

Jalla v Shell – When is a Nuisance “Continuing”?



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The Supreme Court has given a significant judgment about nuisance, civil procedure and the law of limitation in *Jalla v Shell* [2023] UKSC 16.

Introduction

The Supreme Court ruled on a preliminary issue about whether or not there was a continuing nuisance for the purposes of the 6 year time limit under the Limitation Act 1980, and whether the cause of action started to run from the time of the discharge of oil in December 2011 or at a later date.

The underlying claim arose in the context of the latest in a series of incidents of serious environmental pollution from oil extraction operations, of which the Deepwater Horizon leak was perhaps the best known.

The parties and the Claim

The Defendant was a business within the Shell group of companies, and the Claimants brought the claim as a representative action on behalf of more than 27,000 individuals who claimed to have been affected by the Bonga oil spill off the coast of Nigeria as long ago as December 2011.

The leak came from a floating oil production, storage and off-loading facility located about 120 kilometres off the coast of Nigeria. It was said to be the largest oil spill for over a decade. The leak caused damage to the coastline and to various fishing, farming and other businesses. The value of the damage was estimated by the National Oil Spill Detection and Response Agency to be worth about \$3.6 billion. The factual background to the claim is set out in greater detail in a separate ruling of the Technology and Construction Court – *Jalla & Anor v Shell International Trading and Shipping Company Ltd & Anor* [2023] EWHC 424 (TCC) (28 February 2023).

The Limitation Issue

The Claimants had issued their claim form in December 2017, a week before the expiry of the primary limitation period. In April 2018, after the expiry of limitation, they applied to the Court to change one of the companies being sued. The Defendant resisted this, and in response the Claimants argued that because

the nuisance had not been remediated, there was therefore a continuing nuisance and so their application to amend came within limitation. The preliminary issue was decided in favour of Shell both at first instance by Stuart-Smith J (see [Jalla & Ors v Royal Dutch Shell Plc & Ors \[2020\] EWHC 459 \(TCC\)](#) (02 March 2020)) and in the Court of Appeal (see [Jalla & Ors v Shell International Trading And Shipping Company & Anor \[2021\] EWCA Civ 63](#) (27 January 2021)).

Lessons

The judgment represents a significant win for Shell, although it remains to be seen whether it is decisive of the whole dispute; the Claimants can continue against the Shell company which was the original Defendant, and they may yet succeed on the separate “date of damages” issue – see paragraph 12 of the Supreme Court’s judgment. .

There are a number of practice points for lawyers involved in environmental group claims. Those representing claimants would be wise not to issue their claim form close to the limitation deadline; had Mr Jalla’s claim been issued earlier, it might have been possible to seek to amend it within the 6 year limitation period, and this unsuccessful visit to the Supreme Court could have been avoided. That means that it is vital to assemble the claimant group early and try to maintain control over it. That will continue to present challenges, and might be compared unfavourably with herding cats. Identifying the correct defendant(s) and the facts which are said to make them liable is also of vital importance, and defendant entities may try to use the complexities of their corporate structure to make those tasks harder and more opaque.

The legal argument in future cases is likely to focus on whether a nuisance is one off or continuing. Sometimes that will be relatively straightforward – nuisance caused by an oil leak, explosion or fire is likely to be one off, whereas ongoing “state of affairs” nuisance caused by unremediated odour, noise or dust is more likely to create a continuing cause of action. One way to think about the question is to ask whether an injunction to restrain the activity could usefully be granted (see paragraph 28 of the Supreme Court’s judgment). If it could then the nuisance is probably continuing, if not then not.

In those judgments, the Court ruled that in most cases of nuisance, there is a single one off event which causes damage and for which compensation can be claimed; by contrast, a continuing nuisance might be damage caused by smoke, odour, noise e.g. from an ongoing mechanical process, or intrusive tree roots. In the case of nuisance from a single event, limitation runs from the time when damage occurs, whereas in a continuing nuisance case, the cause of action accrues again and again.

Before the Supreme Court, the Claimants argued that the oil remained on their land long after the initial discharge and was not remediated, and in that sense there was a continuing nuisance. The problem with this was that it would extend the limitation indefinitely until remediation. It would remove the protection of limitation from defendants without them necessarily being able to remediate the land and thereby (on the Claimants’ submission) engage the time limit. The Court refused the Claimants’ appeal.

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