Citation Number: [2021] EWHC 2118 (TCC)

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

Royal Courts of Justice
The Thomas Moore Building,
Fetter Lane, London
EC4A 1NL

Date: 20/07/2021

Before:

MRS. JUSTICE O'FARRELL
- -

Between:

Claim no. HT-2017-000383

(1) HARRISON JALLA
(2) ABEL CHUJOR
& OTHERS

Claimants

-and-

(1) ROYAL DUTCH SHELL PLC
(2) SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED
(3) SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED

Defendant

Between:

Claim no. HT-2020-000143

THE 27,830 INDIVIDUAL CLAIMANTS LISTED IN SCHEDULE 1 ("THE INDIVIDUAL CLAIMANTS"), on their own behalf and in the representative capacities (CPR r.19.6) set out in the Claim Form dated 20 April 2020
THE 479 NIGERIAN COMMUNITIES LISTED IN SCHEDULE 2 ("THE COMMUNITY CLAIMANTS"), represented pursuant to CPR r.19.6 by: (i) their resident INDIVIDUAL CLAIMANTS, as set out in Schedule 1, Column F; or (ii) where there is no resident INDIVIDUAL CLAIMANT those resident representatives listed in Schedule 3; and/or (iii) HARRISON JALLA and ABEL CHUJOR;
all as set out in the Claim Form dated 20 April 2020

Claimants

-and-

(1) SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED
(2) SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED

Defendants

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MR. GRAHAM DUNNING QC, MR. OBA NSUGBE QC, MR. STUART CRIBB and MR. WEI JIAN CHAN (instructed by Rosenblatt LLP) appeared for the Claimants.

LORD GOLDSMITH QC, DR. CONWAY BLAKE and MR. TOM CORNELL (instructed by Debevoise & Plimpton LLP) appeared for the Defendants.

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APPROVED JUDGMENT

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS. JUSTICE O'FARRELL :

1. This is the claimants' application for an extension of time in respect of both claims currently before the court: claim HT-2017-000383 and claim HT-2020-000143. In each case, the application that was issued on 2nd July 2021 sought an order extending the date for service of witness evidence in support of the claimants' case on when the relevant accruals of damage occurred, permission to serve supplemental expert evidence in respect of that evidence and permission to amend the date of damage pleading, all by the 20th August 2021.

2. The background to the dispute has now been set out in a number of judgments, both by this court and by Stuart-Smith J (as he then was). In summary, the dispute arises out of an oil spill which occurred in the Bonga oil field off the coast of Nigeria on 20th December 2011. The oil spill emanated from an offshore floating production storage and offloading facility, located approximately 120 kms off the Nigerian coastline of Bayelsa State and Delta State within the Nigerian Exclusive Economic Zone.

3. In the proceedings currently before the court, the claimants allege that oil from the Bonga 2011 spill hit the shoreline and migrated inland causing serious and extensive damage to the land, water supplies and to the fishing waters. The claim is for damages and/or compensation for pollution and environmental degradation caused by the oil spill, which is causing ongoing damage to the land and fishing waters around the villages. The claims are made in negligence, nuisance and *Rylands v Fletcher* liability, subject to the judgment in the Court of Appeal on lack of continuing nuisance, the outstanding judgment in relation to representative parties in respect of the appeal that has just concluded in the Court of Appeal, and any appeal to the Supreme Court.

4. The matter came before Stuart-Smith J (as he then was) in relation to, amongst other things, jurisdictional challenges by the defendants. The judge gave a judgment on 2nd March 2020 in which he resolved some, but not all, of the matters that were before him. In particular, the judge was unable to reach a concluded view on whether or not any part of the claims were statute-barred for limitation because the judge did not have sufficient evidence before him to determine the date of damage of the potentially 27,830 claimants and the 479 communities that were said to have been affected.

5. On 27th March 2020, the judge provided directions so that the issue of the date of damage could be determined. The judge ordered that by 24th November 2020, which date was extended by two months to allow for prospective difficulties caused by the pandemic, the claimants were to file a date of damage pleading setting out the claimants' case on when all relevant accruals of damage occurred with sufficient particularity to enable the defendants to know the case that they had to meet, together with any lay evidence upon which they wished to rely in support of that pleading, and any expert evidence on which they wished to rely. There was then provision for the defendants to respond to the pleading and evidence by 5th April 2021, and it was then

anticipated that there would be a further CMC in December 2020. The date of damage issue would be resolved by a preliminary trial or preliminary issues during the summer term of 2021; that would be by now.

6. The matter did not progress as anticipated by the judge and the matter came before this court on 19th November 2020. At that directions hearing, the court dealt with a number of procedural issues, including a determination as to whether or not there would be a hearing to determine the date of damage and limitation issues; if so, further timetabling matters to enable that to take place. The court, in its order dated 18th December 2020, provided for the claimants to serve their date of damage pleading, lay evidence and expert evidence (to include expert evidence in relation to Nigerian law) in both the 2017 proceedings and the 2020 proceedings by 4th June 2021. There was then provision for the defendants to provide a responsive pleading in evidence by 29th October 2021.

7. There was also provision for the claimants to serve proposals for determining the preliminary issues, including a proposed methodology for any sampling or extrapolation case, and indications as to the categories and number of factual witnesses that would give evidence, together with an outline timetable for the hearing.

8. At the hearing on 19th November 2020, the court fixed the preliminary issues trial for the date of damage, to include the dates on which the claimants first suffered actionable damage, the appropriate limitation periods applicable to those claims, limitation as a defence, and then potentially any further issue that the court ordered should be heard. That trial is currently fixed for a four-week hearing commencing on 21st February 2022.

9. The claimants suffered some difficulties in complying with that timetable and therefore sought and obtained the defendants' agreement to an extension of time. That was set out in a consent order dated 2nd June 2021, approved by the court, which extended time for the claimants to serve their pleading and evidence to 2nd July 2021, and extended time for the defendants to serve their responsive pleading and evidence by 26th November 2021. That extension meant that it would not be possible for the claimants and defendants to exchange proposals as to the mode of determination of the issues in February 2022, but the parties agreed that there would be an additional case management conference before this court in October 2021 at which those matters could be considered.

10. On 2nd July, the claimants served their date of damage pleading. The date of damage pleading is stated to be served in support of the following claimants only: first of all, the personal claims of Mr. Jalla in the 2017 proceedings; secondly, the personal claims of Mr. Ojulu, Mr. Agbeyagbe, Ms. Elizabeth Ekolokolo in the 2020 proceedings; and the claims brought on behalf of five of the communities in the 2020 proceedings.

11. The evidence that was served in support of the date of damage pleading was five witness statements from claimants and one witness statement from Mr. Barry Roche, the managing director of Rosenblatt Limited, the solicitors acting for the claimants. Further, the claimants served expert reports in support of their date of damage pleading, namely, from the Environmental Protection Engineering SA and BM Consultants ('the EPE Report') dealing with the Bonga oil spill, its travel to the

shoreline, and its likely timeline for dispersal; further, the Brookes Bell report dated 5th June 2019, which analysed by way of chemical analysis a report that had been produced by Fugro GB Marine Limited, experts instructed in February 2012 by the defendants; and further, a report of Professor Ojukwu SAN dealing with the Nigerian law of limitation. That report was dated 2nd July 2021.

12. Further, the claimants indicated that they relied upon additional witness statements from Mr. Ekotogobo dated 21st March and 20th April, 2020, the witness statements of Mr. Chujor dated 21st March, 2020 and 20th April, 2020, and an affidavit from Mr. Chujor dated 20th June, 2020. There was also reliance on various contemporaneous documents.

13. Therefore, as of 2nd July of this year, the claimants have served, as required by the court, a date of damage pleading, lay witness evidence in support of the case set out in that pleading, and expert evidence in support of the case set out in that pleading, together with expert evidence on the Nigerian law of limitation.

14. However, the date of damage pleading and the evidence served does not cover all of the claimants as anticipated by the court when the order was made last December. The claimants, in their application, wish to produce a further schedule which will contain the existing schedules to the Particulars of Claim in both actions, but reformatted so that additional evidence or assertion is included as to the alleged date of damage provided.

15. The claimants have clarified through their leading counsel, Mr. Dunning QC, that they are not seeking to produce new witness statements, but they wish to produce the reformatted schedules so as to identify the dates on which it is asserted that damage occurred. The court has been told that approximately 900 entries will be made to the existing schedules so as to provide the additional case on the date of damage for those individuals and/or communities. If the court permits that additional assertion of date of damage to be added to the pleading, then the claimants also seek permission, first of all, to provide additional expert evidence in support of the date of damage asserted and also permission to amend the date of damage pleading. Further, if the extension of time for this exercise is given by the court, Mr. Cribb, counsel for the claimants, submits that the court in those circumstances should permit the claimants to produce mapping evidence to identify the precise location of the individuals and/or communities against whom a date of damage is provided in the relevant schedule.

16. Mr. Dunning submits that this would be an appropriate case in which to grant the extension of time sought because the scale of the exercise that the claimants have tried to undertake is vast. There are 27,830 individual claimants and 479 community claimants. They occupy an area roughly the size of Belgium, but with a very challenging geography and a very limited level of infrastructure. The geography of the Niger Delta is that it is a very remote area, it is densely jungled, it is riddled with small creeks, in addition to the major waterways, and therefore visiting the communities is particularly challenging. Further, the security situation in the Niger Delta exacerbates those challenges still further. There are very serious security issues involved for anyone venturing into that region. Armed robbery and kidnapping for ransom is rife. There are also threats from armed gangs and threats to individuals who are found in those areas.

17. As a result of that, the claimants' search for the various claimants and communities in order to advance their pleaded case and gather evidence has been very severely hampered. Further, there is a lack of developed telecommunications and internet infrastructure in the Niger Delta area. Many of the claimants either have no internet access or if they do, they cannot afford to access it on a regular basis, only when informed that they might have a message to which they should respond. Further, the claimants allege that they have suffered further difficulties as a result of the COVID-19 pandemic. In particular, when the visit to the Niger Delta took place in March 2021, Rosenblatt and the experts, EPE, had to quarantine and the security situation in the Niger Delta was made worse as a result of the pandemic.

18. As a result of those difficulties, Mr. Dunning has explained to the court that despite the best efforts of the claimants, they have been unable to serve all of the evidence that they would wish to rely on and they have been unable to identify the particulars of the pleaded case that they would wish to put before the court for the purposes of the February 2022 trial. Mr. Dunning submits to the court that it is appropriate for the court to have regard to the fact that the claimants have complied with the order of December 2020, as amended by agreement in June 2021. The claimants have served all of the expert evidence relating to the Bonga oil spill and the origins of what the claimants claim is the damage that has occurred to the claimants and their communities.

19. For those reasons, Mr. Dunning submits that it would be reasonable for the court to grant the further limited extension of time for the additional limited exercises that have been identified. It is submitted that no prejudice will be caused to the defendants because they already know the general thrust of the claimants' case. They have already received the detailed expert evidence on which the claimants rely. Also, the defendants' main line of defence is that no damage has been caused by the Bonga oil spill because none of that oil reached the shoreline. As against that, it is submitted by the claimants that if they are not allowed to plead the date of damage in relation to the additional 900 or so names in the schedule, those claimants will be particularly prejudiced because they will not be able to advance their claims.

20. The application is opposed by the defendants. Lord Goldsmith QC, leading counsel for the defendants, submits first of all that the latest extension of time, agreed as recently as 2nd June of this year, was agreed on the express basis that there would be no further extensions of time, and that there was no further flexibility in the timetable in order to meet the February trial date. He submits that it is important for the defendants to know the precise case that they have to meet in order to prepare for the February trial date. The claimants have been given a number of opportunities to set out their case and they should not be given any further indulgence by the court.

21. Lord Goldsmith submits that granting the extension now sought would inevitably mean that the date of damage hearing currently fixed for 21st February 2022 would have to be vacated. The timetable is already extremely tight. The defendants currently have until 26th November 2021 to file and serve their responsive date of damage evidence. If that date were to be moved back to accommodate any further time given to the claimants, the hearing in February 2022 would simply have to be vacated.

22. Further, Lord Goldsmith submits that the claimants have no good reason for a further extension of time. The court made it very clear back in November 2020 that it would have little sympathy for further requests for time, having already taken account of the difficulties posed by the scale of the exercise and the COVID-19 pandemic when fixing the current timetable. The security issues in the Niger Delta were also canvassed at the hearing back in November and the court extended the deadline for service of the claimants' evidence and pleadings from May to June 2021 in order to take account of that issue.

23. In respect of the general scale of the undertaking, the defendants' position is that the very nature of these proceedings requires the claimants to grapple with a very large volume of evidence, but the way in which that could have been dealt with in a proportionate way would have been for the claimants to take up the suggestion made by the court that this matter could be dealt with either by way of test cases, sampling, and extrapolation of a small number of cases, so that it would have been a manageable undertaking for the claimants. If and to the extent they have chosen not to avail themselves of that approach, then they cannot expect the sympathy of the court.

24. Lord Goldsmith particularly relies upon the prejudice that would be suffered by the defendants in opposing the claimants' application. First of all, he submits that if the date of damage hearing were not to be vacated, then any extension of time given to the claimants to finalise their case would significantly disrupt the defendants' preparation of its responsive evidence and its date of damage pleading. If the defendants were to be granted a commensurate extension of time to file their responsive evidence, then the four-week date of damage hearing in February 2022 would have to be vacated. Both options would cause significant prejudice to the defendants, the first in preventing it from properly preparing its defence to the allegations, the second in depriving it of a resolution to the date of damage issue which the court reminds itself, of course, is inextricably linked with the jurisdictional challenges that have been made by the defendants.

25. The principles applicable to the application are not really in dispute. It is common ground that the court has the power to extend time for any step to be taken whether the application is made before or after any time limit has expired: CPR 3.1(2)(a). When making any decision in relation to an application for further time, the court must have regard to the overriding objective set out in CPR 1.1. That requires the court to consider and ensure that a case is dealt with justly and at proportionate cost.

26. That includes, so far as is practicable:

(a), ensuring that the parties are on an equal footing and can participate fully in the proceedings, and that parties and witnesses can give their best evidence;

(b), saving expense;

(c), dealing with the case in ways which are proportionate to the amount of money, importance of the case, complexity of the issues, and 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.

27. One issue that has arisen between the parties is whether or not the matter falls to be dealt with by way of an application for relief from sanctions, pursuant to CPR 3.9. The point arises for two reasons: first of all, the application was submitted by the claimants at the very 11th hour -- I think Lord Goldsmith would say at the 13th hour -- on 2nd July, and payment was taken in respect of the application at six minutes past 4 p.m. as opposed to the 4 p.m. deadline. But of more concern to the defendants is the fact that the application for a further extension of time was made against the defendants' agreement to the earlier application on the basis that there would be no further extension of time sought or agreed to.

28. I have read carefully the correspondence to which the court's attention has been drawn. In particular, the court has taken into account the following.

29. On 20th May 2021 Rosenblatt sent a letter to Debevoise & Plimpton, the solicitors acting for the defendants, in which it stated, at the end of the letter:

> "We recognise the need for pragmatism and are grateful for the proposed three-week extension to Friday, 25th June offered by your client. Taking the above into account, we look forward to hearing from you as regards an extension to Friday, 2nd July 2021 with a commensurate four-week extension afforded to your clients, the service of their responsive pleading and evidence enabling both the July 2021 CMC and the February 2022 preliminary issues trial to remain in place."

30. On 21st May 2021, Debevoise & Plimpton wrote back to Rosenblatt, agreeing to the request for an extension of time to 2nd July, stating:

> "But only in so far as you agree the following points: there will be no further extensions to the date of damage timetable, the four-week extension will remove any flexibility from the date of damage timetable. The defendants will not agree to the disruption of the four-week date of damage trial set down for February 2022. On that basis, the defendants will not agree to any further extension requests or applications and the claimants should not have liberty to apply."

31. At the end of that letter, they stated:

> "We enclose a form of order reflecting the matters set out above. If you agree to this order, please confirm as much in open correspondence by 25th May. Should you make an application to the court requesting an extension on different terms, it will be opposed by the defendants who will also seek that any variation be made on an unless basis."

32. A further letter sent by Debevoise & Plimpton on 26th May 2021 reiterated that the defendants' consent was given on the understanding that the claimants have acknowledged that:

> "(1), this four-week extension will remove any flexibility from the date of damage timetable; (2), the defendants will not agree to the disruption of the four-week date of damage trial set down for February 2022; and (3), on that basis the defendants will not agree to any further extension requests or applications and the claimants do not have liberty to apply."

33. The claimants agreed the form of order put forward by the defendants, but point out quite rightly that there is no unless order attached to it, and no firm agreement by the claimants in that order that no further application for an extension of time would be made.

34. Having considered the submissions made by the parties today and the terms of the correspondence between the solicitors in this regard, the court is satisfied that the defendants were very clear that they were agreeing to an extension of time to 2nd July on the basis that that was it, there would be no further extension of time; and that any further extension of time, if sought, would be opposed by the defendants.

35. However, I am also satisfied that the claimants did not sign up to a binding agreement that they would not apply to the court for a further extension of time, no doubt on the basis that unforeseen circumstances could arise that might make it necessary to make a further application to the court.

36. Stepping back, therefore, the court sees those exchanges as indicating that the defendants made it very clear as to the basis on which they were agreeing to the extension of time; also, the defendants made it very clear that there simply was no further flexibility in the timetable. I take that into account as background, but I do not consider that the exchanges of correspondence shut the claimants out from making this further application. Indeed, I understood Lord Goldsmith to accept that, in any event, the court would have a discretion to consider the application that is being made today.

37. I then turn on to consider the substance of the application against the factors that the court must bear in mind. The first point is that these proceedings were started in 2017. There have already been three timetables for the claimants to provide a pleading and evidence in support of their case on date of damage: initially by Stuart-Smith J (as he then was) back in March 2020; secondly, by this court in the order of December 2020; and then more recently by way of the consent order of 2nd June 2021.

38. Secondly, the court considers that this is a case where there is a need for early resolution of some of the key issues in the case. The oil spill in question occurred in 2011. We are now in 2021. By the time of the date of damage trial, the incident giving rise to the claim will be more than ten years old. Having regard to the need to deal with cases expeditiously, as well as fairly, this is a case that needs to move forward and on which there needs to be resolution.

39. Thirdly, I take into account the fact that the claimants have failed to meet the timetable set down by both Stuart-Smith J (as he then was) and by this court. I accept that the claimants have significant challenges. The COVID-19 pandemic has caused difficulties. The particular challenges caused by the location and circumstances of the claimants as individuals and the communities pose significant logistical and security issues. However, those factors have already been taken into account by the court when fixing and revising the timetable.

40. The court also considers that the claimants must bear some responsibility for the difficulties that they now face. It should have been possible for a strategy to be identified by the claimants that would enable a proportionate approach to be taken to the identification of test or representative or sample claimants and locations, so as to enable the task to be completed by the dates set by the court.

41. As against those matters, the court acknowledges that the claimants did serve on 2nd July 2021 the date of damage pleading, their factual witness in support of that pleading, and extensive expert evidence dealing with both the oil spill and spread of oil contamination together with the Nigerian law issues.

42. Fourthly, the court considers the prejudice to the defendants if the claimants are granted further time to perfect their case. The defendants will suffer prejudice by way of disruption to their preparation for the February 2022 hearing. Either they will have to grapple with additional material, whether it be by way of additional expert evidence or simply by way of additional dates inserted into the current schedules of individuals within a relatively short period of time, or they face losing the trial currently fixed for 2022.

43. I accept Lord Goldsmith's submission that the defendants are entitled to know with precision the case that they have to meet. Regardless of their primary defence, they are entitled to have an opportunity to consider the detail of the claimants' case and the evidence put forward in support, so that they can consider whether or not to challenge that evidence. They are also entitled to a reasonable opportunity to prepare their own case and evidence for the February 2022 hearing.

44. Fifthly, the court must have regard to the use of the court's resources. The February 2022 hearing has been fixed as a four-week trial. As a result of that, judicial resources are tied up for that four-week hearing. Since the December 2020 order, there have been many parties that have come before this court that have asked for an early hearing date, including a hearing date during the early part of 2022. The court has not been able to give them their preferred dates because other trials have been fixed during that period; that includes this trial, which currently takes up a substantial period at the beginning of 2022. The court must have regard to the way in which the court resources are allocated as between different court users when considering whether or not to grant a party the indulgence of further time, it having failed to comply with the timetable set by the court.

45. Drawing all of those threads together, the court considers that the claimants have had sufficient time to identify the witness evidence and produce the expert evidence on which they wish to rely in order to plead and present their case on date of damage. I note that the claimants are not seeking permission to serve further factual witness statements, but the changes that are proposed to the existing schedules in order to

insert dates against perhaps 900 entries would provide a formidable new case that the defendants would have to investigate and to which it would be required to respond.

46. Taking all of those factors into account, the court refuses the application by the claimants for additional time to serve further particulars and/or evidence in support of their case.
