



TCC hands down Judgment on Preliminary Issues in Niger Delta oil spills Group Litigation

By Abigail Cohen

The Technology and Construction Court has given Judgment in respect of eight preliminary issues arising in the Bomu Bonny Oil Pipeline Group Litigation in which approximately 15,000 Nigerian nationals are suing the Shell Petroleum Development Company of Nigeria (“SPDC”) in the English Courts for compensation arising out of two oil spills in the Niger Delta in 2008 and 2009. The issues were wide ranging including questions of statutory interpretation, jurisdiction, quantification of general damages in nuisance claims and the scope of public nuisance. Although applying Nigerian law the Judgment is of relevance to claims in this jurisdiction due to the similarity of Nigerian and English law, and is of relevance to other cross jurisdictional claims. The Court ruled in favour of SPDC on six of the issues, one issue was agreed between the parties, and the issue giving rise to questions of jurisdiction was postponed until trial.

BACKGROUND

- I. The litigation arises out of two operational oil spills which occurred in late 2008 and early 2009 in the Niger Delta from a pipeline operated by SPDC. SPDC has admitted liability in respect of the spills under the Nigerian Oil Pipelines Act 1956 (“OPA”) which contains a right to compensation and imposes, by its s 11(5)(c), strict liability on a pipeline operator save for where a spill is caused by the

malicious acts of third parties and/or a claimant's own default. The OPA also provides for compensation where there has been "neglect" to protect, maintain or repair the pipeline (11(5)(b)) or where there has been injurious affection to land (11(5)(a)). Various claims have been issued in this jurisdiction, some by individuals and some by Community leaders in a representative capacity on behalf of the Community affected by the spills.

2. The Claimants seek financial compensation for loss of earnings, general damages, aggravated damages, exemplary damages, wayleave damages and, in the representative action, an injunction or damages in lieu in respect of clean up and remediation of the area. The claim is yet to be fully quantified but has been estimated at over £100 million by the Claimants' lawyers. A trial is listed for May 2015.
3. Eight preliminary issues were formulated by the parties for determination by the Court (Mr Justice Akenhead). As the applicable law is that of Nigeria the Court heard evidence from two retired Nigerian Supreme Court Justices as to Nigerian law on the issues. It was common ground that the task for the English Court was to put itself into the position of the Supreme Court of Nigeria to decide, in effect, what that court would decide on the issues of Nigerian law.
4. Nigeria received the English Common law upon independence and English jurisprudence remains persuasive, thus many of the concepts and principles arising were similar or the same as those applicable to claims in English law. Accordingly, the Judgment is very much relevant to English common law claims in environmental and other nuisance cases and in respect of the impact of statutory remedies on the common law. Further, it is relevant to claims brought by foreign litigants in this jurisdiction and in particular as to issues of assessment and quantification of general damages.
5. A summary of each of the issues arising and the judgment on those issues is set out below.

Issue I: Exclusivity of the OPA

6. This issue gave rise to the question of whether the OPA, the Nigerian statutory regime governing the operation of oil pipelines, was an exclusive code which ousted common law remedies?
7. The Claimants claimed both under the OPA and also in negligence, nuisance (private and public), *Rylands v Fletcher* and under various Nigerian regulations. SPDC contended that the OPA had operated to oust the common law and thus that the Claimants could only claim under the statutory regime. The significance of this issue was primarily to the claim for aggravated and exemplary damages. As set out below one of the other issues was whether such damages were recoverable under the OPA. SPDC said not and thus if the Claimants were precluded from claiming at common law it followed that the claim for aggravated and exemplary damages had no basis.
8. The Claimants relied heavily on Nigerian jurisprudence over the years since the commencement of the OPA in which claimants had brought claims for damages, and had been awarded damages, under both the OPA and common law concurrently.
9. SPDC contended that this jurisprudence was by no means determinative as the issue of exclusivity had never been raised or argued before the Nigerian courts.
10. The Court agreed and stated that the question had to be approached on the “intellectual merit”. The Court reviewed the English¹ and Nigerian jurisprudence as to supercession of the common law by statute, in particular where the statute contains a compensation clause. The summary of the relevant principles provided by the Court is useful in any claim involving arguments of supercession and is set out at Annex A to this alerter. In summary the Court considered

¹ For example, *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284; *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306; *Johnson v Unisys Ltd* [2001] UKHL 13; *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; *Regina (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54; *Total Network SL v Revenue and Customs Commissioners* [2008] UKHL 19

whether the rights granted by the statute were inconsistent with the continued application of the common law.

An exclusive code?

11. Applying these principles to the OPA the Court held that find that under Nigerian law the common law has been superseded by the OPA in respect of the financial remedies available for damage caused by breakage or leakage from an oil pipeline.
12. The implication of the Judgment on this issue is to significantly narrow the scope of the claims and the investigation necessary at trial. The Court noted the policy advantages to a regime whereby the statutory remedy is exclusive, including that “*compensation claims can be relatively simply mounted*” and that “*quantum should be readily capable of being established*” thus assisting settlement (paragraph 68).

Issue 2: Liability for damage caused by third parties

13. As set out above, s 11(5)(c) of the OPA provides for strict liability save where the damage is caused by the malicious act of a third party. However s 11(5)(b) gives rise to a right to compensation where there has been “*...damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good.*”
14. Criminality in the form of attacks on pipelines and illegal siphoning and bunkering of oil is rife in the Niger Delta. The Claimants contended that insofar as there was any environmental damage as a result of oil spilt from SPDC’s pipeline as a result of such illegal activities, SPDC could be liable for such damage under the OPA if it had not taken steps to “protect” against such illegal activities, for example, patrolling the pipeline.
15. SPDC contended that this was not the proper construction and meaning of the word “protect” and that the duty under s 11(5)(b) did not include a duty to protect against the illegal acts of third parties.

16. The word “protect” in 11(5)(b) had not been analysed by the Nigerian courts. The English court stated that the word had to be construed in its statutory context. The Court concluded with little hesitation that:

“I do not accept that the word “protect” can mean “police” or paramilitarily defend because the licensee will not have and is not granted police powers and (I assume) cannot legally or generally carry offensive weapons such as guns.”

17. The Court therefore went on to conclude that:

“If one takes those activities out of the verbal equation, the usual definitions can be seen to be closer to shielding from danger, injury or change and keeping safe and taking care of...Protection can thus be seen as a continuing function (post-construction) and can clearly cover such matters as protection against matters which might cause damage such as natural elements such as erosion (caused by soil, wind, weather or water) or deterioration in what has been provided (say, attributable to sun causing pipe coatings to crack or otherwise become ineffective).”

18. The furthest the Court was willing to go in respect of actions against the acts of third parties was to state that:

“...the protection requirement within Section 11(5)(b) involves a general shielding and caring obligation. An example falling within this would be the receipt by the licensee of information that malicious third parties are planning to break into the pipeline at an approximately definable time and place; protection could well involve informing the police of this and possibly facilitating access for the police if requested.”

19. The decision is significant because it is easy to imagine that the burden on a licence holder who is responsible for infrastructure in locations where there is high levels of criminality of this nature would be extremely onerous were it to be under a duty to police against such activities or else risk being liable for damage caused as a result. The analysis is no doubt of relevance to the activities of operators in similar industries across numerous locations.

Issues 3 and 4; Heads and Measure of Loss

20. These issues concerned the recoverable heads of loss under the OPA and the applicable measure of loss.

21. S 20 of the OPA provides for the basis of assessment of compensation. S 20(2) states that when awarding compensation under 11(5) the court “*shall award such compensation as it considers just, having regard to...*” five matters² which are set out therein.

General damages for emotional distress

22. The Claimants contended that each individual was entitled to recover - in addition to special damages for loss of earnings, and general damages for damage to property if an owner – general damages for “*shock and fear, annoyance, inconvenience, discomfort and illness, distress and anxiety.*” There were no claims for personal injuries.

23. The Claimants relied upon a number of Nigerian cases in which general damages had been awarded and the above terminology had been used by the courts.

24. SPDC contended that these types of loss do not sound in damages under the compensation scheme or the OPA nor indeed under the common law causes of action whether at English law or Nigerian law. SPDC submitted that on a proper analysis the Nigerian courts were compensating for loss of amenity suffered as a result of damage to land, albeit that such damages may reflect the experiences of the users of that land.

25. The Court agreed, holding that:

² (a) any damage done to any buildings, crops or profitable trees by the holder of the licence in the exercise of the rights conferred by the licence; and
(b) any disturbance caused by the holder in the exercise of such rights; and
(c) any damage suffered by any person by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence; and
(d) any damage suffered by any person (other than as stated in such subsection (5) of this section) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation; and
(e) loss (if any) in value of the land or interests in land by reason of the exercise of the rights as aforesaid,
and also having regard to any compensation already awarded in accordance with subsection (1) of this section.”

“The reference to the recovery of non-pecuniary losses for “annoyance, inconvenience, discomfort or even illness to the plaintiff occupier” in nuisance on analysis relates to a loss of amenity associated with ownership or rights in or over land affected by a given nuisance. There is not a stand-alone right to damages for annoyance etc for someone who has no rights over land. In English law, there is much authority that such amenity loss can be compensated for by reference to one’s use of occupation of land.” (para 115)

26. The Court cited *Hunter v Canary Wharf* [1997] AC 655 in support of this proposition and reviewed the line of English case law cited in, or following *Hunter*, to this effect. As to the tort of private nuisance the Court concluded that:

*“...the law of nuisance, as established for many years and indeed from well before Nigeria’s independence, is that the claimant must have appropriate rights over the land affected and that damages for loss of amenity relate to those rights. The right to damages for nuisance in English and Nigerian law runs with the land over which a claimant has such rights and there is no free standing cause of action in nuisance for loss of amenity, absent such rights, and an unlawful interference with them. I find that the Nigerian courts would accept the principles enunciated in **Hunter** as not only authoritative and persuasive but also as the prevailing law on such issues in Nigeria.” (para 116)*

27. The Court therefore reaffirmed that there is no freestanding right to damages in private nuisance (or in *Rylands v Fletcher* or negligence, see para (b)) for personal losses which do not flow from damage to property.
28. Applying these principles to the construction of what is recoverable as “damage” under the OPA the Court agreed with SPDC that “The whole object of Sections 11(5) and 20(2) of the OPA is to compensate people whose land or rights over or interests are “injuriously affected” or who suffer “damage” as a consequence of the exercise by any OPA licensee of its rights under the licence.” (para 143) and held that “damage does not as such encompass compensation purely for inconvenience etc.”

Aggravated and Exemplary damages

29. The Claimants also each sought aggravated and exemplary damages. SPDC contended that these were irrecoverable under the compensation scheme of the

OPA primarily as they were not provided for by the scheme and further as damages of a punitive nature were inconsistent with the purpose of the OPA and the provision of compensation rather than damages.

30. It was common ground that the test for the recovery of both aggravated and exemplary damages was the same at both English and Nigerian law and the Court cited at length from the English cases of *Rookes v Barnard* [1964] AC 1129 and from the judgments of Stuart Smith LJ and Bingham MR (as he then was) from *AB and others v South West Water Services Ltd* [1993] QB 507.
31. The Court rejected the suggestion that the OPA provided for exemplary damages. It held that the express emphasis in s 11 and s 20 of the OPA was on compensation and that there is nothing to suggest that a claimant is to receive more than his actual loss. Similarly that had the legislature intended for there to be a punitive element to the compensation it would have said so. The fact that s 20 provided for a court to do what is just was not a free ranging discretion, what was 'just' was tied to the five matters set out in section 20(2), of which a licence holder's conduct was not one.
32. Similarly, aggravated damages were held to be irrecoverable, the Court stating that once a claimant had been fully compensated for the damage suffered in accordance with s 11(5) there was no room for any enhancement of the compensation.
33. The arguments and principles considered by the Court will be relevant to statutory schemes in differing fields and to assist in defeating misconceived claims for punitive damages in claims brought under purely compensatory regimes which do not have punishment as their object.

Measure of loss

34. Issue 4 gave rise to the question of whether general damages were only to be assessed by reference to diminution in value or property and/or loss of amenity or by reference to some other measure.

35. As the Claimants had contended for a stand-alone right to general damages they had argued for a measure not tied to the value or reduction in value of the property.
36. As the Court accepted SPDC's case that aside from financial loss such as loss of earnings, compensation is only recoverable under the OPA if it flows from damage to property or interest in property (or damage to the person though that was not in issue) it followed that the appropriate measure was held to be by reference to the diminution in the value of the property or interest in property, consequential loss and/or loss of amenity.
37. SPDC had submitted, and the Court agreed that, such a measure may take into account inconvenience suffered. The Court cited the Judgment of Ramsey J in *Dobson v Thames Water Utilities* [2011] EWHC 3253 (TCC) which involved odours as a result of a nuisance and in which damages were assessed by reference to a proportion of rental value. The Court stated that it would not rule this out as a potential method of assessing just compensation in this case.
38. The decision thus re-affirmed that damages for private nuisance (and under also under statutory regimes in some cases) are tethered to interests in property and thus are to be measured accordingly and not by reference to a finger in the air assessment, or guesswork, as the Claimants had contended.

Issue 5: English or foreign monetary values?

39. Issue 5 raised an important question which will have relevance to claims in nuisance, and in other areas, in which foreign claimants pursue claims before the English courts. That is, whether awards of just compensation under the OPA, or awards of general damages at common law, should be valued by reference to previous awards made by the English Courts or by reference to the value of land and/or the cost of living in Nigeria?
40. It was common ground that by virtue of s 11 and s 14 of the Private International Law (Miscellaneous Provisions) Act 1995 quantification was to be carried out in

accordance with English law. This has been confirmed by the House of Lords in *Harding v Wealands* [2006] UKHL 32. Therefore, that quantification of damages was to be in accordance with English approach and procedures.

41. However the Claimants contended that awards made in English nuisance cases, for example for odours, could be relevant as a tariff or guide to the levels of awards to be made in these cases. SPDC contended that any compensation had to be valued by reference to Nigerian land values, costs of living and monetary values so as to ensure it compensated these Claimants, who live in Nigeria, for their loss, which occurred in Nigeria³.
42. The Court agreed holding that “...awards of just compensation under the OPA, or, if applicable, awards of general damages at common law, should be valued primarily by reference to the value of land and/or the cost of living and/or incomes in Nigeria. Quantification is to be by way of English law procedures and approaches.” (para 160)
43. Therefore, in a case such as this where the nuisance and the damage have been suffered abroad, and the claimants are resident in that country, whilst it is appropriate for the parties to consider the approach taken by the English courts in nuisance claims, for example, as to the quantification of general damages for loss of amenity (in respect of which approaches can vary), the numbers which are to be entered into the judicial calculator applying the chosen approach are to be by reference to the foreign monetary values.

Issue 6: Jurisdiction

44. Issue 6 concerned the Court’s jurisdiction over claims for title to or interests in foreign land. Section 30 of the Civil Jurisdictions and Judgments Act 1982 provides that:

³ In the recent decision of the Supreme Court in *Cox v Ergo Versicherung AG* Lord Sumption emphasised that the overarching principle of assessment is that the particular claimant is put in the position he or she would have been in had the damage not been suffered; see para 21 “*The relevant English law principle of assessment, which applies in the absence of any statute to the contrary, is that Mrs Cox must be put in the same financial position, neither better nor worse, as she would have been in if her husband had not been fatally injured.*”

“(1) The jurisdiction of any court in England and Wales or Northern Ireland to entertain proceedings for trespass to, or any other tort affecting, immovable property shall extend to cases in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property.”

45. The Court felt unable to resolve, at a preliminary stage, whether all of the claims were “principally concerned” with a question of title to or the right to possession of foreign land and held that it would be necessary to carefully analyse individual claims to determine whether, as a matter of fact or degree, they were jurisdictionally barred. The matter was therefore put over to trial.

Issue 7: Public Nuisance

46. Issue 7 raised interesting questions as to the scope of public nuisance. Although these issues were rendered academic by the Court’s ruling on exclusivity the Court nonetheless set out its conclusions.
47. The first issue was whether general damages for personal distress are recoverable in public nuisance? As discussed under Issue 3, compensation for emotional distress was sought under the OPA. However, the Claimants’ also strongly contended that such losses were recoverable in public nuisance and relied on this as an argument to inform the construction of the OPA.
48. The Claimant’s expert had initially contended in his reports that Nigerian law had departed from English law as to the scope of public nuisance but this was not maintained in his oral evidence. It was therefore common ground that in both jurisdictions a claimant seeking damages in public nuisance must show that he or she has suffered *“particular damage other than and beyond the general inconvenience and injury suffered by the public and that the particular damage is direct and substantial.”*
49. SPDC made detailed written submissions to the Court as to the nature of public nuisance, addressing the jurisprudence dating back to the 19th Century in order to demonstrate that the tort did not encompass damages for emotional distress.

50. The Court agreed and held that *“If there was a right to sue for public nuisance, pecuniary loss and personal injury loss is recoverable but there is no stand-alone entitlement to damages for inconvenience etc unless it is quantifiable; thus, damages for distress, shock or fear, falling short of personal injury are not recoverable.”* (para 176).
51. The Judgment brings an element of clarity as to the scope of public nuisance which is an ill defined tort. In the relatively recent decision in the *Corby Group Litigation* [2008] EWCA Civ 463, the Court of Appeal held that personal injury is recoverable in public nuisance in contrast to private nuisance. The Court’s decision in this case dispels the possibility of a further expansion of the tort to encompass claims for emotional distress.
52. The second issue was whether a claim can be mounted in public nuisance in circumstances where all members of the affected class have suffered the same kind of damage? Can it be said in those circumstances that special and particular damage can be made out?
53. This question gave rise to a sub issue as to the meaning of ‘the public’. The Claimants contended that this could be as wide as the entire Nigerian population which meant that in carrying out the comparative exercise it would not be difficult to establish damage other than and beyond that suffered by others. SPDC submitted the public must mean the section of people affected by the nuisance and that where the entire class had suffered, for example, inconvenience, members would not be able to establish damage which was special and particular.
54. The Court agreed with SPDC holding that:
- “...the reference to the “public at large” must relate to the public in the area of the public nuisance...Public nuisance...involves some general inconvenience and even injury suffered to the public and that must be in the area in question. The area may be large or small...It may involve one or more and indeed many potential plaintiffs. What is needed is that for a claimant to succeed is that he or she has suffered both “particular damage other than and beyond the general inconvenience and injury suffered by the public “and that “the particular damage is direct and substantial”. It is almost a contradiction in terms that, where the public overall in say a town or a sizeable*

community (affected by, say, an unlawful traffic obstruction) suffers equally general inconvenience or injury, they all have a claim in public nuisance.”

55. The application of the special and particular damage test to environmental claims such as this will necessarily be fact specific but it is clear that the tort of public nuisance will not always provide a remedy for those living in the vicinity of an incident, and that creative arguments can be made as to the boundaries of this tort.

Issue 8: Interest

56. Issue 8 gave rise to a question as to the entitlement of interest on past losses. As a matter of Nigerian law such interest is not recoverable. It was common ground that as the English court has a discretion under Section 35A of the Senior Courts Act 1981 to award interest that it would be a matter for trial as to whether that discretion should be exercised so as to award zero, as would be the result in Nigeria, or whether some other outcome would be appropriate.

Conclusion

57. The Judgment addressed interesting and important points of principle as to the scope of the torts of private and public nuisance. On a practical level the decision illustrates that bringing matters before the court at a preliminary stage can prove to be an effective means of narrowing and simplifying large scale group litigation thus ultimately saving time and costs at trial.

Abigail Cohen

Abigail Cohen was instructed on behalf of SPDC and was led by Charles Gibson QC, Adrian Briggs and Toby Riley-Smith

ANNEX A: EXTRACTS FROM JUDGMENT RE PRINCIPLES OF SUPERCESSION

- I. The Court reviewed the English⁴ and Nigerian jurisprudence as to supercession of the common law by statute, in particular where the statute contains a compensation clause, and summarised the position at Nigerian law (which would be equally applicable at English law) as follows:
 - a. *A statute can supercede, and have primacy over, the common law.*
 - b. *It can do so expressly or by implication. In either case, it will be a matter of interpretation whether common law rights have been excluded.*
 - c. *There is a rebuttable presumption against legislative interference with the common law (see Adeshina⁵).*
 - d. *The provision by the statute in question for compensation for victims of or persons affected by the subject matter of the legislation is a pointer towards the statute excluding the common law but it is not determinative. Even without compensation, a statute can exclude the common law (see Marcic). The more comprehensive the compensation scheme, the more likely it is that common law is replaced by the statute. To this can be added, the more comprehensive the code (particularly if it has extensive compensation arrangements) within the statute in relation to the area of life or commerce, the more likely that the common law is replaced.*
 - e. *Where the rights granted or created by the statute are inconsistent with the common law, such inconsistency is or may be a strong pointer towards the exclusion of the common law (see Monro). Inconsistency in this context means the statutory remedy having some restriction in it which “reflects some policy rule of the statute” and is “a cardinal feature of the statute”.*
 - f. *Upon examination of the statute, the Court should decide from the contents and the surrounding circumstances whether it was intended to supplant or merely to supplement the comparable portion of the received English law (see Park).*
 - g. *There have to be sufficiently substantial differences between the common law and the statute in question and “that they demonstrate that [the legislature] could not*

⁴ For example, *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284; *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306; *Johnson v Unisys Ltd* [2001] UKHL 13; *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; *Regina (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54; *Total Network SL v Revenue and Customs Commissioners* [2008] UKHL 19

⁵ A Nigerian case though the principle is equally applicable at English law

*have intended the common law remedy to survive the introduction of the statutory scheme” but the Court “should not be too ready to find that a common law remedy has been displaced by a statutory one”, the “mere fact that there are some differences between the common law and the statutory positions is unlikely to be sufficient unless they are substantial” (see *Child Poverty Action Group*).*

- h. A factor pointing towards exclusion of the common law is that if both the common law and statutory provisions and machinery co-exist, differing in matters of detail, there could be chaos (see *Johnson*).*
- i. Another factor pointing towards or against exclusion is whether the statutory regime would be "set at nought" or "defeated" if common law claims can remain permitted (see *Deutsche Morgan Grenfell* referred to in *Total Network*).*

2. The Court further added that:

*“To the above must be added by way of general observation the basic tenets of statutory interpretation. Primarily one looks at the words used to ascertain the meaning. If there is interpretation within the statute itself or from extraneous sources such as reports from for instance law commissioners’ reports as to the mischief which the proposed legislation was designed to address (see Lord Browne-Wilkinson at page 630 in *Pepper v Hart*); this also applies to the terms in which the relevant minister introduced the legislation to the legislature (page 631 *ibid*).”*