Easter Term
[2022] UKPC 22
Privy Council Appeal No 0092 of 2019

JUDGMENT

La Brea Environs Protectors (Appellant) *v* The Petroleum Company of Trinidad and Tobago (Petrotrin) and another (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Briggs
Lord Kitchin
Lord Hamblen
Lord Burrows

JUDGMENT GIVEN ON
23 May 2022

Heard on 21 February 2022

Appellant
Elton Prescott SC
Farai Hove Masaisai
(Instructed by Hove & Associates (Trinidad))

1st Respondent (The Petroleum Company of Trinidad and Tobago)
Gilbert Peterson SC
Amirah Rahaman
(Instructed by Kennedys Law LLP (London))

2nd Respondent (Occupational Safety and Health Agency (OSHA))
Ravindra Nanga
(Instructed by Pollonais Blanc De La Bastide & Jacelon (Port of Spain))

LORD KITCHIN:

INTRODUCTION

1. This appeal concerns the jurisdiction of the court in relation to representative proceedings and, in particular, when managing proceedings in which a number of persons have an interest, to appoint one or more persons, or a body having a sufficient interest in the proceedings, to represent some or all other persons with the same or a similar interest.

2. La Brea is a rural village in southern Trinidad. For many years prior to the events giving rise to these proceedings, families with their homes in that village relied for their livelihoods on activities such as fishing, crab catching and conch harvesting. In mid-December 2013 a number of residents of La Brea woke up to find a strong smell of gas in the air. They gathered together to investigate the source of that smell and, as they did so, they were alerted to the presence of oil along a local beach. It is said that these residents then found extensive oil pollution along this and other beaches and in nearby mangrove wetlands, and that the pollution worsened and spread across a wider area over a number of days. The fumes associated with the pollution were nauseating and many of the residents began to suffer from headaches and vomiting. Children were kept indoors and adults were fearful of using their gas stoves. It is also said that the pollution has had a seriously harmful impact on the wellbeing and the livelihoods of the residents of this area.

3. The appellant, La Brea Environ Protectors ("LBEP"), was formed as a non-profit organisation in January 2014 and was incorporated in May 2014. It is claimed that all of the members of LBEP were residents of La Brea and were adversely affected by the oil pollution. It is also contended that the pollution is the result of oil spills which took place from the pipelines of the first respondent, The Petroleum Company of Trinidad and Tobago ("Petrotrin"). It is common ground that, at the time, Petrotrin was the largest locally owned oil and gas company in the Republic of Trinidad and Tobago and engaged in operations including oil exploration, the production of hydrocarbons and making and selling a wide range of petroleum products.

THE PROCEEDINGS

4. In August 2014 LBEP began these proceedings against Petrotrin, as the first defendant, and against the Occupational Safety and Health Agency ("the OSH Agency"), as the second defendant. LBEP, purporting to act on behalf of its members

listed in a schedule to the statement of case, asserts that Petrotrin is responsible for the pollution which was caused by oil spills from its pipelines from around the middle of December 2013 to the end of that month; that Petrotrin is guilty of a long list of failures and, among other things, neglected properly to maintain the pipelines; failed to adopt appropriate measures to prevent oil spills of the kind which occurred; and failed to take appropriate steps to clear up the spills and minimise their impact on the environment and the local population. It is claimed that Petrotrin has in this way committed an actionable nuisance and a breach of the duty of care which it owed to the local residents, including LBEP's members, and is liable, among other things, for the extensive loss and damage those members have suffered.

5. LBEP also claims that the OSH Agency, as an enforcing body, owed a duty of care to LBEP's members to ensure that Petrotrin complied with the duties imposed on it by the Occupational Safety and Health Act ("the OSH Act") and the policies, standards and codes developed under it, but negligently failed to ensure that it did so and that LBEP's members have suffered loss and damage for this reason too.

6. In October 2014 and again in April 2015, LBEP amended its claim form and statement of case, but has at all times maintained that it is pursuing the claim on behalf of its members. Petrotrin has responded by disputing that it ever owed LBEP a duty of care, denying the allegations of negligence and nuisance and putting LBEP and its members to strict proof of any losses. For its part, the OSH Agency has denied that it ever owed any duty of care to LBEP or that it was negligent.

7. There matters rested until, in May 2018, LBEP made a formal application that it be appointed as a representative claimant for all of the 101 members now listed in the amended statement of case; or that each and every one of those 101 members be added to the claim in substitution for, or in addition to, LBEP. The application has been supported by an affidavit of Ms Oneca Branker-Showers, a director of LBEP, in which she has given evidence of the way the oil spill came to the attention of the residents of La Brea, and explains that LBEP was incorporated to create one voice for all the residents affected by the spill and that, in her view, all of the members have the same interest in these proceedings and it is one which LBEP was and remains capable of representing.

8. This application was heard by Quinlan-Williams J on 17 July 2018 and was dismissed for reasons which she gave in a short judgment in writing on 4 February 2019. The judge refused to allow LBEP to represent all of its members for essentially two reasons: first, LBEP did not itself have any proper interest in the proceedings; secondly and in any event, LBEP certainly did not have the same or a similar interest as those persons whom it sought to represent. The judge did not deal expressly with the

alternative relief sought by LBEP, namely that all of its members be added as claimants in addition to or in substitution for LBEP.

9. LBEP and its members were disappointed by that outcome and, on 24 July 2018, LBEP filed a notice of appeal against it. The appeal came on for hearing before the Court of Appeal (The Hon I Archie CJ, and The Hon C Pemberton JA) on 4 February 2019. The appeal was dismissed for reasons which the Court of Appeal indicated it had explained sufficiently in the course of argument, and which, as appears from the transcript, were essentially the same as those given by the judge, namely that LBEP had not itself been affected adversely by the oil spills; and further and in any event, LBEP did not have the same or a similar interest as the members it was purporting to represent. Nor, it seems, was the court persuaded it was appropriate to add the members of LBEP to the claim as individual parties in addition to or substitution for LBEP.

10. On or about 3 May 2019 LBEP made a further application to have five of its members added to the claim as claimants and for an order that they be appointed to represent all of the other members. The Board has been informed that this further application has not yet been dealt with, and that the judge before whom it is due to be heard is awaiting the outcome of this appeal before giving further directions in relation to it.

11. Accordingly, upon this further appeal, pursued with the permission of the Board given on 10 March 2020, LBEP maintains that the Court of Appeal perpetuated the errors of the judge and that it does indeed have a sufficient interest in the proceedings to represent its members, for they are persons with the same or a similar interest as required by the relevant procedural rules, and particularly so if proper regard is had to the overriding objective that matters are dealt with justly and expeditiously. LBEP also contends that the judge and the Court of Appeal failed properly to address the alternative application before the court, namely that the 101 members of LBEP be added to the claim as additional parties in addition to or in substitution for LBEP itself.

12. The Board will address the arguments advanced on behalf of the parties in a moment. But before doing so, it is necessary to outline the relevant procedural rules in the Republic of Trinidad and Tobago concerning the addition and substitution of parties after proceedings have been commenced, and the power to appoint a person or a body having a sufficient interest in the proceedings to represent all or some of the persons with the same or a similar interest.

THE PROCEDURAL RULES

Addition and substitution of parties

13. The addition and substitution of parties after the commencement of proceedings is dealt with in Part 19 of the Consolidated Civil Proceedings Rules 2016 ("the CPR"). In particular, rule 19.2(3) confers on the court a discretionary power to add a new party to proceedings if (a) it is desirable to add the new party so that the court can resolve all matters in dispute in the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

14. Rule 19.2(5) is concerned with the substitution of one party for another, as opposed to the simple addition of another party to the proceedings, and it confers on the court a power to order a new party to be substituted for an existing one if (a) the existing party's interest or liability has passed to the new party; and (b) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party.

15. Rule 19.2(7) emphasises the need to make any application with reasonable promptitude. In particular the court may not add a party after a case management conference on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the case management conference.

16. Rule 19.3 embodies the general rule that a claim shall not fail because (a) a person was added as a party to proceedings who should not have been added; or (b) a person who should have been made a party to the proceedings was not made a party to them. This is subject to the qualification set out in rule 19.4, namely that where a claimant claims a remedy to which one or more other persons are jointly entitled with him, all persons jointly entitled to the remedy must be parties to the proceedings, unless the court orders otherwise; and that if any such person does not agree to be a claimant, he must be made a defendant, unless the court orders otherwise.

17. Finally, the procedure for adding and substituting parties is addressed in rule 19.5. The court may add, substitute or remove a party on or without an application: rule 19.5(1). An application for this purpose may be made by an existing party or by a person who wishes to become a party: rule 19.5(2). But nobody may be added or

substituted as a claimant unless he has (a) given his consent in writing; and (b) the consent has been filed with the court office: rule 19.5(4).

Representative proceedings

18. The rules concerning representative parties are contained in Part 21 of the CPR and, so far as relevant, apply where five or more persons have the same or a similar interest in proceedings; and concern the power of the court to appoint one or more of those persons, or a body having a sufficient interest in the proceedings, to represent all or some of the persons with the same or a similar interest. It has been recognised for very many years that such orders may prevent an unnecessary multiplicity of proceedings between, on the one hand, persons who have the same or a similar interest in a right and, on the other hand, those who have a corresponding interest in contesting the right. Accordingly, in an appropriate case and for reasons of convenience, it has long been the practice of the courts to select some individuals from each group to represent the rest so that the right in issue can be finally decided as between all interested parties and in that way further the overriding objective of dealing with cases expeditiously and fairly and without unnecessary expense. Rule 21.1 deals with the general position:

> "(1) This rule applies to any proceedings, other than proceedings falling within rule 21.4 where five or more persons have the same or a similar interest in the proceedings.
>
> (2) The court may appoint -
>
> (a) one or more of those persons; or
>
> (b) a body having a sufficient interest in the proceedings,
>
> to represent all or some of the persons with the same or similar interest.
>
> (3) A representative under this rule may be either a claimant or a defendant."

19. The application may be made before or after the commencement of proceedings, and it may be made by any party, any person or body who wishes to be appointed as a representative party, or any person who is likely to be a party to proceedings: rule 21.2(1) and (2). The application must be supported by evidence: rule 21.2(3).

20. As the Board has foreshadowed, LBEP focused its submissions before the judge and the Court of Appeal upon the jurisdiction to make and the desirability of making an order that LBEP be appointed as a representative claimant on the basis, so the submission continued, that it was and remains a body with a sufficient interest in the proceedings to represent all or some of its members as persons with the same or a similar interest. It has advanced the same case before the Board and it contends that the courts below were wrong to reject it. These submissions are at the heart of this further appeal and so the Board will deal with them first. The Board will then address LBEP's further or alternative case that its 101 members ought to have been added to the proceedings as claimants in addition to or in substitution for LBEP itself.

LBEP AS A REPRESENTATIVE CLAIMANT

The approach to be adopted

21. A number of points emerge from the wording of Part 21 which have a bearing on this aspect of the appeal. First, the representative procedure is only available where five or more persons have "the same or a similar interest" in the proceedings, and in those circumstances the court may appoint one or more of those persons, or a body having "a sufficient interest" in the proceedings, to represent all or some of those persons with the same or a similar interest. In various respects, the rule appears rather broader in its scope than its equivalent in the English Civil Procedure Rules, rule 19.6, which calls for more than one person with "the same interest" in a claim, in which case (and subject to certain exceptions) the claim may be begun, or the court may order that it be continued, by or against one of more of the persons who have the same interest as a representative or as representatives of any other persons who have that interest.

22. Any difference between the scope of the rule concerning representative proceedings in England and Wales and the rule in Trinidad and Tobago is not as great as the language suggests, however. It is now clear that the English rule is to be interpreted and applied in a purposive way: *Lloyd v Google LLC* [2021] UKSC 50; [2021] 3 WLR 1268. As Lord Leggatt explained at para 68 (in a judgment agreed with by Lord Reed, Lady Arden, Lord Sales and Lord Burrows), the simplicity of the representative

rule is in a sense its strength, allowing it to be treated as a flexible tool of convenience in the administration of justice and applied to the exigencies of modern life as occasion requires. As for the "same interest" requirement, this needs to be construed purposively in light of the overriding objective of the civil procedure rules and the rationale for the representative procedure. The premise is that claims which raise a common issue or issues are capable of being brought by or against a number of people: hence the potential and motivation for a judgment that binds them all. The purpose of requiring the representative to have the same interest in the claim as the persons represented is to ensure that the representative can be relied upon to conduct the litigation in a way which will promote and protect the interests of all the members of the represented class. That will not be possible where there is a conflict of interest between class members so that, for example, an argument which would advance the cause of some class members would injure the cause of other class members; but it is possible where there is some divergence of interests as, for example, where an issue arises in relation to the claims of, or against, some class members, but not others, as Lord Leggatt elaborated in *Lloyd v Google* at paras 71-74.

23. The decision of the Supreme Court in *Lloyd v Google* clarified a number of other aspects of this jurisdiction which it is important to have in mind in the context of this appeal. First, the ability to act as a representative under the rule does not depend on the consent of the persons represented; nor does the rule confer a right to opt out of the proceedings. Nevertheless, the court has a wide discretion to adopt a procedure which best serves the interests of justice: para 77. Secondly, the nature and adequacy of the class definition is a matter which the court will consider in the exercise of its discretion in deciding whether it is just and convenient to allow the claim to proceed on a representative basis: para 78. Thirdly, it is not a bar to the bringing of representative proceedings that each person represented has a separate cause of action, or even a separate claim for damages. In such cases there may still be advantages in terms of justice and efficiency in adopting a bifurcated process, in which common issues are decided through the representative proceedings and issues requiring separate determination are decided at a later stage: para 80.

24. The Board is of the view that a similar purposive approach must be adopted in considering the elements of rule 21 of the CPR of Trinidad and Tobago in issue in this appeal and, in particular, the meaning and scope of the "same or a similar interest" requirement in rule 21.1(1), and the meaning of the qualifying words "a body having a sufficient interest" in the proceedings in rule 21.1(2)(b). The generality of these words suggests that the representative rule in Trinidad and Tobago has a scope and breadth at least as great as that of the English rule. Once again, the overriding objective has an important part to play, and the court must have regard to the value of the representative rule as a flexible tool of convenience in the administration of justice,

and one that may be applied to meet the demands of modern life, as occasion requires.

25. Nevertheless, the words do have a boundary, for if the representative rule is to have purpose it must be capable of producing a judgment on an issue which is binding on those persons who are represented in relation to that issue. Further, in advancing its arguments, the representative must not be placed in a position of conflict in relation to any of the persons it represents. These requirements therefore give an indication of where that boundary lies.

26. There is one further matter that must be mentioned at this stage. Where the requirements of rule 21.1 are satisfied, the court still has a discretion whether to allow the claim to proceed as a representative action, just as it does in England and Wales.

LBEP's appeal on the representative claimant issue

27. It is contended by LBEP that the judge and the Court of Appeal failed properly to understand the scope and purpose of Part 21 of the CPR of Trinidad and Tobago. They applied rule 21 as a rigid tool and failed to use it in such a way as to further the overriding objective of ensuring that matters are dealt with expeditiously and justly. In particular, so it is said, the judge and the Court of Appeal have taken no proper account of the importance of avoiding an unnecessary multiplicity of parties with essentially the same interest all asserting the same or similar causes of action in this action or, worse still, in separate proceedings, particularly bearing in mind that those affected have limited means. What is more, the submission continues, a series of claims before different judges might result in different and potentially conflicting decisions. Accordingly, rule 21 ought to have been applied in a wide and permissive way so as to allow LBEP, as a representative body, formed by the residents, to represent them in this claim, and the decisions of the judge and the Court of Appeal will have the effect of denying the residents access to justice. In the alternative, the members should be added to the proceedings as claimants in addition to or in substitution for LBEP.

28. LBEP supports these submissions by drawing on the reasoning and conclusions in a series of well-known cases which preceded the decision of the Supreme Court of the United Kingdom in *Lloyd v Google.* They serve to emphasise the flexibility of the representative procedure and rules. Nevertheless, as the Board will explain, some of them also illustrate a number of its limitations.

29. The first decision upon which LBEP has focused is that of the House of Lords in *Duke of Bedford v Ellis* [1901] AC 1. Here six individuals sued the Duke of Bedford, who owned Covent Garden Market, on behalf of themselves and all other growers of fruit, flowers, vegetables, roots and herbs to enforce certain preferential rights claimed under the Covent Garden Market Act, 1828, to stands in the market. They sought declarations of the rights they claimed and an injunction to restrain the Duke from acting inconsistently with them. Lord Macnaghten, giving the leading speech, emphasised at pp 10-11 that the rule, which by that time was embodied in Order 16, rule 9 of the Rules of the Supreme Court, was a simple one resting on convenience and rejected the submission made on behalf of the Duke that the joinder in an action of parties claiming separate and different rights under the Act, both personally and as representing a class, would embarrass or delay the trial. He also cited the words of Lord Eldon in *Adair v New River Co* (1805) 11 Ves 429, and in *Cockburn v Thompson* (1809) 16 Ves 321, 325, 329, to the effect that "it was better to go as far as possible towards justice than to deny it altogether".

30. LBEP also relies upon the decision of the Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284; [2011] Ch 345 which concerned the requirement for a representative action that those represented must have the same interest in it. The Court of Appeal decided that the judge had not erred in striking out the representative element of a claim brought by Emerald against British Airways for breach of statutory duty in allegedly fixing charges for air freight. The claim was brought by Emerald on its own behalf and on behalf of all other direct and indirect purchasers of air freight services affected by the alleged price fixing. The Court of Appeal agreed with the judge that the representative aspect of the claim was fatally flawed because the persons represented were not defined in the pleadings with a sufficient degree of certainty: see paras 62-65. At all stages of the proceedings and not just at the date of judgment, it had to be possible to say of any particular person whether or not they qualified for membership of the represented class of persons by virtue of having "the same interest" as Emerald.

31. That did not mean that membership of the group had to stay constant and closed throughout, however. To the contrary, it might fluctuate. Nor did it have to be possible to compile a complete list, when the litigation began, of all those persons who were in the represented class. But it must have been possible to say at any point whether any particular person was or was not within that class. Here the identity of interest depended on the success of Emerald's claim; it was only if and when judgment was given in favour of Emerald that the members of the class were capable of being identified.

32. There was a further difficulty with the representative part of the claim in *Emerald*, namely that members of the represented class did not in any event have the same interest because there was at least a potential conflict of interest between direct and indirect purchasers of air freight services: see paras 28-29 and 64. However, as Lord Leggatt observed in *Google*, at para 58, it might have been possible to overcome this difficulty by altering the class definition to exclude sub-purchasers or by adopting a bifurcated process in which the issue of principle was decided first in declaratory proceedings. If successful, this action could then have formed the basis for further proceedings to prove the fact and amount of damage in individual cases.

33. The cases of *EMI Records Ltd v Riley* [1981] 1 WLR 923 and *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch) provide an interesting contrast. In each of them the claimant (EMI Records in the first and Independiente in the second) sued in a personal and a representative capacity and sought an injunction and an inquiry as to damages suffered by all the members of the represented class, namely the members of the British Phonographic Industry ("the BPI") (in the *EMI Records* case) and the BPI and Phonographic Performance Ltd ("PPL") (in the *Independiente* case). In 1978 the members of the BPI, and in 2002 the members of the BPI and PPL, produced nearly all of the legitimate sound recordings available in the jurisdiction, and the member responsible for any recording owned or was the exclusive licensee of the copyright in it. EMI Records and Independiente sought an injunction and an inquiry as to damages suffered by reason of the infringement of the members' copyrights and in that way to avoid the unnecessary complications and expense of establishing what damage had been suffered individually by members if they had all been required to bring separate proceedings. EMI Records and Independiente were permitted to pursue the claims on that basis.

34. Returning now to the circumstances of this appeal, the Board is satisfied that despite the flexibility of the representative rule and the relatively wide permissive terms of Part 21 of the CPR, the judge and the Court of Appeal were amply justified in finding that LBEP had no proper basis for bringing or pursuing these proceedings in a representative capacity. The Board has reached that conclusion for the following reasons.

35. LBEP did not exist at the date of the oil spills. It was incorporated in May 2014, after the oil spills and with the intention of representing the interests of the residents of La Brea. LBEP issued a claim form dated 7 August 2014. It was amended on 6 October 2014 and re-amended on 16 April 2015. It seeks, in substance, a declaration that Petrotrin is responsible for the oil spills and, as against Petrotrin and the OSH Agency, damages, injunctive relief and costs.

36. The basis of the claim is elaborated in LBEP's statement of case dated 7 August 2014 and in the amended statement of case dated 16 April 2015. In broad summary and as indicated at the outset of this judgment, that statement of case, in its original and amended forms, asserts that the LBEP's members reside in and around La Brea, that they have been in possession of the lands in that area for very many years and have relied for their livelihoods on the integrity of the environment; that Petrotrin has acted negligently and in breach of the duty of care it has always owed to LBEP's members in permitting the leaks to occur and in failing to take adequate steps to deal with them and their consequences; that the OSH Agency has also acted negligently and in breach of the duty of care it owed to LBEP's members and that its negligent acts and omissions started before the leaks and have continued afterwards; and that LBEP's members have in consequence suffered and are continuing to suffer extensive losses and damage. The impact of these failures has been severe. Indeed, as the amended statement of case asserts, some of the residents have died and their deaths were "directly linked" to the matters complained of in these proceedings.

37. There can be no doubting the seriousness of these allegations. But it is striking that they are focused on duties alleged to have been owed by Petrotrin and the OSH Agency to the local residents; the consequences of the acts and omissions of Petrotrin and the OSH Agency for the residents in terms of the loss and damage they have suffered; and the impact these acts and omissions have had on the environment and on the ability of the residents to sustain their way of life. Indeed, it is hard to discern any coherent case that Petrotrin or the OSH Agency owed any duty of care to LBEP, or that LBEP, as opposed to its members, has suffered any loss or damage for which Petrotrin or the OSH Agency is responsible.

38. All of these matters were highlighted in the amended defences filed by Petrotrin and by the OSH Agency. They also took issue in their pleadings with the substantive allegations made by LBEP and with LBEP's standing to bring the claim. It appears that case management conferences were held on 25 September 2015, 14 January 2016, 12 May 2016, 5 July 2016, 26 July 2017, 29 January 2018 and 23 April 2018. Petrotrin says that on several occasions in the course of these case management hearings its counsel advanced the argument that LBEP had no standing to bring or pursue the claim. Be that as it may, there can be no dispute that despite multiple case management hearings, it was not until 11 May 2018 that LBEP made the application that it be appointed to act as a representative for its members in these proceedings, or that its 101 members be granted permission to be added as claimants in addition to or in substitution for LBEP.

39. That application was supported by the affidavit of Ms Oneca Branker-Showers to which the Board has referred. She emphasises the limited means of the local

residents; that all of those residents have essentially the same claim against Petrotrin and the OSH Agency; that the residents share a common interest in securing a judgment that holds Petrotrin and the OSH Agency liable for the loss and damage they have suffered; and maintains that is one for which LBEP is capable of representing the residents.

40. The Board has no difficulty accepting that the residents themselves have the same or a similar interest in the proceedings. They may have individual claims for damages which may differ one from another. But they undoubtedly share an interest in establishing, so far as it is proper to do so, that Petrotrin and, possibly, the OSH Agency are responsible for the oil leaks, and the pollution and damage to the environment those leaks have caused. They may also have a common interest in establishing that the acts and omissions of Petrotrin and the OSH Agency have caused them loss and damage, even if the full extent of the loss and damage varies from case to case.

41. LBEP is in a very different position, however. As the Board has explained, it did not exist as at the date of the oil spills, and it was formed for the purpose of representing its members. It is said that it is engaged in activities that relate to the preservation of the natural habitat and tourist attractions in the La Brea area. But the nature of those activities and the way in which LBEP is said to have been engaged in them is not explained, save that it was formed to create one voice for all of the residents. As it is, LBEP has not in its claim or in any other way disclosed any possible cause of action (whether in nuisance or negligence or otherwise) arising out of the oil spills themselves. This is because it did not exist at the time of the spills; and in any event it has not itself suffered any economic loss and does not own any land that may be said to have been interfered with. In the opinion of the Board the judge was therefore entitled to reject the application for the reasons she gave: LBEP has not alleged that it has any relevant interest in any proceedings any resident could bring, let alone a sufficient interest in any such proceedings to enable it properly to represent some or all of the residents with the same or a similar interest. Put another way, LBEP has failed to identify any actual or anticipated proceedings in which five or more residents have the same or a similar interest and in which LBEP could be said to have a sufficient interest to enable it properly to represent those residents. Here it is also important to remember the purpose of the representative rule: it is to allow an issue to be decided between two parties in circumstances and in a manner such that the outcome will bind all others who are represented in relation to that issue. This will not be the case if the representative may be placed in a conflict in relation to any of the persons it represents; and, it will not be the case if, as here, the representative does not itself have a properly arguable claim (or defence) in which that issue will be decided.

THE ADDITION OR SUBSTITUTION OF OTHER PARTIES

42. The Board turns now to consider the further aspect of LBEP's original application namely that the members of LBEP be added to the proceedings as claimants in addition to or in substitution for LBEP itself.

The approach to be adopted

43. It is perhaps inevitable that use of the representative procedure will from time to time raise issues concerning the addition and substitution of parties, and here again it is necessary to adopt a purposive approach to the rules and as far as possible to apply them in such a way as to further the overriding objective. The starting point, as we have seen from the *Duke of Bedford* case, is that the representative procedure arose from a recognition that the practice (reflected in rule 19.3 and 19.4 of the CPR) requiring the presence before the court of all parties interested in a matter or suit, in order to produce a final end to the controversy, had to yield where the parties were so numerous that you could never "come at justice" if everyone interested was joined to the proceedings.

44. The court must nevertheless retain the power to reshape the proceedings in the interests of justice as occasion requires. For example, it may emerge that the proceedings need to be resolved in stages, and that a representative procedure is suitable to deal with issues common to all members of a class, but that individuals may have to take active steps and so to "opt in" if thereafter they need to prove they are entitled to relief of a particular kind or, for example, damages to compensate for the particular losses they have suffered. Similarly, it may be necessary to add a party to the claim in substitution for an existing representative if that person is unable or unwilling to continue to act in that capacity for reasons unrelated to any lack of merit of the underlying claim.

45. It must also be borne in mind that those represented in the proceedings are not normally themselves joined or treated as having been joined to the claim. As Lord Leggatt explained in *Lloyd v Google* at para 79, that means that they will not ordinarily be liable to pay any costs incurred by the representative in pursuing (or defending) the claim. That does not prevent the court from making an order requiring a represented person to pay or contribute to the costs where the interests of justice so demand, but it is one of the reasons why a court will not generally add a person as a claimant in addition to or in substitution for another claimant unless satisfied that the person to be added has given his consent in writing.

46. It comes as no surprise that representative claims have from time to time given rise to limitation issues for individuals in the represented class. Here the authorities reveal two lines of reasoning. The first is that time continues to run for limitation purposes until individual claims for damages are brought by the persons represented. The other line of reasoning is that, although a represented person does not become a party until added as a claimant, an action is brought within the meaning of the statute of limitation by such a person when the representative claim is properly initiated, as Lord Leggatt explained in *Lloyd v Google* at para 81 in discussing the first instance decision of Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 and that of the Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021:

> "In *Prudential*, at p 255, Vinelott J expressed the view (obiter) that time would continue to run for the purpose of limitation until individual claims for damages were brought by the persons represented; see also the dicta of Fletcher Moulton LJ in *Markt* [1910] 2 KB 1021, 1042, referred to at para 44 above. The court in *Prudential* did not have cited to it, however, the decision of the Court of Appeal in *Moon v Atherton* [1972] 2 QB 435. In that case a represented person applied to be substituted for the named claimant after the limitation period had expired when the claimant (and all the other represented persons) no longer wished to continue the action. The Court of Appeal, in allowing the substitution, held that the defendant was not thereby deprived of a limitation defence, as for the purpose of limitation the represented person was already a party to the action, albeit not a 'full' party. It might be clearer to say that, although the represented person did not become a 'party' until substituted as the claimant, an action was brought within the meaning of the statute of limitation by that person when the representative claim was initiated. Such an analysis has been adopted in Australia, including by the New South Wales Court of Appeal in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, and by the New Zealand Supreme Court in *Credit Suisse Private Equity v Houghton* [2014] 1 NZLR 541."

47. The normal limitation period for actions of this kind in Trinidad and Tobago is four years from the date the cause of action accrued or, if later, four years from the date on which the claimant first acquired knowledge of the accrual of the cause of

action. This period is prescribed by section 5 of the Limitation of Certain Actions Chap 7:09 ("the Limitation Act"), which states so far as relevant:

> "5(1) Subject to subsection (6), this section applies to any action for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or any enactment or independently of any contract or any such enactment where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
>
> (2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of four years from -
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date on which the person injured first acquired knowledge of the accrual of the cause of action."

48. Section 5 is, however, subject to section 9 of the Limitation Act which reads, so far as material:

> "9(1) Where it appears to the court that it would be inequitable to allow an action to proceed having regard to the degree to which -
>
> (a) the provisions of section 5 or 6 prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that those provisions shall not apply to the action or to any specified cause of action to which the action relates.

…

9(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to -

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 8 or, as the case may be, section 9;

(c) the conduct of the defendant after the cause of action arose, including the extent to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; or

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the defendant's act or omission to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

49. As the Court of Appeal recognised in *Alana Marisa Mohan v Prestige Holdings* Ltd Civ App P-364 of 2017, para 44, there is a clear and obvious error in section 9(1) in that the word "inequitable" ought to have been "equitable". The section is intended to confer on the court a wide discretion to direct that the provisions of section 5 shall not apply where it appears to the court that it would be equitable to allow the action to proceed having regard to the degree to which the provisions of section 5 prejudice the claimant or any person whom he represents; and any decision of the court to allow the action to proceed would prejudice the defendant or any person he represents. In acting under this section, the court must have regard to all the relevant circumstances of the case and in particular to all of the matters set out in section 9(3).

LBEP's appeal against the refusal to add further claimants

50. The Board would make two points at the outset. First, the judge did not deal with this aspect of the application in her judgment and the submissions upon it appear to have occupied very little time on appeal. In the result, the Board does not have the benefit of a reasoned decision of the judge or the Court of Appeal in relation to it. This is regrettable. Nevertheless, the Board has now heard detailed submissions and it is a matter with which it is appropriate to deal so far as it is possible to do so.

51. Secondly, it would be hard not to feel considerable sympathy for the residents of La Brea who, many years after the incidents giving rise to these proceedings, are really no closer to a full hearing of their central complaint that they have suffered considerable loss and damage as a result of oil spills from Petrotrin's pipelines; that those spills and the impact they had on the environment and the local residents were attributable to the wrongful acts and omissions of Petrotrin and the OSH Agency; and that all of the residents so affected are entitled, among other things, to an award of compensatory damages.

52. Nevertheless, the Board has come to the conclusion that it would be wrong at this stage and on the basis of the relatively limited information presently available simply to allow the appeal and direct that all the resident members of LBEP be added to the proceedings as claimants in addition to or in substitution for LBEP itself. The Board has reached that view for the following reasons.

53. First, the Board is far from satisfied that all the members of LBEP have consented to be added as additional claimants. As has been seen, it is a requirement of rule 19.5(4) that nobody may be added or substituted as a claimant unless he has given his consent in writing to be so added. This is not a mere formality. It is very important that the members of LBEP understand the potential consequences of being added to the proceedings as additional claimants, including the possibility of being ordered to pay at least some of the respondents' costs of the claim if the claim were to fail, or of any issue in relation to which an adverse finding may be made.

54. Secondly, the Board has received no satisfactory explanation of why it is considered necessary or appropriate to add all of the members of LBEP as additional claimants and why, were it otherwise appropriate to do so, it would not be sufficient to add, for example, a handful of them as representatives for the rest, assuming, of course, they consented to that course and did so in the appropriate way. Indeed, the Board has noted that an application for a more limited order of this kind was made in May 2019 and has not yet been resolved.

55. Thirdly, the joinder of all or indeed any of the 101 members of the LBEP raises issues of limitation upon which it would have been very helpful to have the views of the judge and the Court of Appeal. In the normal way, resolution of those issues might have been expected to involve a consideration of when time began to run for the purpose of limitation, and in so far as any relevant limitation period had expired, whether and if so on what basis the court was invited to consider whether it was equitable to allow the action to proceed.

56. Fourthly, on the materials before the Board it is not possible to conclude that the application was made with reasonable promptitude. As the Board has explained, a number of case management conferences took place in the period from September 2015 until the end of April 2018, and yet it was not until May 2018 that the LBEP made an application that it be appointed as a representative claimant for all of the 101 members listed in amended statement of case; or that each of those members be added to the claim in addition to, or in substitution for, LBEP.

57. It must also be emphasised that the application made in May 2019 is not presently before the Board. It will be for the parties to this appeal and the members of the LBEP, with the assistance of those advising them, to consider the merits of that (or indeed any other) application in light of this judgment and, if so minded, to pursue any such application they may be advised is appropriate.

58. It follows that this appeal must be dismissed.