A SLIPPERY ISSUE:
THE LIMITS OF 'CONTINUING NUISANCE'

A Note from the 2TG Property Damage Group **February 2021**

***Harrison Jalla and Others v Shell International Trading and Shipping Company and Shell Nigeria Exploration Company* [2021] EWCA Civ 63**

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Introduction

1. On 27 January 2021, the Court of Appeal handed down judgment in *Harrison Jalla and Others v Shell International Trading and Shipping Company and Shell Nigeria Exploration Company* [2021] EWCA Civ 63. The central issue in the case was whether an oil spill off the coast of Nigeria constituted a continuing nuisance.

2. The Court of Appeal dismissed the appellants' appeal which argued that the escape of oil from a pipeline into the sea was a continuing nuisance. The appellants had sought to get around a limitation defence by arguing that as a continuing nuisance, a new cause of action accrued each day that the oil remained, causing damage to the appellants' lands.

The Facts

3. The appellants comprise 27,800 individuals and 457 communities who live and work by or in the hinterland of a stretch of Nigerian coast spanning Bayelsa State and Delta State.

4. The respondents were responsible for an oil spill, 120 km off the shore of Nigeria. It appears that the spill lasted for about 5-6 hours on 20 December 2011, before the relevant pipeline was switched off and the oil stopped leaking into the sea. The oil washed up onto the appellants' land, some time in early 2018.

Critical elements of the claim were not commenced until after that time. The appellants' contention was that, despite that, their claims in nuisance were not statute-barred, because the damage caused by the spill had allegedly continued and was continuing, and thereby giving rise to a fresh cause of action in nuisance every day that the oil remained on their land.

The Issue

5. The central issue the Court of Appeal had to determine was:

   Did the claim in nuisance ...accrue shortly after 20 December 2011 when... "actionable damage as alleged would have been suffered along most if not all of the affected shoreline within weeks rather than months of the December 2011 Spill"; or was this a continuing nuisance with a fresh cause of action arising every day that the oil remained on an appellants land? [27]

6. The issue is confined to nuisance because the claims in negligence against Shell International were, on any view, statute-barred.

The Decision

7. A cause of action in tort is usually a single, self-contained package of rights relating to an act or omission which has caused damage and is actionable in law. Thus, any claim in negligence in this case, arising out of the event when the oil leaked into the sea on 20 December 2011, gave rise to a single cause of action, which as matter of law was completed when damage occurred. That was likely to have been in the weeks after 20 December 2011, when the oil first hit the appellant's land [52].

8. A continuing cause of action is more unusual. Lindley LJ in *Hull v Chard Union* [1894] 1 Ch 293 described a continuing cause of action *as "a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought"*. [53].

Tree roots

9. *"The paradigm example of a continuing cause of action in nuisance is the tree-roots case. The roots of a landowner's tree spread, and encroach under the neighbouring land. The roots begin to undermine the foundations of his neighbour's house. Until such time as the landowner cuts down or severely prunes back the tree in question, he is responsible for the continuing encroachment of the roots. The tree roots therefore comprise a continuing nuisance. The landowner's failure to abate the nuisance by dealing with the tree is a continuing one."* [54]

December 2011 oil spill

10. When it comes to the event in question, the oil spill in December 2011, the Court of Appeal was clear: the oil spill in this case was not a series of continuing acts or omissions, or a repetition of an original act or omission, but a catastrophic one-off leak in December 2011. It was an isolated escape [55]. Moreover, it was abated/remedied within 6 hours of the problem first becoming apparent, when the leak was stopped by turning off the pipeline [58]. There is no authority for the proposition that a one-off event, or an isolated escape, can give rise to a continuing nuisance [57]. Accordingly, the event itself was clearly a single, one-off event giving rise to a single-one off cause of action. By contrast, a continuing nuisance occurs where the state of affairs which creates the nuisance is allowed, either deliberately or through omission to continue, such as the ongoing encroachment of tree roots in *Delaware Mansions*.

11. In argument, Newey LJ suggested, and the Court of Appeal accepted, that because in Delaware Mansions the tree and the roots were still there, there was (unlike the present case) a continuing event or state of affairs. [62]

12. In coming to this conclusion, the Court considered (i) the ongoing nature of physical damage; and (ii) the abatement and remediation of the nuisance.

Ongoing physical damage

13. The Court's judgment is crystal clear that there can be no equation of nuisance with the damage or harm resulting from it. Coulson LJ rejected the contrary proposition for the following reasons:

    (1) One cannot equate nuisance with physical damage or harm; no authority supports the contention, that every day there is oil on land, a fresh cause of action accrues. It would be a radical departure from the case law to say that a continuing nuisance does not require a continuing event or hazard, but merely continuing harm after the single event ended [65]. Instead, one must consider "*the hazard which constitutes the nuisance*" (see Dyson LJ in *L E Jones (Insurance Brokers) Limited v Portsmouth City Council* [2002] EWCA Civ 1723; [2003] 1 WLR 427). In the present case, the hazard that constituted the nuisance was the defective pipe which caused oil to leak into the sea for 6 hours [69]. The hazard which constitutes the nuisance is not the same as the damage caused by the nuisance. [69]

    (2) The ramifications of such an equation (between the cause of action in nuisance and damage/harm) would be considerable; it would mean that from a one-off oil leak companies could face litigation fifty years later [66];

    (3) Thirdly, any argument which equates the cause of action in nuisance with the occurrence of physical harm or damage, so as to arrive at the submission that continuing damage equates to a continuing cause of action, must be approached with caution. That is because, as *Williams v Network Rail Infrastructure Limited* [2018] EWCA Civ 1514; [2019] QB 601 points out, it is at least open to debate whether physical damage is an ingredient of a cause of action in nuisance [68].

14. *Williams v Network Rail Infrastructure Limited* [2018] EWCA Civ 1514; [2019] QB 601, was a case about Japanese knotweed growing on the defendant's land. The principal issue was the defendant's contention that the claimant had not suffered any damage. Sir Terence Etherton MR summarised a number of the general principles of the modern law of nuisance, starting at [39] of his judgment. These were, first, that a private nuisance was a violation of real property rights [40]. Secondly, that although nuisance was sometimes broken down into different categories, those were merely examples of a violation of property rights [41]. He warned of the difficulties with rigid categorisation, because those would not easily accommodate possible examples of nuisance in new social conditions. Thirdly, he said that the proposition that damage was always an essential requirement of the cause of action of nuisance had to be treated with considerable caution [42]. He said that the concept of damage in this context "*is a highly elastic one*". He added that physical damage was not necessary to complete the cause of action [43]. Fourthly, he said that nuisance could be caused by inaction or omission as well as by some positive activity [44]. Finally, he said at [45] that the broad unifying principle in this area of the law was

reasonableness between neighbours (real or figurative) and cited *Delaware Mansions* in support of that proposition.

Abatement and remediation

15. On the issue of abatement and remediation, the Court of Appeal robustly dismissed the appellants' argument that the respondents remained liable for a continuing cause of action until clean-up of the oil spill on land had been achieved [70].

16. In rejecting that argument, the Court of Appeal accepted that nuisance continues until it is abated (see, for example, *Sedleigh-Denfield* and *Delaware Mansions)* [71]. But abatement of the nuisance means dealing with the state of affairs that created the nuisance; it does not involve any obligation to remediate the damage caused by the nuisance. Thus, in *Sedleigh-Denfield*, the nuisance would have been abated by unblocking the pipe and moving the grating. The requirement to abate did not extend to obliging the defendant to go onto the plaintiff's land, drain it of the floodwater and make good the damage caused. Similarly, in *Delaware Mansions*, the Council were liable pursuant to a continuing cause of action until they had cut down the tree, but they were not obliged to go on to Flecksun's property and carry out the underpinning works.

17. In rounding out their dismissal of the appellants' argument on this point, the Court of Appeal also cited [72], in passing, Jonathan Parker LJ in *Green v Lord Somerleyton* [2003] EWCA Civ 198, (at [104]-[109]) where, in a case on continuing nuisance, he rejected a claim that the defendants were in some way in breach of their duty in respect of removing or reducing the risk of damage caused by floodwater. Coulson LJ noted: "*these paragraphs make plain the general limitations on a defendant's obligation to abate a nuisance.*" [72].

Control

18. One final issue of consideration was the feature of "control". As the Court observed at [74], a number of the authorities suggest that one factor in the liability of an occupier for nuisance is their ability, their control, to prevent or eliminate that nuisance (see the well-known cases of *Sedleigh-Denfield, Cambridge Water, Jones v Portsmouth, Mint v Good*). In *Jones v Portsmouth*, Dyson LJ referred to Denning LJ in *Mint v Good* and said:-

    "In my view, the basis for the liability of an occupier for a nuisance on his land is not his occupation as such. Rather it is that, by virtue of his occupation, an owner usually has it in his power to take the measures that are necessary to prevent or eliminate the nuisance. He has sufficient control over the hazard which constitutes the nuisance for it to be reasonable to make him liable for the foreseeable consequence of his failure to exercise that control so as to remove the hazard."

19. The Court concluded:-

    "Translated to the present case, what was within the respondents' control was the ability to eliminate "the hazard which constitutes the nuisance", namely the pipe leaking oil into the sea. They were able to stop the flow to that pipe, turn it off and stop the oil spill. They did not have any control over what happened to the oil once it was in the sea." [75]...

    Accordingly, the respondents abated the nuisance. They were not liable on a continuing basis for their failure (or the failure of others) to remediate the damage caused by the nuisance. [77]

20. The Court of Appeal concluded its judgment by observing that oil is not special thereby capable of creating exceptional propositions [81]:*"the particular properties of oil compared to some of the escapees noted in the nuisance/escape cases cannot give rise to different principles of law. Indeed, Lord Hope in Hunter stressed that the only proper approach to a nuisance case is to look at the underlying principles."* Oil is actually not so different from the toxic solvents allowed to escape in *Cambridge Water*.

21. The Court concluded that this was not in law a case of continuing nuisance. The Judge was right to find that the cause of action accrued to the appellants when the oil first struck their land.

Conclusions

22. This case is compulsory reading for any practitioner dealing with nuisance or *Ryland v Fletcher* claims as it (1) provides a clear, succinct overview of the law on continuing nuisance (see [31]- [45]); and (2) establishes that the law of nuisance, in particular the elements of continuing nuisance, remain unchanged. The judgment also rewards careful reading as it sets out the rationale for the propositions distilled from the case law (see for instance Coulson LJ's detailed discussion of the particular facts of Delaware Mansions at [59] – [62]).

23. The judgment demonstrates that while the modern law of nuisance is flexible, the principles of 'continuing nuisance' are long established. Any argument based on a continuing nuisance needs to apply these well-known principles to the precise factual scenario.

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