Neutral Citation Number: [2024] EWHC 276 (TCC)

Case No: HT-2013-000028

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 12/02/2024

Before :

Mrs Justice O'Farrell DBE

- -

Between :

KING JOHN BARI-IYIEDUM BEREBON & Others — **Claimants**

- and -

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA — **Defendant**

- -
- -

Richard Hermer KC, Alistair Mackenzie & **Kate Boakes** (instructed by Leigh Day) for the Claimants
Lord Goldsmith KC, Dr Conway Blake, Tom Cornell & **Mark McCloskey** (instructed by Debevoise & Plimpton LLP) for the Defendant

Hearing dates: 23rd & 24th May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 12th February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. There are two applications before the court:

   i) an application by the claimants for restoration of the claims that have been the subject of an extended stay since 2014 and directions to trial;

   ii) an application by the defendant, seeking an order that the claims should be struck out as provided in a consent order sealed on 15 October 2021; alternatively, pursuant to CPR 3.4(2)(a) and/or (b); or reverse summary judgment pursuant to CPR 24.2.

The Claims

2. These proceedings arise out of two oil spills that occurred in the vicinity of the Bodo Creek in the Gokana Local Government Area of Rivers State, Nigeria. The first incident occurred on about 28 August 2008, when erosion and rupture in the 24" Bomu-Bonny SPDC Trans-Niger Pipeline at Sivilbilagbara in the Bodo Creek caused a spillage of crude oil into the creek that continued until about October/November 2008. The second incident occurred on about 7 December 2008, when erosion and rupture on the Trans-Niger pipeline at Bodo Bia Barima area in the Bodo Creek caused an oil spillage that continued until about February 2009.

3. Section 11(5) of the Nigerian Oil Pipelines Act 1990 ("the OPA") provides as follows:

> "The holder of a licence shall pay compensation –
>
> (a) to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the rights conferred by the licence, for any such injurious affection not otherwise made good; and
>
> (b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good; and
>
> (c) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.
>
> If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act."

4. Prior to commencement of this litigation the defendant, who operated a pipeline in the area as part of a joint venture with the Nigerian National Petroleum Corporation, admitted liability under the OPA to pay compensation in respect of the above spills.

5. In 2011 and 2012, 13 sets of proceedings were issued by about 15,000 claimants (acting on their own behalf and in a representative capacity for others) against the defendant, seeking compensation for the damage caused by the oil spills, including damage to the Bodo Community land and waterways and for consequential losses. In 2012, the claims were transferred to the Technology and Construction Court and thereafter case managed as group litigation, referred to as "the Bomu-Bonny Oil Pipeline Litigation".

6. This claim (HT-2013-000028) was brought against the defendant by the first claimant King Felix Sunday Bebor Berebon, together with other claimants (the Regent, Labon, Chiefs, Elders and traditional rulers), on behalf of the Bodo Community, a fishing and farming community in Gokana Local Government Area, Rivers State, Nigeria, seeking compensation and/or other relief in respect of damage to community property and rights ("the New Bodo Community Claim").

7. The defendant acknowledged service of the proceedings without any challenge pursuant to CPR 11, thereby submitting to this jurisdiction.

8. On 20 June 2014, Akenhead J handed down a judgment which resolved a variety of preliminary issues between the parties, reported at [2014] EWHC 1973 (TCC), including the following:

    i) Under Nigerian law the common law has been superseded by the OPA in respect of the financial remedies available for land injuriously affected and for damage caused by neglect in the protection, maintenance and operation of the licensed pipelines or caused by a breakage or leakage of such pipelines (with specified exceptions) (at [64]-[69]).

    ii) Once the court is seised of the compensation claim, it has all the powers of the court which have not been withdrawn or limited by the OPA, including the power to grant injunctive relief (at [65]).

    iii) The defendant would not be liable under the OPA in respect of damage caused by illegal bunkering or illegal refining unless it neglected to protect, maintain or repair the pipeline (at [92]-[93]).

    iv) The amount of compensation recoverable under the OPA in relation to damage arising from oil spills may be assessed by reference to the diminution in value of the land and/or interests in land which have been damaged and/or the loss of the amenity value of that land or interests therein and/or consequential loss (at [152]).

9. Following the judgment on preliminary issues, the New Bodo Community Claim was amended to reflect those findings in the Re-Amended Particulars of Claim. The amended claims were limited to the defendant's liability pursuant to section 11 of the OPA as set out in paragraph 51 of the pleading. The claimants alleged that as a result of the two oil spills, marine life within the Bodo Creek was devastated, mangroves

were destroyed and farmland along the coastal areas was contaminated, affecting farm production and yields due to toxicity of the soil and groundwater.

10. At paragraph 64, the claimants sought compensation for the environmental damage to community land, loss of amenity and other consequential losses suffered by the Bodo Community, as set out in the Master Schedule of Loss.

11. Further, the claimants claimed a mandatory injunction requiring the defendant to carry out clean-up and remediation of the impacted land and waterways, alternatively damages in lieu:

> "34. The Claimants aver that following the eventual inspections and clamping of the oil spills by the Defendant, no clean up or remediation has been undertaken by the Defendant to restore the impacted creeks, waterways and land to their pre-spill state or to the condition as required by Nigerian law.
>
> …
>
> 39. Accordingly, in respect of the said oil spills it is averred that:
>
> a. The two oil spills resulted from erosion and rupture ("equipment failure") to oil pipelines operated by the Defendant.
>
> b. The Defendant was provided with prompt notice of the said oil spills and failed to repair the said ruptures expeditiously, to take any/any adequate measures to reduce the flow of the oil and to take any/any adequate measures to contain the spread of oil.
>
> c. The rate of flow of oil from the first spill was in the region of 3,900 barrels of oil for at least 72 days totalling approximately 280,000 barrels of oil. The rate of oil flow from the second spill was at least as large as the first spill and continued for 75 days.
>
> d. The Bodo creek was environmentally sound prior to the said oil spills. The first oil spill extended to most areas within the Bodo creek and to neighbouring communities. The second oil spill added to and compounded the environmental damage which had already been caused by the first oil spill.
>
> e. Once the Defendant had capped the ruptures to the said oil pipelines, it failed to carry out

> any/any adequate clean up and remediation to restore the impacted land, creeks and waterways to their pre-spill condition as required under Nigerian law.
>
> …
>
> 65. In order to put the Community into its position prior to the spill extensive clean up and remediation is required in general terms this would require:
>
> a. An intensive clean-up of oil spilled into the Bodo creek, including the collection of free-floating, cleaning of oiled intertidal sediments, and cleaning of mangroves;
>
> b. An environmental remediation programme, including mangrove restoration and replanting in impacted areas;
>
> c. Fisheries rehabilitation, including restocking native fish populations through aquaculture production;
>
> d. Re-establishment and management of protected areas, including the designation of new mangrove protected areas.
>
> 66. It is averred in light of Defendant's history of poor clean up and remediation practice that the Court should award damages in lieu of the Defendant itself undertaking clean up and remediation …
>
> 67. Alternatively the Claimants seek a mandatory order that the Defendant carry out an appropriate clean-up and remediation of the impacted land and waterways."

12. In its Re-Amended Defence, the defendant admitted that the 2008 oil spills caused environmental damage in Bodo and admitted liability to pay compensation in accordance with the OPA but disputed the extent of such damage. Further, it pleaded that the claims were an abuse of process having regard to ongoing proceedings in the Nigerian courts and denied liability for damage caused by third-party acts, such as illegal bunkering or oil refining.

13. In respect of the clean-up and remediation claim, the defendant pleaded the following at paragraph 12.1 of the Re-Amended Defence:

> "(a) It is denied that the members of the Bodo community, whether individually or in common, have the necessary proprietary interest to entitle them to bring a claim for such injunction in respect of the communal lands …

(c) Further or in the alternative, SPDC avers that it has carried out the "clean up" of, and has taken reasonable steps to carry out the "remediation" of, the area identified as having been impacted by the 2008 Oil Spills …

(d) Without prejudice to the above, SPDC is, and has since 2009 been, ready and willing to undertake further reasonable and necessary clean up and remediation of all areas concerned in this litigation (including the said mangroves, waterways, shrines and water sources) that have been impacted as a result of oil spills from its pipelines, irrespective of the cause of the spills, namely whether operational or caused by illegal activities, in accordance with its own policy and/or its responsibility under EGASPIN and/or its other accepted obligations. For the avoidance of doubt, SPDC is not liable in respect of pollution caused by oil being stolen from its pipelines by unknown third parties and/or transported to illegal refineries for refining and/or to other locations outside its operational area, and/or being refined at such. In the premises it is averred that it would not be just and equitable for the Court to grant a mandatory injunction in circumstances where the land in question has been damaged by oil released by the illegal bunkering and/or illegal refining of third parties.

(e) Accordingly, SPDC has been seeking to engage further with the Community in order to recommence clean up and remediation of the communal lands initially by way of a pilot scheme, such an approach having been agreed between the parties. However, SPDC has been prevented from doing so, *inter alia*, as a result of intra community disputes, the refusal of the Community to grant access to SPDC for these purposes and/or the inclusion of clean up as an issue in this litigation when it ought properly to be progressed as a priority in parallel to these proceedings …

(f) Nonetheless, despite these difficulties and delays and the Nigerian Federal Government's establishment of HYPREP to clean up all hydrocarbon impacted sites in Ogoni area including Bodo, SPDC is supporting and participating in an initiative of the former Dutch Ambassador to Nigeria with regards to clean up of the Bodo area which involves all relevant stakeholders.

(g) SPDC therefore avers that the claim for an injunction and/or damages in lieu, if the Claimants are entitled to bring such a claim, is both unnecessary, unreasonable

and misconceived: it would not be just or equitable for the Court to exercise its discretion to grant such a remedy in circumstances where SPDC is ready and willing to perform the acts which would be the subject of the injunction or an award of damages and/or when the initiatives set out above are ongoing.

(h) Further, it is established as a matter of both English and Nigerian law that, as a general rule, the Court will not grant a mandatory injunction ordering a party to carry out complex works of repair on another person's land (and ownership of which is disputed as set out below …) following a nuisance: **Kennard v Cory Brothers** [1922] 2 Chan 1 at 11-12. This is, *inter alia*, because of the difficulties of supervision and enforcement of such an order. It is averred that this is even more so where the land in question in situated in another country as in this claim and/or where there are issues of access to that land. SPDC's ability to comply with the order would be dependent upon the cooperation of third parties, namely many of the people of Bodo and the surrounding area, who have prevented SPDC from carrying out this work to date, and who have threatened and kidnapped SPDC's employees.

(i) Finally, and for the avoidance of doubt, SPDC avers that it is not liable under the 1990 Act in respect of any damage to the communal lands which has been caused by the default and/or conduct of the members of the Community and/or their representatives in preventing SPDC from carrying out and/or recommencing clean up and remediation of the communal lands and/or in causing delays to that process."

14. The Re-Amended Reply joined issue with the matters pleaded in defence, asserting that the claimants have communal proprietary rights of use and occupation of the communal land and Nigerian law confers the right upon a community to bring a claim for mandatory relief.

Settlement of main claim and stay of clean-up claim

15. On 22 October 2014, the parties (including the individual claimants in the Bomu-Bonny Oil Pipeline Litigation) entered into an agreement ("the Narrowing Agreement"), setting out agreed facts and assumptions that would form the basis of compensation to be paid in settlement of the claims arising out of the 2008 oil spills, subject to an exception in respect of the clean-up and remediation claim, which was then the subject of an independent mediation led by the former Dutch Ambassador to Nigeria, referred to as the Bodo Mediation Process ("BMP") or the Bodo Mediation Initiative ("BMI").

16. The recitals to the Narrowing Agreement included the following:

> "A. The Claimants claim compensation from SPDC in actions in the Technology and Construction Court, a specialist court of the Queen's Bench Division of the High Court of England and Wales (the "litigation"). The litigation relates to two operational oil spills in the Bodo area of Rivers State, Nigeria in 2008 (Spill Numbers 2008_00217 and 2008_00261 respectively) (the "2008 Oil Spills").
>
> B. SPDC has admitted liability under the Nigerian Oil Pipelines Act 1990 (the "OPA") to pay compensation in respect of the 2008 Oil Spills. This litigation concerns the amount of any compensation that may be payable, subject to SPDC's contentions and reservation of its rights in relation to certain jurisdictional issues, including issues arising as a result of parallel proceedings in Nigeria.
>
> E. … the Parties have been able to agree certain assumptions and positions, which are recorded in this Agreement, on the basis of which, subject to the Court's approval, any compensation which is found to be payable will be assessed in the litigation. This will avoid time and costs being spent on certain issues in the litigation by both Parties, which would otherwise be extremely expensive and time-consuming to determine. Such issues include: (i) the volume of oil released by the 2008 Oil Spills; (ii) the differentiation of oil resulting from the 2008 Oil Spills from other oil in the environment around Bodo; (iii) allegations in respect of SPDC's conduct prior to, during, or since the 2008 Oil Spills, including SPDC's approach to pipeline operations, maintenance, integrity and oil spill response (including isolation, clean up and remediation); (iv) the extent to which illegal activities in Bodo and its environs prior to and after the 2008 Oil Spills impacted the environment; and (v) wayleave compensation. The purpose of this Agreement is to remove such issues from the litigation without any concessions as to those issues being made by either Party.
>
> F. In circumstances in which the issues of clean up and remediation of the Bodo Creek (as 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 these 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."

17. Under the terms of the Narrowing Agreement, the parties agreed that any compensation should be payable on the basis of damage resulting from oil released into the Bodo Creek, regardless of the source of such oil in the period between the 2008 Oil Spills and the date of trial, by reference to agreed assumptions set out in the Narrowing Agreement in respect of mangrove damage, fish stocks and other matters.

18. Clause 14 of the Narrowing Agreement provided:

> "For the purposes of this litigation, SPDC will not seek to advance arguments or adduce evidence as to any adverse impact that any oil released into the Bodo Creek, including oil from the NNPC pipeline, illegal theft/bunkering or refining of oil, may have had on the condition of the mangrove habitats and/or fish stocks before or after the 2008 Oil Spills, nor allege that the level of compensation payable should be decreased by reason of such oil. Likewise, the Claimants will not seek to advance arguments or adduce evidence as to SPDC's conduct prior to, during, or since the 2008 Oil Spills, nor allege that the level of compensation payable should be increased by reason of such conduct. Nor shall the Claimants pursue their claims under s.11(5)(b) of the OPA or for wayleave compensation."

19. Clause 16 of the Narrowing Agreement provided:

> "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 4pm 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 4pm on the date seven days prior to the Strike Out Date."

20. Clause 17 stated:

> "Save for paragraph 16 above and this paragraph 17 the Clean Up Claims shall not be subject to this Agreement."

21. Clause 22 stated:

> "Save and except for the Clean Up Claims, the claim for compensation in the New Bodo Community Claim (the "Community Compensation") shall be assessed as being a sum equivalent to 15% of the total value of the net compensation

> paid by SPDC to the Bodo Individual Claimants and Bodo Minors Claimants (numbering no more than 13,673 individuals), subject to a minimum of £5,000,000."

22. Clause 24 stated:

> "Paragraph 22 above sets out the exclusive basis upon which the entire claim for compensation in the New Bodo Community Claim shall be calculated save and except for the Clean Up Claims. The Parties agree that the New Bodo Community Claim shall be stayed pursuant to the draft Consent Order attached hereto at Appendix VII, subject to approval of the Court, pending payment of compensation. Upon payment of compensation in accordance with this Agreement and subject to paragraph 16 above in relation to clean up in the New Bodo Community Claim shall be extinguished as full and final settlement of the claim for losses alleged to have been sustained by the Bodo Community as a community."

23. By clause 27, the parties agreed that the defendant should pay the claimants' costs of the New Bodo Community Claim to the date of the Narrowing Agreement in full and final settlement of any costs payable in respect of that claim (excluding any reasonable and proportionate costs incurred in the event that the clean-up claims were restored pursuant to Clause 16).

24. Clause 31 provided that the Narrowing Agreement should be governed by, construed and take effect in accordance with the laws of England and Wales and that the parties submitted to the exclusive jurisdiction of the courts of England and Wales.

25. On 31 October 2014 the court approved a consent order (sealed on 19 December 2014), pursuant to which the clean-up claim was stayed in accordance with the terms of the Narrowing Agreement.

26. Paragraph 5 of the consent order provided:

> "Claim Number HQ12X04933 (the "New Bodo Community Claim") (save that part of the claim in relation to clean up and remediation that is pleaded in paragraphs 34 to 39 and 65 to 67 of the re-amended Particulars of Claim dated 10 July 2014 and paragraphs 21 to 27 and the first three lines of paragraph 65(1) of the Schedule of Loss dated 14 February 2014 in the New Bodo Community Claim) will be stayed pending the payment of compensation by the Defendant to the Claimants in the New Bodo Community Claim in accordance with the terms of the said Narrowing Agreement."

27. Paragraph 6 of the consent order provided:

> "That part of the New Bodo Community Claim relating to clean up and remediation (namely paragraphs 34 to 39 and 65 to 67 of the re-amended Particulars of Claim dated 10 July 2014 and

> paragraphs 21 to 27 and the first three lines of paragraph 65(1) of the Schedule of Loss dated 14 February 2014 in the New Bodo Community Claim) 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 that are pleaded in those paragraphs, any such an application to be issued and served by 4:00pm on the date seven days prior to the Strike Out Date."

28. On 11 December 2014 the parties entered into an agreement ("the Settlement Agreement"), pursuant to which the defendant agreed to pay the sum of £55 million to the claimants in the New Bodo Community Claim and to the individual claimants in the group litigation, in full and final settlement of all claims in the Bomu-Bonny Oil Pipeline Litigation, save for the clean-up claim. By a consent order dated 15 January 2015, effect was given to the Settlement Agreement and the proceedings were stayed in accordance with its terms.

29. As a result of the preliminary issues findings and the settlement of the main claims for compensation, the scope of these proceedings is now very limited as follows:

    i) The proceedings concern two specific oil spills that occurred in the Bodo Creek in 2008-2009.

    ii) The defendant is liable in respect of those oil spills pursuant to section 11(5) of the OPA but not at common law.

    iii) Claims by individuals for compensation in respect of pecuniary losses were made through other proceedings in the Bomu-Bonny Oil Pipeline Litigation and were settled on a full and final basis.

    iv) The claim for compensation in respect of environmental damage to the Bodo Community land, loss of amenity and other consequential losses caused by those oil spills has been settled on a full and final basis.

    v) The remaining claim in these proceedings is the clean-up claim set out in paragraphs 34 to 39 and 65 to 67 of the Re-amended Particulars of Claim, together with the associated losses pleaded in the Schedule of Loss.

    vi) The relief claimed in respect of the clean-up claim is a mandatory order, or damages in lieu, in respect of appropriate clean-up and remediation of the impacted land and waterways resulting from those oil spills.

Bodo Mediation Initiative (BMI or BMP)

30. Dr Vincent Nwabueze is the manager of the Ogoni Restoration Project, the SPDC team responsible for managing contracts for the Bodo Creek clean-up operation on behalf of the Project Directorate of the BMI. A brief history of the remediation operations to date is set out in his witness statements dated 10 March 2023 and 17 May 2023, and the contemporaneous documents in the hearing bundle.

31. Early attempts to clean-up the Bodo Creek were frustrated by fighting between competing factions within the Bodo Community, leading to violence, denial of access and the lack of a secure working environment. The difficulties were exacerbated by ongoing bunkering and illegal refining.

32. In 2013 the BMI was established but the death of King Felix Berebon, then the paramount ruler, gave rise to a succession dispute causing further delay to any remediation plans.

33. On 30 April 2015 the Bodo Community, represented by John Alawa, the Chairman of the Bodo Mediation Committee, and the defendant entered into a Memorandum of Understanding setting out the basis on which a clean-up and remediation process could be implemented.

34. Recital C stated:

> "The Parties agreed to the BODO MEDIATION PROCESS (referred to as "BMP") in August 2013 to find mutually acceptable basis for BODO to grant SPDC access to clean up and remediate oil polluted areas in BODO without prejudice to the existing litigations in local and foreign courts. BMP is chaired by the former Dutch Ambassador to Nigeria, Mr. Bert J. Ronhaar and the former Coordinator of NACGOND, Inemo Samiama and is supported by Voluntary Stakeholders and Federal and State Government Agencies listed in recital D below. The Parties agreed to collaborate and partner in order to achieve the following aims:
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> i. clean-up, remediate and restore the agreed oil polluted areas in BODO, especially Sivibiragabra/Patrick Water-Side, St. Brigid and Tene-ol ("Identified Areas");
>
> ii. safeguard the portion of the Trans Niger Pipeline (TNP) that traverses BODO and related SPDC JV facilities in order to prevent mechanical pipeline failure and pipeline and asset vandalism caused by criminal practices of oil theft and illegal refining;
>
> iii. contribute to the economic livelihood of the people and areas affected by the oil pollution and support the socio-economic development of BODO;
>
> iv. building trust and confidence between the Parties through mutually agreed activities/programmes, and dialogue processes, guided by independent chairpersons and advisors."

35. Recital D identified the Voluntary Stakeholders as:

i) the Rivers State Sustainable Development Agency ("RSSDA");

ii) the National Coalition on Gas Flaring and Oil Spills in the Niger Delta ("NACGOND");

iii) the Embassy of the Kingdom of the Netherlands ("RNE"); and

iv) the United Nations Environment Programme.

36. Recital D also identified the Nigerian Federal and State Government institutions involved as:

i) the National Petroleum Investment Management Services ("NAPIMS");

ii) the National Oil Spill Response and Detection Agency ("NOSDRA"); and

iii) the Rivers State Ministry of Environment ("MoE").

37. Pursuant to the Memorandum of Understanding, the parties agreed the following:

> "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.
>
> 3. The terms of reference for the clean-up, remediation and restoration works of the Identified Areas in BODO will continue to be based on and guided by reviews of scope of work based on the (pre-) Shoreline Clean-up Assessment Technique (SCAT) methodology by jointly established teams, headed by international consultants/experts with proven reputation and relevant international track record approved by 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 referred to in paragraph 1 who shall report to the Technical Working Committee.

7. The clean-up, remediation and restoration works will be split into three phases as follows:

a) The first phase will be the Free Phase Removal of polluted areas. The technical bidding process was started in July 2014. Since then, two contractors have been selected and approved by NAPIMS on the basis of their technical methodology including the use and training of local work force. Final contract award by SPDC is expected before July 1st 2015 and to be completed by early 2016.

b) The second Phase will be the Remediation Phase. The scope of works and selection of contractors will be established before 31 December, 2015 by the Technical Working Committee based on the outcome of the (pre- SCAT) investigation and monitoring missions in the field during the Free Phase Removal.

c) The third Phase will be the Restoration Phase. The scope of this Phase will be the re-vegetation of the various floral communities native to the Bodo creek in the "Identified Areas", reintroduction of native faunal species and constant monitoring and evaluation of their survival and succession.

…

11. In view of the overall agreement between the Parties, SPDC has agreed to contribute a one off "goodwill grant" of Seven Million United States Dollars (USD 7

> million) to support sustainable socio-economic development projects in the BODO area such as improving potable water supply, electricity and public health infrastructure and/or establishing a health insurance scheme. This payment is in addition to the concluded community based compensation settlement agreement and Parties agree that the goodwill grant represents the total contribution of SPDC in this regard.
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> …
>
> 21. This MOU shall terminate upon completion of the activities referred to in clause 1-13.
>
> This MOU may be extended by a Party sending a written request for an extension to the other Party and the Chair of BMP no later than three (3) months prior to the expiration of this MOU.
>
> Parties must mutually agree to the extension period in writing before such extension shall become effective.
>
> …
>
> This MOU shall be governed by and construed in all respects in accordance with the law of the Federal Republic of Nigeria…"

38. As agreed in the Memorandum of Understanding, the clean-up, remediation and restoration works comprise three phases:

    i) Phase 1 – removal of polluted areas, by breaking up surface contamination and contaminated sediments, together with pre-shoreline clean-up assessment technique ("SCAT") surveys;

    ii) Phase 2 – remediation in accordance with approved remediation plans, together with SCAT survey verification and chemical testing in accordance with Nigerian regulatory requirements;

    iii) Phase 3 – restoration by re-vegetation of the Bodo Creek, including mangrove planting and monitoring.

39. In May 2015, pre-SCAT assessments were conducted and remediation plans were developed. However, in September 2015, the project sites were attacked and shut down by youths from the Bodo Community, who demanded that all work on the clean-up process should stop until local contractors were included in Phase 1 and the wages for youths involved in the clean-up were increased. The Bodo Community refused to allow the clean-up process to continue and, as a result, the Phase 1 contractors were forced to withdraw from the area.

40. In 2016, some of the claimants, including the new King of the Bodo Community, King John Berebon, issued a number of applications in the federal court of Nigeria,

seeking injunctions to prevent any cleaning, surveillance or remediation work in the Bodo area.

41. In October 2016 the claimants made an application to restore the claim and lift the stay in these proceedings. By that date, Sir Robert Akenhead had retired, a number of the claimants had died, including the original lead claimant, King Felix Berebon, and others were no longer members of the Council of Chiefs and Elders with authority to act on behalf of the Bodo Community.

42. On 16 June 2017, the application was heard by Coulson J (as he then was), who provided guidance as to the court's approach to such application in his judgment reported at [2017] EWHC 1579 (TCC):

> "[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 v Dow Jones & Co Inc*** [2005] EWCA Civ 75). 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.
>
> [50] It may not always be appropriate for an application to lift a stay to be determined by a direct analogy with r.3.4 or r.24.2. There may, for example, 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, when applying the test outlined in paragraph 48 above, the stay should be refused.
>
> [51] That said, a court could not sensibly apply the test in paragraph 48 above without some regard to those rules of the CPR. But for the stay, the action would still be ongoing, so questions of abuse of process or the absence of reasonable grounds for continuance will, at the very least, provide helpful guidelines for the proper exercise of the court's discretion in deciding whether or not to lift the stay."

43. Given the uncertainty caused by the death or removal from the Council of the claimants and the late service of an application for substitution, the matter was adjourned so that the validity of the application, including the question of the claimants' title to sue, and Leigh Day's authority to act for them, could be investigated and/or resolved.

44. Amendments were made to the Claim Form and Re-re-amended Particulars of Claim were produced, to make substitutions and additions in respect of the appropriate claimants, including a new lead claimant, now King John Bari-Iyedum Berebon.

45. The adjourned application to lift the stay came before Cockerill J on 22 May 2018. In her judgment reported at [2018] EWHC 1377 (TCC), Cockerill J noted at [23] that significant progress had been made in implementing the remediation plan, including the following steps:

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

    ii) The community leadership withdrew claims for injunctions preventing clean-up and they agreed to allow the appointed contractors the necessary access to the relevant areas, such as to enable clean-up operations to start.

    iii) Phase 1 (the removal of free-phase oil) re-started and was expected to be completed by the end of June 2018.

    iv) Regulatory approval was obtained in December 2017 for Phase 2 (remediation) and Phase 3 (restoration).

    v) It was hoped that the Phase 2 work would start towards the end of 2018 and that Phase 3 would start by about October 2019.

    However, the court noted that there remained outstanding difficulties, including leadership conflicts within the Bodo Community and further oil contamination caused by illegal bunkering and refining activities.

46. Having considered all the circumstances of the case, the court ordered a restoration of the claims and imposed a further unconditional stay until 1 July 2019:

> "[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.

…

[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…"

47. By order dated 24 July 2018 Cockerill J imposed a stay of the proceedings until 1 July 2019, providing that they would be struck out without further order unless either party applied to restore the claims prior to 24 June 2019.

48. Thereafter, the Phase 1 clean-up operation continued, using pressurised water flushing of contaminated sediments, raking and breakup of surface contamination and algal mats in limited areas. A site characterisation and coring programme was undertaken, providing chemical results from over 700 samples taken from the surface, at 15-25 cm depth, and from 30 cores taken to 3.7 m depth.

49. On 2 September 2019, the BMI and SPDC produced a revised version of the Bodo Creek Remediation Action Plan and Close Out Criteria ("the RAP"), indicating a completion date for Phase 2 by the end of 2021. The RAP identified 55 oil pollution incidents between 2008 and 2019 that required remediation, caused by the 2008 oils spills and other incidents of sabotage and theft and stated:

> "There have been multiple incidents recorded in the area. In addition, the area is tidal with potential for re-impact from surrounding waterways from crude theft and artisanal refining. The clean-up area covers a mangrove swamp region within a

> challenging terrain and access to majority of the clean-up area is by boat transport."

50. Remediation objectives were described in the RAP as follows:

> "The remedial action objective is to address the risks of direct contact by users of the mangrove area and creeks including incidental ingestion. Proposed site-specific target levels have been derived for the area taking different exposure scenarios into consideration as below (BMI, 2019). This is in line with the Environmental Guidelines and Standards for the Petroleum industry in Nigeria (EGASPIN) framework that provides for a tiered risk-based approach for soil and groundwater remediation in line with American Society for Testing & Materials - Risk-Based Corrective Action (ASTM - RBCA). Values were derived using the RBCA Toolkit (GSI, 2019)."

51. The estimated scope of work was described as follows:

> "1. Asphaltic Tar-like Weathered/ Crude Oil Sludge and Burnt Crude in Sand Matrix
>
> These are found at illegal refineries and along heavily contaminated upper shorelines as discontinuous deposits of varying thicknesses thick overlying the sands and chikoko mud. They vary in thickness from 3 - 5cm or more and range in width from 0.5m to 10 cm and in length from 1m to about 50 m along shorelines. The area of impact may be significantly more in refinery locations. The tar shall be scraped off using shovels and hand digging tools and bagged in leak proof HDPE waste bags for evacuation to a waste treatment facility. In addition, there shall be levelling of illegal refining sites such that all pits and excavations are filled in and match the surrounding landscape. The wastes shall be treated thermally, and the resultant ash stabilized."
>
> 2. Heavily impacted sandy soil with intercalations of mud and clay
>
> This is found primarily adjacent to the sand roads at Patrick Waterside, along the shorelines and beneath deposits of weathered asphaltic materials in refineries and is relatively permeable because of the sand content. The heavily impacted sands are 3 – 30cm deep and shall be excavated for on-site soil washing in equipment capable of agitating the soils and approved surfactants with recovery of the resultant effluent for treatment and disposal.
>
> 3. Heavily oiled sediments - crude oil trapped in Chikoko mud, and sand deposits

These materials constitute about 80% of the remediation scope and are found along soft channel sediments continuing landward onto the mangrove platform until heavy oiling ends. SCAT and site characterisation indicate that the impact is primarily limited to the top 0.5m of the sediments. Raking shall be used to break up algal mats and expose the sediment surface. Low pressure, high volume flushing will be used to release oil within the top 30 – 50 cm and reduce crude oil contamination in the soil to silver sheen and/or less than 25% brown/black oil at the sediment surface and the surface of water found in a pit dug to 0.3m. Pressure pumps carried on boats shall be used to pump water from the creek via hoses with nozzles which shall be inserted into the sediments. Water pressure shall be applied from bottom up (not top down which may force oil deeper) to release oils to the surface. Repeat flushing in rooty (former) mangrove sediments will be avoided to prevent liquefying of sediments, making replanting more difficult Flushing is to be conducted and the released oil is to be contained when the tide is ebbing using river booms. The released oil will be recovered manually into temporary storage cans and transported to a lined and/or bunded storage container (fast tanks) for subsequent evacuation to an approved treatment facility. Residual oil will be mopped up using absorbent materials (pads, booms, rolls). Used absorbent materials shall be stored in leak proof HDPE waste bags for evacuation to approved treatment facility.

4. Lightly Oiled Former Mangrove Areas

These areas are found primarily on the harder mangrove platform and not in soft mud areas. Any present algal mats shall be broken up using rakes or shovels to expose the oil and mix surface sediments. Where SCAT observations indicate less than 25% brown/black oil at the sediment surface and the surface of water found in a pit dug to 0.3m, they may be replanted with mangrove seedlings.

5. Revegetation

Mangrove revegetation shall be conducted to assist in ecosystem recovery. The seedlings will be planted in holes large enough to accommodate the soils accompanying the seedlings at 2m x 2m spacings. Monitoring of mangrove survival shall be conducted periodically by visiting sites in the early stages and ultimately using satellite imagery.

6. Nypa Palm Removal

Nypa Palms will be removed manually using diggers, shovels and by pulling and mechanically (using swamp buggy). They shall be evacuated from the site using boats and stockpiled for subsequent disposal."

52. On 11 October 2019 the Department of Petroleum Resources, now known as the Nigerian Upstream Petroleum Regulatory Commission ("NUPRC"), approved the RAP. On 25 October 2019 NOSDRA approved the RAP, with modifications to the Site Specific Target Levels ("SSTLs"), the proposed residual levels of petroleum hydrocarbons in the contaminated soil and sediments.

53. Dr David Little was appointed as a consultant by the claimants to assess the efficacy of the RAP for the clean-up of the Bodo Creek. His report dated 5 May 2020 concluded that the RAP was generally in line with international good practice in environmental risk assessment, oil spill response and ecological restoration. He considered that the RAP was underpinned by a strong multi-disciplined technical report (the BMI 2019) but he was concerned that it did not give sufficient detail for fully confident testing, assessment and certification to be made. On 2 July 2020, Dr Gundlach, the BMI Project Director, produced a response to Dr Little's report, including further explanations regarding the RAP and SSTLs adopted by the BMI.

54. Following the above approvals, the Phase 2 clean-up and mangrove re-vegetation began.

55. In his technical notes and report dated 17 May 2023, Dr Gundlach explains that to enable monitoring of all activities, the contamination area was divided into smaller work units ("the Grids"). Before and after remediation, chemical sampling was undertaken by a combined SCAT team and Chemical Sampling team to verify that residual total petroleum hydrocarbons ("TPH") were below the required threshold. The Rivers State ministry ("MoE"), national government representatives (NOSDRA and NUPRC), and designated community members participated during the sampling. Surface and subsurface samples were taken in each Grid.

56. Delays to progress were caused by the Covid-19 pandemic, which gave rise to suspension of the project from March to November 2020 and preventative action against the spread of Covid through to 2022.

57. On 11 May 2021 the Mangrove Monitoring Plan and the Mangrove Planting Plan were approved and signed by SPDC, the BMI and Dr Pidomson (acting on behalf of the Bodo Community). Mangrove seedling planting began. On 10 November 2021, the Chemical Sampling Plan was approved and signed by Dr Pidomson, SPDC and the BMI.

58. In 2022, NOSDRA began independent verification with a designated sampling team and the participation of the SCAT team. One in every five Grids previously sampled was scheduled to be re-sampled.

59. In August 2022, BMI remediation contractors were threatened with violence and forced to leave an area subject to disputes between the Bodo and Goi communities.

60. In November 2022, remediation operations were suspended after BMI storage facilities and contractor base camps were burned and looted, destroying all shoreline technical survey equipment.

61. By letter dated 26 April 2023, King John Berebon wrote to SPDC inviting them to resume the remediation work:

> "I, HRH, King John Berebon, the paramount ruler (Menebon) Bodo-City writes on behalf of the entire Bodo community to formally invite your company (SPDC) to resume work activities on the Remediation site in Bodo which was suspended due to community crisis in November 2022.
>
> The community has since returned to its peaceful state and other work activities by SPDC like the pipeline monitoring and repairs have been ongoing. Hence, the need to also resume work activities on the Remediation project.
>
> The community is committed to providing a conducive environment for this Remediation works and the youths are eager to commence work as soon as possible.
>
> We therefore request that you begin mobilisation plans as quickly as possible.
>
> We await your favourable response."

62. SPDC responded by letter dated 8 May 2023:

> "… We are pleased to hear that the community unrest and violence that forced the BMI to suspend clean-up activities in November 2022 have been resolved peacefully. We are, of course, amenable to your invitation on behalf of the Bodo Community, and we will work with you within the usual BMI framework to resume BMI clean-up activities as soon as possible.
>
> We were dismayed and disappointed when the BMI was forced to suspend clean-up activities in November 2022, in response to storage facilities and contractor base camps being raided and burned by members of the Bodo Community. Nevertheless, given that the clean-up is at an advanced stage, SPDC is optimistic that the BMI can effectively implement the final months of the clean-up exercise.
>
> As you are aware, SPDC takes safety and security very seriously and has always sought to ensure that BMI staff and contractors, many of whom are members of the Bodo Community, can carry out clean-up activities safely and free from violence and intimidation. We therefore also welcome your re-commitment, in the spirit of the April 2015 SPDC / Bodo Community Memorandum of Understanding, to ensuring a conducive working environment for the resumption of BMI clean-up activities. As part of resuming the clean-up activities, we would like to discuss with you certain assurances that will be required from the Bodo Community and its leadership, to ensure the safety of all BMI staff and contractors going forward.

> SPDC remains committed to the clean-up of Bodo under the BMI. We believe that the BMI framework remains the best and only way of achieving clean-up for the benefit of the Bodo Community, and to the satisfaction of the various civic and government stakeholders involved.
>
> We look forward to engaging in further discussions with you, your representative team, and the BMI Project Directorate to resume site operations as soon as possible, and remediate the remaining 46 clean-up grids.
>
> Please inform us of when you will be able to begin such discussions…"

Status of remediation process

63. The Bodo Remediation and Revegetation Project encompasses 963 hectares (~2,400 acres) and both parties have described it as the largest remediation and planting project ever undertaken in an oil contaminated mangrove habitat in Nigeria and worldwide.

64. Dr Gundlach's report states that 834 hectares, 87% of the total 962.3 hectares of the contamination area (317 out of 363 Grids) were remediated by the end of 2022.

65. In the BMI annual report of 2022, it was anticipated that, subject to resolution of the community difficulties, remediation and mangrove planting could be completed by the end of 2023 / early 2024 and mangrove monitoring would continue until 2028/2029.

66. Mr Mark McCloskey, associate solicitor at Debevoise & Plimpton LLP, acting for the defendant, states in his witness statement dated 10 March 2023 that the BMI is the only viable way to achieve clean-up of the Bodo Creek. As at March 2023, it had achieved 87% completion of the clean-up and required only three to four further months to achieve full completion. On that basis, it is argued that the litigation no longer serves any practical value, is abusive and should be struck out.

67. Dr Nwabueze states that SPDC's position is that it is just and reasonable to allow the clean-up claim to come to its natural end. Having acceded to the claimants' requests to extend the stay in 2019, 2020 and 2021, and when there were some concerns about remediation progress following the Covid-19 pandemic, there is now no legitimate purpose to keep the clean-up claim afoot. Remediation of the Bodo Creek is now almost 90% completed (as certified by the BMI pursuant to Nigerian law and regulations), and only three to four months remain before full completion is achieved. The parties clearly have every intention of seeing clean-up through to completion, and there is nothing that the clean-up claim can or will add to the clean-up of the Bodo Creek, or the broader process of reconciliation within the Bodo Community and Ogoniland.

68. In his ninth witness statement dated 20 October 2022, Mr Daniel Leader, barrister and partner at Leigh Day, stated that the claimants' position was that significant progress in respect of the clean-up operation had been made and the procedural stay of

proceedings should be extended to facilitate an independent review of the remediation works. At that point in time, the claimants anticipated that an independent review of the clean-up process could be conducted within six months. On that basis, a further stay of one year (up to October 2023) was requested.

69. The claimants' position has now changed. A number of concerns have been raised as to the adequacy of the clean-up operation, as set out in Mr Leader's tenth witness statement dated 10 May 2023.

70. King John Berebon states in his witness statement dated 10 May 2023 that he is not satisfied that the clean-up in the Bodo Creek is complete. His concern is that the BMI lacks independent oversight and monitoring mechanisms; it is not independent of SPDC and there are doubts regarding the independence and capacity of the Nigerian regulators.

71. That concern is echoed by Chief Joseph Kpai, the regent paramount ruler of Bodo, in his witness statement dated 9 May 2023. He acknowledges that there has been progress in some areas of Bodo and new plants are growing but he does not consider that the clean-up operation is complete because there is oil in the soil and on the water surface, and there is evidence of carbon pollution by the river banks.

72. Dr Gabriel Pidomson, Chairman of the Bodo Contact Committee, states in his witness statement dated 10 May 2023 that the Bodo Community was not properly consulted regarding the BMI's scientific methodology, verification framework or clean-up developments. The Bodo Community did not consent to the RAP or SSTLs, and their questions about the project's technical framework have never been properly addressed.

73. The claimants rely on a report dated 9 May 2023 prepared by Yakov Galperin and David Little, environmental consultants. Galperin and Little carried out a preliminary review of the close out criteria used by the BMI, from which they conclude that the close out criteria are unlikely to meet most accepted international standards. Their view is that the BMI SSTLs are well above EGASPIN's standard intervention value for soil (5,000 mg/kg) and will leave dangerous levels of contamination in the soil. They raise concern that SPDC's use of the Risk-Based Corrective Action ("RBCA") approach to remediation of the Bodo Creek is inappropriate and flawed because such approach by design leaves in place a potentially harmful level of contamination.

74. The claimants also rely on a report dated 9 May 2023 by Dr Aroloye Numbere, a mangrove researcher with a Ph.D. in Ecology, Evolution & Systematics from Saint Louis University, Missouri, USA, who carried out sampling of selected areas said to have been remediated and produced photographic evidence. He states that he identified contaminated wetlands, with brown crude oil deposits on the swamp and the water's surface and oil marks on the mangrove roots, signifying that the area had been covered by oily water during high tide. He also found hardened crude oil deposits that had formed tar blocks, dead or dying plants near the polluted areas, and liquid tar coming from the soil. His conclusion is that the photographs demonstrate that the areas that were remediated now have crude oil deposits and have been highly polluted.

75. In his report dated 17 May 2023, Dr Gundlach states that oil from 2008 would be evaporated, stranded and bio degraded, and unable to be analytically detected separately from the numerous oil spills that have occurred since then. On that basis his opinion is that it is physically and chemically impossible that any surface oil on the water is from the 2008 oil spills; any substantial oil observed along the shoreline or in the water is not caused by oil from the 2008 spills, nor from leaching of oil from sediments, but is more likely a result of new spills from other illegal actions.

76. Dr Gundlach's addendum report dated 18 May 2023 disputes that the oil identified in the Numbere photographs is old oil; his view is that it is fresh oil. He notes that an oil spill in late March 2023 could have contributed to the fresh oil shown in the photographs. He also notes that some of the sites inspected by Dr Numbere are areas that clearly have not been remediated and others appear to be along the edge of the road, an area where clean-up contractors were expressly directed not to undertake intensive remediation to avoid potential road damage.

77. By letter dated 22 May 2023, Galperin and Little respond to Dr Gundlach's addendum, stating that it is not possible to tell from the photographs whether the oil is old or fresh oil, or the source of such oil.

Status of the proceedings

78. Further stays of the proceedings were granted by consent orders sealed on 21 June 2019, 10 October 2019 and 30 September 2020. The most recent stay was by consent order dated 15 October 2021, providing that the proceedings would be struck out on 28 October 2022 without further order unless either party applied to restore them prior to 4pm on 21 October 2022.

79. The cumulative effect of the above orders has been to stay the proceedings since the end of 2014.

80. Thus, 15 years after the oil spills occurred and more than 10 years after the proceedings commenced, despite a substantial settlement of the claim for compensation under the OPA and an agreed remediation initiative that has been in place since 2015, the parties are in dispute as to what has been achieved and how any outstanding issues should be resolved.

The Applications

81. On 20 October 2022 the claimants issued their application for an order that the stay granted by Fraser J by order dated 15 October 2021 be lifted, that the clean-up claim be restored and then immediately stayed again for one year. This application is not pursued in that the claimants no longer seek a further stay. However, as set out in Mr Leader's witness statement dated 10 May 2023, they now ask the court to restore the claim and issue directions for the outstanding claims to be determined at trial.

82. The claimants' position is that there is a real dispute between the parties as to the adequacy of the clean-up that has been undertaken to date. The claimants are not in a position to agree that the active clean-up phase of the BMI is 87% complete. The defendant's figure of 87% is based on 317 out of 363 grids of land having been sampled but the number of samples tested per grid were inadequate to demonstrate the

extent of completion. The inspection carried out by Dr Numbere indicates that there is oil contamination in areas said to be remediated. Further, there are concerns as to the efficacy of the clean-up operation as set out in the Galperin and Little report. The SSTLs used appear to be too high to be protective of human health and the close out criteria under the BMI do not appear to meet most accepted international standards for oil spill remediation.

83. The claimants submit that this is a dispute which is incapable of being determined summarily at an interlocutory hearing as it would require the court to conduct a mini trial, which is impermissible in the circumstances of this case. It is in that context that the claimants now seek to have the matter restored for trial. In response to the defendant's submission that lifting the stay would amount to an abuse of process, the claimants submit:

    i) The claimants have a right in private law to have the oil cleaned up and the land restored to the condition it was in before the spills occurred and they seek to vindicate that right through these proceedings.

    ii) The fact that a trial might be complex and costly would only be considered disproportionate if the court concluded that the claimants' evidence were hopeless.

    iii) In response to the defendant's case is that this court could not order a mandatory injunction that would require constant supervision and cut across the regulatory scheme in Nigeria, the claimants submit that they have a legitimate pleading for injunctive relief for remediation which is sound in Nigerian law. Even if an injunction were not granted, the court could still award damages.

    iv) The evidence of obstruction of the remediation scheme by the claimants relates to matters that were before Coulson J in 2017, save for the attack in November 2022. It is not suggested that any of the claimants were responsible for such attack and King Berebon's evidence is that he wants to recommence the clean-up operations.

84. The defendant opposes the claimants' application and contends that the claim should be struck out as provided by the consent order sealed on 15 October 2021. Alternatively, by application dated 10 March 2023, the defendant seeks to strike out the claim on the grounds that: (a) the claimants have no reasonable grounds for bringing the claims pursuant to CPR 3.4(2)(a) and/or they are an abuse of the court's process pursuant to CPR 3.4(2)(b); and/or (b) the claimants have no real prospect of succeeding on the claims pursuant to CPR 24.2(a) and/or there is no other compelling reason why they should be disposed of at a trial pursuant to CPR 24.2(b).

85. The defendant's position is that the claimants' application for restoration should be dismissed and/or the claim should be struck out because the BMI clean-up process is substantially complete and the core phases are due to finish within a matter of months. It has been a hugely successful operation and should be allowed to progress to full completion without the distraction of a major trial.

86. The defendant submits that, given the success of the BMI clean-up process and the fact that any remaining oil from the two spills in 2008 would be negligible (and indistinguishable from other more recent sources of pollution), a mandatory injunction for a further or alternative clean-up process would achieve nothing. It would therefore be disproportionate to order a costly and complex trial of the clean-up claim. In any event, while the claimants state that they should not be compelled to give up their legal rights to enforce a proper clean-up of their environment at this stage, environmental clean-up in Nigeria is an ongoing and enforceable obligation owed by SPDC to the competent Nigerian regulators. There is therefore no basis upon which to restore the clean-up claim, and it should be struck out.

87. The defendant submits that the claimants' application for restoration should be refused. The proceedings have been afoot for 12 years and the only remaining part of the claims is the clean-up claim in respect of the 2008 oil spills. The defendant has already paid £55 million in compensation, together with a further goodwill payment of US$ 7 million. It is estimated by the defendant that approximately US$ 65 million has been spent on the clean-up scheme under the BMI. The clean-up operation will not survive restoration as it would be put on hold to await the outcome of the proceedings.

88. The defendant's position regarding the summary judgment and/or strike out application is as follows:

    i) There is no tangible advantage to be gained from the clean-up claim. The BMI clean-up process has been carried out in accordance with Nigerian law, as approved and supervised by multiple Nigerian regulators. It is substantially complete. To the extent it has not already been cleaned up, any residual oil from the 2008 Bodo Spills would by now be highly-weathered and innocuous. The real problem is oil from multiple other sources of oil pollution, including illegal refining, that fall outside the scope of the clean-up claim. The claimants' criticisms of the BMI process are unfounded and the court can dispose of them without ordering a substantive trial.

    ii) The clean-up claim is fundamentally flawed as a matter of Nigerian law and English law and bound to fail. It is non-justiciable by reason of the act of state doctrine. The court could not order a mandatory injunction that would require constant supervision and cut across the regulatory scheme in Nigeria. Further, it would be inequitable and contrary to the requirements of justice to order a mandatory injunction compelling the defendant to do something that the claimants themselves have obstructed for many years.

    iii) The clean-up claim amounts to an abuse of process. It would be disproportionate to order a costly and complex trial in circumstances where there is very little (if anything) to be gained for the claimants given the advanced state of the BMI clean-up.

Approach to the applications

89. Although procedurally, the appropriate course is to consider the application to lift the stay before the application for summary judgment and/or strike out, in practice the applications are inextricably inter-dependent. Logically, the court should consider

first whether, if it lifted the stay, it would then strike out the claim; if so, no useful purpose would be achieved by lifting the stay and the claim should be left to be automatically struck out pursuant to the terms of the existing consent order. If the court determines that the defendant would not be entitled to summary judgment and/or strike out, then the court should go on to consider the claimants' application for restoration of the claim on its merits and any directions for trial. Accordingly, the starting point is to consider the defendant's application for summary judgment and/or strike out.

Applicable legal principles

90. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

91. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:
>
> …
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the courts process or is otherwise likely to obstruct the just disposal of the proceedings …"

92. The principles to be applied in determining whether the pleaded claim has a real prospect of success or is bound to fail can be summarised as follows:

i) The court must consider whether the claim has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]. There must be a plausible evidential basis for the claim: *Brownlie v Four Seasons Holding Inc* [2017] UKSC 80 per Lord Sumption at [7].

iii) The court must not conduct a "mini-trial": *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [95];

Lungowe v Vedanta [2019] UKSC 20 at [9]-[14]; *Okpabi v Royal Dutch Shell* [2021] UKSC 3 at [21].

iv) The court should hesitate about making a final decision without a trial and must take into account not only the evidence actually placed before it at the application stage, but also any reasonable grounds identified for believing that a fuller investigation into the facts of the case would add to or alter the evidence relevant to the issue: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] EWCA Civ 661 at [4]-[6], [17]-[18]; *Okpabi* at [127]-[128].

93. The court has the power to strike out a statement of case under CPR 3.4(2)(b) on the basis that it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of proceedings: see Lord Diplock in *Hunter v Chief Constable of the West Midlands Policy* [1982] AC 529, 536C:

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to the litigation before it, or would bring the administration of justice into disrepute amongst right-thinking people."

94. Proceedings may be abusive if, even though they raise an arguable cause of action, they are objectively pointless and wasteful, in the sense that the benefits to the claimants from success are likely to be extremely modest and the costs to the defendants in defending the claims wholly disproportionate to that benefit: *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 at [69]; *Município de Mariana v BHP Group (UK) Limited* [2022] EWCA Civ 951 at [175].

95. A finding of abuse of process does not lead automatically to a striking out of the claim. The court then retains a discretion as to the appropriate response, which must always be proportionate: *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 WLR 110 at [63] and [64].

96. The court must exercise caution before striking out a properly arguable claim for abuse of process: *Mariana* (above):

> "[178] Finally, but importantly for present purposes, litigants should not be deprived of their claims without scrupulous examination of all the circumstances and unless the abuse has been sufficiently clearly established: "the court cannot be affronted if the case has not been satisfactorily proved" (see *Alpha Rocks Solicitors v Alade* [2015] 1 WLR 4535 at para. [24]; *Hunter* at p.22D; *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004 at para. [48]). Thus it has been stated repeatedly that it is only in "clear and obvious" cases that it will be appropriate to strike out proceedings as an abuse of process so as to prevent a claimant from bringing an apparently proper cause of action to trial …

…

> [211] A claimant's unhindered right of access to justice in respect of properly arguable claims is a core constitutional right inherent in the rule of law (see for example *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869, at paras. [61]-[85]), as well as being enshrined in article 6 (see for example *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004 at paras. [46]-[48]). We do not go so far as to say that a claimant has an unfettered right to pursue an arguable claim against their chosen defendant: the *Wyeth* and *Jameel* abuse jurisdiction provides an exception to that general principle. Nevertheless, where the *Henderson* principle is not in play, it will be a rare case in which the court can say that there is no legitimate advantage in pursuing a defendant merely because there exists a claim for the same loss against another person, and especially so when it is advanced on a different basis of liability."

Disputes regarding the BMI process

97. It is clear to the court, from the documentary evidence in the bundle, including the contemporaneous reports, the witness statements and the recent correspondence between King John and SPDC, that the BMI clean-up process is at an advanced stage, albeit not complete, and both parties remain committed to continuing the remediation through to completion. Despite that, there is evidence that the claimants are aggrieved that the process may not achieve a satisfactory outcome. The following issues in dispute have been identified.

98. First, the conclusions in the Galperin and Little report are that the close out criteria are unlikely to meet most accepted international standards; the SSTLs are above EGASPIN's standard intervention value for soil (5,000 mg/kg) and will leave dangerous levels of contamination in the soil. Dr Gundlach's response is that the BMI SSTLs were developed in accordance with EGASPIN, sound reasons have been provided for the SSTLs adopted using the net environmental benefit analysis, and results to date indicate such approach has been successful. Following Phase 2 remediation, mean surface values dropped from 59,810 to 1,675 mg/kg, while median values dropped from 39,000 to 927 mg/kg. Mean subsurface values decreased from 23,721 to 728 mg/kg, while median values decreased from 9,300 to 314 mg/kg. Out of 673 samples collected by 29 August 2022, all but 3.5% met the required SSTL for the sampled area. Only 24 samples exceeded the threshold of 5,000 mg/kg. Whilst the detailed points made by Dr Gundlach call out for a response, the court is not in a position to reach a concluded view on this issue without scrutiny and testing of the disputed expert evidence at a hearing.

99. Second, Dr Pidomson asserts that the Bodo Community has not been properly consulted regarding the BMI's scientific methodology, verification framework or clean-up developments. In particular, it is said that the Bodo Community did not consent to the RAP or SSTLs, and their questions about the project's technical framework have never been properly addressed. Dr Gundlach rebuts that criticism, stating in his report that Bodo Community representatives are included in all aspects

of the project, from overall project management and direction to field verification for clean-up, chemistry and mangrove planting, and are recipients of all project documents developed by the BMI, namely, weekly and annual reports, technical notes, minutes of meetings, international publications and electronic messaging. The defendant invites the court to determine this issue on the material before it but that would require the court to conduct a mini trial on the documents, contrary to the principles applicable on an application for summary judgment/strike out as set out above.

100. Third, the claimants seek to rely on the photographic images in Dr Numbere's report of 9 May 2023, which it is said depict oil pollution, indicating that the clean-up operation has been inadequate. Dr Gundlach has raised legitimate criticisms of this evidence; in particular, photographs taken outside the clean-up area, photographs showing areas that have not yet been remediated, photographs showing fresh oil which could not result from the 2008 oil spills, and photographs that have not been geotagged so that it is impossible to identify their location. Indeed, in their letter dated 19 May 2023, the claimants were forced to correct the coordinates originally given for the photographs, an unsatisfactory state of affairs so close to the hearing. If this were the only evidence relied on by the claimants, it would not amount to a plausible evidential basis for the claim. However, this is not the sole basis of the claim and its deficiencies do not displace the more substantive disputed issues identified above.

101. Fourth, King John Berebon asserts that the BMI lacks independent oversight and monitoring mechanisms; it is not independent of SPDC and there are doubts regarding the independence and capacity of the Nigerian regulators. These criticisms are firmly rejected by Dr Nwabueze and Dr Gundlach who, it is noted, previously was retained as the claimants' expert. However, the court is unable to reject the claimants' factual assertions as having no real substance without giving the parties an opportunity to test the evidence at a hearing.

102. It follows from the above, that the defendant has not established on a summary basis that the claimants' clean-up claim has no merit on the evidence and is bound to fail.

Relief sought in clean-up claim

103. The court then turns to consider whether the clean-up claim is fundamentally flawed as a matter of Nigerian law and English law and bound to fail. The defendant submits that:

i) The mandatory injunction sought by the claimants is redundant.

ii) The clean-up claim would necessarily require the court to adjudicate on the validity or effect of the executive acts of foreign government agencies but that would be impermissible as a matter of English law pursuant to the act of state of doctrine.

iii) There is no prospect of the court ordering a mandatory injunction in circumstances such as these where the court could not police the injunction effectively.

iv) The clean-up claim seeks equitable relief in circumstances where the claimants have acted unconscionably throughout the ongoing BMI process, and there is no tangible advantage to be gained from the claim in any event.

Redundancy of relief

104. Although there is clear evidence that the BMI clean-up process is almost complete, for the reasons set out above, there is a real dispute between the parties as to the adequacy of the work undertaken that is not suitable for disposal on a summary basis. Therefore, it cannot be said with any certainty that an injunction, or other declaratory relief, would be redundant.

Act of state doctrine

105. The defendant's submission is that the claimants' residual clean-up claim is non-justiciable by reason of the act of state doctrine and the court should dispose of this jurisdiction challenge on a summary basis.

106. The nature of the act of state doctrine was considered by the Supreme Court in *Belhaj v Straw & Others* [2017] UKSC 3 per L. Neuberger SCJ:

> "[118] In summary terms, the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully.
>
> …
>
> [121] The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.
>
> [122] The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.
>
> [123] The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it…
>
> [124] A possible fourth rule was described by Rix LJ in a judgment on behalf of the Court of Appeal in *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* [2014] QB 458, para 65, as being that

> "the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office.""

107. The defendant's case is that the second rule is engaged. The principle underpinning the second rule and its ambit were considered by the Lord Lloyd-Jones SCJ in *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57 at [135]:

> "It appears therefore that a substantial body of authority, not all of which is obiter, lends powerful support for the existence of a rule that courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state. The rule also has a sound basis in principle. It is founded on the respect due to the sovereignty and independence of foreign states and is intended to promote comity in inter-state relations. While the same rationale underpins state immunity, the rule is distinct from state immunity and is not required by international law. It is not founded on the personal immunity of a party directly or indirectly impleaded but upon the subject matter of the proceedings. The rule does not turn on a conventional application of choice of law rules in private international law nor does it depend on the lawfulness of the conduct under the law of the state in question. On the contrary it is an exclusionary rule, limiting the power of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings. In the words of Lord Cottenham, it applies "whether it be according to law or not according to law". I can, therefore, see no good reason to distinguish in this regard between legislative acts, in respect of which such a rule is clearly established … and executive acts. The fact that executive acts may lack any legal basis does not prevent the application of the rule. In my view, we should now acknowledge the existence of such a rule."

108. Where the act of state doctrine applies, it is not open to the parties to confer jurisdiction on the court: *Pakistan v National Westminster Bank* [2016] EWHC 1465 Ch per Henderson J at [89].

109. The defendant submits that, by its very nature and context, the clean-up claim will invariably require the English courts to question the validity or effect of the acts of the Nigerian regulators/executive agencies in the context of the BMI clean-up, and thus falls foul of the act of state doctrine. As such, the court has no jurisdictional competence to determine the residual clean-up claim, and it should therefore be struck out. NOSDRA and NUPRC form part of the executive or government of Nigeria and

exercise executive functions on behalf of the Nigerian state. NOSDRA is an executive agency under the Federal Ministry of Environment vested with the statutory responsibility for coordinating the management of oil spill incidents with respect to clean-up, remediation and damage assessment. NUPRC is a parastatal agency under the Federal Ministry of Petroleum Resources, with "the statutory responsibility of ensuring compliance with petroleum laws, regulations and guidelines in the upstream oil and gas sector". The executive functions of these agencies include EGASPIN, the SCAT team, the chemical sampling team, and regulatory close-out of the BMI project. It is said that the clean-up claim will, by its very nature and context, require the court to adjudicate or sit in judgment over the validity, legality, lawfulness, acceptability or motives of state actors. The effect of the claim is to seek judicial review of the policy issues and acts of the regulators. That would amount to a trespass on executive acts and is non-justiciable by reason of the act of state doctrine.

110. This argument turns on the proper characterisation of the clean-up claim. The pleaded case is that the claimants are entitled to appropriate clean-up and remediation of the Bodo Creek. They seek a mandatory injunction for the same or damages in lieu. The defendant's case is that the BMI is the appropriate clean-up and remediation scheme and it is almost complete. That necessarily brings into focus the nature and scope of the BMI, what it has achieved and what, if anything, further is required.

111. Any determination of the residual claim in these proceedings would require a factual investigation to establish the methodology of the BMI plan, the nature and extent of the remediation carried out, any outstanding work and the resulting state of the land. That information is well-documented and readily available. The court would also be required to consider whether the BMI process resulted in effective clean-up and remediation of the land affected by the 2008 oil spills so as to satisfy any outstanding liability on the part of the defendant in these proceedings. That would involve scrutiny and testing of the recent factual and expert evidence regarding adequacy of the remediation process in the context of the claimants' asserted rights.

112. Against those findings, the question for the court would be whether the claimants were entitled to any further relief against the defendant, by way of injunctive or declaratory relief, or an award of nominal or substantial damages.

113. There is no inherent question as to the lawfulness or validity of the clean-up and remediation activities of the Nigerian regulators and executive agencies. The court's determination of the residual issues in the proceedings would not necessitate any direct or collateral adjudication regarding Nigerian government policy, value judgments by the regulators, justification for the methods adopted, or the competence and integrity of Nigerian executive agencies. If, and to the extent that, the claimants sought to frame their residual claim by reference to wider issues, such as legitimacy or general efficacy of the relevant regulations, oversight and enforcement of clean-up operations, the court would reject any claim that crossed the line so as to trespass on the lawfulness or validity of executive acts.

114. Accordingly, I do not accept that the pleaded clean-up claim necessarily requires the court to adjudicate on the lawfulness or validity of state actors. For the purpose of the test on the summary judgment / strike out application, the court is satisfied that the clean-up claim is not bound to fail by reason of the act of state doctrine.

Mandatory injunction

115. The clean-up claim seeks a mandatory injunction ordering the defendant to carry out an appropriate clean-up and remediation of the impacted land and waterways. Damages are claimed in lieu of an injunction.

116. Under section 37(1) of the Senior Courts Act 1981 the High Court may by order, whether interlocutory or final, grant an injunction in all cases in which it appears to the court to be just and convenient to do so.

117. The court's jurisdiction to grant an injunction is dependent on the claimants establishing a legal or equitable right that is justiciable, and infringement, or threat of infringement, of that right by the defendant. It is common ground that the 2008 oil spills caused injury to the land and gave rise to the defendant's liability to pay compensation under the OPA. The preliminary issues decided by Akenhead J included a finding that in principle a final injunction might be available as part of, or ancillary to, any award of compensation under the OPA. There are disputes as to whether the claimants have sufficient interest in the land to claim injunctive relief and/or whether any infringement has been remedied by the compensation already paid together with the BMI process but those are matters that are not suitable for summary disposal.

118. Even where the court has jurisdiction to grant an injunction, such relief is equitable and always discretionary, having regard to factors such as the adequacy of damages, utility of the order sought, any delay in seeking the order and whether the claimant comes to the court with "clean hands".

119. The defendant's submission is that in this case there is no prospect of the court ordering a mandatory injunction where: (i) such injunction would require an unacceptable degree of supervision by the court; and (ii) the claimants have acted unconscionably throughout the ongoing BMI process. In those circumstances, a claim for damages in lieu of an injunction must also fail.

120. The court would be very reluctant to order a mandatory injunction requiring constant supervision, especially where, as here, the activities are being carried out in another jurisdiction. However, in *Co-operative Insurance Society Limited v Argyll Stores* [1998] AC 1 (HL), Lord Hoffmann distinguished the court's reluctance to grant an order for specific performance, such as running a business over an extended period of time, from an order requiring a defendant to achieve a specified result at p.13D-E:

> "The possibility of repeated applications for rulings on compliance with the order which arises in the former case does not exist to anything like the same extent in the latter. Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order."

121. The defendant correctly draws attention to Lord Hoffmann's warning as to the need for precision in the terms of any mandatory injunction at p.13H-14A:

> "If the terms of the court's order, reflecting the terms of the obligation, cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased. So is the oppression caused by the defendant having to do things under threat of proceedings for contempt. The less precise the order, the fewer the signposts to the forensic minefield which he has to traverse."

122. The existing pleaded case is too vague and uncertain to form the basis of a mandatory injunction. The claimants accept the need to amend their claim but have not produced any draft amendment, a state of affairs that I indicated was unsatisfactory. It does not follow that the requirements of an appropriate order could not be formulated with suitable precision, so as to define any obligations on the part of the defendant and avoid constant supervision by the court. Whether any such order would be appropriate in this case would be a matter for the court to determine on the facts; it is not one that would be appropriate for the court to determine on a summary basis.

123. It is well-established that he who comes into equity must come with "clean hands": *RBS v Highland Financial Partners* [2013] EWCA Civ 328. It is said by the defendant that the claimants have acted unconscionably, by pressing for an injunctive remedy in circumstances where they acquiesced over many years in the BMI process, and where they have prevented the defendant from proceeding with the remediation plan, through obstruction of the works, looting and destruction of the remediation offices and stores.

124. The claimants seek to minimise these events and submit that the Bodo Community should not be held responsible for acts by some of its members so as to extinguish the rights of the others. There is no indication that the violence was a concerted operation. The claimants rely on evidence of their more recent commitment to cooperate in completing the BMI process.

125. The court accepts that there is clear evidence of past obstruction on the part of the Bodo Community, including the lead claimant. These are matters that the court would have to weigh in the balance when determining whether it would be just and convenient to grant any injunction or other relief. It is not a matter for summary disposal at this stage.

126. Damages may be awarded in substitution for an injunction, by way of a monetary substitute for an injunction: *Jaggard v Sawyer* [1995] 1 WLR 269 (CA) per Millett LJ at pp.284-287. The power to award damages in substitution for an injunction is dependent on the court's having jurisdiction to grant an injunction: *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 per Lord Reed JSC at [45]-[46]. If jurisdiction is established, the court's power to award damages in substitution of an injunction involves an exercise of discretion, which as a matter of principle, should not be fettered: *Coventry v Lawrence* [2014] UKSC 13 per Lord Neuberger JSC at [101]-[121].

127. Against that background, there is an arguable case that the claimants might establish an entitlement to an injunction or damages. On that basis, it would not be appropriate for the court to strike out the claim or grant reverse summary judgment.

Abuse of process

128. The defendant's submission is that the clean-up claim amounts to an abuse of process on the grounds that the substantive phases of the clean-up operation are almost complete and it would be disproportionate to order a costly and complex trial in circumstances where there is very little (if anything) to be gained for the claimants.

129. It is common ground that the BMI process has been ongoing for many years and has made substantial progress. That much is clear from the contemporaneous documents. The defendant's position is that the remediation was 87% complete by the end of 2022, with the claimants' cooperation it could be completed within months, and any remaining oil pollution from the 2008 oil spills would be negligible. If that were proved to be correct, it is unlikely that the court would grant the claimants any substantive relief. However, the precise extent of the clean-up and remediation achieved and/or its adequacy is not agreed by the claimants. As set out above, the court is not in a position to dispose of the issues arising in the residual claim on a summary basis. The claimants have an arguable cause of action.

130. It is said by the defendant that it would be disproportionate to order a costly and complex trial in circumstances where there is very little, if anything, to be gained by the claimants given the advanced state of the BMI clean-up. There is considerable force in the defendant's submission that it would be disproportionate to order a costly and complex trial, given the limited matters now in issue in the claim. However, that could be addressed by appropriate costs and case management; it does not follow that a trial would be pointless and wasteful. Analysis of the outstanding disputes between the parties leads to the conclusion that the remaining clean-up claim is not so insignificant so as to amount to an abuse of the process.

131. In summary, the claimants have an arguable case that they are entitled to relief in respect of the residual clean-up claim. The defendant has not established that the claim is bound to fail or amounts to an abuse of process. For those reasons, the defendant's application for reverse summary judgment or to strike out the claim would be dismissed if the stay were lifted.

Restoration application

132. The court then turns to the application by the claimants to restore the claim and give directions to trial. The claimants accept that they are not entitled to an automatic lifting of the stay; they must establish that it would be appropriate for the court to lift the stay. However, they submit that where, until now, the stay has been imposed and extended with the consent of both parties, the threshold for restoring the claim should be low. They rely on the right of access to justice in respect of properly arguable claims as a core constitutional right inherent in the rule of law, as explained in *Mariana* (above) at [211].

133. The defendant's position is that the court should decline to lift the stay so that paragraph 3 of the Order sealed on 15 October 2021 is re-engaged and the clean-up claim is automatically struck out retrospectively as at 28 October 2022. The restoration application should be dismissed because the BMI approved clean-up process is substantially complete and there is therefore nothing left for the claimants to litigate.

134. The court rejects the claimants' submission that the court does not have any discretion to refuse the restoration application if it takes the view that the claim is not amenable to strike out or summary judgment. As set out by Coulson J in his judgment at [2017] EWHC 1579 (TCC) at [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 v Dow Jones & Co Inc*** [2005] EWCA Civ 75). 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."

135. The overriding objective in CPR 1.1 requires the court to dealing with cases justly and at proportionate cost:

> "(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate—
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with rules, practice directions and orders."

136. CPR 1.4 requires the court to further the overriding objective by actively managing cases. Such active case management includes: (i) encouraging the parties to co-operate with each other in the conduct of the proceedings; (ii) identifying the issues at an early stage; (iii) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (iv) fixing timetables or otherwise controlling the progress of the case; (v) considering whether the likely benefits of

taking a particular step justify the cost of taking it; and (vi) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

137. When deciding whether to allow restoration, the court must consider all the above relevant factors. Although there is considerable overlap, this is not confined to the arguments relied on in respect of the summary judgment, strike out and abuse of process issues and not automatically determined by the court's decision on the defendant's application.

138. The court is satisfied that the claimants have an arguable case and a prima facie right to have that case tried in the absence of settlement. The question that then arises is whether it would be proportionate and in accordance with the overriding objective to restore the claim, having regard to the substantial duration of the stay, the extent of the clean-up and remediation carried out under the BMI, and the limited matters remaining in issue.

139. It is acknowledged that the issues now identified by the parties would require some factual and expert evidence but the court firmly rejects the assumption that this requires a costly and complex trial. The remaining issues in the proceedings are limited. Most of the factual investigation into the history, methodology, activity and status of the BMI process is documented and not in dispute. Issues as to the Bodo Community's involvement in the BMI process and obstruction of the clean-up will require some limited factual evidence but, again, the underlying narrative of these events is documented. Expert evidence will be required to determine the extent and effectiveness of the clean-up operations, whether any oil from the 2008 spills persists; if so, what impact, if any, that has on the Bodo Community environment. However, the expert issues have already been identified, they are relatively narrow and there has been adequate time for full investigation to be carried out. In those circumstances, although the parties may wish to adduce further factual and expert evidence, that exercise can be carried out rapidly and at modest cost.

140. Consideration has been given to the possibility of a further stay. It is obvious to the court that the BMI remediation scheme is the best option and likely to be the only substantial remedy available to the claimants. However, although both parties say that they are committed to completing the clean-up and remediation process, positions have become entrenched and neither party is asking for a further stay. The options are strike out or trial.

141. In those circumstances, the court considers that the time has come for the residual clean-up claim to be restored and case managed to a swift and final trial.

142. In the absence of any agreed or firm proposals for trial, the court orders the following timetable:

    i) The claimants shall by 4pm on 3 May 2024 file and serve (a) any proposed amendments to the claim or updated schedule of loss; (b) factual witness evidence relied on; (c) expert reports relied on; (d) key documents relied on or necessary to explain the case; and (e) adverse documents as defined in paragraph 2.7 of Practice Direction 57AD.

ii) If the defendant objects to the proposed amendments, prompt notice must be given to the claimants and the court will hear the contested application at a hearing on 17 May 2024 with an estimate of 2 hours.

iii) The defendant shall by 4pm on 19 July 2024 file and serve (a) any consequential amendments to its defence; (b) factual witness evidence; (c) expert reports; (d) key documents relied on or necessary to explain the case; (e) adverse documents as defined in paragraph 2.7 of Practice Direction 57AD.

iv) The claimants shall by 4pm on 13 September 2024 file and serve (a) any consequential amendments to the reply; (b) rebuttal factual witness evidence; (c) rebuttal expert reports; (d) key documents relied on or necessary to explain the case; (e) adverse documents as defined in paragraph 2.7 of Practice Direction 57AD.

v) By 4 October 2024 the experts of like discipline shall meet for the purpose of identifying the issues on which they are agreed and those on which they disagree, narrowing the issues between them and, where possible, reaching an agreed opinion on those issues.

vi) By 4pm on 18 October 2024 the experts of like disciplines shall prepare and file a joint statement in accordance with CPR 35.12, setting out those issues on which they agree and those on which they disagree, with a summary of their reasons for disagreeing.

vii) The pre-trial review is fixed for 1 November 2024 with an estimate of ½ day.

viii) The trial is fixed for 17 February 2025, with an estimate of 6 days, including 1 day for judicial reading.

Conclusion

143. For the reasons set out above:

i) The claimants' application to restore the claim is granted.

ii) The defendant's application for summary judgment and/or strike out is dismissed.

iii) The court orders the above directions for trial fixed for 17 February 2025.

144. The court will hear the parties on the appropriate terms of the order and all other consequential matters arising out of this judgment on a date to be fixed following hand down.