually agreed activities/programmes, and dialogue processes, guided by the independent chairperson and advisers.

> 1. BMP comprising of Working Groups (including a technical Working Committee) a Steering Committee and a Plenary (general assembly/overall decision making body), will continue to cover all relevant aspects and activities related to the mediation. The Plenary reviews and endorses the proposals by the Working Groups, the overall work plan and approves the Project Director for the clean-up, remediation and restoration works.
>
> 2. The clean-up, remediation and restoration of the Identified Areas in BODO will be carried out in accordance with Nigerian law, by reputable contractors with proven international track record and experience with large scale clean-up, remediation and restoration works in a complex environment approved by the BMP Plenary…
>
> 4. SPDC will be responsible for the cost of clean-up, remediation and restoration of the Identified Areas under consideration, including the related bidding and contracting processes which shall be in accordance with the Joint Operating Agreement of SPDC, based on the recommendations of the Technical Working Committee and taking into account the applicable approval procedures of the relevant Nigerian authorities, including the National Petroleum Investment Management Services (NAPIMS).
>
> 5. In order to ensure that the clean-up, remediation and restoration of the Identified Areas is achieved, Bodo will grant and maintain unfettered access to SPDC, the Project Director, the Contractors and all persons performing or related to the performance of the clean-up, remediation and restoration works of the Identified Areas.
>
> 6. The day-to-day implementation of the clean-up, remediation and restoration work plan for the Identified Areas in BODO will be guided and supervised by the Project Director…"

16. Regrettably in the first two years of the process little or no progress was made in carrying out the remediation scheme envisaged in the MoU. Two main issues were identified to Coulson J in 2017.

17. The first was physical violence, threats, and hostility from some of those within the Bodo Community, aimed at those charged with cleaning up the pollution. It is fair to say that on the evidence before me the extent of this was in issue. However, it is indubitably the case that there was an incident in 2015 (whether properly described as a physical attack or not) which led to project sites being shut down and contractors taking the view that they had to withdraw. Certainly, too, on 26 October 2015 the

claimants' solicitors, Leigh Day, wrote a letter addressed to 'the Bodo Community'. Amongst other things, they said:

> "As I explained to you in December when I told you about the settlement proposal, the clean-up part of your claim has been 'stayed' in the High Court in London. What this means is that this part of the claim has not been concluded but instead has been put on hold for a period of 2 years from October 2014. That should mean that if clean-up does not commence before October 2016, your community could instruct us to take the matter back before the British Judge.
>
> When the Dutch Ambassador to Nigeria began lobbying Shell on your behalf we felt that it would be a good idea to give that initiative an opportunity to succeed as it has a good chance of working. We understand that international contractors have been appointed. It is therefore important that the process is given a chance to succeed before we consider intervening. If we find that the clean-up is not being done to a sufficient standard we will speak with you and if the Community instructs us to we will return to court to try to force Shell to clean-up to an international standard. However, until we allow that clean-up to start we cannot assess it to see whether it is being done to an international standard so it is extremely important that the clean-up is allowed to start.
>
> I would also like to stress that there is no pot of money available for clean-up that could be shared instead of being used for clean-up. If the clean-up of the Bodo creek is prevented from going ahead then Shell can simply walk away, the British courts would very likely decide not to get involved and the Bodo creek will not be cleaned. There is no alternative to clean-up. It is therefore imperative that the clean-up is allowed to go ahead as the Bodo creeks are your and your families' future livelihood.
>
> The option to return to court is a last resort and this option will not be available to you if you do not allow the clean-up to start. I appeal to you to allow the clean-up to commence and then we can assess the situation after it has started early next year."

18. The second main issue identified to Coulson J was the existence of six sets of legal proceedings, started in Nigeria in 2016 and 2017 by the claimants or those whom they purport to represent each of, in which an injunction was sought to prevent the remediation works being carried out. Those legal proceedings also delayed the clean-up process.

19. Other factors mentioned by Coulson J which remain live are the issues of political instability, contractor issues and the misconception as to “monetising” the clean-up. As to the first, the original first claimant, King Felix Berebon, died in 2013. His death was

followed by a dispute as to the succession which itself involved legal proceedings. The succession of his son, King John Berebon, was only confirmed by the Nigerian Courts in 2016. King John Berebon was one of those who had sought an injunction preventing the carrying out of the remedial works, though that claim has now been withdrawn. However, despite the succession being confirmed it appears that there continues to be some political instability.

20. As to the second issue the Claimants expressed before Coulson J and continue to express concerns as to one of the contractors appointed in relation to the Phase 1 clean-up. They argue that the process by which this contractor, INKAS, was appointed was suspicious, that it made an "inexplicable and extraordinary mistake" in failing to hire a local partner company in Bodo which inevitably led to protests and that it was guilty of "persistent poor contract performance". While these allegations are firmly in issue it appears that this perception has fuelled hostility to the process in the Bodo Community, which cannot have helped with moving the clean-up forward.

21. Thirdly there is the question of "monetising". It seems to be the case that there has been a perception in the Bodo Community that an alternative to clean-up would be to distribute the funds which would otherwise be spent on clean-up to the community. Although Leigh Day have rightly advised their clients that this is not a possibility this possibility appears to linger in at least some parts of the Bodo Community and to fuel hostility to the clean-up process.

22. There are also other issues which have arisen in the course of work to date, such as health issues, and issues as to whether the Bodo Community is being given a great enough share of the work, for example in relation to disposal of material from the clean-up. There is also the issue of damage to the Bodo area caused by extensive illegal bunkering and refining which has no relation to the spills which gave rise to these proceedings.

23. However the optimism which Coulson J noted at paragraph 18 of his judgment has to some extent been justified. SPDC and the Bodo community have managed to move forward with the clean-up and remediation of the polluted sites. More specifically:

    i) A new Council of Chiefs was appointed on 21 August 2017.

    ii) The Community leadership completed the withdrawal of the various claims for injunctions preventing clean-up.

    iii) The Community agreed to allow the appointed contractors the necessary access to the relevant areas, such as to enable the BMI to give the green light to allow the contractors to start clean-up operations.

    iv) Six days after the sealing of Coulson J's Order on 1 September 2017, clean-up contractors obtained the requisite access to sites from the Bodo Community and "Phase 1" of clean-up (the removal of free-phase oil) re-started. Phase 1 is expected to be completed by the end of June 2018.

    v) Regulatory approval was obtained in December 2017 for Phase 2 (remediation) and "Phase 3" (restoration). It is hoped that the tendering processes for these phases will be completed and contractors appointed, by about October 2018,

with mobilisation of those contractors to site to begin Phase 2 work shortly thereafter.

vi) It is hoped that Phase 3 will commence one year after the commencement of Phase 2 (October 2019) and run in tandem with the remainder of phase 2.

vii) The end point of the clean-up process remains unknown.

24. However, not all the news is good. It appears that there remain difficulties within the Bodo Community, including new leadership conflicts, and re-oiling of the environment due to illegal activities continues to be an issue.

25. Nor did the parties make as much progress in the run up to this hearing as had been hoped. There was correspondence between the parties' solicitors which has led to the substitution application being uncontested. However, when it comes to the restoration application the parties agreed in principle that there should be a further stay, and also agreed in principle that it should have some form of additional conditionality attached to it. But the positions on the conditions never came close to agreement, with SPDC wishing to peg the conditions to the MoU obligations, and the Claimants advocating some form of benchmarking to progress on the ground. Thus, the restoration application remains, at least in material respects, live.

26. In support of and opposition to the application, considerable further evidence has been served, some of which deals in detail with the issues on the ground. Again, hundreds of thousands of pounds of costs are reported to have been incurred.

27. There are two substantive issues before me:

i) The Substitution application: this is not contentious.

ii) The Restoration application: this concerns the question of the period for which any stay should be ordered and the conditions to be attached to it, if any.

28. There is also the question of who should pay the costs of the application and a lurking issue as to disclosure of information to the Claimants regarding the progress of the BMI process.

The Substitution Application

29. This application deals with two issues: the removal of deceased claimants, and the addition of replacements for them, and further additions to ensure that a proper spread of the ruling persons within the Bodo Community are included so as to ensure that changes in the Bodo formal rulership structures do not result in issues as to the entitlement of the claimants in the litigation to act for the community.

30. I am satisfied that the substitutions and removals sought are sensible and appropriate. I have been referred to the requisite written consents. No issue has been taken as to the various formalities required under CPR Part 19 and SPDC does not oppose the changes.

31. I will therefore make the order sought. In the light of the position on the stay I am not minded to make any orders for service of an amended claim form or Particulars of Claim. It seems to me that that is a matter which should be dealt with in the event that

the claim is fully restored. Making an order at this stage for substantive steps to be taken may well prove to be a waste of costs.

32. There is one further point regarding substitution. In their letter of 18 December 2017, the Claimants offered that the King and the members of the CCE, in addition to undertaking in their personal capacity to comply with Clause 5 of the MoU (granting and maintaining access to Bodo for the purposes of clean-up) would also undertake:

> "in their offices to use their best endeavours to procure compliance by all members of the Community… with the clause 5 obligation and upon notice of any breach of the clause 5 obligation by any member of the Bodo Community to take all reasonable steps available to them to restrain such a breach including if necessary legal action".

33. The draft Order offered by the Claimants indicates that this undertaking will be given by each of the named Claimants. That is plainly appropriate.

34. SPDC in its skeleton indicated that: *"SPDC, in the spirit of reciprocity, has confirmed that it is willing to provide the undertaking set out in the draft order attached hereto."* However, the ambit of any undertaking actually offered is not clear from the draft order and appears to be in issue.

The Restoration Application

35. The Claimants argued that:

i) The appropriate test to consider is that enunciated by Coulson J. Absent any successful argument in relation to abuse of process (which was not made by SPDC on this application) the Claimants have an unfettered right of access to the Court.

ii) Absent any ground to oppose the restoration, SPDC have no basis on which to seek to ask the Court to impose conditions, still less draconian conditions on the stay.

iii) Whether the test is satisfied must be determined at the time of the application to lift the stay. Any imposition of conditions would be premature or unnecessary; there is no case of wrongdoing pursued in this hearing and the correct route to police any wrongdoing is either via opposition to restoration or an application to strike out.

iv) Any conditions would need to be justified by a guiding principle and firm findings enabling a limitation of the basic right of access, and both were lacking here. Nor is the Court equipped at this time to make such findings.

v) There is nothing in SPDC's finality argument which offers a suitable guiding principle which counterbalances the right of access.

vi) Coulson J did not suggest that any stay would be subject to conditions – only that a restoration would be subject to conditions.

vii) Further SPDC's proposed conditions are objectionable, inter alia, as breaching the principles which indicate that a party cannot be compelled to participate in ADR, as insufficiently reflecting SPDC's responsibilities outside of paying for the clean-up (eg if a contractor fails properly to progress the clean-up) and as being disproportionate as triggering strike out in the event of any breach by any member of the community.

viii) An unfettered stay of 2 years (to May 2020) would strike the appropriate balance.

36. SPDC on their part contended that:

i) Any stay should be for a short and finite period.

ii) The case is now very stale, having been commenced in 2013 and the remainder settled in 2014. The effect of the stay sought would be to take the case past its 9 year anniversary.

iii) Allowing a stay without conditions would be to indicate that rolling stays would be forthcoming ad infinitum, which must be wrong. There is a genuine and important interest in finality both for the parties and for the Court.

iv) The logic of the stay was to allow clean-up to start and progress under the auspices of the BMI as contemplated by the Narrowing Agreement, and to give the Claimants some appropriate level of comfort in relation to the BMI process before the litigation was brought to an end. That point has now been reached, or will have been reached by October of this year.

v) Any stay should be subject to conditions. Coulson J had indicated that any future stay would be on conditional terms and the parties had agreed this in principle.

vi) SPDC's proposed order reflects the parties' primary obligations and therefore offers appropriate reinforcement of the parties' voluntary commitments to the BMI process whilst minimising the risk of the continuation of this litigation acting as an incentive to elements of the Bodo Community to frustrate the BMI process. It also provides an appropriate degree of certainty and finality.

37. There are essentially three issues in relation to the question of a stay:

i) Is lifting the stay at all necessary?

ii) For how long should the stay be granted?

iii) Should it be granted on terms and if so, what terms?

38. This frame of reference is not insignificant because it must be borne in mind that what I am not asked by the Defendant to do today is to refuse to restore the case, or to grant a stay. That is an option which is open to the other party when a party to a stayed action seeks to restore the action.

39. On the first question I was initially inclined to follow a course which did not involve restoring the case, because there has been no formal consideration of the issues relevant to a full restoration. However, I have ultimately formed the view that it is procedurally correct that a restoration, at least for a brief period, is necessary both as regards the need to make the order for substitution and to the extent that anything other than a continuation of the stay is required.

40. There will therefore be a technical restoration of the claim for these administrative purposes. It is not a full restoration for trial, which was not ultimately sought, and I make quite clear that I have not had to consider for these purposes the issues which would arise – as indicated in the judgment of Coulson J – upon such an application. There is no sense in which my decision on this issue should therefore be considered by any judge considering a full restoration application as tying his or her hands in any way.

41. Turning then to the question of the length of the stay and its terms, SPDC have focussed in their submissions on the question of the importance of finality, as a matter which goes both to the length of the stay and the imposition of conditions.

42. There is, of course, force in this. I entirely accept that the default stay under Part 26 is only for one month and that the practice in this court is to be relatively resistant to lengthy stays: see for example paragraph 7.2.3 of the TCC Guide and *CIP Properties (AIPT Ltd) v Galliford Try Infrastructure Ltd* [2014] EWHC 3546 (TCC) at [9].

43. However, this must be seen as a somewhat unusual case. It is not simply a large and complex case, it is a case which affects directly the lives and livelihoods of the people directly affected by a very significant oil spill. It is common ground that, while the BMI process is not formal ADR, it is in the context of this case the best and perhaps the only way of ensuring that the "clean-up" - to which both parties have made it very clear to this court that they are committed - takes place, and takes place as swiftly as possible. Further it is plain that the Court does have power under 26.4(2A) and (3) CPR to impose a stay for settlement *"until such date or for such specified period as it considers appropriate"*.

44. There is, of course, a need to bear in mind the desirableness of finality within a reasonable period for the parties, and for the Court (see such cases as *Jameel v Dow Jones* [2005] EWCA Civ 75, [2005] QB 946 at [54] and *Jones v University of Warwick* [2003] EWCA Civ 151 [2003] 1 WLR 954 at [25]). However, so far as the parties are concerned, they have indicated their desire at an earlier stage to give the remediation process, time to make progress and that this remains the case in essence was evident both in the submissions made by both parties before me and also in the Defendant's approach adverted to above of not putting the Claimants to their election now, but endorsing the concept of a further stay.

45. So far as the Court is concerned this is not, as matters stand, a heavy drain on the Court's resources and so the Court can afford in this case to give more weight to other factors.

46. I also bear well in mind that the Claimants originally sought only a year's extension of the stay, taking it to October 2017, and that effectively the history of the application has ensured that this period has already been comfortably exceeded.

47. Ultimately what has seemed most important to me, given the "in principle" agreement of the parties to a further stay at this stage, is for the Court to provide as closely as possible the assistance which the parties sought in asking for the stay originally. Matters have moved on since then, and the reason for the delay in the timeline of progress, may yet have significance, but in essence I would want to see some good reason to depart from the scheme which the parties had in mind when seeking the original stay.

48. What then was that intention? On the basis of the materials before me it appears from the MoU that it was anticipated that two things would have happened before the time for making a decision as to whether to lift the stay arrived. The first was the completion of Phase 1 of the clean-up, which had been anticipated to occur by early 2016. The second was the selection of contractors for Phase 2, which appears to have been timed for early 2016 also. It is not entirely clear whether it was anticipated that Phase 2 works would have started by October 2016, but that appears not unlikely. This suggests, as seems in fact to be common ground, that the parties wanted to get remediation to a good way along the timeline to see if scope remained for this action to be needed.

49. The evidence before me indicates that at present it is anticipated that Phase 1 works will be completed by the start of July 2018. The definition and approval of the scope of the Phase 2 works has also been completed. It is on this basis that SPDC seeks a stay only until October 2018. However, the tender process (which, given the complaints about the last tender process, is sensibly intended to be done rigorously with *"clear and unambiguous technical and commercial evaluation criteria to eliminate contractors without the requisite capacity and competence to carry out these works"*) is not anticipated to be completed before October 2018; and that date is not a firm one.

50. I am therefore not attracted by SPDC's submission that the stay should extend no further than October 2018. That would seem to put the Claimants in the position of having to take the decision as to restoration of the action at an earlier point in the timeline than the parties initially intended.

51. Nor, however, am I attracted by the Claimants' suggestion of dates in 2020. It seems to me that SPDC are right to say that at the time of the original stay the parties understood that the clean-up process would take longer than 2 years to achieve. That is what the Claimants' expert, Dr Gundlach, indicated clearly when he gave an estimate that 5 years would be required. To allow a stay of this length would be to allow a stay which is not in tune with the parties' intentions and indeed strays close to the *"gun in the cupboard"* situation deplored by Coulson J. I also consider that based on the evidence before me even the October date is too far off.

52. I will therefore order that the stay be re-imposed until 1 July 2019. That gives time to evaluate the Phase 1 results, the appointment of the Phase 2 contractors, even allowing for some slippage in that process and (it is to be hoped) also allows for some progress to be made with Phase 2.

53. The next question is whether the stay should be made conditional. There is a degree of common ground, in that it is ultimately accepted that the Court has the jurisdiction to make any further stay conditional and also that the parties discussed and reached some agreement in principle as to the imposition of conditions, but did not agree on the nature of the conditions.

54. Further it seems to be the fact that, while Coulson J anticipated that any full restoration of the case would be accompanied by conditions (for example as to costs budgeting), he did not make any determinations as to the basis on which any such application as that before me should be resolved. I am not therefore in any way constrained by the parties' agreement or any prior determination as to the question of conditions.

55. As to the nature of conditions, although counter-conditions were tendered for discussion by the Claimants, the only conditions "in play" are those put forward by SPDC. They are as follows:

> "No application to restore and/or to strike out the Clean-Up Claim shall be made during the currency of the said stay, save:
>
> (a) by the Claimants in the event of a breach of clause 4 of the MoU on the part of the Defendant which is of sufficient seriousness to cause the irretrievable breakdown of the BMI
>
> (b) by the Defendant in the event of a breach of clause 5 of the MoU on the part of members of the Bodo Community which is of sufficient seriousness to cause the irretrievable breakdown of the BMI."

A further sub-paragraph was also proposed to each of (a) and (b) as an alternative. This stated: *"the failure of the BMI process to make reasonable progress in relation to the clean-up in accordance with clauses 1 to 3 of the MOU"*. It was included apparently as a nod to the Claimants' position in correspondence which was that conditions had to be linked to progress on the ground by means of milestones.

56. There are, in my view, two problems with these proposed conditions. The first was the focus of the argument before me, namely whether it is appropriate to make such a limitation on a party's right of access save on the basis of the kinds of considerations adverted to by Coulson J. On this I tend to agree with the Claimants, though I do not accept their argument entirely.

57. I do consider that the Court, in looking at an application of this nature, has to bear in mind the authorities which make clear that a claimant generally has a right of access to the court in respect of a claim properly brought (see, for example, *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, paragraph 9, per Dyson LJ). That principle, in my view, operates with at least as much force where the process in support of which there has been a stay is not a court sponsored or approved ADR but a mediation process such as the BMI, which provides no guarantee of an alternative remedy.

58. Although this was not expressly stated by Coulson J, it appears to me to be inherent in his judgment and in particular his conclusion at paragraph 53 that he proceeded on this basis.

59. The core of Coulson J's approach was this:

> "48. The starting point is that the stay should be lifted if that is in accordance with the overriding objective (CPR 1.1) and if it is

> in accordance with the requirements of justice (Jameel). The issue as to whether that would be an appropriate and proportionate use of the court's resources automatically falls for consideration under r.1.1. The burden of satisfying this test is on the party who wishes to lift the stay.
>
> 49. It is not appropriate to tilt the playing field or 'load' the test to be applied in any particular way (for example, by identifying presumptions or making repeated references to the need for 'exceptional circumstances' to be shown in order to prevent the stay being lifted). Each case will turn on its own facts. "

60. He then went on to consider the question of the approach if that application were opposed root and branch and considered (in line with the starting point I have outlined above) that the kinds of questions which apply in relation to issues of abuse of process and summary judgment/strike out are likely to provide "helpful guidelines" though he made an important (and it seems to me plainly correct) qualification, namely that:

> " There may ... be cases which fall short of being an abuse of process or having no reasonable ground for continuance but which, in all the circumstances, might still lead a court to conclude that, ... the stay should be refused."

61. I cannot see why this approach should not be, broadly speaking, applicable to the imposition of conditions which, if they do not amount to barring the right of action in the stayed claim, do amount to a significant limitation on the right to bring the claim.

62. The approach is, of course, subject to something of a sliding scale – as is appropriate given the underlying rationale set out by Coulson J at [48-49]. There may be conditions which might be suggested which do not amount to a significant limitation of a party's right of access to the Courts; such conditions might not require the consideration of abuse of process or summary judgment tests. So too might those tests be less likely to be indicative where a partial restriction rather than a full bar is in the nature of the condition proposed.

63. However, this is all hypothetical. In this case the condition being proposed plainly is intended to operate as a significant limitation on the Claimants' rights to restore the litigation. This was clear from the submissions advanced, and also inherent in the tying of the need for conditions to finality.

64. Yet it was not argued at this hearing that the case approached one of abuse of process, or was one where the merits would justify summary judgment (though the right to make those submissions based on past facts was maintained). Essentially it was said that the need for finality, incentivisation to focus on the BMI, not the litigation and the uncontroversial aspects of past behaviour such as the existence of the six past injunction applications was effectively enough for the court to conclude that the imposition of the conditions was appropriate as being in line with the overriding objective.

65. I cannot accept this submission. In the context of a significant limitation on what prima facie is an unfettered right of access to the Courts I consider that considerably more than this would be required. Even if the full weight of the abuse of process/summary

judgment arguments were not needed, material of some weight would be needed to tilt the scale of the overriding objective in favour of such a limitation. Despite Mr Webb QC's clear and careful exposition I am not persuaded that the issues identified come close to that weight.

66. The second issue, though not specifically raised as an issue, is the potential for creating yet further uncertainty and scope for dispute between the parties. They may be confident that they would be at idem on the question of whether the BMI had irretrievably broken down or whether there had been a breach of obligation of "sufficient seriousness" with appropriately causative effect. Having read the evidence presented in this application and the solicitors' correspondence as to the attempts to agree a way forward, I cannot share any such optimism.

67. Imposing this condition would in my judgment almost inevitably mean adding to the issues for determination by the court on any application to restore or to strike out vibrant disputes about the actual state of the BMI, the existence and seriousness of breach, its causative effect in the context of the other events postdating this hearing, and also potentially the construction of the clause itself. This is therefore a factor which would tend to suggest that this would not be a sound decision from a case management point of view.

68. I have considered, given the parties' in principle agreement to conditions, whether other conditions might be composed which do not suffer from the defects identified above and in argument. I would not have been attracted by the Claimants' proposals, which also seem to have ample scope for increasing rather than decreasing the range of dispute. I have certainly found myself unable to alight on anything worth putting to the parties for discussion - and of course it is unlikely that the weighty professional teams engaged on each side would not have put forward the best and most practical conditions they could compose.

69. I will therefore make the stay an unconditional one. However, in doing so I do not accept that this means that the Claimants have an open door to extending the stay indefinitely. The conclusion I have reached is a conclusion based on the dispute before me – where the question of stay was effectively not in issue, and I was not (despite the service of extensive factual evidence) asked to determine the position on the facts.

70. It is emphatically not the case that any future application would necessarily have the same result. If on a future occasion SPDC chose to oppose the restoration for the purposes of granting an extension of the stay there are a number of possibilities. One is that, having considered all the evidence, the Court does grant a further stay. But there are two other very real possibilities. One is that the Court puts the Claimants to their election and agrees to restore the action, but only for trial (ie. refuses to grant any further stay).

71. The second possibility is that having considered the application on the merits no restoration will be granted. On this I would make the following points.

72. While I agree with the Claimants that any future hearing would enable them to rely on further evidence to contextualise the application (and the grounds for opposition) at the time made, two notes of caution should be sounded. The first is that the point which Coulson J makes about going behind contemporaneous documents at paragraph 62 is a

forceful one. A court is always likely to give considerable weight to the evidence provided by the contemporaneous documents – and to Coulson J's preliminary conclusions based on those documents.

73. Nor do I accept that any dispute as to issues such as abuse of process would necessarily require a full trial with live witness evidence. The Court might, depending on the nature of the dispute, be minded to follow that course; but issues of abuse of process or summary judgment and strike out are frequently (bearing in mind the tests inherent in those applications) dealt with by the courts on the basis of witness statements.

74. I also endorse Coulson J's conclusion that actions which do amount to an obstruction of the BMI process are well capable of founding an abuse of process argument which could preclude an application for restoration. Such actions as have been described in the evidence - and in particular any continuation or resumption of such actions impacting the timeline going forward - could provide a valid basis for refusing to restore the action and could also impact on the question of whether any mandatory injunction or damages in lieu could ever be granted.

75. I note and entirely endorse what Coulson J said at [82] of the judgment:

> "…the BMI process remains the best way (perhaps the only way) in which the remediation scheme can be achieved. For their own sake, the claimants therefore need to cooperate with the BMI in every way. The consequences of not doing so are stark."

76. Where I slightly part company with the learned judge is in relation to other factors. He said at paragraph 53 that he saw the obstruction case as the only argument which could prevent restoration. It seems to me that the further along the timeline one progresses the more acute may become the other potential issues as to the merits of the claims covered by the stay, and that an opposition based not on abuse of process grounds but on summary judgment/strike out type grounds may take on greater significance. So I see some force in the points made at paragraphs 44 and following of the skeleton of SPDC as to the gradually lessening ground on which the claim which founds the injunction and the claim for damages in lieu has to bite. This slight difference however only goes to lend further force to the passage quoted above.

Other matters

77. I have not been addressed on the costs issue, so I leave that for further submissions.

78. I was addressed on the question of disclosure. What has been sought is some form of order that SPDC disclose to the Claimants and Leigh Day all minutes of BMI proceedings, including the weekly BMI management meetings. This is said to be sought to enable the Claimants to participate effectively in the ADR process and to avoid the misinformation and distrust which formed the background of the breakdown of the BMI in 2015. The issue, it appears, is that the members of the Bodo Community who attend such meetings are not formal representatives but experts retained by the BMI, and they do not consider it appropriate to disclose BMI minutes.

79. Rightly no formal application along these lines was pursued at this hearing. Instead the Claimants urged SPDC to give consent to BMI to make such disclosure, putting down

a marker that if this was not forthcoming or some modus operandi in this regard not reached, it might be necessary to make an application to restore the action for seeking disclosure.

80. SPDC indicated that they had no opposition in principle to the Bodo representatives receiving updates, but put down their own marker about the need to maintain confidentiality over some aspects of the process and that a balance needs to be drawn.

81. I have no need therefore to make any decision, still less any order in relation to this. However, based on what I have seen and heard it seems to me that:

i) Provision of adequate information to enable the Bodo Community to understand the progress of the BMI process and participate in it seems to be inherent in the MoU and in particular Recital C(iv) of that document;

ii) To the extent that the actual process for bringing this about as set out in clause 1 of the MoU is not operating effectively (eg. because, as I am told, Working Groups are not active and Plenaries are few and far between) it would plainly be desirable for the parties to put in place an alternative route by which information can be disseminated;

iii) At the same time the kinds of concerns which SPDC highlighted as to provision of material which is confidential or in the process of evaluation are real. A balance has to be struck. It cannot be the job of the Bodo experts attending the weekly meetings to make this decision. As I indicated in the course of argument one route may be to ensure that Minutes are recorded and provided which do not deal with matters which it would be inappropriate or premature to disseminate;

iv) In the event that the parties cannot come to some way forward by agreement there appears to be a likelihood of a further hotly fought dispute coming before this court under the aegis of this claim. I make no comments about the basis for or prospects of such an application; however, one can be confident that it would increase still further the costs incurred by both parties in this matter. That would be a highly undesirable result.