Neutral Citation Number: [2021] EWCA Civ 1389

Case No: A1/2020/1490

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT
Mr Justice Stuart-Smith
[2020] EWHC 2211 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/09/2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE GREEN

- -

Between :

Harrison Jalla and Abel Chujor	**Appellants**
- and -	
Shell International Trading and Shipping Co Ltd **Shell Nigeria Exploration and Production Company ltd**	**Respondent**

Appeal (2): Representative Action

- -

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

Hearing dates : 7 & 8 July 2021

- -

Approved Judgment

LORD JUSTICE COULSON :

1 INTRODUCTION

1. The primary issue that arises on this appeal is whether the claims of over 28,000 individuals and communities for 'remediation relief' against the respondents can be pursued by two named individuals by way of a representative action under CPR 19.6(1). Until that part of the claim form was struck out by the judge, the claim was said to be advanced by the two appellants, Harrison Jalla and Abel Chujor, "for themselves and on behalf of the Bonga Community". The Bonga Community was subsequently said to comprise 27,830 individuals and 457 communities in the area of Nigeria affected by the December 2011 oil spill. I shall call them collectively "the represented parties". In a judgment dated 14 August 2020, at [2020] EWHC 2211 (TCC), Stuart-Smith J (as he then was) ("the judge") concluded that, for a variety of reasons, these proceedings could not be pursued by the two appellants as a representative action. Accordingly, he struck out the representative element of the proceedings, leaving just the two appellants' claims in this action. They now appeal against that decision.

2. I address the issues that arise on appeal in this way. In Section 2, I summarise the factual background. That is no more than a summary, because the factual background to this case has been set out in detail, not only in the judge's judgment referred to above, but also in his earlier judgment on limitation issues ([2020] EWHC 459 (TCC)), and in my judgment in this court dismissing the appeal on the limitation issues at [2021] EWCA Civ 63.

3. In Section 3, I address the procedural background by reference to four particular elements: the claims as originally pleaded; the limitation difficulties; the alleged representative nature of the action; and the so-called "refinement" of the pleaded claims during the argument before the judge. I then set out the relevant parts of the judge's judgment in Section 4 and, in Section 5, I identify the two specific grounds of appeal now relied on by way of challenge to that judgment.

4. I set out the relevant law in Section 6 below, at the end of which I summarise what I consider to be the applicable principles. In Section 7, I endeavour to stand back and consider what a representative action is designed to achieve, and whether those aims are capable of being achieved in the present case. Thereafter, I deal with the two specific grounds of appeal: Section 8 considers whether the appellants are right to say that this case is "materially indistinguishable" from the decision of this court in *Lloyd v Google* [2020] QB 747; and Section 9 considers whether the judge erred in holding that the appellants and the represented parties "did not have the same interest in the claim, because each represented individual or community claimant would need to prove that he, she or it had individually suffered loss and damage" as a result of the December 2011 oil spill. There is a short summary of my conclusions in Section 10.

2 THE FACTUAL BACKGROUND

5. The two appellants are both occupiers of land on or inland from a stretch of Nigerian coast spanning Bayelsa State and Delta State. The 27,830 individuals and 457 communities that make up the represented parties are also said to be located along the coast and/or inland. The relevant area covers an area the size of Belgium. Unfortunately, the maps made available by the appellants to explain the geography are

particularly unilluminating; the only one of any clarity does not show the location of any of the represented parties[1]. As a result, and with all due respect to the individuals and communities concerned, when using examples to illustrate some of the points I wish to make below, I must do so by reference to the rather better-known geography of Belgium.

6. The Bonga oilfield is 120 kilometres off this part of the Nigerian coast. The second respondent ("SNEPCO") is domiciled in Nigeria. It operates a FPSO (a Floating Production Storage and Offloading facility) in the Bonga oilfield which is linked to a SPM (Single Point Mooring Buoy) by three submersible flexible flow lines. The oil is extracted from the seabed via the FPSO through the flow line to the SPM and then on to the vessels and tankers which take the oil away.

7. During the night of 19/20 December 2011, the MV Northia moored at the SPM in order to load just under 1 million barrels of crude oil from the Bonga FPSO. Something went very wrong during this operation and there was a significant spillage of oil into the ocean, which was not acted on until 8am on 20 December. The first respondent ("STASCO") is domiciled in the UK and was added as a defendant to these proceedings later, by way of amendment. It is alleged that STASCO is liable in law for the acts or omissions of the master and crew of the MV Northia, although there is a significant dispute about that.

8. The judge concluded that the oil would have reached the shoreline within a few days of 20 December 2011, deciding that it was clear (beyond reasonable argument to the contrary) that actionable damage would have been suffered along most if not all of the affected area within weeks rather than months of December 2011. There is now a dispute about whether damage caused by the oil getting into the inland waterways occurred at a much later date.

9. As set out in the appellants' amended particulars of claim, the damage caused by the December 2011 oil spill has been extensive, causing a dramatic and deleterious effect on fishing, farming, the mangrove forest and the supply of drinking water. Sadly, it appears that, due to the proliferation of oil extraction in West Africa, and numerous problems with oil theft and illegal refining, the December 2011 oil spill is far from being the only oil pollution that has affected this part of Nigeria during the relevant period.

10. The appellant, Mr Jalla, has not been chosen as one of the two representative claimants by accident. He is a respected and important person within the Bonga Community and is associated with a charity known as the Oil Spill Victims Vanguard, known as "OSPIVV". I note that this was set up in January 2012, immediately following the December 2011 oil spill, which is itself an indication of when the oil first began to adversely affect at least some of these communities. The OSPIVV Constitution sets out a number of aims and objectives. One of them is referred to as:

> "Participation in all negotiations and preparation of all texts, acts, guidelines or regulations as well as distribution of allocation of funds that are direct or indirect result of

[1] Mr Cribb explained that the map showed the locations of some of the communities who are not involved in this case but are claimants in what is known as "Jalla 2" (see paragraphs 19 and 21-22 below).

> compensation to victims and communities of oil spill and hazards of gas flaring."

Although it is not entirely clear from these words, it is submitted that if, for example, Mr Jalla was successful in his claim for the cost of a reasonable remediation scheme, the money paid by the respondents would be distributed by OSPIVV.

11. One other point made on a number of occasions by Mr Dunning during his oral submissions was that the 28,000 plus represented parties had all given their authority to be represented by the appellants. Like just about everything else in this case, that is disputed. It is asserted on their behalf that the represented parties had given such authority to the original solicitors when the claims were commenced. Those solicitors have since come off the record and have been replaced. As I understand it, the replacement solicitors are still endeavouring to obtain the necessary authority.

3 THE PROCEDURAL BACKGROUND

3.1 The Original Pleaded Claims

12. The claim form was issued on 13 December 2017, just a week less than 6 years after the December 2011 oil spill. It was served on 4 April 2018. It identified a claim for damages/compensation, interest and costs. The original particulars of claim, served on 10 April 2018, sets out claims for negligence, nuisance, breach of statutory duty, trespass, *Rylands v Fletcher,* and breach of human rights under Nigerian law. They focus on the detrimental effect on the claimants' economic activities and quality of life and are accompanied by a claim for aggravated and exemplary damages. The relevant part of the prayer claims (1) damages; (2) a mandatory injunction requiring the defendants to put in hand a remediation scheme or, in the alternative at (3), the cost of an appropriate remediation scheme to be carried out by a third party[2].

3.2 The Representative Nature of the Action and the Summary Judgment Application

13. The original claim form identified the claimants as being the two appellants "and others". The identity of those "others" was not further explained. The claim form was amended (without leave) when it was served on 4 April 2018, when it was said that the claim was advanced on behalf of the two appellants "for themselves and on behalf of the Bonga Community". The composition of "the Bonga Community" was not explained. There is a separate dispute about the legitimacy of that amendment, and whether the additional words have any legal effect.

14. On 10 April 2018, when the original particulars of claim were filed and served, it was pleaded that the claim was made by the two appellants "for themselves and on behalf of the Bonga Community brought pursuant to CPR part 19 rule 19.6". This was the first express reference to the possibility that these proceedings were being pursued as a representative action. The particulars of claim attached two Schedules. Schedule 1 identified the 27,800 individuals and Schedule 2 identified the 457 communities (whom

[2] The claim for a mandatory injunction is pursued vigorously, despite the fact that the particulars of claim criticises the respondents' "woefully inadequate attempts to clean-up and remediation". On the material currently available, I should have thought that, in principle, a claim for a mandatory injunction requiring STASCO to undertake a large scale remediation scheme, thousands of miles away, was ambitious, as was the proposition that the works to be performed by reference to any such injunction could sensibly be policed by the TCC in London.

collectively I have called the represented parties). They are the parties whom, it is said, the two appellants represent in these proceedings.

15. The respondents sought reverse summary judgment on the basis (amongst other things) that the claims against STASCO were statute-barred and that in consequence, for the reasons explained in paragraph 18 below, the English Courts had no jurisdiction to consider the claims. At the hearings before the judge in September and October 2019, dealing with that application, it was suggested that the claims in nuisance were not statute-barred because the nuisance was continuing. That argument was rejected by the judge in his judgment of 2 March 2020 and subsequently by this court in the judgments of 27 January 2021.

16. The appellants also argued at the hearing, for the first time, that they owned inland properties, in addition to their properties on the coast, which they alleged suffered separate (and later) actionable damage. In consequence of this development, and the possibility that there may have been different damage which occurred on different dates, the respondents were obliged to 'park' the application to strike out on limitation grounds, but maintained their wider point that the action could not proceed as a representative action under r.19.6. That issue was considered by the judge at a hearing on 28 May 2020, and gave rise to the August 2020 judgment under appeal.

3.3 The Remaining Limitation Issues

17. Although a claim arising out of the December 2011 oil spill had been intimated against Shell in July 2012, no steps were taken to commence proceedings until 13 December 2017 (paragraph 12 above). That was one week shy of the expiry of the 6 year limitation period[3]. STASCO were not joined as a defendant until 4 April 2018[4] (more than 6 years after the spill and its immediate aftermath). Furthermore, the critical allegations against STASCO in respect of the MV Northia were deemed by the judge not to have been made until 2 March 2020 (which was the date of his judgment and over 8 years after the spill), giving rise to an even later date for limitation purposes.

18. Although no explanation has ever been given for these various delays, I am in no doubt they have given rise to the bulk of the problems with this litigation, some of which are identified in the judgments of this court at [2021] EWCA Civ 63. Those difficulties are inextricably linked to questions of jurisdiction, because STASCO is the "anchor" defendant: it is the claim against STASCO which allows the appellants to argue that the English Courts should accept jurisdiction. In consequence, as the judge and this court have previously noted, the question of whether or not the claims against STASCO are statute-barred is critical to whether or not the English Courts have jurisdiction to deal with any of these claims *at all*.

19. Following the emergence of the argument that damage inland may have happened significantly after the December 2011 oil spill itself, the judge required the two appellants and all of the represented parties to provide a 'date of damage' pleading, explaining when the oil first struck their land. Although the judge subsequently struck out the claim that this was a representative action and held that it could only be pursued by the appellants as individuals, that actually made no difference to the importance of

[3] The respondents also have a further argument that, in Nigeria, the relevant limitation period is 5, not 6, years.
[4] There is a dispute as to whether they were properly joined on this date.

the 'date of damage' pleadings which he had ordered, because by this time all the represented parties had become claimants in their own right in a separate action against the respondents called Jalla 2. Thus the 'date of damage' pleadings were still required. We were told that such pleadings have recently been provided by one of the appellants and 10 or so of the 28,000 plus represented parties. Mr Dunning said at the hearing of the appeal that an extension of time was being sought in respect of the remainder. I note that, subsequently, O'Farrell J refused the requested extension, which order – if it stands – will have the effect of drastically reducing the scope of these proceedings in any event, whatever the outcome of this appeal.

3.4 The Amendment and Further "Refinement" of the Pleaded Claims

20. The amended particulars of claim add a good deal of detail about STASCO and about the operation of the MV Northia, to set up the necessary allegations of duty and breach. There is very little in the amendments about the loss and damage claimed. No part of the amended pleading explains the basis on which the two appellants can sue on behalf of the represented parties listed in Schedules 1 and 2. The amended particulars of claim appear to use the expression "the Claimants" to mean all the represented parties, not just the two appellants.

21. It is the appellants' case that their pleadings were further "refined" by a concession made in their written submissions provided in advance of the May 2020 hearing before the judge. They repeated this concession at the hearing itself. The refinement was said to arise out of the appellants' assertion that the remediation relief was the central relief sought in these proceedings and that, although they "do not accept that their individualised claims for damages are inconsistent with or incapable of being pursued in a representative action, they are content to pursue those claims in the protected proceedings they have now issued instead ["Jalla 2"], the claims of the Named Claimants [the appellants] aside". Notwithstanding the time that has elapsed since that refinement was identified, the appellants' pleadings have not been formally amended. The appellants say that paragraph (1) of the prayer (the claim for damages noted in paragraph 12 above) should be read as if it had been deleted.

22. In this way, the claims for individual damages by the 28,000 plus represented parties are now being pursued in the separate proceedings referred to as Jalla 2, and not in these proceedings. However, the individual claims by the two appellants themselves, and the claims for remediation relief (either the mandatory injunction or the costs of the clean-up) of all the represented parties, are still being pursued in these proceedings. It therefore remains the appellants' case that this action ("Jalla 1") can be pursued by way of a representative action, on behalf of over 28,000 represented parties scattered across an area the size of Belgium. It is that assertion which, in all the circumstances of this case, the judge rejected; it is that assertion that lies at the heart of this appeal.

4 THE JUDGMENT

23. The judge set out the applicable principles relating to representative actions in some detail, addressing the authorities from [28]-[59], and summarising the relevant principles at [60]. No part of the grounds of appeal or accompanying skeleton argument sought to challenge or criticise the summary at [60], and when invited to do so orally, Mr Dunning's points were brief and, if I may say so, unconvincing. Instead, his focus was on what he submitted was the judge's failure to apply those principles to the facts.

24. The judge's analysis is at [69]-[78]. At [69], he said that there was no doubt that the claims being advanced by the two appellants, and those they claim to represent, "raise some common issues of law and fact". These included the fact of the December 2011 oil spill, how and why it occurred, and whether its occurrence was caused by breach on the part of STASCO or SNEPCO of any duty owed to the Claimants. He was prepared to assume that any duty owed to some of the represented parties would have been owed to all. He also said that it was reasonable to assume that the basis of the claims being brought by individuals and communities in relation to these issues were effectively the same for all practical purposes.

25. However, at [70] and [71] the judge said that this was not enough to make this a representative action under r.19.6. He said:

> "70. Even assuming that all findings were made in the Claimants' favour, the facts and issues outlined immediately above do not give rise to a right to relief because they stop short of landfall or damage to the Claimants' interests. Beyond the common issues of fact and law outlined above, these proceedings are individual claims because each Claimant (or possibly small group of Claimants living in a particular community) and each community needs to go further and prove that Bonga oil caused them damage. Adopting the language of Lord Macnaghten, the matters in which the Claimants may have a common interest are not sufficient to enable the Court to "try the right". That is not changed by the expedient of abandoning the individual Claimants' individualised claims for damages in these proceedings and pursuing them in another action, though the obvious purpose of taking that step was to align the position of the Claimants in this action more closely with the facts of *Lloyd v Google*. The difficulty for the Claimants is that, whether claiming individualised damages or "remediation relief", any individual or community Claimant will need to prove that they have been adversely affected by Bonga oil pollution. By their skeleton argument for the present hearing the Claimants accepted that they need to show that they have suffered some damage in order to complete the causes of action upon which they rely for their claims. I agree, but would go further: it will be necessary for them to show that they have suffered damage to an extent that justifies their claim for "remediation relief".
>
> 71. The Defendants make it clear that they would raise substantial objections to the English court granting "remediation relief" by ordering either an English company (STASCO) or a Nigerian company (SNEPCO) to remediate damage to land situate in Nigeria, as requested by paragraph 2 of the prayer in these proceedings. Leaving those objections on one side, the Court could not make such an order (or the orders sought in the alternative of paying the costs of remediation works) without investigating precisely where such remediation was required and whether it was attributable to the 2011 Bonga oil spill. No principle of law has been identified that would enable a Claimant or community at one location in the allegedly affected area to claim remediation for damage suffered by another

> community at another location or for the whole area. It is therefore, in my judgment, a misuse of language to characterise the "remediation relief" that an individual or community Claimant seeks as being relief that is beneficial for all whom the Lead Claimants propose to represent. If one community were to succeed and another were to fail in proving its individual loss and damage, any order for "remediation relief" would necessarily be restricted to the loss and damage proved by the successful community. That would not be beneficial for all as it would be limited to the consequences and need for remediation affecting the successful community. It is possible to imagine a patchwork of success, but not obvious that even such a patchwork would justify orders for the wholesale remediation of all consequences of the Bonga oil spill apparently contemplated in these proceedings."

26. At [72], the judge dealt with whether or not the existence of what he called "individualised claims" prevented an order for representative proceedings. He was clear that, in principle, they did not. But he went on to examine those claims in the context of the action overall:

> "72. In principle, the existence of individualised claims does not necessarily prevent an order for representative proceedings. The question is whether the individualised claims can be regarded as "subsidiary" to the main issue that is the subject of the proceedings. In my judgment it is impossible to do so. I do not underestimate the significance of or, in general terms, the resources that will need to be devoted to the common issues. The court cannot form a precise estimate of the resources that would need to be devoted to the common issues and the individualised issues respectively, but the evidential complexity inherent in proving pollution caused by the 2011 Bonga oil spill over the wide area that is apparently the subject of these proceedings can readily be appreciated. The need for (a) individual evidence of damage and (b) extensive expert evidence on pollution migration and attributing damage to the Bonga oil spill when the damage is said to have occurred years later and great distances from the coast is self-evident to anyone with experience of such litigation. Although I make no findings of fact, the difficulties of attribution of causation are highlighted by the evidence of Ms Keibi Atemie who describes many other sources of oil pollution that plague the Nigerian coast and hinterland. Nor can it be said that the issues of loss, damage and causation are subsidiary in importance to the Claimants since they are just as critical as the common issues (as outlined above) to any prospects of any success or relief at all. They are not "subsidiary" to another issue that can be described as "the main issue": they are an integral part of the overall issues that are raised by the proceedings."

27. The judge's conclusion that the represented claimants did not satisfy the requirement of "the same interest" (either as between themselves or as between themselves and the two appellants) can be found at [74]-[76] as follows:

> "74. It is obvious that individualised factual and causation defences will be raised in relation to all individual claimants (or groups of individual claimants from one location) and all communities. The Claimants submit that limitation is not an issue to be brought into account because it has been decided by the March judgment. I disagree. Although the principles and framework have been established, it may safely be predicted that the Defendants would scrutinise the dates on which damage is alleged to have been suffered by individuals and communities alike with a view to running individualised limitation defences (whether on the basis of a limitation period of five or six years).
>
> 75. Standing back, I do not accept that the demonstration of some common issues of law and fact is sufficient to satisfy the requirement that the multiple parties have "the same interest" within the meaning of CPR r. 19(6)(1) and in accordance with the principles that I have identified earlier in this judgment. The matters that the Claimants have in common are insufficient to lead to the relief that they claim; and it is impossible to escape the conclusion that these are a very large number of individual claims requiring individual consideration and proof of damage and generating individual defences.
>
> 76. In the period to 19 September 2019 it might have appeared possible, at a stretch, to treat the suffering of damage and defences of limitation monolithically, in which case it might have been tempting to formulate the common issues in terms that could give rise to the claimed relief. However, since the Claimants' case began to shift on that date, it has become increasingly clear that such an approach would have been mistaken."

5 THE TWO GROUNDS OF APPEAL

28. The two grounds of appeal must be considered by reference to the applicable law (Section 6 below), and against a backdrop of what a representative action under r.19.6 is designed to achieve, and whether that is possible or practicable here, given the particular features of these proceedings (Section 7 below).

29. Ground 1 of the appeal is that:

> "The Learned Judge erred in law in failing to hold that the instant proceedings are materially indistinguishable from the decision of the Court of Appeal in *Lloyd v Google* [2020] QB 747, in which a valid representative action was held to be established, as the "same interests" requirement was satisfied."

30. This ground of appeal obviously involves a consideration of *Lloyd v Google,* and a comparison with the present case. This debate has not been significantly hampered by the absence of the judgment of the Supreme Court in *Lloyd v Google*. That is because, at least in some ways, the judgments in *Lloyd v Google* in the Court of Appeal represent the high water mark of the appellants' case and are binding on this court. Lord

Goldsmith was quite prepared to meet the arguments on ground 1 on the assumption that *Lloyd v Google* was correctly decided. I set out my views on ground 1 in Section 8 below.

31. Ground 2 of the appeal is that:

> "…the learned Judge erred in law in holding that the Named Claimants and the Bonga Community did not have the same interest in their claim, because each represented individual or community claimant would need to prove that he, she or it had individually suffered loss and damage as a result of Bonga Spill."

32. Although the respondents' primary response to this ground is to submit that it criticises the judge for a conclusion he did not reach, I have widened my analysis of this ground in Section 9 below to address some of the other arguments advanced by the appellants which do not otherwise fall to be considered under the preceding Sections of this judgment.

6 THE LAW

33. The court was referred to a good number of authorities and there were many more in the bundles to which we were not taken. I have considered all of the authorities in the bundles for the purposes of this judgment. I have set out below only those which I consider to be of significance in the development of the law in this area. Other than *Duke of Bedford v Ellis* [1901] AC 1, the other cases to which I refer are of much more recent vintage.

34. The starting point is the CPR. Rule 19.6(1) provides as follows:

> "**19.6**
> (1) Where more than one person has the same interest in a claim –
> (a) the claim may be begun; or
> (b) the court may order that the claim be continued,
> by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest."

In the interests of shorthand, I refer to an action of the kind envisaged by r.19.6(1) as "a representative action".

35. In *The Duke of Bedford v Ellis*, six individual stallholders at Covent Garden sued the owner, the Duke of Bedford, seeking declarations and an injunction to restrain the Duke from overcharging. The claim was brought on behalf of all the stallholders. The Duke challenged the legitimacy of the action. Lord Macnaghten said:

> "If the persons named as plaintiff are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse…in considering whether a

> representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members."

36. In this way, the House of Lords decided that the claim was properly brought as a representative action. Lord Shand justified this on the basis that the rule saved "the multiplication of action, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant." Lord Shand also went on to address the claims for financial loss suffered by individual growers. He said that was a "subsidiary matter" because the real issue in dispute was the nature and extent of the privileges granted to all the stallholders, in which they had the same interest.

37. In *Prudential Assurance Co Ltd v Newman Industries and others* [1981] 1 Ch 229, a representative action alleging conspiracy and fraud was brought by shareholders against the company and directors. Although all the shareholders had received the allegedly fraudulent circular and so were in the same position in respect of the breach, Vinelott J was concerned that the defence would be raised that some individual shareholders had suffered damage and others had not. He said that this was contrary to the first condition for representative actions, which was that any order in the representative action must not confer a right of action on a member of the represented class who would not have otherwise been able to assert such a right in separate proceedings, or bar a defence otherwise available to the defendant in a separate action. In consequence, he found that the plaintiff shareholder could bring a representative action on behalf of the shareholders, but only for declaratory relief, and not for damages. Any damages claims would have to be proved individually by each shareholder outside the representative action.

38. At 251H-252B, Vinelott J said:

> "These cases common in my judgment, establish two positions. First, no order would be made in favour of a representative plaintiff if the order might in any circumstances have the effect of conferring on a member of the class represented a right which it could not have claimed in a separate action or of barring a defence that the defendant could have raised in such proceedings. Secondly, no order will be made in favour of a representative plaintiff unless there is some element common to the claims of all members of the class which he purports to represent. But these two cases do not, in my judgment, establish the wider proposition for which Mr Scott contends, namely, that the Court has no jurisdiction in any circumstance to entertain an action by a plaintiff claiming to represent a class in cases where the cause of action of the plaintiff and of each member of the class is, or is alleged to be, a separate cause of action founded in tort."

Although the case went to the Court of Appeal, the conclusions in that passage were not the subject of the appeal.

39. In *Irish Shipping Limited v Commercial Union Assurance Co. PLC* [1991] 2 QB 206, there was a claim by shipowners against the leading underwriter and one of the 77 other subscribing insurers. The Court of Appeal rejected the submission that the inclusion of claims for debt or damages to be paid by the representing insurers precluded the use of a representative action, Staughton LJ saying expressly that it was not the law "that claims for debt or damages are automatically to be excluded from a representative action, merely because they are made by numerous plaintiffs severally or resisted by numerous defendants severally. The rule is more flexible than that." However, Staughton LJ went on to say that, in principle, the raising of different defences on individual contracts, such as misrepresentation, non-disclosure, or lack of authority to sign, might give rise to a different conclusion, but that such issues did not appear likely to arise on the facts of that case (see 227F). He went on to observe at 227H-228A that the insurers' defences all appeared to be the same, although he had no qualms about a proceeding which allowed additional grounds to be argued by others "if they do not wish to join in the action".

40. In *National Bank of Greece v Outhwaite* [2001] CLC 591, Andrew Smith J referred to the overriding objective and said that r.19.6 should be interpreted "in a way that makes the representative proceedings machinery available in cases where its use would save expense and enable a matter to be dealt with expeditiously". This observation echoed Megarry J's earlier comment in *John v Rees* [1970] 1 Ch 345 that the rule was to be treated "as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice." As the judge correctly observed below (see [45]), Andrew Smith J's comment cannot mean that the overriding objective provided separate and sufficient criteria for representative proceedings that supersede the terms of r.19.6(1) itself.

41. In *Independiente Limited and Ors v Music Trading On-line (HK) Limited and Ors*. [2003] EWHC 470 (Ch), a claim was brought by certain claimants suing on behalf of themselves and representing all other members of the British Phonographic Industry Limited ("BPI") and Phonographic Performers Limited ("PPL") who were the owners of licensees of the UK copyright in various sound recordings. The claim against the defendants was for an injunction and damages arising out of the sale of bootleg CDs. There was an issue as to whether the action properly fell within the provisions of r.19.6. Sir Andrew Morritt VC found that all the represented parties had an "identical" interest in the injunction (see [27]), and that any pecuniary relief was, by its nature, equally beneficial to BPI and PPL and to the represented parties. In reaching this conclusion, he adopted the approach in an earlier case on very similar facts to which we were also referred, namely *EMI Records Ltd v Riley* [1981] 1 WLR 923.

42. In *Millharbour Management Limited and Ors v Western Homes and Anr* [2011] EWHC 661 (TCC), Akenhead J was grappling with the issue of generic defects in a block of flats where some of the claimants were owner/occupiers who had entered into contracts of sale with the defendants (and who therefore had claims in contract), whilst others were sub-tenants of a housing association (and had claims against the defendants under the Defective Premises Act). Both the owner/occupiers and the housing association tenants were liable to pay a service charge for the costs of repair and maintenance. The judge concluded that, on the facts, this was properly constituted as a representative action.

43. He summarised the relevant principles at [22], where he described the requirement of "the same interest" as "a threshold point which must be established by reference to the facts so far as it is possible to ascertain the facts at the time when the court considers the representative capacity of any party." He went on:

> "(3) The question of whether and the extent to which parties have the same interest can only be answered by reference to the facts of the particular case, albeit that it will be necessary to determine, amongst other things, whether the representing party and the represented parties in effect have the same cause of action or liability as the case may be, subject of course to the relevant facts ultimately being found."

44. In that case, there was no conflict between the two groups of claimants because, although the legal basis for their claims was different, the defects complained about were broadly the same and equally affected both groups. There was no evidence that specific and particular defences would be raised in relation to the individual flats. The defence that the defects were not as widespread as the claimants maintained was, according to the judge, "essentially a generic defence". Limitation issues were recognised as giving rise to a potential difficulty (see [34]) but the judge considered that, on the facts of that case, one way round that might be to limit the representative capacity to a given date.

45. *Emerald Supplies v British Airways PLC* [2010] EWCA Civ 1284; [2011] Ch 345 is important because, in the later case of *Lloyd v Google*, it was described by the Chancellor as "the latest authoritative statement" on the principles to be applied under r.19.6. The claimants, who were importers of flowers, claimed against BA on the basis of alleged price-fixing agreements. They claimed on their own behalf and on behalf of all other direct or indirect purchasers of air freight services. Mummery LJ summarised the applicable principles at [4], where he said:

> "4. No group litigation order was sought in this case, which relates to the jurisdictional and discretionary aspects of an order for representative parties. CPR 19.6 requires the parties in question (in this case the claimants and those whom they purport to represent) to have "the same interest." As Professor Zuckerman explains, the key factor in representative proceedings is identity of interest in the relevant group. That identity of interest is determined with a view to promoting the litigation objectives of justice, economy, efficiency and expedition. Although the modern trend is to give the rule an increasingly liberal interpretation, so that the court can deal with as many claims as possible within one set of proceedings, Professor Zuckerman comments (at paragraph 12.27) that "it is not surprising that the use of this procedure has so far been confined to situations where the interests of the representatives and the represented were virtually the same." That approach is conditioned by two principal considerations: first, the binding effect of the proceedings on the represented persons, who have not given their leave to litigate on their behalf and do not actively or actually participate in the proceedings; and, secondly, the limited powers of the court to ensure that the proceedings are conducted in the interests of all the represented

> persons. The potential presence of separate defences also militates against representative proceedings by claimants: a defendant should not be prevented from raising a defence that he may have against only some of the persons represented."

46. The Court of Appeal ruled that the action was not appropriate for a representative action. This was because: i) it was impossible to ascertain whether or not a person was a member of the represented class until after the issue of liability had been tried; and ii) the defendant would have had defences against some but not others of the represented class, which meant that they had different interests. Mummery LJ said:

> "62. In my judgment, Emerald's case for a representative action, whether as originally pleaded or as proposed to be amended, is fatally flawed. The fundamental requirement for a representative action is that those represented in the action have "the same interest" in it. At all stages of the proceedings, and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having "the same interest" as Emerald.
>
> 63. This does not mean that the membership of the group must remain constant and closed throughout. It may indeed fluctuate. It does not have to be possible to compile a complete list when the litigation begins as to who is in the class or group represented. The problem in this case is not with changing membership. It is a prior question how to determine whether or not a person is a member of the represented class at all. Judgment in the action for a declaration would have to be obtained before it could be said of any person that they would qualify as someone entitled to damages against BA. The proceedings could not accurately be described or regarded as a representative action until the question of liability had been tried and a judgment on liability given. It defies logic and common sense to treat as representative an action, if the issue of liability to the claimants sought to be represented would have to be decided before it could be known whether or not a person was a member of the represented class bound by the judgment.
>
> 64. A second difficulty is that the members of the represented class do not have the same interest in recovering damages for breach of competition law if a defence is available in answer to the claims of some of them, but not to the claims of others: for example, if BA could successfully run a particular defence against those who had passed on the inflated price, but not against others. If there is liability to some customers and not to others they have different interests, not the same interest, in the action.
>
> 65. In brief, the essential point is that the requirement of identity of interest of the members of the represented class for the proper constitution of the action means that it must be representative at every stage, not just at the end point of judgment. If represented persons are to be bound by a judgment that judgment must have been obtained in

> proceedings that were properly constituted as a representative action *before* the judgment was obtained. In this case a judgment on liability has to be obtained before it is known whether the interests of the persons whom the claimants seek to represent are the same. It cannot be right in principle that the case on liability has to be tried and decided before it can be known who is bound by the judgment. Nor can it be right that, with Micawberish optimism, Emerald can embark on and continue proceedings in the hope that in due course it may turn out that its claims are representative of persons with the same interest."

47. *Lloyd v Google* was a claim brought on Mr Lloyd's own behalf and on behalf of more than 4 million users of iPhones for damage suffered by reason of Google's alleged breach of its duties under the Data Protection Act 1988 in tracking and using the browser-generated information of users of a particular smart phone without their consent. Mr Lloyd made it plain that he was not claiming loss and damage based on how any individual represented person may have been affected by the breach. Instead he claimed a uniform sum in respect of the loss of control over data. On this basis, the Court of Appeal allowed the representative action to proceed. Sir Geoffrey Vos said at [75]:

> "75. In my judgment, however, the judge applied too stringent a test of "same interest", partly I think because of his determination as to the meaning of "damage". Once it is understood that the claimants that Mr Lloyd seeks to represent will all have had their BGI – something of value - taken by Google without their consent in the same circumstances during the same period, and are not seeking to rely on any personal circumstances affecting any individual claimant (whether distress or volume of data abstracted), the matter looks more straightforward. The represented class are all victims of the same alleged wrong, and have all sustained the same loss, namely loss of control over their BGI. Mr Tomlinson disavowed, as I have said, reliance on any facts affecting any individual represented claimant. That concession has the effect, of course, of reducing the damages that can be claimed to what may be described as the lowest common denominator. But it does not, I think, as the judge held, mean that the represented claimants do not have the same interest in the claim. Finally, in this connection, once the claim is understood in the way I have described, it is impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others. The wrong is the same, and the loss claimed is the same. The represented parties do, therefore, in the relevant sense have the same interest. Put in the more old-fashioned language of Lord Macnaghten in *The Duke of Bedford* at [8], the represented claimants have a "common interest and a common grievance" and "the relief sought [is] in its nature beneficial to all"."

48. Finally, I should mention the decision of the High Court of Australia in *Carnie v Esanda Finance Corporation Limited* [1995] HCA 9, which was not referred to or relied on by Mr Dunning, but which is given some prominence in the commentary at 19.6.3 of the White Book 2021. That referred to the requirement for a representative action being merely "a significant common interest in the resolution of any question of law or fact

arising in the relevant proceedings". Three points emerge from an analysis of this decision. First, the Australian rules applicable at the time did not allow for Group Litigation Orders ("GLOs"), which may explain the potentially wide ambit given in *Carnie* to the requirements of a representative action. Secondly, the court did not in fact conclude that a representative action was appropriate in that case: they remitted that issue back to the lower court. Most important of all, the potentially broad approach to the rule in *Carnie* finds no support in any of the English authorities to which I have referred, and is contrary to the approach in many of them, particularly *Emerald Supplies*.

49. Standing back for a moment, it is right to note that, as a matter of law and practice in England and Wales, representative actions are relatively uncommon (see the passage to that effect at [4] of the judgment in *Emerald Supplies*, cited at paragraph 45 above). In cases where there are a large number of claimants with some or even many facts common to their individual claims, but where there are also not insignificant differences, the parties and/or the courts will usually choose one of two other options. The first is the making of a GLO, as discussed by Mummery LJ at [3] of his judgment in *Emerald Supplies*. They are regularly used in environmental cases: indeed, the judge himself tried just such a claim in the TCC: see his judgment (running to 1,885 paragraphs) in *Ocensa Pipeline Group Litigation* [2016] EWHC 1699 (TCC).

50. The other methodology, also common in TCC cases, is for all the claimants to be parties to the action in their own name, and where a representative sample are then taken to be lead claimants for the purposes of deciding the substantive issues in the case. Careful sampling by both sides to arrive at a representative group of lead claimants is, in my experience, by far the best way of ensuring that, in such cases, the claimants as a whole can take advantage of those matters on which they have a genuine common interest, whilst also allowing decisions on the range of individual points and defences that may arise, some affecting one group of claimants, some another. The results are then extrapolated across all the claimants. I note that that happened in *Ocensa* too, where there were four 'trial claims'.

51. Neither of those options involve the particular requirements and limitations of a representative action under r.19.6 which are apparent from the authorities noted above. I would summarise those requirements and limitations as follows:

a) A representative action is a particular form of multi-party proceeding with very specific features. One such feature concerns the congruity of interest between representative and represented. Another is the need for certainty at the outset about the membership of the represented class.

b) The starting point (or threshold) for any representative action is that the representing parties must have "the same interest in a claim" as the parties that they represent.

c) "The same interest" is a statutory requirement which cannot be abrogated or modified (see [74] of *Lloyd v Google*). It was described by Gloster LJ in *Re X and others* [2015] EWCA Civ 599, [2016] 1 WLR 227 as "a non-bendable rule".

d) The reason why the represented parties need to have the same interest in a claim as the representative claimant is because the represented parties are bound by the

result of the representative action. That is what Mummery LJ in *Emerald Supplies* called "the binding effect of the proceedings".

e) The court will adopt a common sense approach to this issue. It must be the same interest "for all practical purposes" (the expression used by Staughton LJ in *Irish Shipping* at 227G); or it must be "in effect the same cause of action or liability" (the expression used by Akenhead J in *Millharbour* at [22(3)]. This avoids the sort of rigidity deprecated by Megarry J in *John v Rees*.

f) In this way, it is easy to see why all the stallholders in *Duke of Bedford v Ellis*, and all the shareholders in *Prudential Assurance*, had the same interest in the injunction and the declarations sought. Similarly, in *Lloyd v Google*, the Chancellor said of the relationship between the representative and the represented parties that "the wrong is the same, the loss claimed is the same. The represented parties do, therefore, in the relevant sense have the same interests."

g) It may not affect the making of an order for a representative action if the represented parties also have their own separate claims for damages. In the copyright collection cases (such as *Independiente),* where the emphasis was on the injunction for breach of copyright, the damages were of secondary importance: they simply paid the costs of the policing operation. Individual claims for damages, which were regarded as "subsidiary" in *Duke of Bedford v Ellis,* can be the subject of an inquiry or an account, or they can lead to subsequent individual claims (outside the representative action), which was the approach adopted in *Prudential Assurance*.

h) Thus, the existence of individual claims for damages is not necessarily a bar to their being dealt with in some way via a representative action. It will always depend on the factual circumstances.

i) The analysis of "the same interest" is undertaken by the court at the time of the application under r.19.6. The court has to consider what the issues are likely to be by reference to all the information then available (see Akenhead J at [22] of *Millharbour*). To the extent that Lord Macnaghten in *Duke of Bedford v Ellis* was suggesting that the exercise should be carried out solely by reference to the claimants' pleadings, that is emphatically no longer the practice, as demonstrated most recently by *Emerald Supplies*, *Millharbour* and *Lloyd v Google*.

j) These later authorities also show that it is necessary to consider the likely defences as part of the analysis. So in *Irish Shipping*, although potential defences were identified, at 227F Staughton LJ said that they were "unlikely to arise". The suggestion is that, if they had arisen, the case would have been decided differently. In *Emerald Supplies*, on the other hand, Mummery LJ said at [64] that "if there is liability to some customers and not to others they have different interests, and not the same interests, in the actions." In *Lloyd v Google*, the court expressly took into account the fact that it was "impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others."

k) Likewise, depending on the circumstances, limitation defences may be a factor to be taken into account when assessing whether or not to make an order under r.19.6: see [22(7)] of the judgment in *Millharbour*.

l) As to the equally fundamental requirement that membership of the represented class must be capable of being ascertained at the outset of the proceedings, I can do no better than repeat Mummery LJ's words in *Emerald Supplies* (see paragraph 46 above): "It cannot be right in principle that the case on liability has to be tried and decided before it can be known who is bound by the judgment".

7. A REPRESENTATIVE ACTION: WHAT IS RULE 19.6 INTENDED TO ACHIEVE AND CAN THAT CAN BE ACHIEVED IN THIS CASE?

7.1 Purpose

52. The primary purpose of r.19.6 and the making of an order constituting a claim as a representative action is to save time and costs. In the right case, such an order is efficient and convenient. If A and B can represent C-D, without C-D being parties to the proceedings, but with C-D being bound by the result, then there is a considerable saving of time, costs and effort. Allied to that is the avoidance of procedural complexity. In a properly-constituted representative action, there need be no concern about whether all the relevant parties are before the court. The purpose of a representative action is to ensure that the claims of the representatives are tried, with the result equally binding on all those whom they represent.

53. These obvious benefits mean that the issue as to whether or not the representatives have the same interest in the claim as the represented persons becomes critical, and has to be the subject of a careful evaluation. On the findings made by the Court of Appeal, *Lloyd v Google* is a paradigm example of a representative action. On the facts, the representative had the same claim as the 4 million he represented, which gave rise to the same damage and in respect of which Google would have the same defences. Instead of 4 million claimants, there was one, with the result of his claim then binding the 4 million.

54. So, if the claims made by the representatives are successful, then so too are the claims of the represented parties. Conversely, if the claims made by the representatives fail, then so do the claims of the represented parties. The court only tries the claims of the representatives; it does not consider the individual claims of the represented parties. The whole point of a representative action is that it avoids such granularity; otherwise its principal benefit is lost.

55. It is therefore easy to see why, in a certain kind of pollution case, a representative action is an appropriate course. Say, for example, a group of residents are troubled by the emissions from the chimney of a chemical plant. If those residents sought an injunction against the company, it is overwhelmingly likely that they would have the same interest in the claim and therefore could be represented by one of their number. That very example of a claim in tort meeting the requirements of "the same interest in a claim" is expressly set out at page 139 g of the report of *Radcliffe and others v Coltsfoot Investments Ltd* [1987] LRC (Comm) 127. Conversely, it is much more difficult to see the requirement being met in a situation where the residents have claims for different personal injuries arising from the pollution caused by the chimney. In such a case, there will usually be a group litigation order ("GLO") instead. Two examples of pollution cases in the TCC which were tried by way of a GLO are the *Corby* litigation [2009] EWHC 1944 (TCC) and *Barr v Biffa Waste* [2011] EWHC 1003 (TCC). Both were the subject of a GLO and were not representative actions under r.19.6.

56. Some of the reporting of and commentaries about the judge's judgment in this case suggested that the English Courts were unwilling or unable to deal with multi-party environmental claims. That could not be further from the truth, as paragraphs 49-55 above have, I hope, explained. For a wider discussion about the English Courts' willingness to accept jurisdiction in environmental cases of precisely this sort, see *Vedanta Resources PLC v Lungowe and Others* [2019] UKSC 20, where jurisdiction was accepted by the TCC, a decision subsequently upheld by the Court of Appeal and the Supreme Court. It is not therefore in issue that, in an appropriate case, the English Courts will accept and then case manage claims like this through to judgment. But the issue here is very different and much more limited: it is whether *these particular proceedings* are properly constituted as a representative action.

7.2 The Present Case

57. On a proper analysis of these proceedings, none of the purposes of a representative action can be achieved. This is not, and never could be, a representative action.

58. The primary reason for that conclusion was illustrated during Mr Dunning's oral submissions. In the way in which he suggested that this litigation would have to be tried, there would be no saving of time and cost. In fact, there would be no benefit at all in treating this as a representative action: it would become a representative action in name only, and not in substance.

59. This was because Mr Dunning accepted in argument that these proceedings would have to be case-managed and tried as if they were in excess of 28,000 individual claims. He expressly agreed that issues such as limitation, alternative causation, and whether the damage to each parcel of land justified the remedial scheme claimed for, would have to be addressed, in some way or other, on an individual basis, represented party by represented party.

60. These points came into sharp focus when Mr Dunning was asked what would happen if the court determined that the claims brought by the two appellants were statute-barred or otherwise failed. In a representative action, because the represented parties' claims stand or fall on the determination of the claims of the representatives, the dismissal of the representatives' claims would bring about the end of all the claims. But Mr Dunning submitted that, here, if one or both of the two appellants' claims failed, say, on grounds of limitation, new representatives would then be put forward from the 28,000 plus represented parties, and that those new representatives would then represent those whose claims were not (or which they said were not) statute-barred[5]. There are at least two fundamental objections to any such course.

61. First, it would involve a form of "rolling" representative action, where (at least potentially) no represented party was bound by the court's determination of anyone else's claim. It would require the respondents to defeat the claim of the two appellants, and then wait for the next two representatives to be chosen and to go on and endeavour to defeat those claims too. And so on. I venture to suggest that no representative action has ever been conducted in such a way. The reason? Because the existence of the

[5] My lord, Lord Justice Green, asked Mr Dunning if there were any of the represented parties who "covered everything" i.e parties whose claims would involve a consideration of all the issues likely to arise in the case. Mr Dunning could not say.

manifestly different interests of the represented parties mean that it is not a representative action in the first place.

62. Putting the point another way, there could be no benefit to all even if, say, Mr Jalla's claim was upheld. The represented parties would not benefit from a finding that Mr Jalla had suffered a compensatable injury; the only thing that would matter to any of the represented parties was whether or not that represented party had themselves suffered a compensatable injury. If there is no benefit to all, there is not the same interest in the claim.

63. Secondly, Mr Dunning's solution presupposed that the two new representatives (who, on this scenario, would have replaced the appellants) had claims which were not statute-barred, and which would also succeed on causation and the justification of the claimed remedial scheme. But whether or not the claims of the new representatives actually met those requirements could only be determined by the court. So it would mean that the court would inevitably be determining, on a case-by-case basis (whether using sampling or not), whether or not each individual claim was statute-barred and/or had demonstrated the necessary or any damage to land and/or that the damage complained of was caused by the December 2011 oil spill.

64. Not only is that not a representative action (and instead the equivalent of the trial of 28,000 plus individual claims), but it is also wholly contrary to the authoritative decision of this court in *Emerald Supplies*. Mummery LJ said "it defied logic and common sense" if the issue of the defendants' liability to the parties who sought to be represented had to be decided before it was known whether the individual was or was not a member of the represented class. Yet that is precisely what Mr Dunning envisages, potentially working through the claims of each of the 28,000 plus represented parties. In my judgment, such a proposal again demonstrates that this is simply not a representative action[6].

65. Further, the conduct of this case has not reduced procedural complexity: on the contrary, it has added to it. To use Lord Shand's words, it has resulted in a "multiplication of action", not the opposite. The claims of the represented parties have essentially been split into two, with their claims for their share of the cost of any remedial works (assuming an injunction is refused) to be determined in these proceedings (Jalla 1), and their claim for what the judge called "individualised damages" (personal injury, damage to fishing and other rights and so on) to be heard under the umbrella of Jalla 2. The judge said that it was unique in his experience for one claimant to bring two separate actions for two different heads of loss and damage arising out of the same underlying claim. It certainly is unique in mine.

7.3 Access To Justice

66. Mr Dunning submitted early on in his oral submissions that there were only two ways in which this litigation could have been progressed: either by way of a GLO or a representative action. His suggestion was that, if this court did not allow the appeal, in

[6] I acknowledge that the judge dealt briefly with the issue of ascertainment of the class at [78] and found in favour of the appellants. There is no cross-appeal. But the judge was dealing with a specific issue of identity, by reference to the names in the Schedules. The point of principle arising from *Emerald Supplies* is much broader, and is inextricably linked to the issue on appeal, namely whether this action was ever capable of being constituted as a representative action.

circumstances where there was no GLO, the appellants (and more particularly, the represented parties) would be denied access to justice.

67. With respect, I consider that analysis to be wrong. These proceedings could (and perhaps should) have been brought by way of a GLO. Each side blames the other for why this action was not so brought, but the fact remains that it was not. This action could also have been brought by the 28,000 plus represented parties as individual claimants with one consolidated particulars of claim, and then case-managed sensibly so that sufficient sample claimants and claims were determined by the judge for extrapolation purposes. It is not as if those acting for the appellants did not have the relevant information as to the identities of the represented parties; they were able to serve the particulars of claim with the 28,000 plus names in two Schedules. In consequence, if there is a problem now because the claim form was only issued in the name of the two appellants, that is of the appellants' and the represented parties' own making; it is not a question of access to justice.

68. This is a convenient place to deal with another submission which Mr Dunning made for the first time during his oral submissions. He suggested that these proceedings were properly constituted as a representative action because the 457 communities in Schedule 2 could not bring legal proceedings on their own behalf (having no legal status or personality), and always required to be represented by an individual. In my view, that is a red herring. That the individual communities do not have legal status, and therefore require to be represented by an individual, is doubtless a factor which has been sorted out for the purposes of Jalla 2. But the mere fact that each community needs to be individually represented does not mean that it follows that the particular appellants here are able to represent all of them *by way of a representative action*, for all the reasons previously given.

7.4 The Appellants' Reasons

69. In the light of all this, it may be wondered why the appellants are so keen for this to be designated a representative action pursuant to r.19.6? When my lord, Lord Justice Green, put that question to him, Mr Dunning simply said "that is the way it was commenced", an answer he repeated a little later. Of course, the respondents deny that it was validly commenced as a representative action anyway: see paragraphs 13-16 above. But leaving that aside, if an action is not, on analysis, a representative action under r.19.6, the fact that the claimants purported to start it as such can be of no relevance.

70. I am in no doubt that, in the present case, the appellants' real concern is that, if the judge's order stands, they will face yet another limitation difficulty. Indeed, Mr Dunning fairly accepted that "there is a time bar problem if it is struck out". But again, it seems to me that, if the court concludes that an action is not a representative action under r.19.6, then the fiction should not be maintained that it is, merely to protect the claimants from the limitation consequences of that conclusion.

71. Furthermore, there are two sides to the limitation coin. It should not be forgotten that, on the respondents' case, the appellants' attempt to categorise this as a representative action is an attempt to backdate the commencement of the claims of the 28,000 plus represented parties to December 2017, despite the fact that the claim form of that date made no mention of them. Accordingly, the proposed designation of this action as a

representative action is mired in the limitation arguments either way. In my view, they must be disregarded for the purposes of the r.19.6 analysis.

72. This Section of my judgment demonstrates that this action was not, and is not envisaged by the appellants and the represented parties to be, a representative action at all. The represented parties do not agree to be bound by the result of the claims brought by the appellants. They want their own individual claims for remediation relief to be addressed, just as their claims for individualised damages will be assessed in Jalla 2. The membership of the relevant class is impossible to ascertain at this stage, or at any stage prior to judgment. The reason why the appellants want the action to be designated a representative action is not concerned with the merits of such a designation at all; it is solely concerned with the tangential issue of limitation which is irrelevant either way.

73. So, subject to an analysis of grounds 1 and 2 of this appeal producing a different or modified answer to the primary question, I conclude that the judge was right to find that, as a matter of principle, this was not a representative action.

8 GROUND 1: IS THIS CASE "MATERIALLY INDISTINGUISHABLE" FROM *LLOYD V GOOGLE*?

8.1 The Issue

74. Mr Dunning submitted that, just as in *Lloyd v Google* where the represented parties had suffered the same type of loss as Mr Lloyd, the represented parties in the present case had all suffered the same type of loss. He relied on the reasoning in *Lloyd v Google* by analogy to say that the same result should follow because this case was "materially indistinguishable".

75. Lord Goldsmith rejected that proposition. He said that in *Lloyd v Google*, the wrong was the same, the loss was the same, and the defences were the same. But he argued that here, there were a plethora of different issues involving (amongst other things) whether or not there has been damage to an individual's land, whether that damage was sufficient to justify remediation, and of course the limitation argument.

8.2 Discussion

76. I consider that, for the reasons set out below, this case is not "materially indistinguishable" from *Lloyd v Google*. On the contrary, it is a very different case.

8.2.1 Different Causes of Action

77. In *Lloyd v Google*, the cause of action was a statutory claim where all the represented parties had, by definition, suffered the same breach and the same type of damage, namely the loss of control or loss of autonomy in their confidential information.

78. The present case involves a claim which, whether it is put in nuisance, negligence or howsoever, requires proof of actual damage to land to complete the individual cause of action. Mr Lloyd could disavow the individual facts of each represented person in *Lloyd v Google*, but in the present case, the individual facts relating to each parcel of land will or might be different (as outlined in greater detail below) and each would have to be investigated to see whether or not the owner/occupier of the land in question had a cause of action at all.

79. Further, there is the related point, by reference to what Mummery LJ said in *Emerald Supplies*. Here, it is only if the represented parties can show that their land was damaged by the December 2011 oil spill that they potentially become members of the class that deserves/requires representation. That requires a trial before it can be ascertained. Again, that difficulty simply did not arise in *Lloyd v Google*.

8.2.2 Relief Claimed

80. In *Lloyd v Google*, the damage was the loss of control of the data. The Court of Appeal concluded that Mr Lloyd could represent the represented parties because i) they were not seeking to rely on personal circumstances affecting any individual, "whether distress or volume of data abstracted" (see [75]); ii) the limitation period had expired without any claims by individuals who had suffered sustained significant pecuniary loss [see [76]); and iii) any such individuals could apply to be joined as parties if they wished to claim additional losses (see [76]).

81. In the present case, none of those factors are applicable. The claim for remediation relief in this case means that each represented party must be able to establish that the damage that they have suffered (whether individually or as part of their community) is sufficient to warrant either the injunction requiring the respondents to carry out the clean-up, or the award of compensation so they can pay for their own clean-up. That makes this a wholly different sort of case.

82. This point is emphasised by the size and scale of the Bonga Community. The appellants say that the Bonga Community is the size of Belgium. Using that comparison to exemplify the points I want to make, it may be that, such was the nature of the spill in their area, the individuals and communities in and around Antwerp could show that a particularly large-scale and extensive clean-up was necessary. But at the same time, because of the limited damage suffered by those in Bruges, a much smaller scale remedial scheme might be appropriate. And perhaps the people in Ypres would not be able to justify the need for any remediation at all.

83. Accordingly, the refinement in the pleaded case, which saw the claims for individual losses migrate to Jalla 2, does not get round this fundamental difficulty. It is highly likely that the spread, scale, and long term effect of the December 2011 oil spill was different in different parts of this vast area. That will inevitably impact upon the nature, scope and extent of any remedial works. That again makes this case very different to *Lloyd v Google*.

8.2.3 Limitation

84. In *Lloyd v Google*, limitation was not raised as an issue. By contrast, in the present case, the limitation issues are front and centre. The judge's order requiring 'date of damage' pleadings from all the represented parties in Schedules 1 and 2 demonstrates that criticality. Going back to my example, the people in Antwerp may have brought their claim within time. But the people in Ypres may be outside the relevant limitation period. It is therefore impossible for the claim of one represented party necessarily to be the same as that of another, or of the two appellants.

85. That conclusion is in accordance with the principles summarised in paragraph 51 above. But it is also common sense. What if the claims of the two appellants are statute-barred?

In a representative action under r.19.6, such a result would mean that the claims of the represented parties also failed. Mr Dunning said that that would be unjust and unfair on all those represented parties whose claims were not statute-barred. So it would; but that simply underscores why this is not a representative action.

86. It is right that, depending on the facts, there can sometimes be ways round limitation difficulties, such as the taking of a determinative date, as Akenhead J postulated in *Millharbour.* Mr Dunning originally shied away from this, saying that it was not an easy date to identify. Later he said that the appellants would accept a determinative date of 2 March 2014. Speaking for myself, I am always a bit wary about basing decisions on impromptu offers of this kind made during oral submissions. But I do not consider that Mr Dunning's proposition is workable in any event.

87. That is primarily because, in this case, limitation is an all-pervasive issue which requires to be determined on a case-by-case basis. The date suggested is the date referable to the STASCO allegations, and is not linked to any evidence about the damage to land. Moreover, even if this notional date was adopted, it would still be impossible to ascertain the membership of the represented class without a trial of the relevant issues. So it would still fall foul of the principles set out by Mummery LJ in *Emerald Supplies.*

8.2.4 Alternative Causes of Pollution

88. In *Lloyd v Google*, there was no causation issue. In other words, it was not said that Google were not responsible for the particular data breach or that some other service provider had caused some of the issues. It was, to that extent at least, a very straightforward case.

89. In the present case, each represented party would have to show the causative link between the December 2011 oil spill and the damage that they say justifies the remediation claim. As I have indicated, it appears to be a sad fact that there is much oil pollution in this area. The represented parties would need to demonstrate, in each case, that the oil spill which they say caused them damage was the spill for which, on their case, the respondents are responsible. They do not agree to be bound by the failure of the appellants' claims if, say, it turned out on the facts that the appellants had suffered damage that was nothing to do with the December 2011 oil spill.

90. Issues of causation, therefore, are another significant difference between this case and *Lloyd v Google*.

8.3 Conclusion on Ground 1

91. For all these reasons, I conclude that this case is materially different to *Lloyd v Google*. Moreover, in my analysis of that argument, I have demonstrated some of the reasons why, on the particular facts of this case, it is not suitable to be a representative action. The variables which concern each relevant parcel of land may go to duty and breach; they certainly go to causation, loss and damage. This is the sort of case which, notwithstanding the numbers of potential claimants and the large geographical area involved, can be (and in Jalla 2 perhaps is) the subject of perfectly workable litigation: it is just not possible to categorise it as a representative action under r.19.6.

9 GROUND 2: HAVE THE INDIVIDUAL/COMMUNITY CLAIMANTS FAILED TO ESTABLISH 'THE SAME INTEREST' BECAUSE OF THEIR INDIVIDUAL CLAIMS?

9.1 The Issue

92. Mr Dunning submitted that the judge erred in concluding that, because the individual and community claimants needed to prove individual loss and damage, this was not suitable for a representative action. He relied on *Duke of Bedford v Ellis* to demonstrate that the mere presence of individual claims did not prevent the finding of a representative action.

93. Lord Goldsmith accepted that the mere presence of individual claims did not prevent a finding of a representative action. But he submitted that the judge made no contrary finding. He then went on to say that the judge analysed the whole question of "the same interest" carefully and reached the correct conclusion.

9.2 Threshold Answer

94. In my view, Lord Goldsmith was right to say that there is a threshold reason why this ground of appeal fails: the judge did *not* find that the represented parties did not have "the same interest" in the claim because each had to prove individual damage. Indeed the judge accepted the contrary. At [43], [50], [60 vi] and particularly [72] the judge made plain that the existence of individual claims did not necessarily prevent an order for representative proceedings. This ground of appeal tilts at a windmill which, on analysis, is just not there.

95. Instead the judge embarked on a much more nuanced analysis. He considered the detail of the claims and the likely defences and concluded that, for a variety of practical reasons, the action could not be constituted as a representative action. That was based on his evaluation of the material before him. The existence of individual claims for damages was a matter that he took into account, but no single factor was decisive.

96. So I consider that this ground of appeal mischaracterises the judge's reasoning and cannot succeed. The same is true of paragraph 16 of the grounds of appeal, where it is submitted that "the 'same interest' requirement does not mean that all represented parties must be in exactly the same position". The submission is correct, but it again relates to a finding that the judge did *not* make. Nowhere in the judge's judgment is that statement made, and nowhere is his reasoning based on a precise identicality of the type suggested. The judge applied the test of the claims being "the same for all practical purposes". That is the correct principle: see paragraph 51(e) above.

97. The judge concluded that, in this case, the represented parties would need to show sufficient damage to their land to justify the remediation relief sought. They would need to show that the nature and scale of the remediation costs or scheme that they seek to implement were caused and justified by reference to the respondents' breaches of duty. On the facts, those were not subsidiary matters but were, as the judge put it at [72], "an integral part of the overall issues raised by the proceedings".

9.3 Other Arguments about "The Same Interest"

98. In Sections 7 and 8 above, I have explained the practical reasons why, on my analysis, the represented parties did not have the same interests as each other, nor the same interests as the appellants, for the purposes of r.19.6. However, in deference to Mr Dunning, I should go on to address the other points that he advanced on this issue. It is convenient to do this under ground 2 of the appeal.

9.3.1 The Relevance of Potential Defences

99. First, as a matter of principle, there was a suggestion that the judge was wrong in principle to take into account the potential defences that may be raised in answer to individual claims when considering whether or not this could be a representative action. As previously indicated, that submission is contrary to the authorities summarised at paragraph 51(j) and (k) above.

9.3.2 A Common Cause Before The Oil Got To Shore

100. Mr Dunning submitted that all of the 28,000 plus represented parties had the same interest for the purposes of r.19.6 because they all made common cause in relation to the events that occurred until the oil got to shore. As the judge found, they all had a common interest in showing that the respondents were in breach of duty and responsible in law for the December 2011 oil spill. Thereafter, Mr Dunning said, it was just a question of quantum, and those potential differences as to quantum could not be used to justify the suggestion that this was not a representative action.

101. In my view, the answer to that submission is that, until the oil got to the shore, it is likely that nobody had any claims *at all*. On the basis of the particulars of claim, it appears that the appellants and the represented parties only acquired their individual claims after that, when (on their case) the oil adversely affected their land (or their rights consequential upon land, such as fishing rights). So in this case it is what happens *after* the oil reaches the shore that matters for the purposes of r.19.6. And at that point, for the reasons already given, their individual interest in the claim for remediation relief is plainly not the same.

102. To put the point another way, the claim for a mandatory injunction or the costs of a remedial scheme depends on damage to land. That in turn requires (and was accepted to require) an individual analysis of the individual parcels of land (however broken down) to identify whether or not they suffered damage; whether or not that damage was at such a level that it justified remedial works and if so, the scope of the necessary works; when the oil first made landfall (and therefore whether or not the claim was statute-barred); and whether or not the damage was due to this or another oil spill or event. All of those issues are quite capable of being satisfactorily tried (and many of them may be tried in Jalla 2). But in relation to each of those issues, for the reasons explained above, the individual represented parties do not necessarily have the same interest as each other, and do not necessarily have the same claims as the two appellants. So the basic ingredient of a representative action is entirely missing.

9.3.3 Simply a Function of Geography?

103. In my view, this was also an answer to Mr Dunning's repeated remark that the fact that there were claims involving numerous parcels of land in multi-ownership was "simply a function of geography". In the absence of the most basic information as to where these parcels of land are actually located, it is perhaps difficult for anyone to assess that statement, even on its own terms. But it misses the point. Even if all the relevant areas of land were owned by one single person (another example urged on us by Mr Dunning), it would not avoid the need for each area or parcel of land to be considered separately in order for the issues as to causation, limitation and scope of remedial scheme (if any) to be resolved.

104. Mr Dunning said that he placed no reliance on the individual characteristics of the owners, but that too is misleading. The individual characteristics of the owners may matter to the success or failure of his or her or their claim – Do they own the property in question? Has their possession of the land been adversely affected by the December 2011 oil spill? – but certainly the individual characteristics of each parcel of land will be critical. As my lord, Lord Justice Lewison, observed during argument, no-one can devise a remediation scheme (either for the respondents to implement or to pay for) without investigating the nature, scope and extent of the damage wrought by the December 2011 oil spill in the parcel of land to be remedied. So that requires a consideration of the damage in specific areas (to be agreed by the parties or decided by the judge) to see if an individual (or a group of individuals) has a claim for remediation relief whether to the extent alleged or at all. That might be 500 miles away from Mr Jalla's land. Having him as their representative will not be of any practical value or assistance to that individual or group.

105. Finally on this point, it must be remembered that "the geography" has become even more central to this case because of the change in the appellants' case. It was originally thought that this was a monolithic case about sea-borne oil pollution affecting parcels of land on the coast. It is the appellants who, perhaps as a result of the limitation issues, introduced the notion that the oil polluted thousands of parcels of land hundreds of miles inland, years after the December 2011 oil spill. They cannot dismiss the consequences of that change of case as being just "a function of geography".

9.3.4 The Same Interest in Quantum?

106. The appellants argued that, as a matter of principle, parties who were "in the same position as to quantum" satisfied the "same interest" test under r.19.6. In my judgment, there are at least two flaws in that submission when applied to this case. First, it mischaracterises the issues in play. There are issues of liability, causation, limitation and loss; they cannot be fairly tucked away as somehow just being matters of quantum.

107. Secondly, the represented parties cannot be said to have the same interest, even on quantum. A, B, and C may all have claims that are not statute-barred, and can show that the damage to their land caused by the December 2011 oil spill justifies the fullest possible remediation scheme. But X's claim may be statute-barred, so he recovers nothing; it may be that Y's claim is attributable to a different oil spill altogether, so she would also recover nothing; and the community at Z may not have suffered sufficient damage to justify any remedial scheme at all, or alternatively a much lesser scheme

than that to which A, B and C are entitled. In such circumstances, A, B and C are in an entirely different position on quantum to X, Y and Z.

9.3.5 A Patchwork of Success

108. In the grounds and the skeleton, the appellants criticised the judge for saying at [71] that "a patchwork of success" on the part of the individual claimants would militate against a representative action. I profoundly disagree. Indeed, it is precisely the possibility of mixed success, as I have identified it above, which demonstrates why these proceedings are incapable of comprising a representative action. I note too that, in his oral submissions, Mr Dunning expressly accepted that the outcome of the action may be a patchwork of success; however that was based on the premise that each individual claim of the represented parties would be tried to a conclusion, which is not a representative action anyway.

9.3.6 The Common Fund

109. Another argument raised orally was to the effect that the so-called 'common fund' administered by OSPIVV also gave rise to some sort of common interest. In my view it does not: at most, it is an administrative mechanism for the distribution of any monies recovered in respect of the December 2011 oil spill. In that way it is different to the use of the BPI in the *EMI* and *Independiente* cases, where the BPI acted as *de facto* agents of the record companies, and where the monies recovered paid for the policing of those who made and sold bootlegs. It is also very different to the liability to pay the service charges in *Millharbour,* which all the represented parties were contractually obliged to pay.

10. CONCLUSION

110. For the reasons that I have given, this was not and could never have been a representative action. If my lords agree, I would dismiss the appeal against the order of Stuart-Smith J.

LORD JUSTICE GREEN

111. I agree.

LORD JUSTICE LEWISON

112. I also agree.