

Supreme Court spells out the limitations of nuisance

Georgia Whiting and Chris Bryden of [4 King's Bench Walk](#) report on a Supreme Court ruling on a major oil spill case that has implications on what the courts will regard as constituting a 'continued nuisance' in construction disputes where limitation is important.

KEY POINTS

- The Supreme Court has given a helpful and thorough overview of what constitutes a 'continuing nuisance' which can be of key importance where limitation is in issue.
- The case concerned a major oil spill which occurred off the coast of Nigeria in December 2011. The oil washed up onto the Claimants' land within weeks thereafter.
- The essence of the claimants' case was that there was continuing nuisance because the oil was still present on their land and has not been removed or cleaned up.
- However, if that submission was 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.
- That could not be correct, as it would have the effect of extending the limitation period indefinitely until the land was restored.
- 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.

The tort of nuisance is not an area which should be overlooked by construction professionals, as smoke, noise, vibrations (and even visual intrusion as per our recent article considering *Tate v Fern [2023] UKSC 4*) can all give rise to actionable claims in nuisance. This can have a significant impact on a construction project which may find itself embroiled in injunctive

proceedings or a subsequent claim for significant damages.

This article considers the recent Supreme Court decision in *Jalla v. Shell International Trading and Shipping Co Ltd [2023] UKSC 16*. The Supreme Court upheld the decision at first instance, itself upheld by the Court of Appeal, that the nuisance as alleged by the Claimants could not constitute a continuing nuisance, meaning that limitation had expired and accordingly should not be extended by reference to the concept of a continuing nuisance. In so doing the Supreme Court considered when a nuisance can be continuing, which is highly relevant in respect of nuisance claims in the construction field.

Background

The case concerned a major oil spill (the Bonga Spill) which occurred off the coast of Nigeria in December 2011. The spillage lasted between five and six hours on 20 December 2011 before the relevant pipeline was switched off and the oil stopped leaking into the sea. The oil washed up onto the Claimants' land within weeks thereafter. It was estimated that the equivalent of at least 40,000 barrels of crude oil leaked into the ocean. The Claimants were two Nigerian citizens, though there was an issue as to whether the claim was also brought in a representative capacity for some 27,830 other individuals who were also affected. For the purpose of the appeal it was accepted that they were the only Claimants. Shell International Trading and Shipping Co Limited ('STASCO') was a company domiciled in England. The claim was brought against it and another Shell company based in Nigeria. The Claim Form was issued on 13 December 2017, just a week less than six years from the spill. However in April 2018 the

Claimants purported to amend their claim form including changing one of the parties to STASCO. They also issued a series of applications in 2019 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 relevant test in the CPR and could not do so.

It was in that context that the question of a continuing nuisance arose such that the limitation period ran fresh from day-to-day. Sitting in the High Court, Stuart-Smith J (as he then was) concluded that this single spill gave rise to a one-off claim in nuisance which crystallised within weeks rather than months of 20 December 2011. He found that the Claimant's claims were not, and could not be, claims for continuing nuisance such as to give rise to a fresh cause of action on each fresh continuance of the nuisance. To treat the escape of the oil as a continuing nuisance would be "a major and unwarranted extension of principle".

The Court of Appeal upheld the decision of the High Court, agreeing with Stuart-Smith J's finding that this was not a case in which the principles in *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 ("*Delaware Mansions*") assisted the Claimants to any degree. A continuing cause of action will usually involve a repetition of the acts or omissions giving rise to the original cause of action. The tree roots in *Delaware Mansions* were a paradigm example – the removal of the tree would have stopped the nuisance but otherwise the tree and its roots were still there – this being the continuing event. That was very different from a single one-off event, the oil remaining on the Claimants' land being the consequence of that single event. The continuation of damage did not equate to the continuing of the nuisance.

The Court of Appeal held that "the present case is not about a series of continuing acts or omissions, or a repetition of an original act or omission. It is a case about a single event, a catastrophic one-off leak from the FPSO in December 2011. In the language of some of the older authorities, it is, or gave rise to, 'an isolated escape'". The Appeal was accordingly dismissed.

The Supreme Court

Lord Burrows (with whom Lord Reed, Lord Briggs, Lord Kitchen and Lord Sales agreed) dismissed

the appeal, though noted that the lower courts had slightly overcomplicated matters by failing to make clear that a continuing nuisance in the legal sense is commonplace. In doing so, he gave a very useful statement of the law in respect of what constitutes a 'continuing nuisance.'

In general terms, the tort of private nuisance is committed where the defendant's activity, or state of affairs for which the defendant is responsible, unduly interferes with the use and enjoyment of the claimant's land. 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, such that the tort is often described as one dealing with the respective rights of neighbours. It was assumed for the purposes of the appeal that the tort of private nuisance may be committed where the nuisance emanates from the sea, and it was also assumed that the tort of private nuisance may be committed by a single one-off event such as an oil spill.

In contrast to the tort of trespass to land, the tort of private nuisance is not actionable per se, and the requirement is satisfied for private nuisance by establishing undue interference with the use and enjoyment of land.

It was submitted by the claimants that there was a continuing nuisance for as long as the undue interference with the claimant's land was continuing. They argued that, on the assumption that the oil spill was still present on the land of the claimants, and had not been removed or cleaned up, there was a continuing cause of action that accrued fresh from day-to-day.

It was noted that there was no prior case in English law that had decisively rejected or accepted the argument on continuing nuisance put forward by the claimants. The court considered the three main cases relied upon by the Claimants: *Darley Main Colliery Co v Mitchell* ("*Darley*") (1886) 11 App Cas 127, *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 ("*Sedleigh-Denfield*"), and *Delaware Mansions*.

Darley concerned defendants with the right to extract coal from under the claimant's land. In doing so, they had caused subsidence to that land in 1868, thereby committing the relevant tort for which they were required to compensate the claimant. They carried out no further excavation, but in 1882, a further subsidence caused different damage to the claimant's land. The majority of the

House of Lords held that the second subsidence constituted a new cause of action from the first. The limitation period, therefore, had not expired, and the general rule that damages for a cause of action must be recovered once and for all was not infringed.

In *Sedleigh-Denfield*, Middlesex County Council had trespassed onto the defendants' land and placed a pipe in a ditch to carry away rainwater. However, the pipe from became blocked with leaves and other debris. The defendant knew or should have known of this issue. Three years later, after a heavy storm, the pipe became blocked, the ditch overflowed, and this caused significant flooding and damage to the claimant's land. The House of Lords found the defendants liable in private nuisance. Although the defendants had not created the nuisance (which had been created by the trespassing Council), they had "continued the nuisance" as they did not take reasonable steps to remedy the position.

In *Delaware Mansions*, The House of Lords held that 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.

Part of the difficulty in articulating what is meant by a continuing nuisance for the purpose of the tort was the ease at which, as a matter of ordinary language, the effect of the oil in question not being cleaned up can be described as a continuing nuisance. However, that was wholly misleading when considering continuing nuisance in the legal sense. 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 and vibrations are continuing nuisance where those interferences are continuing on a regular basis. The cause of action therefore accrues afresh. That is precisely why the standard remedy is for an injunction. 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.

The essence of the claimants' case was that there was continuing nuisance because the oil was still present on their land and has not been removed or cleaned up. However, if that submission was 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. That could not be correct, as it would have the effect of extending the limitation period indefinitely until the land was restored.

The Appeal was accordingly dismissed: there was no continuing nuisance 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.

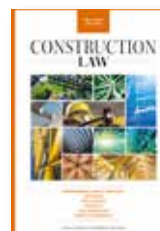
Conclusion

The explanation of a continuing nuisance in a legal sense is important for the construction industry in that it brings some certainty to what will and will not extend limitation periods. Unfortunately for the claimants in this case, a continuing nuisance is not the same as continuing damage as a result of a one off nuisance. **CL**



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