Neutral Citation Number: [2021] EWCA Civ 1559

Case No: A1/2021/1323 & A1/2021/1324

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURT
TECHNOLOGY AND CONSTRUCTION COURT
Mrs Justice O'Farrell DBE
[2021] EWHC 2118 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE COULSON
and
LORD JUSTICE EDIS

- -

Between :

(1) Harrison Jalla **(2) Abel Chujor**	**Appellants/ Claimants**
- and -	
(1) Shell International Trading And Shipping Co. Ltd. **(2) Shell Nigeria Exploration and Production Co. Ltd**	**Respondents/ Defendants**

And Between:

(1) 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 **(2) 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 residents 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**	**Appellants/ Claimants**
- and -	
(1) Shell International Trading And Shipping Co. Ltd. **(2) Shell Nigeria Exploration and Production Co. Ltd**	**Respondents/ Defendants**

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Appeal 3: Refusal to Extend Time

Graham Dunning QC, Stuart Cribb and Wei Jian Chan (instructed by **Rosenblatt Ltd**) for the **Appellants**
Lord Goldsmith QC, Conway Blake and Tom Cornell (instructed by **Debevoise and Plimpton**) for the **Respondents**

Hearing dates : 30 September 2021

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Approved Judgment

Lord Justice Coulson:

1. Introduction

1. For the reasons explained in her *ex tempore* judgment given on 20 July 2021 ([2021] EWHC 2118 (TCC)), O'Farrell J ("the judge") refused to extend time further to allow more of the claimants in these two actions to serve Date of Damage Pleadings ("DODPs") and associated material. In consequence of that order, the claims of only 9 of the 28,000 plus claimants – 5 communities[1] and 4 individuals - survive to be considered at the trial of the limitation issues due in February 2022. The claimants seek permission to appeal ("PTA") against the judge's order.

2. By reason of the urgency of that application, exacerbated by a CMC on Friday 8th October to consider the detail of the forthcoming trial, this court agreed to deal with the application for PTA, and the substantive appeal if permission were granted, at a rolled-up hearing on 30 September 2021. On Monday 4 October, we informed the parties that we would grant PTA, but refuse the appeal on the merits. This judgment sets out my reasons for those conclusions.

2. The Relevant Background

3. It is unnecessary to set out the background. This case will not be unknown to even the casual reader of BAILLI, having been the subject of eight judgments already: six at first instance and two in this court. Stuart-Smith J (as he then was) set out the background to the dispute in some detail in his judgment dealing

[1] It is common ground that the communities do not have legal personality themselves and so are not claimants in their own right. Certain individual claimants are said to represent each of them.

with the limitation issues at [2020] EWHC 459 (TCC) ("the limitation judgment"). I make a number of references to that judgment below.

4. The claims concern an oil spill off the coast of Nigeria in December 2011. The spill happened at a platform owned/operated by Shell companies in the Bonga oilfield, which is why the papers talk about "the Bonga oil" or "the Bonga spill". For reasons unexplained, the original proceedings were only commenced in December 2017, a week before any six year limitation period expired. There is a separate dispute, raised by the defendants, to the effect that the relevant Nigerian limitation period was five years rather than six.

5. I should make two things clear about precisely who is covered by the term "the claimants". In the 2017 proceedings, there were two named claimants, Harrison Jalla and Abel Chujor. Although it was said that they represented some 27,830 other individuals and 457 communities, and that this was in essence a representative action pursuant to CPR r.19.6, Stuart-Smith J rejected that submission and ruled that the 2017 action was not and could not be a representative action ([2020] EWHC 2211 (TCC)). That decision was recently upheld by this court ([2021] EWCA 1389). That means that the 2017 action now involves just two claims, those of Mr Jalla and Mr Chujor.

6. In order to try and ameliorate these difficulties, a second action was begun in April 2020. Although this features most of the same 28,000 plus claimants who were identified in the 2017 action, there are some who were new[2]. At one time, the claims advanced in the two actions were said to be different too, although

[2] There is no explanation of the overlap or the differences between the cast lists in the two actions.

now that the 2017 action is in respect of Mr Jalla and Mr Chujor only, those differences have fallen away.

7. The proceedings were originally started against the wrong defendant. Of the two defendants now before the court, it is accepted that it is the second defendant ("STASCO") who matters, because they are the anchor defendant, domiciled in England. If the claim against STASCO is statute-barred, the English courts do not have jurisdiction to hear these claims. STASCO were not joined until 4 April 2018, and the key allegations against them were not made until 2 March 2020. Assuming a six year limitation period, this made the relevant dates for limitation purposes 4 April 2012 and/or 2 March 2014. This was respectively 4 months, and/or 2 and a quarter years, after the Bonga oil spill itself. The separate April 2020 action gave rise to a relevant date for limitation purposes of April 2014.

8. The defendants have raised a jurisdictional challenge which in part turns on the limitation defence of STASCO. It had originally been assumed by everyone that the claims were in respect of damage to land along the relevant stretch of the Nigerian coast, and that there would be one date for the accrual of the claimants' cause of action. That is how the claim in the 2017 action was pleaded. The limitation judgment made plain that such a cause of action accrued before April 2014 and was therefore statute-barred. Stuart-Smith J said:

> "59. On the basis of the information before the Court, which I have summarised briefly above, it is safe to conclude without conducting a mini-trial that *if* the oil from the December 2011 Spill was responsible for the damage of which the Claimants complain, then oil reached the shoreline within a few days of 24 December 2011. Evidently, some parts of the shoreline included within the claims in this litigation were more remote than others from the Bonga FPSO and so landfall would not all have occurred at the same time. However, it is clear beyond reasonable argument to the contrary that

> 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. Not only is there actual evidence of oil reaching the shoreline at about the end of December 2011, but also no plausible mechanism has been suggested that would lead to the December 2011 Spill getting as close as it did to the shoreline by 24 December 2011 but then (assuming it did) causing such havoc over the allegedly affected shoreline only after some extended delay. This does not mean that all Claimants living and working along the shoreline were affected as soon as oil first hit land; but the substantial quantities of polluting oil alleged by the Claimants strongly support the conclusion that, where oil hit a particular stretch of the shoreline, many if not all Claimants living and working in that area would have suffered one or more of the effects of which they now complain within a short time. Even without conducting a mini-trial, therefore, the Court can be confident that actionable damage sufficient to start time running in negligence and/or nuisance occurred for many Claimants before 4 April 2012. This is supported primarily by the movement of the Bonga oil slick and the location and timing of the FUGRO samples as summarised in the Appendices to the Brookes Bell report and also by the other evidence summarised above."

9. However, during the hearing in September 2019 which led to that judgment, the claimants suggested, for the first time, that, because some of the properties were inland, the oil may have taken much longer to reach those properties, and that as a result there might be many different (and later) dates for limitation purposes. Stuart-Smith J said:

> "60. Because of the almost complete lack of specificity or evidence about the migration of oil and the location of Claimants, it is not clear that all Claimants had suffered actionable damage by 4 April 2012. However, there is no material before the Court to indicate that the Defendants do not have a reasonably arguable case on limitation for the action as a whole, simply based upon the date of the December 2011 Spill, the short time it would have taken to get to the shoreline, and the months that remained before 4 April 2012 for actionable damage to occur over a wide area. The Claimants do not plead when they first suffered damage, either in general terms or specifically. Neither in the pleadings nor in evidence is there any analysis of the location, alleged date of damage, or mechanism of migration and heads of damage caused by migrating oil. The only assumption that can safely be made is that the further from the shoreline and the more remote in time it may ultimately be alleged that damage was first suffered, the greater will be the need for the case to be properly pleaded and for evidence, both general and specific, to sustain a

> claim that the individual Claimants suffered actionable damage by Bonga Oil. In these circumstances, apart from being confident that any Claimants who had not suffered damage by 4 April 2012 but who will ultimately prove that they suffered damage thereafter will have suffered damage progressively depending upon their distance from the coast and the existence of pathways for pollutants to follow, it is not possible to determine which Claimants suffered actionable damage when."

10. This new case, which prevented Stuart-Smith J from finally resolving the limitation position, was the genesis of the DODPs. He was very clear as to their importance, and the lay and expert evidence which he envisaged would be served alongside them. He spelt that out in his judgment on the consequential matters, dated 27 March 2020, at [2020] EWHC 738 (TCC):

> "13. The Claimants accept that they should serve a "Date of Damage Pleading". Given the delays that have already occurred, I do not think that goes far enough. Any pleading would have to be based upon evidence that justifies it, which in the present case would necessarily include both lay evidence identifying when the Claimants say they noticed or suffered damage and expert evidence validating the allegation that the damage noticed or suffered on a certain date was caused by the December 2011 Spill. If the Claimants serve their supporting evidence with the Pleading, the Defendants will then know the case that they have to meet and the evidence that they have to either accept or dispute. They should then be properly equipped to respond to that case with a view to trying the question when causes of action accrued reasonably soon, if that remains an appropriate course.
>
> 14. It is for the Claimants to decide what evidence they shall serve. Because it appears that groups of Claimants live in the same communities so that they may have dates of damage in common, it is not a requirement of this order that evidence from each and every Claimant must be submitted. Nor do I prescribe any particular form of "Date of Damage Pleading" though it seems likely to involve schedule as well as narrative sections. The Claimants should liaise with the Defendants and, as necessary, refer back to the Court for further guidance. The form of the end result is less important than the substance: the Defendants must know the case they have to meet with sufficient particularity to enable them to respond and defend their interests fully and properly.
>
> 15. The Claimants should be under no illusions: the iterative approach to this litigation that appears to have prevailed until now

> must cease. Without in any way fettering the decisions that the Court may make in future, the Claimants should assume that they will only have one opportunity to get their case in order from now on."

11. It is plain that Stuart-Smith J envisaged the service of this material - the DODPs, the witness statements, and the experts' reports - as a complete package, to deal comprehensively with the date(s) that the claimants said that Bonga oil from the December 2011 spill first affected their land.

12. Stuart-Smith J ordered the service of the DODPs, and the package of lay and expert evidence, by 24 November 2020. That lengthy period (from March to November 2020) expressly took into account the effects of the pandemic, although of course nobody appreciated in March 2020 just how widespread those would be. The defendants were given 5 months to respond thereafter.

13. I analyse the delays from March 2020 until today in greater detail below. For present purposes it is sufficient to note that, in November 2020, the claimants sought a significant extension of time for the DODPs, and the accompanying package of evidential material, to 4 June 2021. The defendants' response date was consequentially extended to 29 October 2021. The reasons for this extension put forward by the claimants included the security issues in this part of Nigeria, the difficulties with communications, and the pandemic. It was also in November 2020 that the trial of limitation issues was fixed for February 2022. Those issues were said to include "the date on which the claimants first suffered actionable damage", which again put centre stage the date on which the claimants said that the Bonga oil first struck their land.

14. In May 2021, the claimants sought a further three-and-a-half month extension for the service of their DODPs, and the package of accompanying evidence. The

defendants refused to agree to that, but were eventually prepared to offer a one month extension to 2 July 2021. Their solicitors made it clear that they would not agree to any further extension because that would mean that the trial in February 2022 would have to be aborted. The claimants accepted that offer and the court endorsed the agreed extension to 2 July 2021, together with the concomitant extension to the defendants' time to respond to 26 November 2021. In my judgment, particularly given the holiday season thereafter, those were the last realistic dates that could have been agreed/ordered for the provision of this material by the parties, without there being an adjournment of the trial of limitation issues in February 2022. That is an issue to which I return below.

15. On 2 July 2021, as Mr Dunning rightly said, the claimants served a good deal of important material. They served experts' reports which explained in detail the mechanism of how and why the Bonga oil reached the Nigerian coastline (and indeed some inlets) on 25/26 December 2011. That put in issue the defendants' case that no Bonga oil reached the coast at all, although (on Stuart-Smith J's findings set out at paragraph 8 above) any claims in respect of the damage done then and over the next weeks and months were themselves statute-barred. No consequential amendments to reflect this were provided[3].

16. In addition, the reports explained how, in theory, oil can become stranded and sink, potentially washing up on land sometime after the original event. Although the reports contained various modelling exercises, they did not attempt to

[3] This is a not insignificant omission. Lord Goldsmith showed the court a reference to Mr Dunning's submission that, following the original limitation judgment, 85% of the claims were not statute-barred. The subsequent expert evidence served on behalf of the claimants might be thought to show that the suggestion that only 15% of claims were statute-barred was an understatement. Yet not a single claim has been abandoned since the 2017 action commenced.

analyse whether the Bonga oil reached a particular location at a given date or within a particular timeframe. That may be because the experts, like everyone else, simply did not know when the claimants (other than the 9 referred to in paragraph 17 below) said that the Bonga oil had first arrived in their communities.

17. There were five witness statements, from Mr Jalla, Mr Demeyin, Mr Ikinbor, Mr Emanuel, and Mr Ofuna. Those five statements supported the personal claims of Mr Jalla in the 2017 proceedings; the personal claims of Mr Ojuleu, Mr Agbeyagbe and Ms Ekolokolo in the 2020 proceedings; and the claims bought on behalf of five of the communities in the 2020 proceedings. The statements dealt with the date the oil first struck the land in question, and also explained – where they could – how and why the witness said that it was Bonga oil. For example, both Mr Demeyin and Mr Ofuna said that "I believe it was from the Bonga Oil Spill because it was the only spill at that time."

18. The claimants also served a DODP. Paragraph 2 of that pleading made it plain that it was served in support only of the 9 claims that I have identified in paragraph 17 above. The DODP was long because it summarised both the evidence of the oil reaching the shore and the modelling referred to above. The only section of the DODP directly relevant to the question of the date of damage was Section F, which summarised the witness statements to which I have already referred and identified five dates of damage for the five communities, and the four individuals from those communities who make their own separate claims. There is a map which shows that four of these five communities are on one estuary, which itself appears to be a very small part of the huge area said to

be relevant to these two sets of proceedings. The fifth community is just to the south of that same estuary.

19. On 2 July 2021, the last possible date on which they could have done so, the claimants sought an extension of time until 20 August 2021 to serve further DODPs, together with other witness statements, expert evidence and the like. The defendants disputed the extension sought, and the dispute was heard by the judge on 20 July 2021.

3. The Hearing on 20 July 2021

20. At the hearing on 20 July 2021, the judge asked Mr Dunning what precisely he was proposing, because the appellants had indicated (not for the first time in these proceedings) that they might want something different to that which was set out in their application notice. Mr Dunning indicated that the claimants did not now wish to produce any new witness statements, although he indicated that some further expert evidence might be served. He said that the claimants wanted to reformat the existing schedules which identified them by name, in order to ascribe a date of damage to some further individuals and communities. He agreed that this was "not conventional", and was "not as good as true witness statements of fact". But he said that it was the best that the claimants could do. The judge continued to press Mr Dunning as to what he could actually provide if she extended time. He said that the claimants could reformat the schedules to identify dates "from about 900 individuals across six communities". He reiterated that this limited exercise would involve "just the dates".

21. Mr Dunning was anxious to make plain to the judge the draconian consequences if time was not further extended. He said (pages 32-33 of the transcript):

> "The consequences for there to be an extension as opposed to no extension are as follows. On the defendants' side if there is an extension, the consequences will be minimal, for the reasons I have explained and I am going to flesh out in a bit more detail in a moment. On the other hand, the consequences for the claimants will be, if no extension is granted, that any of those 900 or so communities or individuals who are currently able to put a date forward – hopefully there will be some more – because their case has not been pleaded, they will be shut out from pursuing the claim entirely. We respectively submit that would be disproportionate."

I read that as saying that Mr Dunning accepted that he could do no better than ask for the reformatting in respect of the 900 individuals (and "hopefully" some others). He appeared to acknowledge that, save for those 900 and the "hopeful" additions, the claimants were in a very difficult position.

4. The Judgment

22. The hearing lasted a day, principally because of its critical importance to the claimants. The judge acknowledged the difficult position that the claimants had got themselves into at [19] of her judgment, where she said:

> "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 prejudice because they will not be able to advance their claims."

Again, that observation assumes that, by 20 July 2021, the best that the claimants could do was the reformatting of the schedules in respect of the 900 individuals and 6 communities, together with the hope of a few more.

23. Having summarised the arguments of both parties, and identified the relevant general principles, the judge then dealt with the important elements of the history. She concluded that, although there had been no binding agreement leading up to the order of 2 June 2021 (to the effect that the claimants would

not make a further application for an extension of time), so that they were not shut out from making a further application, she was satisfied that the defendants were "very clear" that they were agreeing to an extension of time to 2 July on the basis that "that was it, there would be no further extensions of time; and that any further extension of time, if sought would be opposed by the defendants": see [34].

24. The judge then went on to consider what she called "the substance of the application against the factors that the court must bear in mind." She identified those factors as being the fact that the proceedings were already three years old and there had already been three DODP timetables [37]; the need for early resolution of some of the issues in the case [38]; the fact that the challenges caused by the location and circumstances of the claimants had already been taken into account when the revised timetable was set in November 2020 [39]; the claimants' failure to identify a sensible and proportionate strategy for the trial of these claims [40]; the service of the material on 2 July 2021 [41]; the prejudice to the defendants if further time was granted [42]-[43]; and the effect on the court's resources [44]. At [45] she concluded:

> "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. "

5. Permission To Appeal

25. There are four grounds of appeal. Ground 1 is the contention that the judge failed to weigh in the balance the fact that, if there was no extension of time, the vast majority of the claims would effectively be struck out. Ground 2 is the contention that the judge should have granted a lesser extension than that sought, but did not do so. Ground 3 is the complaint that the judge was wrong to conclude that the extension of time sought by the claimants would materially prejudice the defendants. Ground 4 is the complaint that, because of an absence of reasons, the claimants did not know why the judge had rejected their principal submissions. I consider that at least grounds 1 and 3 satisfy the relevant test for permission to appeal and that, in all the circumstances of the case, it would be appropriate to grant permission to appeal on all grounds, particularly given the importance of these claims to the thousands of claimants in Nigeria.

26. I approach the issues in this way. In Section 6, I set out the applicable principles of law. In Section 7, I deal with ground 1 of the appeal, which is in many ways the most important. Thereafter, at Section 8, 9, and 10, I deal with grounds 2-4 respectively. There is a short summary of my conclusions at Section 11.

6. The Applicable Legal Principles

27. The starting point is that this was a case management decision, reached after a full day's argument. In *Mannion v Ginty* [2012] EWCA Civ 1667 at [18], Lewison LJ said that it was "vital for the Court of Appeal to uphold robust, fair case management decisions made by first instance judges". That point was reiterated in *Abdulle v Commissioner of Police of the Metropolis* [2015] EWCA Civ 1260; [2016] 1 WLR 898, where it was made plain that this principle

applied, even if the case management decision in question had a very significant impact upon the proceedings.

28. In such a case, this court can only interfere with the decision of the lower court if the judge had regard to a factor that was irrelevant or failed to have regard to a factor that was relevant, or if the judge's discretion was "clearly wholly wrongly exercised": see *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 and *Royal and Sun Alliance Insurance PLC v T&N Ltd* [2002] EWCA Civ 1964, at [38] and [47]. That is, on any view, a high hurdle for the claimants to overcome in this case. This was a decision of the judge in charge of the TCC, with considerable experience of case-managing challenging claims through to a conclusion.

29. The court will grant a reasonable extension if it does not impact on hearing dates or otherwise disrupt proceedings: see *Vneshprombank LLC v Georgy Bedzhamov* [2019] EWHC 1430 (Ch), citing *Hallam Estates v Baker* (2014) 4 Costs LR at 26. The fact that a refusal to extend time would in practice mean the end of the claim is a factor to be weighed in the balance, but it cannot of itself warrant the grant of relief: see *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] 3 Costs LR 588 (CA). The need to comply with court orders was there said to be "of paramount importance". That approach ties in with the long-standing principle that a claimant's entitlement to sue a defendant is not an absolute right, and does not permit that claimant to fail to comply with court orders, or delay and disrupt the administration of justice: see *Leizert and Anr v Kent Structural Engineering Ltd* [2002] EWHC 942 (QB).

30. When considering applications of this sort the court is obliged to take careful account of the over-riding objective at CPR 1.1. That provides:

> "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to 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."

As part of its consideration of the over-riding objective, the court should consider the effect of the application in question on the administration of justice and upon other court users: see *Biguzzi v Rank Leisure PLC* [1991] 1 WLR 1926 and *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

31. In the present case, the judge gave some thought to whether the principles applicable to relief from sanctions under r.3.9 (as per *Denton v TH White Ltd* [2014] EWCA Civ 906) were relevant, but concluded that, because the application for an extension of time was (just) made in time, she did not need to consider those principles further: see [27].

32. I agree with Mr Dunning that the regime under r.3.9 as to relief from sanctions is not directly applicable here (because there was no sanction, there being no

failure to comply with an unless order). I also accept that in many cases where an extension of time is sought to comply with an existing order of the court, the relief from sanctions regime will not be relevant.

33. But I consider that the approach in *Denton v White* is of some relevance when considering the particular circumstances of this case. This was a situation where, just as if they were facing an unless order with which they had not complied, the claimants needed the court to get ithem out of a major difficulty; where they were throwing themselves on the mercy of the court in order to prevent the vast majority of their claims from coming to a shuddering halt. No extension of time meant no continuing claim for the vast majority of these claimants, just as if the order of 2 June 2021 had indeed been an unless order. Accordingly, it seems to me that the general principles identified in *Denton v White* are applicable, at least by analogy, when considering the application of the over-riding objective to this case. An examination of whether the claimants' failure to meet the earlier orders of the court was serious and significant; whether there was a proper explanation for those delays; and a consideration of all the circumstances of the case, is a useful and illuminating way of arriving at an answer to the question as to whether or not it was in accordance with the overriding objective to grant the claimants a further extension of time.

7. Ground 1: The Draconian Effect of Not Extending Time

34. The claimants' first and most significant ground of appeal is that the judge failed to take into account the fact that, if she did not extend time, the vast bulk of the claimants would not be able to pursue their claims. They point out that nowhere in her consideration of the relevant issues at [37]-[45] does the judge refer to

the prejudice to the claimants if time was not extended. In addition, Mr Dunning suggested that at least some of the language in those paragraphs suggests that the judge did not appreciate those draconian consequences. For example, he noted that, at [42], the judge referred to the application as an attempt by the claimants to gain "further time to perfect their case", when in reality it was much more important than that. The claimants therefore do not shrink from saying that, in consequence, she reached a conclusion that no reasonable judge could have reached.

35. I acknowledge at once that, in the crucial balancing section of the judgment at [37]-[45], the judge did not identify the draconian effect of not extending time. It would plainly have been much better if she had done so. But I remind myself that this was an *ex tempore* judgment at the end of a long day in which the claimants had been arguing, front and centre that, if time was not extended again, the vast bulk of their claims would be stopped in their tracks. In those circumstances, I consider that it is inconceivable that the judge was unaware of the consequences of refusal.

36. Moreover, she expressly referred to that central element of the claimants' submissions at [19]. Mr Dunning criticised that passage, set out at paragraph 22 above, on the basis that the judge appeared to have in mind only the 900 claimants for which he had indicated that a date could be provided in the reformatted schedules, and thereby forgot or ignored all the other claimants in the case. I consider that criticism to be unfair. I have set out in paragraph 21 above the submission that Mr Dunning made about the 900 dates. In my view,

the judge's observation at [19] related directly to the submission that had been made to her by Mr Dunning.

37. I consider that the judge took the draconian effect of not extending time as a given. It was the fundamental consequence against which everything else had to be measured. She expressly examined all the other relevant factors to see whether, in all the circumstances, the draconian consequences of not extending time were proportionate and justified. That was the principal purpose of her analysis at [37]-[46]. She concluded that, for the reasons she set out, the further extension was not warranted and the draconian consequences therefore followed. In my view, therefore, although she did not spell out that point in that way, that was the process which she undertook.

38. I consider that the judge took into account everything relevant. It is not suggested that she had regard to anything irrelevant. In addition, it cannot be said that she was plainly wrong in her conclusion: she gave clear reasons why, given the length of time the case had already taken, the latitude that the claimants had already been given, the consequences of a further extension (including the potential effect on the trial fixed for February 2022), an extension was not warranted. I consider that most judges would have reached the same conclusion.

39. However, in order to deal with the claimants' appeal fully and fairly, I am prepared to assume that, contrary to those views, the judge did err in the way that Mr Dunning suggested under ground 1. If so, it is then necessary for this court to re-exercise the discretion. In undertaking that task, I have had particular

regard to one matter which the judge did not expressly address[4], namely why what the claimants propose to do in the extended period is contrary to all the previous directions, would not advance their case, and should not therefore be permitted. In addition, I have found it helpful, as advertised above, to undertake that re-exercise of discretion with a careful eye on the three step approach enunciated in *Denton v White*. When the exercise of discretion is approached in this way, I consider that the judge's conclusion is the only one available.

a) The Claimants' New Proposal

40. I have set out at paragraphs 20-21 above the claimants' change of position before the judge. The main thrust of their application was to be allowed to serve a reformatted schedule with 900 or so dates added to it in respect of certain (unidentified) claimants. In his submissions to this court, Mr Dunning said that the claimants were now in a position to do the same in respect of 165 communities and 22,167 individuals. Unlike the position before the judge, he said to this court that the claimants had abandoned the attempt to serve any further expert evidence. Aside from the provision of better maps, he confirmed that the claimants would not be providing anything else. There would, he repeated, be no further witness statements.

41. As I have said, Mr Dunning accepted before the judge that the absence of further witness statements to confirm any more dates of damage was both unconventional and an inferior methodology. Although he refused to concede that any dates added to a schedule in the way he proposed could not be evidence

[4] That is not a criticism of the judge. The claimants' change of position did not emerge until the hearing on 20 July. Furthermore, it was only in this court that the claimants made plain that they were not intending to rely on any further evidence at all.

at all, it is self-evident that, on their own, they would not be. The dates would be a mere assertion, made by somebody unknown pressing a button on a computer, with no evidence to confirm or support the dates or to show that they had not been plucked out of the air at random. On their own, therefore, it is plain that the reformatted schedules would add nothing.

42. Mr Dunning suggested that the claimants may be capable of proving any additional dates by inference, by reference to the evidence which they had already served. But an analysis of that evidence demonstrates how and why the argument does not get off the ground. As I have already said, the evidence of fact previously served is extremely limited, relating to one inlet or estuary out of the hundreds along this stretch of coast. That cannot be the basis for any meaningful extrapolation. And although the court was not shown the experts' reports in full, I was able to form the clear view, from the very full extracts in the DODP, that no relevant inferences can be drawn from the expert evidence either, because that is entirely general and site-unspecific. It identifies no periods when the Bonga oil might have stayed submerged in this water, and gives no dates or range of dates for when the Bonga oil might have struck any part of the land in question. Assuming therefore that the DODP sets out the most important extracts from the experts' reports on the subject of date of damage, it appears that the experts cannot even offer any possible parameters for such periods or dates.

43. Accordingly, the unconfirmed dates in the reformatted schedules envisaged by the claimants could not be advanced by inference from the existing evidence, given the manifest limitations of that evidence.

44. Furthermore, I consider that what the claimants now wish to do amounts to a complete negation of what the court has previously ordered them to do. As explained in Section 2 above, the entire structure of Stuart-Smith J's directions, and the way in which they have since been case-managed, assumed that, in order to justify dates which were many months or years after the Bonga oil spill, the claimants would need to serve supporting factual evidence. Stuart-Smith J deliberately eschewed the idea that the claimants could simply plead a variety of dates in a schedule: that was why it was expressly part of his directions that they serve evidence that supported the (later) dates which they wished to assert. What the claimants now want to do is to overturn 16 months of case-management directions, and be permitted to do something much less onerous and of little or no utility. So, on analysis, this is not an application to extend time yet further; it is instead an application which seeks to remove the specific burdens which Stuart-Smith J properly placed on the claimants in March 2020.

45. In my view, the claimants should not be permitted, at or beyond the eleventh hour, to rewrite the directions in this way. It should be remembered that Stuart-Smith was critical of the claimants' "iterative approach" (see paragraph 10 above). He regarded the DODPs and their supporting material as representing to the claimants something of the last chance saloon. In my view, the claimants have failed to appreciate or accept the opportunity he gave them.

46. So if I had to re-exercise the court's discretion, I would regard these factors alone as out-weighing the draconian consequences of refusal, and thus justifying the order that the judge made.

b) The Overriding Objective and the Approach in Denton v White

47. Further and in any event, the court has to consider the application to extend time by reference to the overriding objective, with its concepts of dealing with a case justly and at proportionate cost, expeditiously and fairly, taking into account the court's resources and enforcing compliance with orders. All of these issues can be considered, directly or indirectly, through the prism of *Denton v White*.

48. The first question is whether the failure of the vast bulk of the claimants to serve the DODPs, together with the pack of supporting material, on 2 July 2021, was serious and significant. I am in no doubt that it was. As the judge explained, there had already been three timetables set to accommodate the claimants' delays. They had had from March 2020 to provide this material and, by July 2021, they had only produced a pleading in support of 9 out of 28,000 plus claimants. Most TCC cases are resolved, from start to finish, in 16 months, and although it can with justification be said that this was not a standard TCC case, to take so long over one element of one sub-trial speaks for itself.

49. Furthermore, the delays were serious and significant because any delay in the service of material beyond 2 July 2021 would inevitably have led to the adjournment of the trial of the limitation issues. It is implausible to suggest otherwise. Even if the claimants had complied with the revised order and provided the DODPs, and everything else, by 2 July 2021, the respondents had to reply by the end of November (in a shorter period then they had originally been given by Stuart-Smith J). Allowing for the Christmas/New Year period, that would have made the time for the preparation for the February trial itself extremely tight. It would have imposed a huge burden on everyone to ensure an efficient hearing. By their application, the claimants were seeking an extension

of another seven weeks. That would have shunted the date for the defendants' responses, allowing for the holiday period, to mid/late January 2022. A trial of the issues two or three weeks later would therefore have been impossible.

50. I put that point to Mr Dunning during the course of the hearing. He accepted the logic of it. His argument was that the defendants did not need the time that they had originally been given to respond to the claimants' DODPs and the supporting material. That was therefore another example of the claimants' application seeking to rewrite all that had gone before. Mr Dunning confirmed that his case was that, even if the claimants were allowed an extension to early October to reformat the schedules, the defendants should not be given any time beyond the existing November date to put in their responses. His argument was that the defendants already knew the case that they had to meet and that the provision of the dates of damage by the claimants was, in his phrase, "a sideshow".

51. I deal with, and reject, that submission in Section 9 below, when dealing with the claimants' ground 3. For present purposes, I would simply observe that that submission is contrary to the orders made by Stuart-Smith and O'Farrell JJ (the most recent of which was an order to which the claimants consented) when they allowed the defendants a period of 5 months or so to respond to the DODPs and supporting material. It was inherent in the structure of their orders that the DODPs, and supporting material, were very important, in order that the defendants knew and could respond to the case that they had to meet as to when actionable damage occurred. To suggest now that the defendants did not need

this time at all, because the dates were "a sideshow", flies in the face of the case management structure of the actions since March 2020.

52. For these reasons, I consider that the accrued and proposed further delays were serious and significant.

53. The next question is whether there is a proper explanation for the delays. In my view, there is no real explanation for the delays at all.

54. I start the analysis with the making of the order by Stuart-Smith J in March 2020 for the provision of the DODPs. I remind myself that this pleading had only been necessitated as a result of the emergence at the hearing of the suggestion that many of these claims involved, not property on the coast, but property inland. In other words, the DODPs were themselves only necessitated in the first place by the claimants' late change of case.

55. Between March and August 2020, there is nothing in the papers before this court to indicate that anything happened on the claimants' side to comply with the order of Stuart-Smith J. In August, the claimants changed solicitors, and Rosenblatt came on the record (although they had been involved before as agents for the original solicitors). But again, for the period between August 2020 and about March 2021, it is not apparent from the claimants' evidence that any steps were taken to comply with the original or the revised orders of the court.

56. There are two witness statements, both dated July 2021, from Mr Roche and Ms Macleod, which contain the only information about delay. They both identify some of the generic difficulties with obtaining information in this part of Nigeria (although those same difficulties had already formed the basis of the extension

from November 2020 to June 2021 which O'Farrell J had granted in November 2020). Mr Roche deals in some detail with a trip into the interior, but it does not appear that any relevant information was obtained from that trip: certainly, it appears to involve a different area to the estuary where the 9 claims (which were supported by the DODP served on 2 July 2021) originated.

57. In other ways too, these statements were more notable for what they omitted than what they said. Lord Goldsmith pointed out that the existing schedules identify thousands of mobile telephone numbers for individual claimants, yet there was no evidence that these numbers had been called in order to advance the DODPs. On going to it, the passage in Mr Jalla's statement which Mr Dunning said dealt with this point made no mention of the mobile telephones. Lord Goldsmith also pointed to the earlier evidence of Mr Okerieke, the Secretary of Bonga Oil Spill Communities, who said that his duties included "receiving, transferring, and handling all documents pertaining to this Court case and liaising with the general cohort of claimants…" There was no evidence that his services had been utilised in any way in the preparation of the DODPs and supporting material.

58. But the critical omission in these two statements involved any sort of chronology; indeed, save in two instances, they do not refer to any dates at all. There is a reference in Mr Roche's statement to just one date (23 March 2021), which concerned a boat trip that did not happen; and another single reference in Ms Macleod's statement (to a letter of 18 May 2021, talking about the generic difficulties of security and communication in the region). Taking that evidence in the round, the only inference that I can draw is that the attempt to comply

with the revised order of November 2020 only started to happen in the late spring and early summer of 2021, shortly before the time for the service of the DODP was due to expire in early June 2021. It is therefore unsurprising that the claimants had to apply for a further extension of time.

59. In one sense, it is the position from May 2021 (when the further extension was agreed) to July 2021 which concerns me the most. The claimants had originally sought a further extension of three months but the defendants, not unreasonably, refused to agree. In the end those representing the claimants agreed to the one further month's extension (to 2 July 2021) offered by the defendants. Their agreement can only have been on one of two possible bases.

60. The first would have been that the claimants' representatives truly believed that they could serve the DODPs and supporting evidence in respect of all 28,830 claimants by 2 July 2021. That seems highly implausible given the difficulties to which Mr Roche and Ms Macleod refer in their statements. Indeed, there is no evidence to indicate how such optimism could have been justified, nor is there anything to say, for example, that an event happened in June 2021 that suddenly made that timetable impossible to meet.

61. Mr Dunning suggested that paragraph 7 of Ms Macleod's statement did provide support for the decision to agree the one month extension. There she said:

> "In seeking the original agreed extension of time it was the Claimants' belief that significant ground could be covered within that time to make good the aspects of the Order that had proved most challenging."

In my view, as was debated with Mr Dunning during the hearing, those words were not only studiedly vague, but they also referred only to "the claimants'

belief". It was the claimants' *solicitors* who agreed the order, and therefore it was for the *solicitors* to say how and why they considered that they could provide the vast amount of missing material in a month. I dare say that was only loose language, but the fact is that neither Ms Macleod nor anybody else has purported to do so.

62. The other possible basis for the claimants' representatives' agreement to the 2 June order is that they thought it most unlikely that they could be ready to serve all the DODPs and the supporting package by 2 July 2021, and so agreed to the consent order on the basis that they would do what they could by 2 July 2021 and then, if necessary, make a further application to the court for a yet further extension of time[5]. That would not have been an appropriate approach. But whichever basis the claimants' representatives worked on, it provides no explanation at all for the further delays that have occurred since May 2021, when the last extension was agreed.

63. As to the course that the claimants now wish to take, namely the production of schedules with some dates added, without any supporting evidence at all, there is no evidence before the court as to why this sudden and dramatic *volte face* has taken place. Is it because the solicitors have abandoned hope of obtaining the evidence which Stuart-Smith and O'Farrell JJ thought was necessary? Is it because further work has shown that many more of the claims are statute-barred than had been thought? Is it because the claimants' representatives have developed a new and better method of communication with the claimants? Is

[5] In this respect, I note that the 4 weeks that were agreed and the 7 weeks extension on top of that sought in the claimants' application to the judge, amounts approximately to the 3-and -a-half months that the claimants had originally sought in May 2021 and which the defendants had roundly rejected.

there some new method of calculating the relevant dates that had not hitherto been used? There are no answers to these questions. The absence of this basic information is even more surprising when it is remembered that, as long ago as March 2020, Stuart-Smith J said that the claimants' "iterative approach" to this litigation had to cease. As Lord Goldsmith put it during the hearing, there was no explanation "as to why they could advance only 9 claims in July, but can today do thousands."

64. For these reasons, therefore, I consider that there is no proper explanation of the delays in this case.

65. Finally, the third stage of *Denton v White* requires the court to consider all the circumstances of the case. Two factors that must be considered as part of that analysis, and which are also expressly part of the overriding objective, are the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with court orders. On both of these counts, the history as recounted above means that the claimants come up very short.

66. This litigation has not been conducted efficiently or at proportionate cost, a complaint made by both Stuart-Smith and O'Farrell JJ, and a point made by this court in the recent judgment about why the 2017 proceedings were not a representative action. These delays simply highlight further the inefficient and costly way in which the claimants have approached the claims. The importance of complying with court orders is self-evident and the claimants' approach to the consent order of 2 June 2021 (likely to have been based either on unrealistic optimism or cynical opportunism) is another strong factor weighing in the balance against them.

67. This litigation has been bedevilled by problems, many of which arise from the limitation issues, and others from the way in which it has been set up and run. Those problems are, I am afraid, the claimants' responsibility. Their unconventional attempts to avoid the defendants' limitation defences (by way of the assertion of continuing nuisance and the suggestion that the 2017 action was a representative action) have been rejected by every court which has considered them. In some ways, this is a claim that is facing death by a thousand cuts.

68. Of course, I acknowledge without qualification that, if no further extension of time is permitted, the vast bulk of these claims will fail because the claimants will not have been able to avoid Stuart-Smith J's underlying finding that the damage happened within weeks of the Bonga oil spill. But in the light of the continuing delays that have occurred in identifying the material that would avoid that outcome, the lack of any proper explanation for those delays, the prejudice to the defendants if a further extension was allowed (dealt with in greater detail under ground 3 below), and the practical pointlessness of allowing dates to be put forward in a schedule without any evidence to support them, mean that, in accordance with the overriding objective, the extension of time should be refused.

69. For these reasons, if it is necessary to re-exercise the court's discretion, I would re-exercise that discretion in the way set out above and would conclude that the draconian consequences of the order were justified in the circumstances of the case.

70. I go on to consider the other grounds of appeal but they are, in my view, of secondary importance and have in many ways already been answered in the analysis set out above.

8. Ground 2: The Granting of a Shorter Extension

71. The claimants complain that the judge should have granted a shorter extension than the one that they sought, which would have allowed them to provide amended schedules in respect of approximately 900 claimants. In my view, Lord Goldsmith was right to describe this argument as a makeweight. There are three complete answers to it.

72. The first is that at no time did the claimants formally ask the judge for any lesser extension limited to the 900. On the contrary, Mr Dunning indicated that he could not do so because he did not have the necessary instructions. It is wrong in principle for a party to complain that the judge failed to make an order which they deliberately did not ask her to make.

73. The second answer is that, for the reasons set out at paragraphs 41-44 above, the reformatted schedules would not have made any meaningful difference because, unsupported by any other evidence, the dates on the proposed schedules could never have been proved.

74. The third answer is that, for the reasons that I have already explained, any delay in the provision of further information as to the dates of damage would have meant that the trial of limitation issues would have had to have been adjourned. This ‘halfway house’ argument cannot affect that conclusion. So the primary

difficulty still remains that any date beyond 2 July 2021 was going to lead to an adjournment to a trial fixed 18 months ago.

75. For these reasons I do not consider there is anything in ground 2.

9. Ground 3: No Prejudice to the Defendants

76. The claimants argue that any extension of time would not affect the defendants, because they already know the case they have to meet and have already advanced evidence in support of their propositions that: i) the oil was not Bonga oil; and ii) was the result of a different oil spill altogether. Mr Dunning's skeleton argument went so far as to say that the dates of damage were essentially irrelevant to the defendants and were no more than a formal element required of the claimants in order to prove their own case.

77. I reject the claimants' submissions. They are, as many of their submissions have been over these three appeals, unacceptably one-eyed.

78. First, as I have already pointed out, the submission ignores the fact that the provision by the claimants of the dates of actionable damage was required in the first place by Stuart-Smith J because, without it, the new/late case that some of this property was inland (and therefore may have suffered damage later) could not get off the ground. He had found that, in general terms, the damage would have occurred within weeks of the December 2011 Bonga oil spill. The claimants needed to get round that difficulty for their claims to proceed. The DODPs and supporting material were not therefore a simple box-ticking requirement; they were the only way in which the claims (or at least some of them) might survive.

79. Secondly, the dates of damage needed to be properly set out and supported in order that the defendants could then see the case they had to meet. They had already met the case about damage to the coastal properties; prima facie, claims based on that damage were statute-barred. Now they had to meet the new/late case. The judge envisaged that there would be "individualised limitation defences" to address those new dates of damage. It is self-evident that such individualised limitation defences could not be advanced until the defendants knew the individual case on the date of damage that they had to meet.

80. Thirdly, the provision of the DODPs and supporting package goes to a critical issue between the parties. Mr Dunning made much of the fact that the defendants' defence is that the Bonga oil never washed up on the shore at all. I accept that that is the defendants' primary defence. But they have also made it plain that, further and in any event, they deny that the oil about which the complaints are made is Bonga oil. In my judgment, this alternative line of defence ties in precisely with the importance to the defendants of knowing the date of damage alleged.

81. The connection arises in this way. There is evidence from Ms Atemie, a senior Shell employee with detailed knowledge of the widespread oil pollution in this part of the Niger Delta. She makes it plain that hundreds of thousands of barrels of oil are spilt, lost or stolen every day in this part of Nigeria. Mr Dunning relied on her evidence to demonstrate that the defendants do not need to know the precise dates relied on by the claimants in order to mount this alternative defence. But that is to miss the point. Ms Atemie gives very detailed evidence about particular spills and other relevant events in specific communities in this

part of Nigeria, and even attaches dates to them. What the defendants want, and were entitled to expect, is a detailed series of DODPs together with supporting evidence which made clear precisely what dates the claimants were relying on in particular locations. The defendants would then be able to cross-reference the claimants' dates with Ms Atemie's evidence about the other spills.

82. In this way, if the claimants were saying that there had been an oil spill in community X on 1 January 2015, the defendants could check their extensive records (as evidenced by Ms Atemie) and see if that tallied with an oil spill 2 miles upriver from community X on 29 December 2014. In other words, Ms Atemie's evidence makes clear how and why the defendants required the DODPs and the supporting material in order to know the case they had to meet and to see if they could advance a positive case on causation on the basis of their own knowledge of other spills.

83. Fourthly, there is the question of an adjournment of the February trial. As noted above, any delay in the provision of the further information beyond 2 July 2021 would lead to the adjournment of the trial. That is the very last thing that the defendants want, as they made clear in the inter-solicitor correspondence in May.

84. For these reasons, I consider that Mr Dunning was wrong to submit that the extension that he sought would not prejudice the defendants. On the contrary, it plainly would cause prejudice: it would affect the defendants' substantive right to know the case they have to meet and also their entitlement, after three years of interlocutory warfare, to have a trial of the limitation issues.

10. Ground 4: No Reasons Given for the Rejection of the Claimants' Arguments

85. The claimants complain that the judge did not give proper reasons as to why she was not granting an extension of time, given the draconian consequence of that order, and that she did not address their arguments.

86. In my view, this submission is parasitic on the previous grounds of appeal, particularly ground 1. In my view, the judge did give proper reasons for her decision and did address (albeit sometimes briefly) the claimants' arguments. But to the extent that she did not give adequate reasons, and it is necessary for this Court to re-exercise the discretion, I have set out under grounds 1 and 3 above why any such re-exercise leads inexorably to the same result. In so doing, I believe I have addressed all of Mr Dunning's submissions on behalf of the claimants.

11. Conclusions

87. For the reasons that I have given, if my Lords agree, I would grant permission to appeal but refuse the substantive appeal on the merits.

Lord Justice Edis:

88. I agree with both judgments.

Lord Justice Underhill:

89. I agree that this appeal should be dismissed. I will give my reasons in my own words, but I do not believe that they essentially differ from Coulson LJ's, and in the light of his clear and comprehensive judgment I can do so shortly.

90. I would emphasise the following features of the situation in which the Judge had to make her decision:

(1) *The belated emergence of the new limitation case.* The Claimants' new limitation case had not emerged until the hearing before Stuart-Smith J in September 2019, the best part of two years after the 2017 proceedings were launched: see paras. 7-8 of Coulson LJ's judgment. That was not in itself a reason for not allowing it to be advanced, as Stuart-Smith J accepted, but it fully justifies his warning that the Claimants "should assume that they will only have one opportunity to get their case in order from now on": see para. 15 of his judgment, quoted by Coulson LJ at para. 10 above.

(2) *The importance of the requirement to plead and verify the new limitation case.* The order of Stuart-Smith J with which the Claimants sought more time to comply was of fundamental importance to the viability of their claims. Even on the basis that the relevant limitation period was six years, each Claimant (whether an individual or a community) needed to establish that Bonga oil had first caused damage at their respective locations no earlier than 20 April 2014. Unless such a date were alleged in each case, and supported by evidence, the claims could not proceed. We are not therefore concerned with some procedural order of peripheral importance.

(3) *The length of the delay*. Stuart-Smith J's original deadline for compliance gave the Claimants seven months to plead and verify the new limitation case. That period had been twice extended, first by over six months (to 4 June 2021) and then again by a further month (to 2 July 2021). At the

time of the application for a further extension, on 2 July 2021, the Claimants had thus already had twice the time originally set to plead and verify a case which should in truth have been pleaded from the start.

(4) *Absence of explanation.* The evidence filed in support of the Claimants' application offered no real explanation of why they had been unable to comply with that timetable. Mr Dunning supplied us with a three-page *"Summary of Evidence Presented to Court on Reasons for not Complying Fully with Date of Damage Directions*". This consisted of a number of points extracted from, and cross-referenced to, the witness statements of Ms Macleod and Mr Roche. (I should say that it contained no reference to the exhibits to those statements, most of which were not in the bundles.) Coulson LJ summarises the content of those statements at paras. 56-58 above. As he says, Ms Macleod's statement explains in general terms the difficulties of communicating with the communities to which the Claimants belong, which are scattered over a huge area in a part of Nigeria where there are serious problems about transport and security (said to have been made worse by the pandemic) and where telephone and internet access are far from straightforward. I do not doubt those difficulties, but they have been present from the start of the litigation, and have already been taken into account in setting both the original and the extended deadline. The Claimants' solicitors and Steering Committee must (and certainly should) have put in place at least some basic systems for obtaining information from the communities which they represented; and indeed, as appears from para. 57 of Coulson LJ's judgment, there is other evidence that that was the case. What was required in support of the

application for an extension was a particularised explanation of what those systems were and why it had not been possible to use them to obtain the required information from any but five of the over 479 communities. But the evidence relied on by Mr Dunning contains nothing of this kind, and when we put this difficulty to him at the hearing he was unable to refer us to anything further. There is also a real puzzle about the relevance of Mr Roche's statement for our purposes. His evidence is unspecific about what his expedition was intended to achieve, but it can never have been the intention that he would visit all 450 communities: in the event he only visited eight, none of which was among the five from which date of damage evidence has been obtained. Neither witness explains why it was not possible to obtain the required information by phone or email. Granted the problems (in particular about internet communication), the Claimants' solicitors and Steering Committee had nevertheless had over a year to find ways of overcoming them, and the material required, though important, was narrow in scope, consisting essentially of a date and a single witness to verify it. As Coulson LJ notes at para. 60, the evidence also contained no particularised explanation of how the Claimants' solicitors, having failed to obtain the necessary information thus far, expected to be able to do so if granted the extension sought.

(5) *The admission that the Claimants would not in fact be able to comply with the order even if the extension were granted*. At the hearing before the Judge Mr Dunning made it quite clear that even in relation to the 900 communities in respect of which the Claimants expected shortly to be able to plead a date of damage there was no intention to provide any evidence

verifying that date: see para. 20 of Coulson LJ's judgment. That was a remarkable admission. The requirement for verification was as much a part of Stuart-Smith J's order as the requirement to plead a date of damage. It is hard to see how the Judge could have been justified in granting an extension in circumstances where it was acknowledged that even in the extended period the original order could not be complied with. I agree with Coulson LJ (see para. 40 above) that in truth Mr Dunning was seeking a variation of Stuart-Smith J's order in this regard, though he did not do so explicitly; but it would have been extraordinary for the Judge to accede to such an application when the requirement for verification had, for good reason, been an essential condition of Stuart-Smith J's decision to allow the Claimants one more chance to get their house in order on limitation.

91. If the decision falls to be taken by this Court I would regard those reasons as sufficient to require us to refuse the extension sought. It was also an important feature in the Judge's reasoning that the grant of an extension would require the adjournment of the hearing fixed for February 2022: Mr Dunning did not accept that that was so, but I agree with what Coulson LJ says about that (see paras. 76-84). That is certainly a material factor, but I would not myself put it at the centre of the argument in the circumstances of this case. Although the Court is rightly slow to make "disciplinary" orders on case management grounds which will prevent parties from having their substantive disputes determined, there are circumstances where such orders are justified; and I agree with Coulson LJ that they are not necessarily confined to cases where an order is or has been made explicitly by way of a "sanction". The factors which I have enumerated in the

previous paragraph, and particularly the last two, mean that this is a case where it would be right to refuse an extension even if the specific prejudice caused by the history of unexplained non-compliance with the Court's orders was slight.

92. That being so, the criticisms made by Mr Dunning of the Judge's reasoning are not decisive of the outcome of this appeal. With the benefit of hindsight, it would probably have been better for her not to have given an *ex tempore* judgment where her decision had such a fundamental impact on the future of the litigation as in this case. I agree with Coulson LJ that she should in her judgment have explicitly acknowledged that impact. But I also agree with him that it is hard to believe that she failed to appreciate it or to take it properly into account. Although Mr Dunning criticised her focus on the further 900-odd individual claims (comprising six communities) in which he said that he would be in a position to comply (in part) with the order, it seems to me that that was because those were the only cases in which the possibility of compliance was being asserted. I would also, as appears above, have attached more importance than she explicitly did to the absence of any proper explanation for the delay. If, which I need not decide, the way that she expressed her reasons was insufficient to justify her conclusion, I am nevertheless satisfied that that conclusion was correct.

93. It makes no difference to my decision that Mr Dunning told us that the Claimants were now in a position to supply dates of damage for 165 communities and over 22,000 individual Claimants: see para. 40 above. That was not the evidence before the Judge; but even if it were permissible for us to take into account changes since the date of her decision (which I am not sure

that it is in the circumstances of this case), what he told us was unsupported by any evidence, and he confirmed that the material to be supplied would only be a pleaded date of damage and would not be accompanied by verifying witness statements.