Easter Term
[2023] UKSC 16
On appeal from: [2021] EWCA Civ 63

JUDGMENT

Jalla and another (Appellants) *v* Shell International Trading and Shipping Co Ltd and another (Respondents)

before

Lord Reed, President
Lord Briggs
Lord Kitchin
Lord Sales
Lord Burrows

JUDGMENT GIVEN ON
10 May 2023

Heard on 29 and 30 March 2023

Appellants
Jonathan Seitler KC
Alice Hawker
Stuart Cribb
(Instructed by RBL Law Ltd)

Respondents
Lord Goldsmith KC
Dr Conway Blake
Tom Cornell
(Instructed by Debevoise & Plimpton LLP (London))

LORD BURROWS (with whom Lord Reed, Lord Briggs, Lord Kitchin and Lord Sales agree):

1. Introduction

1. This appeal concerns the tort of private nuisance in the context of a major oil spill which occurred off the coast of Nigeria in December 2011. The question at issue is whether there is a continuing private nuisance and hence a continuing cause of action. This matters because the date of accrual of the cause of action is the date from which the limitation period starts to run. Under English law (as laid down by section 2 of the Limitation Act 1980) the limitation period is six years although the limitation period may be five years under Nigerian law which, it is common ground, is the applicable law. The claimants submit that there is a continuing cause of action because there is a continuing nuisance so that the limitation period runs afresh from day to day.

2. In general terms, the tort of private nuisance is committed where the defendant's activity, or a state of affairs for which the defendant is responsible, unduly interferes with (or, as it has commonly been expressed, causes a substantial and unreasonable interference with) the use and enjoyment of the claimant's land: see, eg, *Lawrence v Fen Tigers Ltd ("Lawrence")* [2014] UKSC 13, [2014] AC 822, para 3 (per Lord Neuberger); *Fearn v Board of Trustees of the Tate Gallery ("Fearn")* [2023] UKSC 4, [2023] 2 WLR 339, paras 18 – 20 (per Lord Leggatt); Christian Witting, *Street on Torts* (16th edn, 2021) p 424; *Clerk & Lindsell on Torts* (23rd edn, 2020) para 19-01; John Murphy, *The Law of Nuisance* (2010) para 1.05; Donal Nolan, "'A Tort Against Land': Private Nuisance as a Property Tort" in *Rights and Private Law* (eds Donal Nolan and Andrew Robertson, 2012) pp 459, 463 – 465. Nearly always the undue interference with the use and enjoyment of the claimant's land will be caused by an activity or state of affairs on the defendant's land so that the tort is often described as one dealing with the respective rights of neighbouring landowners or occupiers: see, eg, *Sedleigh-Denfield v O'Callaghan ("Sedleigh-Denfield")* [1940] AC 880, 903 (per Lord Wright). But the creator of the nuisance can be sued whether or not that person still has (or perhaps ever had) any interest in the land from which the nuisance emanates (see para 44 below). Moreover, it is being assumed for the purposes of this appeal that the tort of private nuisance may be committed where the nuisance emanates from the sea. It is also being assumed that the tort of private nuisance may be committed by a single one-off event such as the oil spill in this case. I shall say more about those two assumptions at the end of this judgment (see paras 47 – 49 below).

3. As with the tort of negligence, and in contrast to the tort of trespass to land, the tort of private nuisance is actionable only on proof of damage and is not actionable per se (see *Clerk & Lindsell on Torts* para 19-02). This requirement is satisfied for private nuisance by establishing the undue interference with the use and enjoyment of the land. That includes physical damage to the land itself and damage to buildings or vegetation growing on the land. But commonly there will be an undue interference with the use and enjoyment of land – as by the impact of noise or smell or smoke or vibrations or, as in *Fearn*, being overlooked – even though there is no physical damage to the land or buildings or vegetation.

4. It is submitted by the claimants that, in this case, there is a continuing nuisance, and hence a continuing cause of action, for as long as the undue interference with the claimants' land is continuing. They argue that, on the assumption that the oil from the oil spill is still present on the land of the claimants and has not been removed or cleaned up, there is a continuing cause of action for the tort of private nuisance that is accruing afresh from day to day.

5. That argument of the claimants, which is being dealt with as a discrete preliminary matter prior to trial, was rejected by Stuart-Smith J: [2020] EWHC 459 (TCC) paras 62 – 68. The appeal against that decision was dismissed by the Court of Appeal (Lewison, Newey and Coulson LJJ) with the leading judgment being given by Coulson LJ: [2021] EWCA Civ 63. The claimants now appeal to the Supreme Court.

2. The factual background and the claim

6. The claim has been brought in respect of alleged oil pollution of land, including waterways, caused by an oil spill which occurred off the coast of Nigeria on 20 December 2011 ("the Bonga Spill"). The leak which gave rise to the Bonga Spill occurred during a cargo operation at an offshore installation in the Bonga oil field. The Bonga oil field is located approximately 120 km off the coast of Nigeria. The infrastructure and facilities at the Bonga oil field include a Floating Production Storage and Offloading unit ("FPSO"), which is linked to a Single Point Mooring buoy ("SPM") by three submersible flexible flowlines. The oil is extracted from the seabed via the FPSO, through the flowlines to the SPM, and then on to tankers. The Bonga Spill resulted from a rupture in one of the flexible flowlines connecting the FPSO and the SPM. The leak occurred overnight during a cargo operation when crude oil was being transferred from the Bonga FPSO through the SPM and onwards onto a waiting oil tanker, MV Northia. The cargo operation commenced on 19 December 2011, and the leak began at an unknown time prior to 3:00am on the morning of 20 December 2011. The cargo operation and the leaking were stopped after about six hours.

7. As a result of the Bonga Spill, it is estimated that the equivalent of at least 40,000 barrels of crude oil leaked into the ocean. The claimants allege that, following its initial escape, the oil migrated from the offshore Bonga oil field to reach the Nigerian Atlantic shoreline where they claim it has had a devastating impact on two affected States in the Niger Delta – Delta and Bayelsa States. The claimants allege that the oil has not been removed or cleaned up. In contrast, the defendants maintain that the Bonga Spill was successfully contained and dispersed offshore such that it did not impact the shoreline. Nevertheless, they accept that, for the purposes of determining the limitation issue in this appeal, it should be assumed that some quantity of oil from the Bonga Spill reached the Nigerian Atlantic shoreline. The parties have further agreed that, for the purposes of determining the legal issue in this appeal (and in line with Stuart-Smith J's finding, on the basis of the information before him, at para 59 of his judgment), it is to be assumed that oil reached the Nigerian Atlantic shoreline within weeks rather than months of 20 December 2011.

8. The claimants, Mr Jalla and Mr Chujor, are two Nigerian citizens. They bring a claim in the tort of private nuisance for undue interference with the use and enjoyment of land owned by them which they say has been impacted by the Bonga Spill. Although there has been a dispute as to whether they were also validly bringing these proceedings as a representative action on behalf of 27,830 other individuals, it is accepted that, for the purposes of this appeal, the only claimants are Mr Jalla and Mr Chujor and that this is not a representative action.

9. The defendants are Shell International Trading and Shipping Co Ltd ("STASCO") and Shell Nigeria Exploration and Production Co Ltd ("SNEPCO"). Both are companies within the Shell group of companies. The former is an English company domiciled in London. It is alleged that STASCO is directly or vicariously liable for the operation of the MV Northia. It has been sued in England, as an English domiciled company, pursuant to article 4 of the Recast Brussels I Regulation (Regulation (EU) No 1215/2012). SNEPCO is a Nigerian company which owned and operated the FPSO, the SPM and the ruptured flowline that connected the two. SNEPCO is alleged to be liable as the operator of the FPSO at the relevant time. It was served out of the jurisdiction on the basis that it was a necessary or proper party to the claim against STASCO.

10. The claimants issued their claim form on 13 December 2017. This was just under six years after the spill occurred on 20 December 2011. In April 2018, over six years after the spill, the claimants purported to amend their claim form including changing one of the parties being sued from Shell International Ltd (a company which they had initially sued) to STASCO. In April, June and October 2019, they issued a series of applications to amend their claim form and particulars of claim. The defendants submitted that, as the amendments were being sought after the expiry of

the limitation period, the claimants had to satisfy the requirements of CPR rr 17.4 and/or 19.5 (now 19.6) and that they could not do so.

11. It was in this context, of determining whether the amendments were being sought outside the limitation period, that the question of a continuing nuisance, with which this appeal is concerned, arose. The claimants submitted that, because there was a continuing nuisance, their applications to amend the claim form and particulars of claim were within the limitation period.

12. It is important to stress that this appeal is concerned only with the question whether on the facts (including those assumed by the parties for the purposes of this appeal) there was a continuing nuisance so that the applications to amend the claim form and particulars of claim fell within the limitation period (and note also that claims for damages at common law are restricted to causes of action accruing within the limitation period: see para 32 below). We are not concerned with a separate argument that the oil spill may have reached land of the claimants at later dates than within weeks rather than months of 20 December 2011. That separate argument has become known as the "date of damage" issue and was the subject matter of the recent decision of O'Farrell J on 28 February 2023: [2023] EWHC 424 (TCC). The parties have agreed that the issues of fact and law determined by O'Farrell J in relation to the "date of damage" issue are irrelevant to the continuing nuisance issue of law that arises for determination on this appeal.

3. The decisions and reasoning of the courts below on the continuing nuisance issue

(1) Stuart-Smith J

13. Along with determining a number of other issues, with which we are not here concerned, Stuart-Smith J at paras 62 – 68 reasoned as follows on the continuing nuisance issue:

> (i) It is clear that a nuisance can be a continuing one such that every fresh continuance may give rise to a fresh cause of action in the tort of private nuisance. Stuart-Smith J suggested that a classic example of a continuing nuisance is provided by *Battishill v Reed* (1856) 18 CB 696 where, inter alia, the defendant constructed on his own land a building higher than the claimant's with its eaves overhanging the claimant's property so that rain water ran from those eaves onto the claimant's land causing damage.

(ii) As Lord Atkin pointed out in *Sedleigh-Denfield* at p 896 (where a flood on the claimant's land had been caused by the act of a trespasser on the defendant's land), there is a risk of imprecise language in referring to a state of affairs that has the potential to cause damage as itself being a nuisance. It is clear that there is no cause of action in private nuisance unless and until damage has been caused.

(iii) Although the claimants relied on *Delaware Mansions Ltd v Westminster City Council* (*"Delaware Mansions")* [2001] UKHL 55, [2002] 1 AC 321 as authority for the proposition that failure to remediate the consequences of a single event can be a continuing nuisance, that case was distinguishable and did not assist the claimants. Roots from a tree on an adjoining pavement had caused cracks in the claimant's building. The claimant was held entitled to recover from the defendant highway authority the cost of carrying out the necessary underpinning works. Stuart-Smith J considered that that was a case of a continuing nuisance where the continuing presence of the tree roots gave rise to a continuing need for underpinning that would have been avoided if the defendant had removed the tree. That was very different from what he described as the "normal" case of private nuisance where there is a single escape for which all damages must be claimed at once even if the consequences of the nuisance persist. The present case was a single escape case and there was no continuing nuisance. He said that if, in *Sedleigh-Denfield*, there had been an escape of water, which had formed a lake which caused damage to the claimant's land over a period of weeks, that would have been one occurrence of a legal nuisance, for which all damages should have been claimed at once, despite the extent and duration of the consequential damage. He concluded that to treat the escape of the oil as a continuing nuisance, in the sense contended for by the claimants, would be "a major and unwarranted extension of principle" (para 67). The limitation period should therefore not be extended by reference to the concept of a continuing nuisance.

14. It is helpful to set out the terms of the order made by Stuart-Smith J on this issue:

> "For the reasons set out in paragraphs 62-68 of the Judgment, it is declared that the nuisance as alleged by the Claimants in their original Particulars of Claim and/or their draft Amended Particulars of Claim and on the evidence before the Court at the hearings in September and October 2019 could not constitute a continuing nuisance and that

accordingly the limitation period should not be extended by reference to the concept of a continuing nuisance."

(2) The Court of Appeal

15. The decision of Stuart-Smith J was upheld by the Court of Appeal on the continuing nuisance issue (which was the sole issue on the appeal). Before coming to his essential reasoning, Coulson LJ considered five leading cases on the tort of private nuisance: *Sedleigh-Denfield* and *Delaware Mansions* (both of which I shall examine in detail later in this judgment); *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (pollution of water supply was not actionable in nuisance or under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 because the type of harm was not reasonably foreseeable); *Hunter v Canary Wharf Ltd* [1997] AC 655 (interference with television reception was not an actionable nuisance and, in any event, those without an interest in the land could not sue); and *Williams v Network Rail Infrastructure Ltd* [2018] EWCA Civ 1514, [2019] QB 601 (Japanese knotweed, that had spread from the adjoining neighbour's land, was an actionable nuisance).

16. Turning to Coulson LJ's essential reasoning, this can be summarised in the following way:

(i) A continuing cause of action in tort will usually involve a repetition of the acts or omissions which give rise to the original cause of action. The "paradigm example" (para 54) of a continuing cause of action in the tort of private nuisance is a tree-roots case such as *Delaware Mansions*. On the assumption that a one-off event or an isolated escape can comprise an actionable private nuisance, there is no authority for the proposition that a one-off event or an isolated escape can give rise to a continuing nuisance. Here the event occurred on 20 December 2011 and the leak had been stopped within six hours. It was a single, one-off event, giving rise to a single, and not a continuing, cause of action. The oil that remained on the claimants' land was the consequence of that single event.

(ii) *Delaware Mansions* was distinguishable from the present case because the tree and its roots were still there. Unlike the present case, there was therefore a relevant continuing event or state of affairs.

(iii) It was incorrect in principle to equate the continuing harm or damage, constituted by the continuing presence of the oil on the claimants' land, with there being a continuing nuisance. Moreover, to do so would have serious

ramifications for the law on limitation of actions. It would mean that, from a one-off oil leak, companies like STASCO and SNEPCO could be faced with litigation many decades later.

(iv) To treat the oil on the claimants' land as being a continuing nuisance until removed or cleaned up implied that there was a continuing obligation on the defendants to remediate the damage. Yet the defendants had no control over the oil once it had reached the claimants' land and had no right of access to that land.

(v) The particular properties of oil – which may make it almost impossible to disperse without a proper clean-up operation – do not mean that different principles of law should be applied to it. In any event, oil is in this respect no different to, for example, the toxic solvents that escaped in the *Cambridge Water* case.

(vi) The losses for which damages were being claimed (for example, for the effect of the oil on the fishing and farming industries) were consistent with the damage, necessary for the accrual of the cause of action, being caused by a one-off event at the start. In Coulson LJ's words at para 84:

> "[T]he heads of loss suggest a devastating single event, which had a terminal effect on fishing, fish trading, farmland, drinking water, mangrove swamps and other features of the land. The suggestion in the pleading is that all the damage which could have occurred has occurred, and that compensation is sought for that damage. That is inconsistent with damage which is or could be continuing."

(vii) Coulson LJ therefore concluded that this was not in law a case of continuing nuisance and that the judge had been correct to decide that the claimants' cause of action accrued when the oil struck their land.

4. Four cases in the House of Lords or Supreme Court

17. It appears that there is no prior case in English law that has decisively rejected or accepted the argument on continuing nuisance put forward by the claimants in this case. But in the search for the correct legal principles, three cases of the highest court were particularly focussed on in the claimants' submissions: *Darley Main*

Colliery Co v Mitchell ("Darley") (1886) 11 App Cas 127, *Sedleigh-Denfield*, and *Delaware Mansions*.

18. Before turning to those three cases, it is helpful to refer to the very recent exposition of the core principles of the tort of private nuisance by this court in *Fearn*. It was there decided that the defendants were committing the tort of private nuisance by using the top floor of their building as a public viewing gallery which looked straight across into the living areas of the claimants' flats. Lord Leggatt, giving the leading judgment with which Lord Reed and Lord Lloyd-Jones agreed (Lord Sales and Lord Kitchin dissenting), set out the core principles of the tort of private nuisance as follows:

> (i) The tort of private nuisance is a tort to land (ie it is a property tort). It is concerned with the wrongful interference with the claimant's enjoyment of rights over land (and the concept of land includes buildings and rights, such as easements, which attach in law to the land). Only a person with a legal interest in the land can sue and the law is concerned to protect the claimant against a diminution in the utility and amenity value of the land.
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> (ii) Nuisance can be caused by any means and does not require a physical invasion. Anything short of direct trespass on the claimant's land which materially interferes with the claimant's enjoyment of rights in land is capable of being a nuisance. The interference may be by something tangible (the example given being Japanese knotweed) or something intangible such as fumes, noise, vibration or an unpleasant smell. It can include intrusive overlooking.
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> (iii) The interference must be substantial and must be an interference with the ordinary use of the claimant's land. The use of the defendant's land must also go beyond what is ordinary use. At a general level, what is involved is the balancing of the conflicting rights of landowners. This has sometimes been expressed by saying that the interference with the use and enjoyment of land must be "unlawful" or "undue" or, although Lord Leggatt advised caution in using this term, "unreasonable".
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> (iv) In deciding whether there is a private nuisance one must have regard to the character of the locality.
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> (v) Coming to a nuisance is no defence. That is, at least as a general rule, it is not a defence that what was previously not a nuisance has subsequently

become one because the claimant has acquired or started to occupy the land affected or has changed its use.

(vi) It is not a defence to a claim for private nuisance that the activity carried on by the defendant is of public benefit although this may be relevant in determining the appropriate remedy.

19. I now turn to the three cases in the highest court that were particularly focussed on by Jonathan Seitler KC, counsel for the claimants. Taking them chronologically, the first is *Darley*. There the defendants had the right to extract coal from under the claimant's land. In doing so, they had caused subsidence to the claimant's land in 1868, thereby committing the relevant tort (which, although not made clear in the speeches, was most obviously the tort of private nuisance) for which they had compensated the claimant. They carried out no further excavation work but in 1882 a further subsidence occurred causing different damage to the claimant's land. That further subsidence in 1882 would not have occurred if an adjoining owner had not carried out excavation work for coal on and under his land or if the defendants had left enough support under the claimant's land.

20. The majority of the House of Lords (Lord Blackburn dissenting) decided that the second subsidence constituted a new cause of action separate from the first. The facts therefore fell outside, and did not infringe, the general rule (see, eg, *Fitter v Veal* (1701) 12 Mod 542) that damages for a cause of action must be recovered once and for all; and the limitation period had, therefore, not expired. All their Lordships made clear that the tort in question was actionable only on proof of damage. Lord Fitzgerald at p 151 (but, it would appear, not the other two Lords in the majority, Lord Halsbury and Lord Bramwell) placed weight on there being a continuing omission by the defendants in not taking steps to provide adequate support and therefore in permitting the state of affairs to continue. Lord Blackburn dissented because, in his view, after 1868 there had been no further breach of duty by the defendants comprising a continued withdrawal of support and the new damage did not constitute a new cause of action separate from that for which damages had already been given.

21. In *Sedleigh-Denfield*, Middlesex County Council had trespassed onto the defendants' land and placed a pipe in a ditch to carry away rain water. But the grating over the end of the pipe had been placed on top of the pipe instead of at the entrance to the pipe so that it could not be effective in stopping the pipe becoming blocked with leaves and other debris. The defendants knew or reasonably should have known of the unguarded pipe. Three years later, after a heavy storm, the pipe became blocked, the ditch overflowed, and the claimant's land was flooded thereby

causing substantial damage. The House of Lords held that the defendants were liable to the claimant in the tort of private nuisance. Although the defendants had not created the nuisance (which had been created by the trespasser), they had "continued" the nuisance (and in the opinion of Viscount Maugham they had also "adopted" it by making use of the pipe). The defendants continued the nuisance because, despite actual or presumed knowledge of the unguarded pipe, they did not take reasonable steps to remedy the position.

22. As referred to by Stuart-Smith J (see para 13(ii) above), Lord Atkin pointed to the inaccuracy of talking about there being a nuisance on the defendants' land given that the tort of private nuisance is not committed unless and until damage to the claimant's land is caused. Lord Atkin said at p 896:

> "It is probably strictly correct to say that as long as the offending condition is confined to the defendant's own land without causing damage it is not a nuisance, though it may threaten to become a nuisance. But where damage has accrued the nuisance has been caused."

23. Finally, in *Delaware Mansions*, the roots of a plane tree on the pavement adjoining a block of flats had caused cracks, which appeared in 1989, in the structure of the flats. The land on which the block of flats was built was then owned by the Church Commissioners but in 1990 they transferred the freehold to Flecksun Ltd for £1. The defendant highway authority (Westminster City Council) refused to remove the tree. The claimant, Flecksun, carried out the necessary underpinning works to protect its property at a cost of £570,734.98 and claimed that cost from the defendant highway authority as damages for the tort of private nuisance. It was held by the House of Lords that they were entitled to the damages claimed. There was a continuing nuisance, of which the defendant knew or ought to have known, and reasonable remedial expenditure was recoverable by the owner who had to incur it. Lord Cooke, giving the leading speech with which the other Lords agreed, said the following at para 33:

> "there was a continuing nuisance during Flecksun's ownership until at least the completion of the underpinning and the piling in July 1992. It matters not that further cracking of the superstructure may not have occurred after March 1990. The encroachment of the roots was causing continuing damage to the land by dehydrating the soil and inhibiting rehydration. Damage consisting of impairment of the load-bearing qualities of residential land is, in my view,

> itself a nuisance…. Cracking in the building was consequential. Having regard to the proximity of the plane tree to Delaware Mansions, a real risk of damage to the land and the foundations was foreseeable on the part of Westminster, as in effect the judge found. It is arguable that the cost of repairs to the cracking could have been recovered as soon as it became manifest. That point need not be decided, although I am disposed to think that a reasonable landowner would notify the controlling local authority or neighbour as soon as tree root damage was suspected. It is agreed that if the plane tree had been removed, the need to underpin would have been avoided and the total cost of repair to the building would have been only £14,000. On the other hand the judge has found that, once the council declined to remove the tree, the underpinning and piling costs were reasonably incurred …"

5. What is a continuing nuisance?

24. Part of the difficulty in articulating what is meant by a continuing nuisance for the purposes of the tort of private nuisance is that, as a matter of ordinary language, one can naturally describe the effect of the interference or damage still being present, and not having been cleaned up or otherwise dealt with, as being a continuing nuisance in the sense of being a continuing problem. In this case, therefore, one can naturally describe the oil still being on the claimants' land as a continuing nuisance. But that is wholly misleading when one is trying to clarify the meaning of a continuing nuisance in the legal sense.

25. While I agree with the essential reasoning of the lower courts, with respect, they may have slightly overcomplicated matters by failing to make clear that, far from being unusual, a continuing nuisance in the legal sense is commonplace in respect of the tort of private nuisance.

26. In principle, and in general terms, a continuing nuisance is one where, outside the claimant's land and usually on the defendant's land, there is repeated activity by the defendant or an ongoing state of affairs for which the defendant is responsible which causes continuing undue interference with the use and enjoyment of the claimant's land. For a continuing nuisance, the interference may be similar on each occasion but the important point is that it is continuing day after day or on another regular basis. So, for example, smoke, noise, smells, vibrations and, as in *Fearn*,

overlooking are continuing nuisances where those interferences are continuing on a regular basis. The cause of action therefore accrues afresh on a continuing basis.

27. This explanation is consistent with *Hole v Chard Union* [1894] 1 Ch 293 which was a nuisance case in which the general concept of a continuing cause of action was considered albeit in the context of procedural rules that no longer apply. There the defendants had repeatedly discharged sewage and refuse into a stream that ran through the claimant's land and past his house. The claimant had been granted an injunction to stop the nuisance but it had continued. The claimant had died and the question was whether his successors were entitled to damages for loss suffered subsequent to the injunction coming into force. Applying the then relevant Rules of the Supreme Court (Order 36, rule 58) that turned on whether, prior to the date of assessment, there was a continuing cause of action. The Court of Appeal held that there was a continuing cause of action in nuisance. Lindley LJ said at pp 295-296:

> "what is called a continuing cause of action is 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."

And AL Smith LJ said at p 296:

> "If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on *de die in diem*."

Davey LJ agreed with both judgments.

28. It is precisely because, in the normal case, the tort of private nuisance is continuing that an injunction, prohibiting the continuation of activity or a state of affairs, is a standard remedy for the tort of private nuisance. This is not to deny that in *Lawrence*, paras 119-124, 161, this court suggested that there may be a greater willingness than in the past to refuse an injunction for a continuing nuisance and to award damages instead.

29. The concept of a continuing nuisance also has the consequence that, at common law, damages are given for the causes of action that have so far accrued and cannot be given for future causes of action which have not yet accrued: see, eg, *Midland Bank plc v Bardgrove Property Services Ltd* (1992) 65 P & CR 153. Where the nuisance continues, the claimant must therefore periodically come back to court to

seek damages at common law. In contrast, damages for future causes of action can be given as equitable damages in substitution for (in lieu of) an injunction under section 50 of the Senior Courts Act 1981 (the successor to Lord Cairns' Act): see, generally, *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851; *Hooper v Rogers* [1975] Ch 43; *Jaggard v Sawyer* [1995] 1 WLR 269.

30. It can be seen that, on this analysis, a case on tree roots, such as *Delaware Mansions*, provides a good example of a continuing nuisance but need not be viewed as the paradigm example of a continuing nuisance. In such a case, there is an ongoing state of affairs outside the claimant's land, constituted by the living tree and its roots, for which the defendant is responsible and which causes, by extraction of water through its encroaching roots, continuing undue interference with the claimant's land. The cause of action for the tort of private nuisance therefore accrues afresh from day to day.

31. There are three additional points to make about a continuing nuisance. The first is that a continuing nuisance is in principle no different from any other continuing tort or civil wrong. So, for example, in *Coventry v Apsley* (1691) 2 Salk 420 the tort of false imprisonment (trespass to the person), which is actionable per se, was continuing so that there was a continuing cause of action for as long as the false imprisonment carried on (ie for as long as there was the repetition of the imprisoning conduct).

32. The second point is that it follows logically from the concept of a continuing cause of action that, if the limitation period is one of six years from the accrual of the cause of action, damages at common law for a continuing nuisance cannot be recovered for causes of action (ie for past occurrences of the continuing nuisance) that accrued more than six years before the claim was commenced: see generally, eg, *Cartledge v E Jopling & Sons Ltd* [1962] 1 QB 189, 207 (per Pearson LJ) (decision affirmed [1963] AC 758); Law Commission Consultation Paper No 151, *Limitation of Actions* (1998) paras 3.24 – 3.28.

33. The third point is the importance of recognising that, in addition to the two examples of possible linguistic confusion referred to in paras 22 and 24 above, there is a further linguistic complication in respect of a continuing nuisance. This is because of the concept of the defendant "continuing" a nuisance. What is meant by this was clearly explained in *Sedleigh-Denfield*. It means that a defendant who has not created the nuisance will be liable for it (if damage is caused to the claimant) where, with actual or presumed knowledge of the continued state of affairs, the defendant does not take reasonable steps to end it. But the "continuing" of the nuisance in this sense is not the same as there being a continuing nuisance in the sense of there being a

continuing cause of action with which we are here concerned. The contrast in the two senses can be simply illustrated by the facts of *Sedleigh-Denfield*. There the defendants had "continued" the nuisance, created by the trespasser, so that they were liable in the tort of private nuisance for the damage to the claimant's land caused by the flooding. But that did not mean that there was a continuing cause of action. On the contrary, as I shall clarify in the following paragraphs, the cause of action accrued once when the claimant's land was flooded.

6. Was there a continuing nuisance in this case?

34. Having explained what is meant by a continuing nuisance, such that the cause of action is continually accruing, we are now in a position to examine the central submission of Mr Seitler. The essence of the submission is that there is a continuing nuisance in this case because, on the facts that are to be assumed for the purposes of this appeal, the oil is still present on the claimants' land and has not been removed or cleaned up.

35. If this submission were correct, it would mean that if the other ingredients of the tort of nuisance were made out, and a claimant's land were to be flooded by an isolated escape on day 1, there would be a continuing nuisance and a fresh cause of action accruing day by day so long as the land remained flooded on day 1000.

36. It can therefore be seen that the effect of accepting the submission would be to extend the running of the limitation period indefinitely until the land is restored. It would also impliedly mean that the tort of private nuisance would be converted into a failure by the defendant to restore the claimant's land. It might also produce difficulties for the assessment of damages, which are, in general, to be assessed once and for all (see para 20 above). Where land is flooded on day 1, all the losses, past and prospective, for that accrued cause of action can be assessed on day 1 (including the cost of restoration). It is unclear how there can be a different assessment of damages, for a different cause of action, on day 2.

37. But in the light of the analysis set out above, it is clear that Mr Seitler's submission is incorrect. There was no continuing nuisance in this case (and there would be no continuing nuisance in the example of the one-off flood) because, outside the claimants' land, there was no repeated activity by the defendants or an ongoing state of affairs for which the defendants were responsible that was causing continuing undue interference with the use and enjoyment of the claimants' land. The leak was a one-off event or an isolated escape. The oil pipe was no longer leaking after six hours and it is being assumed for the purposes of this appeal that the oil reached the Nigerian Atlantic shoreline (and hence the claimants' land) within weeks

rather than months of 20 December 2011 (see para 7 above). Although this was not an issue in *Sedleigh-Denfield*, the cause of action in that case accrued and was complete once the claimant's land had been flooded by the isolated escape: there was no continuing cause of action for as long as the land remained flooded. So here the cause of action accrued and was complete once the claimants' land had been affected by the oil: there was no continuing cause of action for as long as the oil remained on the land.

38. Similarly, Stuart-Smith J and the Court of Appeal were correct that the facts of this case are distinguishable from a tree root case such as *Delaware Mansions*. In that case, in contrast to this, there was an ongoing state of affairs outside the claimant's land, constituted by the living tree and its roots, for which the defendant was responsible and which, by further abstraction of water through the encroachment of the roots, caused continuing undue interference with the use and enjoyment of the claimant's land.

39. To accept Mr Seitler's submission would be to undermine the law on limitation of actions – which is based on a number of important polices principally to protect defendants but also in the interests of the state and claimants (see Law Commission Consultation Paper No 151, *Limitation of Actions* (1998) paras 1.22 – 1.38) – because it would mean that there would be a continual re-starting of the limitation period until the oil was removed or cleaned up.

40. It is not surprising that Mr Seitler could cite no case directly supporting the position he was advocating. And while there may be no authority that directly contradicts his central submission, that submission is contrary to principle and would have the unfortunate policy consequence of undermining the law of limitation.

7. Why the *Darley* decision does not assist the claimants

41. Although it was not referred to by the lower courts (and was apparently not cited to them), Mr Seitler placed considerable reliance on *Darley*. He indicated that that case supported his submissions because it showed that one could have a cause of action accruing, triggering a fresh limitation period, at a much later date than the initial activity of the defendant and without any further activity by the defendant. However, the facts of *Darley* are plainly distinguishable from the facts of this case. While it can be said that, similarly to the oil spill, the excavation had gone on outside the claimant's land, in the sense that the defendants were exercising rights as lessees of a seam of coal underneath the claimant's land, it was crucial in that case that there was fresh damage caused, that is separate and different subsidence of the claimant's land, at the later date in 1882. But it was no part of Mr Seitler's case that

the oil caused separate and different damage to the claimants' land. Rather his submission was that there was a continuation of the same interference by reason of the oil still being on the claimants' land. Nor did he (or could he) submit that there remained any causative state of affairs offshore, once the leak had been stopped.

42. In my view, *Darley* is most naturally described as a case of successive causes of action arising through the occurrence of separate events of damage, albeit brought about by the same conduct of the defendants. True it is that, at least if one applies the reasoning of Lord Fitzgerald, it might perhaps be said that the defendants were "continuing" the nuisance - albeit that, in contrast to *Sedleigh-Denfield*, that nuisance was created by the defendants themselves - by a failure to ensure that adequate support was put in place to stop the risk of further subsidence. But even if that is linguistically possible, it has no relevance to the continuing nuisance, in the sense of a continuing cause of action, with which we are concerned in this case. In *Darley*, there was precisely no continuation of the same cause of action and hence no accrual of the cause of action day by day.

8. Must the defendant have control over the continuing nuisance?

43. Lord Goldsmith KC, counsel for the defendants, submitted that in any event there could be no continuing nuisance here because it is a necessary requirement for a continuing nuisance that the defendant has some control over, and must therefore be able to prevent, the continuation of the nuisance. And on these facts, the defendants had no control over the oil once it had reached, and interfered with, the claimants' land.

44. However, while continuing control will almost always be present in a case of continuing nuisance, this is not a necessary requirement. This is because the person who has created a nuisance can be sued in the tort of private nuisance even though that person may no longer have control over the state of affairs that is causing the continuing nuisance. This is clearly shown by *Thompson v Gibson* (1841) 7 M & W 456. There the defendant had erected a building, with the consent of the owners of the land (the corporation of Kendal), which was interfering with the claimant's right to hold a market. It was held that the building was a continuing nuisance and that the defendant remained liable to the claimant to pay damages for that continuing nuisance even though the defendant could not now remove the building because he had no right to enter the land without the permission of the corporation which owned it. The earlier case of *Rosewell v Prior* (1701) 2 Salk 460 was referred to with approval. In that case, the defendant had built a house which interfered with the claimant's right to light. It was held that the defendant remained liable for that

continuing nuisance even though he had subsequently rented out the premises and, it would appear, had no power to redress the wrong.

45. That the creator of the nuisance can always be sued in the tort of private nuisance, at least if that person had control of the land at the time the nuisance was created, and irrespective of whether that person still has control, is supported by commentators: see, eg, Christian Witting, *Street on Torts* (19th ed, 2021) p 430; *Clerk & Lindsell on Torts* (23rd ed, 2020) para 19-70.

46. Therefore, contrary to Lord Goldsmith's submission (and see also Coulson LJ's reasoning referred to at para 16 (iv) above), it is not an additional reason for regarding there as being no continuing nuisance in this case that the defendants have no control over the oil on the claimants' land.

9. Permission to cross-appeal?

47. I mentioned in para 2 above that it has been assumed for the purposes of deciding the continuing nuisance issue that the tort of private nuisance may be committed first, where the nuisance emanates from the sea and, secondly, by a single one-off event such as the oil spill in this case. Lord Goldsmith submitted that both of those assumptions are incorrect as a matter of law and that we should go on to decide those two points of law in the defendants' favour. He argued that there was no need for the defendants formally to cross-appeal because they had given adequate notice of those points of law to the claimants in their written case before this court. He also pointed to a written exchange with Coulson LJ which he said showed that the Court of Appeal did not regard it as necessary for there to have been a cross-appeal. In any event, if there were a need for a cross-appeal, the defendants asked for permission from this court to cross-appeal and, if necessary, would make a formal application for such permission. Stuart Cribb, on behalf of the claimants, objected to such permission now being granted not least because these were points of law that had not been argued in the lower courts.

48. Both parties included in their written cases for this hearing submissions on those two points of law. After hearing argument at the start of the hearing, the court decided that, given the terms of the order made by Stuart-Smith J (see above para 14), the defendants were required to cross-appeal. In the circumstances, the court decided to hear de bene esse, after the submissions on the main continuing nuisance issue, oral submissions on those two points of law. Those submissions were made, on behalf of the defendants, by Dr Conway Blake and, on behalf of the claimants, by Alice Hawker and Stuart Cribb.

49. Given my conclusion on the continuing nuisance issue, determination of those two points of law is not necessary. In those circumstances, and because I consider that the defendants should have properly sought permission to cross-appeal and did not, I would refuse the defendants permission to cross-appeal on those two points of law. I shall therefore say nothing further about them. Of course, if there were to be a trial, this would not preclude the defendants from taking those points and they could then be decided in the light of the full facts.

10. Conclusion

50. For all the above reasons, I would dismiss this appeal.