



## High Court strikes out representative proceedings: Claimants in oil spill claim do not have “the same interest” within the meaning of CPR 19.6

By Ben Norton

In *Jalla v Shell International Trading and Shipping Co Ltd* [2020] EWHC 2211 (TCC), the Defendants applied to strike out representative proceedings on the ground that the represented Claimants did not all have “the same interest” within the meaning of CPR 19.6. Application granted. Although they raised some common issues of law and fact, the Court found that the proceedings were individual claims as each Claimant needed to prove that the oil spill caused them damage. Mr Justice Stuart-Smith’s judgment provides a helpful summary of the applicable principles and a detailed analysis of the key authorities, including the Court of Appeal’s decision in *Lloyd v Google* [2019] EWCA Civ 1599, which is due to be heard by the Supreme Court in 2021.

### BACKGROUND

1. The claim concerns an oil spill which occurred on 20 December 2011 off the coast of Nigeria. The Claimants, a combination of Nigerian individuals and

communities, allege that oil from the spill caused serious damage to their land and water supplies.

2. Following a judgment handed down in March 2020 ([2020] EWHC 459 (TCC)), the Defendants applied to strike out the proceedings on several grounds, including that the proceedings were not properly constituted as a representative action in accordance with CPR 19.6 because the Claimants did not all have “the same interest” within the meaning of the rule.
3. On 20 April 2020, in response to the Defendants’ strike out application, the Claimants issued fresh proceedings (known as “the Protective Proceedings”) which largely mirrored the present proceedings. On 24 April 2020, the Claimants abandoned their “individualised” claims for damages in the present proceedings so that the main relief sought was remediation. The step was taken as an attempt to circumvent the Defendants’ submissions on the strike out application.

## THE ISSUES

4. The main issues before the Court were as follows:
  - a. Do the Lead Claimants and those they purport to represent have the same interest in the claim that is being made?
  - b. Can the represented class be ascertained with sufficient certainty?

## ISSUE 1: THE SAME INTEREST

### The applicable principles

5. On the issue of what constitutes ‘the same interest’, Mr Justice Stuart-Smith considered numerous well-known authorities in detail, including *Duke of*

*Bedford v Ellis* [1901] A.C. 1, *Irish Shipping Ltd v Commercial Union Assurance Co. PLC* [1991] 2 QB 206, *Millharbour Management Ltd and others v Weston Homes and another* [2011] EWHC 661 (TCC), *Emerald Supplies v British Airways Plc* [2010] EWCA Civ 1284 and *Lloyd v Google*. At [60], he provided a summary of the relevant principles:

“i) *Representative proceedings are not the only vehicle for multi-party litigation: see the citation from Zuckerman at [52] above;*

ii) *The requirement in CPR r. 19(6)(1) that persons have "the same interest" is statutory and is not to be abrogated or substituted by reference to the overriding objective. That said, the rule is to be interpreted having regard to the overriding objective and should not be used as an unnecessary technical tripwire: see [44]-[45], [53] above;*

iii) *The purpose of a representative action is to accommodate multiple parties who have the same interest in such a way as to go as far as possible towards justice rather than to deny it altogether. This is done by adopting a structure which can "fairly and honestly try the right": see the citation from page 10 of the Duke of Bedford case at [31] above;*

iv) *It is for this reason that representative proceedings may be appropriate where the relief sought is in its nature beneficial to all whom the lead claimants propose to represent: see the citation from page 8 of the Duke of Bedford case at [31] above and see [47] above;*

v) *The "same interest" which the represented parties must have is a common interest, which is based upon a common grievance, in the obtaining of relief that is beneficial to all represented parties: see [47] above. It is not sufficient to identify that multiple claimants wish to bring claims which have some common question of fact or law;*

vi) *It is not necessary that the claims or causes of action of all represented parties should be congruent, provided that they are in effect the same for all practical purposes : see [39] and [49] above;*

vii) *The existence of individual claims over and above the claim for relief in which the represented parties have the same interest does not necessarily render representative proceedings inapplicable or inappropriate: see [38] above. The question to be asked is whether the additional claims can be regarded as "a subsidiary matter" or whether they affect the overall character of the litigation so that it becomes or approximates to a series of individual claims which raise some common issues of law or fact: see [33] above;*

viii) *Similarly, while the court will pay little attention to potential individual defences that are merely theoretical, the existence of potential defences affecting some represented parties' claims but not those of others tends to militate against representative proceedings being appropriate. One reason for this is that it may be procedurally difficult or impossible to accommodate individual defences in representative proceedings, though the rules make provision for affected parties to be protected: see [53] above. Another is that if a defence is available in answer to the claims of some but not others of the represented class they have different interests in the action: see [56] above. Adopting slightly different language, I would add that the existence of individual defences calls into question whether the action really is a claim for relief that is beneficial for all or is a collection of individual claims sharing some common issues of fact or law;*

ix) *If the criterion of "the same interest" is satisfied the Court's discretion to permit representative proceedings to continue should be exercised in accordance with the overriding objective."*

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### **Application to the facts**

6. In applying the principles to the present action, Mr Justice Stuart-Smith first noted that the claims advanced by the Claimants and those they represented raised some common issues of law and fact. The Court has powers to enable such common issues to be litigated once in a way which accommodates all potential Claimants, such as via a GLO or common case management ([69]).
7. However, Mr Justice Stuart-Smith proceeded to find that, beyond the common issues of fact and law, the present proceedings were individual claims because each Claimant needed to prove that the oil spill caused them damage ([70]). The Protective Proceedings did not change this fact. In order to claim for “remediation relief”, each Claimant still needed to show that they had suffered individual damage.
8. In principle, the existence of individualised claims does not necessarily prevent an order for representative proceedings. The question is whether the individualised claims can be regarded as “subsidiary” to the main issue that is the subject of the proceedings. In Mr Justice Stuart-Smith’s judgment, the issues of loss, damage and causation were an integral part of the overall issues raised by the proceedings ([72]).
9. In addition to the above, it was also obvious that individualised factual and causation defences would be raised in relation to all individual Claimants, including limitation defences ([74]).
10. Accordingly, the Court found that the represented Claimants did not satisfy the requirement of “the same interest” and the proceedings could not continue as a representative action.

## ISSUE 2: ASCERTAINMENT OF THE CLASS

11. How precisely must the represented class be identified and what is the relevance of conflicts of interest between persons who are said to be represented as part of the class? On this second issue, Mr Justice Stuart-Smith again consulted the leading authorities before stating at [68] that:

*“With considerable hesitation, I would suggest that the touchstones should be (a) clarity of definition of the class; (b) lack of internal conflict within the class, which will be a subset of (a); (c) ability to evidence inclusion within the class, whether by self-certification or otherwise; and (d) whether it appears that the class, as defined, share the same interest in the outcome of the representative proceedings that are considered to be in accordance with the overriding objective.”*

12. On the facts, had the representative proceedings been appropriate, the Court found that they would not have been struck out on the basis of failure to ascertain the class. The fact that some Claimants might prove not to have suffered damage or might fail for limitation reasons does not demonstrate or even suggest that the class is unascertained ([78]).

## DISCUSSION

13. The Court of Appeal’s decision to allow a representative action in *Lloyd v Google* in October 2019 led to speculation regarding the extent to which mass-tort claims could be brought as representative actions. An Alerter on that case, which is listed to be heard in the Supreme Court in March 2021, may be found [here](#).

14. As observed by Mr Justice Stuart-Smith at [59], in *Lloyd v Google*:

- a. The Claimants disavowed reliance on any facts affecting any individual represented claimant. This was integral to the Court of Appeal's decision that all represented parties shared the same interest.
  - b. The Court of Appeal considered the possibility that Google could raise any defence to one represented claimant that did not apply to all others and rejected it as "impossible to imagine".
15. In the present case, the Claimants clearly intended to align their position with the facts of *Lloyd v Google* by abandoning their individualised claims for damages. However, the attempt failed. In *Lloyd v Google*, the alleged wrong was the acquisition by Google of browser generated information ("BGI") which is automatically submitted by a browser upon connecting to the internet. All the claimants therefore sustained the same loss, namely loss of control over their BGI. By contrast, in *Jalla*, the alleged wrong was the geographically uneven distribution of a physically harmful substance (i.e. an oil spill). Unlike in *Lloyd v Google*, the Claimants could not escape the fact that they each needed to show that they had suffered individual damage and that the Defendants would likely raise individualised defences.
16. Nevertheless, representative proceedings are not, of course, limited to data protection claims. Claimants need look no further than *Millharbour*, discussed at [49-50] of *Jalla*, for an example of representative proceedings where the alleged wrong was a physical defect (excessive heat in a residential development caused by hot water pipes) and it was recognised as possible that individualised defences could be raised.
17. Mr Justice Stuart-Smith's judgment provides a helpful discussion of the leading authorities in this area, as well as a summary of the relevant principles. However, the outcome of this decision will come as little surprise to practitioners. Given the limited application of CPR 19.6, it was and will continue to be unusual for claims of this type to be brought as a

representative action, despite the advantages which this procedure offers to claimants.

**Ben Norton**

27 August 2020