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Case No: KB-2023-000252
Case No: KB-2022-005017
Case No: KB-2023-002200
Case No: KB-2023-002201
Case No: KB-2023-000437

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

THE "BILLE AND OGALE GROUP LITIGATION"

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 March 2024

Before :

MRS JUSTICE MAY DBE

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Between :

(1) ALAME AND OTHERS

CLAIMANTS: KB-2023-000252 "BILLE INDIVIDUALS"

(2) CHIEF MINAPAKAMA AND OTHERS
CLAIMANTS: KB-2022-005017 "BILLE COMMUNITY"

(3) OKPABI AND OTHERS

CLAIMANTS: KB-2023-002200 "OGALE COMMUNITY"

(4) EJIRE AWALA AND OTHERS

CLAIMANTS: KB-2023-002201 "OGALE INDIVIDUALS"

(5) OKOCHI NWOKO ODODO AND OTHERS
CLAIMANTS: KB-2023-000437 "ADDITIONAL OGALE INDIVIDUALS"

Claimants

- and -

SHELL PLC (formerly known as ROYAL DUTCH SHELL PLC) — **First Defendant**

THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD

Second Defendant

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Richard Hermer KC, **Edward Craven**, **Alistair Mackenzie, Kate Boakes, George Molyneaux** (instructed by **Leigh Day**) for the **Claimants**
Lord Peter Goldsmith KC, **Shaheed Fatima KC**, **Dr Conway Blake** and **Tom Cornell** (instructed by **Debevoise & Plimpton LLP**) for the **Defendants**

Hearing dates: 12th – 14th December 2023

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JUDGMENT

Mrs Justice May DBE:

Introduction

1. These are group actions against Shell involving claims arising from oil pollution in the Niger Delta. There was a further CMC hearing over three days in December 2023, listed to deal specifically with matters of case management and disclosure following on from my judgment on issues raised at a 5-day CMC in July 2023. This judgment should be read with my judgment from the July CMC at [2023] EWHC 2961 ("the November judgment"). The abbreviations adopted in the November judgment are continued here.

2. Three statements were filed for the purposes of the December hearing: for the Claimants there was the sixth statement of Ms Modi, dated 29 November 2023 ("Modi 6") and the eighth statement of Mr Renshaw dated 1 December 2023 ("Renshaw 8"); for the Defendants I received the eighth statement of Mr Boyne dated 8 December 2023 ("Boyne 8").

Case management and "global claims"

3. It is obvious that this litigation must progress, in some form. The usual course in group litigation such as this is to identify "lead" claimants and to progress from there. However in this case, for the reasons I gave in my November judgment, the current lack of pleaded detail on causation precludes any sensible identification of lead individuals at this stage. On the present state of the pleaded case, the necessary causal link between event(s) and breach and breach and loss has not been identified. In that judgment I concluded as follows, at [45]

> *"For now, therefore, I do not see any practical alternative but to view the cases of all bar the 5 Bille claimants as global claims unless or until a more particular case is identified…"*

4. Much of the December CMC was taken up with argument as to the case management implications of this conclusion. Mr Hermer KC, for the Claimants, sought clarification of what I meant, in particular to identify whether my "global claim" conclusion was descriptive of the current state of the pleaded case, or prescriptive as to the test for causation that the court would be applying at any trial. Lord Goldsmith KC submitted that my judgment needed no clarification. He suggested that I had made a final determination that these are global claims, and that, as such, I should shape the course of the litigation by focussing on Shell's case that significant amounts of pollution in both Bille and Ogale were caused by third party and other activity for which Shell could not be held responsible.

5. I consider that my November judgment was clear: the pleaded case precludes case management of this litigation being organised by reference to the selection of lead claimants. A different way forward must accordingly be found. That is not to say that a lead claimant approach may not become possible in future, if and when appropriate amendments are sought and allowed, but in my view the only way to progress at present is by treating the Claimants' case as an "all-or-nothing" claim and proceeding accordingly. To that extent only I accept Lord Goldsmith's submissions and reject Mr Hermer's suggestion that my November judgment was descriptive only. I do not accept Mr Hermer's suggestion that the result of the July CMC is to be seen as a staging post to an events-based claim, with the consequence that disclosure is to be directed towards permitting the Claimants to identify what specific events have caused their loss and what specific acts or omissions on the part of the Defendants can be linked to such events. I deal with this further in relation to disclosure, below.

The way forward

Trial of Preliminary Issues

6. Fortunately, by the time of the most recent hearing there was a substantial measure of agreement between the parties as to how the case should move forward. The first area of agreement is that the Bille claims are to be addressed first, separately from the Ogale claims. The hearing accordingly focused on the Bille claims, arguments as to case management and disclosure were confined to those. I say no more about the Ogale claims in this judgment.

7. There was also agreement as to at least the first stage of the court's decision-making process in relation to the Bille claims. The first hearing, to be listed over 3 weeks in January-February 2025, will be a preliminary issues trial ("the PI trial"). That trial, involving amongst other things expert evidence of Nigerian law, is intended to determine principles of Nigerian law and statutory construction affecting these claims.

8. During the course of completing this judgment, the court was notified that the parties have agreed a list of 22 issues to be determined at the PI trial. However, there is disagreement as to the inclusion of two further issues as follows: first, whether the concept of a "global claim" is a matter of procedural or substantive law; second, if substantive, whether Nigerian law recognises and applies the concept of a global claim as it is understood in English law, i.e., that a claimant is bound to recover nothing if it is established that a factor for which a defendant is not liable made a significant contribution to the damage (the precise wording is paraphrased). I have received several pages of written submissions from both sides arguing for and against the inclusion of these issues.

9. Having considered the written submissions carefully, I see the force of Lord Goldsmith KC and Ms Fatima KC's arguments that a global claim is a pleading point and thus a procedural one, governed by English law. Yet I am reluctant finally to decide such an important matter without the benefit of full oral argument and reference to authority. In any event, as causation itself is indisputably governed by Nigerian law, it seems to me that the consequences of a decision on global claims, even if the decision to apply the concept is procedural and a matter of English law, will need to be examined through the prism of Nigerian law. The matter of how causation is to be decided and what principles are to be applied is key to this case. The global claim approach, if it applies, may well be determinative; the Defendants certainly appear to think so, hence their determination to pursue the advantage.

10. With that in mind, I have concluded that it is appropriate to include issues 16 and 17 in the list of issues for determination at the PI trial. Neither is going to add significantly to the time required (although looking at the long list of other issues I do wonder if 3 weeks is going to be long enough to hear all the necessary evidence and argument). Moreover, as the proper approach to causation may well be determinative of many of these claims it makes sense to argue it fully at as early a stage in the litigation as possible. There appears to be a great deal of overlap between issues 15 and 17 in any event.

A "factual trial" to follow

11. As any decisions made at the PI trial are unlikely to be wholly dispositive of any claims (though they may well affect the approach to them) there will necessarily be a further trial or trials after that. The issue for the court at the December hearing was how to progress matters efficiently and sensibly so as to be ready for a factual trial that is to

follow after the PI trial has concluded. Neither party was suggesting that nothing be done beyond preparing for the PI trial, both sides recognised that they need to be preparing, in tandem with getting ready for the PI trial, for what is to come beyond that. Disclosure is a key part of that preparation.

12. In planning now for what is to come after the PI trial, and in considering disclosure (see below) I bear in mind the following: the Claimants have chosen to start group litigation by pleading multiple as-yet incompletely identified events of pollution, from different locations (also incompletely identified) and by a number of different mechanisms within a 500sq kilometre area of the Niger Delta over a three year time period. This is not a case where the litigation turns on events which have been identified from the start (as in the Bodo litigation, which involved 2 identified events causing loss) or a single mechanism of pollution (as in the Vedanta case, where by-product from mining operations over a period was the single cause of pollution in the area). The pleadings in this case do not permit the court or the parties to link a Claimant's (or set of Claimants') loss to an event(s) of pollution, nor the event(s) to breach by the Defendants. Various failures on the part of SPDC in maintaining or protecting its pipeline and other infrastructure in Bille in the relevant period have been pleaded, but only in general terms. Since the law to be applied in evaluating liability is different depending on the precise polluting event, a general pleading of what failures on the part of Shell will be alleged is insufficient to join up the dots of an events-based case. Mr Hermer, at the CMC in July and again in December, pointed, in general terms, to the expert evidence which the Claimants intend to obtain in order to plead the fully-particularised case that he intends to pursue for each Claimant. To date the Claimants have not taken steps to obtain such evidence.

13. At present therefore, as I pointed out in my November judgment, it is not possible to make a principled selection of lead cases. Yet this litigation must progress and the only way that I can presently see in which that can be done is to plan for a trial based on an "all-or-nothing" case, in which the Claimants are holding the Defendants responsible for all loss arising from oil pollution in the Bille region between the years 2011-2013. Hence my conclusion, discussed at the hearing, that the factual trial which is to follow the trial of preliminary issues, will address what the parties summarised as the "3Cs", namely contamination, consequences and causes in the Bille region during 2011-2013. This is wider than the Defendants' proposal for a global claim trial, which was to have focussed only on the existence of causes of pollution for which they were not responsible. The scope of the factual trial, as I presently envisage it, will be an examination of all oil contamination of the Bille area over the period 2011-2013; only then can the significance or otherwise of particular causes or events be determined, together with the possibility or otherwise of disentangling losses arising from polluting events for which the Defendants are not liable (if any). If, following the PI trial, there appears to be a more sensible and practical alternative to this way of addressing the claims, then the shape of the factual trial which is to follow can be re-addressed at that time. Or indeed at an earlier stage, if there is reason to do so.

14. I take a factual trial addressing the 3Cs as the background, and the current driver, to my decisions on the various disclosure issues which were raised at the December hearing.

Disclosure

General principles of disclosure

15. No special or different principles of disclosure apply to group litigation, though timing or phasing of disclosure is likely to be appropriate in these larger cases.

16. Standard disclosure is dealt with by CPR Part 31.6(a) and (b), which requires a party to disclose only those documents that (i) support their own or another party's case or (ii) adversely affect their own or another party's case. Whether a particular document or class of documents falls into one or another of these categories is to be determined by reference to the pleadings: see the White Book commentary at para 31.6.3, approved in *Depp v News Group Newspapers Ltd* [2020] EWHC 1689 (QB).

17. In making an order for specific disclosure the court will have regard to the overriding objective and to the concept of proportionality. The overriding objective requires a party to give access to those documents which will assist the other side's case; the court may exercise its discretion to order disclosure of such documents at any stage of proceedings, whether or not standard disclosure is underway. Before ordering disclosure, the court will need to be satisfied that the documents are relevant, relevance being ascertained by reference to the pleaded case and the factual issues in dispute on the pleadings: *Harrods v Times Newspaper Ltd* [2006] EWCA Civ 294.

Arguments as to the proper approach to disclosure in this case

18. Mr Hermer described the Claimants as "broadly welcoming" a factual trial looking at the 3Cs, whilst expressing concern that the process of disclosure should look beyond both the PI trial and the factual trial. He submitted that the court should order appropriate disclosure now so as to prevent undue delay to the progression of the litigation after these trials, giving as an example the issue of negligence in relation to third party activity causing pollution.

19. As to specific disclosure, Mr Hermer pointed out that this was in fact more like staged disclosure of material which would anyway fall to be disclosed under standard

disclosure requirements. What they were seeking were specific categories of relevant and disclosable documents now, rather than later.

20. Referring to the disclosure decision of Fraser J (as he then was) in the Mercedes "diesel-gate" litigation (*Cavallari v Mercedes Benz Group AG* [2023] EWHC 1888 (KB)) Mr Hermer submitted that here there is a similar "informational asymmetry" between the parties, where Shell has all the information about its operations in Bille and the Claimants have none, or at any rate very little and incomplete information. He argued that, in fairness to the Claimants given that asymmetry, they should be given disclosure of all documents in the hands of the Defendants bearing on their operations in Bille during the relevant period. He argued that the Claimants' experts need this information in order to identify particular polluting events, allowing the Claimants to particularise their case on causation by making the links (breach to event and event to loss) which are currently absent.

21. In response Ms Fatima emphasised that the proper and principled approach to disclosure is by reference to pleaded issues. She described Mr Hermer's approach as "topsy turvy", arguing that the court must look at the case as it is pleaded, rather than at the case the Claimants would wish to plead. She pointed out that, properly analysed, the informational asymmetry identified in *Cavallari* was referred to by the court in that case as a reason to order early disclosure of a specific set of documents already accepted by the Defendants as relevant; it was not treated as a free-standing principle entitling the claimant to wide-ranging disclosure. She submitted that the status quo here, as the court has found, is that the Claimants are bringing an all-or-nothing, global claim; the ambit of disclosure should be guided by that and not by a case that the Claimants say they would like to bring. Ms Fatima argued that you cannot come to the court as a

litigant and say: the defendant has got more information than me so I should have it. It is for the claimant to make out their case and not for a defendant to provide the material to enable them to do so. She says that here the Claimants have not pleaded breach to spill and spill to loss so there is no pleaded claim on those two limbs. The court cannot therefore judge whether or not the documents which the Claimants say they need are actually (a) relevant, (b) reasonably necessary or (c) reasonably proportionate. The only principled and proportionate approach to disclosure was to order it by reference to the issues to be considered at the factual trial, namely the "3Cs".

Conclusion

22. As I said during the course of the hearing, litigation of this size necessarily evolves as each stage is passed. That is likely to be particularly true as this litigation progresses. It may be that when and if evidence of Nigerian law is produced it will persuade me that, under Nigerian law, I can take a different approach to causation but I have seen none yet, despite the obvious importance of this issue to the progress of the litigation. For now, therefore, and in the absence of any such evidence, applying well-established principles of English law I regard the claim as an all-or-nothing case and approach case management, including disclosure, on that basis.

23. As the Defendants accept, that does not mean the case is to halt or that there is not substantial disclosure to be made. There is. But it does require me to consider carefully what is relevant and proportionate now, by reference to the case as it currently is, and not as the Claimants would like it to be, or even as it may be in future. An information imbalance is not a sufficient reason to order disclosure, where relevance has not first been established. The observations of Fraser J in ordering specific disclosure of two documents in the *Cavallari* case are not to be understood as establishing a free-standing

right to disclosure where one side has more information than the other. Relevance to pleaded issues must be the touchstone. Two examples from this case serve to demonstrate the difficulty of taking the general approach advocated by Mr Hermer: first, under Nigerian law there is strict liability for pollution arising from equipment failure. For such events, maintenance records will be irrelevant. Next, if, at the PI trial, I come to the same view as Akenhead J did in the Bodo litigation as to the proper meaning and effect of section 11 of the OPA – that there is liability provided negligence is shown – how is disclosure relevant to negligence in respect of third-party interference to be given where the individual events have not been identified?

24. Some of the documents sought may be relevant and (proportionately) disclosable for other reasons, but not on the sole basis that they might have information which might assist the Claimants in identifying which event(s) have caused an individual's loss. That would be a classic fishing expedition. I repeat that the Claimants have chosen to bring a case based on multiple polluting events of many differing kinds occurring in a wide area over an extended period of time; it is for them to provide the necessary clarity so as to permit disclosure which is properly tethered to the issues. The Defendants are not to be expected to throw open the doors to their archives or to permit a general trawl through their records. The tail must not be allowed to wag the dog.

25. I also reject the two further reasons variously relied on for particular items of disclosure namely: (i) to assist with the organisation of disclosure by indicating who had responsibility and where for SPDC's operations in Bille and (ii) to assist with settlement of the case. As to (i), it is for the Defendants' representatives to advise and oversee proper disclosure of all relevant material. Regarding settlement, whilst acknowledging that assisting in settlement might be a good reason to order specific disclosure in an

appropriate case, that can only be so where the relevance of the documents to the pleaded issues has first been established, which is not the case here.

26. Before turning to the Claimants' applications for (1) specific disclosure and (2) general, or standard, disclosure there were some general points which arose repeatedly during the argument and which it may be helpful to deal with and dispose of first.

Disclosure from RDS

27. Ms Fatima argued that RDS should not be obliged to search for or disclose any documents. Disclosure from RDS should await the outcome of a decision on SPDC's liability, she submitted, since the liability of RDS was parasitic upon SPDC's, or at least that it would be necessary first to establish the situation on the ground in Nigeria before RDS' liability could be considered. Moreover, in the event of SPDC being found liable it was solvent and could pay any damages, without recourse to RDS. Insofar as the Supreme Court made observations about the relevance of particular documents it did so in the context of considering the question of jurisdiction; comments made in the judgments should not be read directly across to the current application as a reason for ordering disclosure now.

28. I have concluded that Ms Fatima is right, but only up to a point. To the extent that RDS has documents which bear upon the "3Cs" then they are relevant and should be disclosed. Mr Boyne in his evidence (Boyne 8 at paragraph 63) said this:

> *"The Defendants have never disputed that they are in the possession of large volumes of documents in relation to the Second Defendant's operations and, in particular, oil spills"* (emphasis added).

29. This evidence confirms that, as might be expected, RDS has documentation which would be relevant to a consideration of contamination, consequences and causes in the

Bille area during the period 2011-2013. Such documents will need to be found and disclosed.

Unidentified spills and reliability of JIV reports

30. The Defendants have agreed to give disclosure of a number of categories of documents, as being relevant to the factual trial (for instance, items (f), (i), (j) and (o) below), but only insofar as they can be searched for by (known) incident number. This does not satisfy the Claimants, since their case includes as a key allegation that the Defendant's monitoring and recording of polluting events from their infrastructure in Bille was deficient. The Claimants believe that there were oil spill events for which the Defendants were responsible but which went unrecorded at the time. Their pleaded case, at paragraph 33, of the Bille PoC specifically refers to "other spills…not publicly recorded…".

31. The Claimants have produced evidence that the JIV reports, the first and main record of any spill event, are unreliable: summarised at Modi 6, paragraphs 10(a) and 40. It is fair to say that the evidence deals mainly with the reliability of the content of the individual reports, rather than as a(n) (in)complete record of spill events which occurred over the period, but the extent of the omissions/inaccuracies within the reports raises an obvious concern about the latter point. I asked Ms Fatima during the course of the argument whether the Defendants were satisfied that their recording systems accurately recorded events of oil contamination into the Bille region; she was unable to confirm that.

32. In circumstances where the factual trial will at present need to focus on <u>all</u> oil polluting events during the period 2011-2013, and where there is evidence that the JIV reports are inaccurate, proper disclosure will in my view require the Defendants to search for

documents which are relevant to the subject matter of that trial. This cannot be restricted to documents relating exclusively to spills which have an incident number but must include material which may point to other incidents. Shell and their representatives will be better aware of what such material may be but the evidence in Modi 6 suggests that asset monitoring reports may be a place to start. I do not intend to suggest that there should be wholesale disclosure of all such reports, but if and insofar as such material does indicate a breach and/or spillage, whether because a "pigging" run has noted corrosion and breach in a part of the pipeline running through Bille during the relevant period, or because the pipeline oil pressure data has noted a reduction at a particular point, I would consider such material to be relevant and disclosable.

Specific disclosure

33. I can set out my conclusions on the separate items sought by the Claimants as to specific disclosure relatively briefly.

(a) Reports of Significant Incidents taking place in the Bille area between 2011 to 2013

34. These documents are clearly relevant to the purpose of the factual trial, which includes establishing the existence and extent of oil contamination occurring in the Bille area over the relevant period, namely 2011-2013. I note Mr Boyne's concern (Boyne 8, paragraph 94) that these reports are likely to do no more than duplicate information that SPDC already has and will make available; but concern that they <u>may</u> be duplicative is not the same as confirmation that they <u>are</u> and in any event a certain amount of duplication within disclosure, in litigation of this size, is inevitable. I was told at the hearing that a search could be done by reference to the names of assets within the Bille area.

(b) All versions of "Manual(s) of Organisational Authorities" in existence between 2011-2013

35. Mr Boyne's evidence is that the Manual is a database, rather than individual documents. The contents of such a database do not appear to me to be relevant to the scope of the factual trial; I make no order for specific disclosure now. The contents of such a database are likely to be highly pertinent to the ways in which RDS organised and controlled the activities of SPDC in Bille, as the Supreme Court recognised, but that is a matter for a later stage of this litigation.

(c) Minutes of various RDS committee meetings insofar as these related to oil pollution and/or risk to health from oil pollution in the Bille area between 2009 and 2014

36. There was some confusion at the hearing about the purpose and scope of these documents, Mr Hermer initially arguing for their disclosure not limited to the Bille area only but covering the whole of Shell's oil-producing activity in Nigeria, going to the issue of the liability of the parent company for the activities of SPDC. He later clarified, however, that what was sought were minutes of meetings discussing pollution in Bille in the relevant period. There is evidence (albeit controversial) from a former RDS employee, Rebecca Sedgwick, to the effect that significant incidents of pollution and the response to them were discussed within RDS. In my view, the contents of minutes dealing with any such discussions and decisions are relevant and disclosable.

(d) & (e) "Framework for Risk Management of Historically Contaminated Land for SPDC Operations in Niger Delta" and a similar document relating to contamination in "Mangroves and other Swamp Areas" from, or applicable in, the period 2011-2013

37. These documents, as described in Modi 6, appear to be, or at least to include, an evaluation of contamination and its effects on mangroves and other areas, which would include the Bille region. To the extent that this evaluation identifies or describes contamination occurring or existing within the Bille area during the relevant period then the contents are relevant to the court's consideration of the 3Cs at the factual trial and should be disclosed. These are two specific documents, locating them and providing disclosure of any relevant content will not be unduly onerous.

(f) Loss of Primary Containment reports relating to infrastructure within the Bille area between 2011 and 2013

38. The Defendants accept that these documents are relevant and should be disclosed now. For the avoidance of any doubt, all such reports should be disclosed for the Bille area over the relevant time period, whether or not they relate to specific incidents currently identified in the Particulars of Claim. Mr Boyne's evidence is that searching otherwise than by incident number will be unduly onerous and accordingly disproportionate but I do not accept this: I was told that there were some 70 named items of infrastructure and 50km of pipeline within the Bille area, presumably the pipeline will have identifiable sections. I do not believe that performing a search by reference to named items of infrastructure and identifiable sections of the pipeline (there is only one) can be said to be disproportionate in a case of this size. As I pointed out in argument at the hearing, proportionality of disclosure will depend on the size and complexity of the case.

(g) & (h) Environmental Evaluation studies and Financial liability assessments for Divestment by SPDC of the Oil Mining Licence and Nembe Creek Trunk Line in 2014

39. Insofar as these documents contain material relating to the condition of the environment within the Bille area, they are potentially relevant to the court's consideration of the

3Cs at the factual trial and should be disclosed. I understand the Defendants to accept this (Boyne 8, paragraph 116).

(i) & (j) Conceptual Site Models and Remediation Action Plans 2011-2013

40. The Defendants have agreed to provide the information sought under this head, though not in the form which the Claimants had understood it to be kept.

(k) Records of contamination monitoring data 2011-2015

41. Likewise in respect of this information. The longer period (to 2015 rather than 2013) is to provide for the possibility of delayed effects from oil-polluting events.

(l) Spill Impact maps 2011-2013

42. The Defendants will provide these for the Bille area for the relevant period. Again, I consider that all maps of the area prepared by SPDC identifying the impact of oil pollution over the period 2011-2013 are relevant to the 3Cs and should be disclosed.

(m) Annual asset integrity status reports relating to SPDC's pipeline in the Bille area 2011-2013

43. I take the point that in the absence of pleaded events linked to loss, relevance to the pleaded case is not established. However, as I have indicated above, given the potential unreliability of the JIV reports I consider that an appropriate search will need to be made in these records for events that may indicate that there has been a spill. All polluting events are relevant to the court's consideration of the 3Cs at the factual trial.

(n) Well maintenance records relating to wells in the Bille area between 2011-2013

44. Likewise in respect of these records.

(o) Photographs and video footage taken during Joint Investigation Visits, for the purpose of preparing JIV Reports within the Bille area during 2011-2013

45. The Defendants accept that these are relevant and will disclose them.

(p) Photographs and video footage taken during surveillance overflights over the Bille area during 2011-2013

46. The Defendants accept that these are relevant and will disclose them.

(q) Satellite images of the Bille area over 2009-2014

47. The Defendants point out that these are images which they purchased commercially, which would equally be available to the Claimants to purchase; nevertheless they will disclose all images which they have obtained. Again, the slightly wider time period for disclosure is designed to capture the situation on the ground prior to 2011 and the possibility of enduring/later effects of polluting events occurring in Bille during 2011-2013.

Standard disclosure

48. I have set out my conclusion on the approach to disclosure generally in this case at [22] to [25] above.

49. Mr Renshaw deals with standard disclosure at paragraphs 19 and following of Renshaw 8. He refers to the various discussions which the parties had had prior to the July CMC and to points of agreement which appeared to have been reached at that time. At the hearing, Mr Hermer spent relatively little time on standard disclosure, other than to press the court to make an order requiring standard disclosure to progress side by side with specific disclosure and preparation for the PI trial and the factual trial to follow.

50. Mr Hermer suggested that, by analogy with orders made by Akenhead J in the Bodo litigation, the court should order standard e-disclosure by reference to key words and key custodians at SPDC and Shell to proceed at the same time. He pointed out that the parties had made some progress together towards identifying such key words and persons earlier last year before the November judgment, and asked for that to continue.

51. One of Mr Hermer's points in favour of making progress with generic disclosure side by side with specific disclosure concerned what steps would follow the resolution of Nigerian law issues at the PI trial. If, for instance, the court was to reach the same conclusion as Akenhead J in the Bodo litigation as to the proper construction of section 11 of the OPA then SPDC's liability would turn on showing negligence in protecting the pipeline from third party interference. There ought to be standard disclosure now, he suggested, of all SPDC and parent company documents relating to the protection of the pipeline. But, as I asked Ms Fatima during submissions, how would this work in the context of a trial where specific events of third party interference causing loss have not been identified? Her response was that she had no idea, that the place to look for the identification of loss-generating events, in relation to which a negligent failure to protect could be examined, was the pleaded case, yet there is nothing there.

52. Ms Fatima pointed out that the GLO was ordered and the parties had preliminary discussions on standard disclosure at a time when it was envisaged that the case would be approached on a spill-by-spill basis tracking the effect of specific events on a set of lead claimants. But that was before the provision of all SoIs, the July hearing and the November judgment; now that the court has determined that lead claimants cannot be identified and that the case must be viewed as an all-or-nothing claim, the approach must be different. Relying on the evidence in Boyne 8 Ms Fatima says that the sheer

quantity of documentation means that a more focussed approach is required, that disclosure be given in an organised way by reference to what is necessary to resolve the issues in dispute. The status quo is that the claim is an all-or-nothing one; that being so, the Defendants resist an order which would put them to the effort and expense of a disclosure exercise amounting to an unfocussed trawl through the full record of all of Shell's activity in the Bille region during 2011-2013.

53. As I have already indicated, I have some sympathy with the Defendants' position. Whilst the case is at its present stage of generalised allegations of breach and loss, where specific events are not tied to particular breaches, I do not see how fault-related disclosure can properly and sensibly be pursued without it ending up as a wide-ranging enquiry of all activity in the region over the pleaded period. I think that this would be wrong both as a matter of proportionality and because it would amount to a fishing exercise.

54. Moreover, the disclosure which is already to be given by <u>both</u> Defendants by way of the specific disclosure indicated above, as well as any and all other documents relevant to establishing the 3Cs at the factual trial, seems to me to be more than enough to progress the litigation very considerably at this stage.

55. Having said this, I emphasise that the court remains adaptable, open to a reconsideration both of disclosure and of the future path of this litigation in the light of subsequent events, such as decisions made at the PI trial or any future permitted amendments to the pleaded case. I recognise that this imports a degree of future uncertainty for the parties and the court, but that is unavoidable in a case of this size and nature.