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Case No: **KB-2023-000252**

KB-2022-005017

KB-2023-002201

KB-2023-000437

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th June 2025

Before :

The Hon. Mrs Justice May DBE

Between :

(1) ALAME & ors.

Claimants: KB-2023-000252 “Bille Individuals”

(2) CHIEF MINAPAKAMA & ors.

Claimants: KB-2022-005017 “Bille Community”

(3) OKPABI & ors.

Claimants: KB-2023-002200 “Ogale Community”

(4) EJIRE AWALA & ors.

Claimants: KB-2023-002201 “Ogale Individuals”

(5) OKOCHI NWOKO ODODO & ors.

**Claimants: KB-2023-000437 “Additional Ogale
Individuals”**

- and -

(1) SHELL PLC

(formerly known as ROYAL DUTCH SHELL PLC)

**(2) RENAISSANCE AFRICA ENERGY
COMPANY LIMITED (formerly**

Claimants

Defendants

Approved Judgment

known as **THE SHELL PETROLEUM
DEVELOPMENT COMPANY OF NIGERIA LTD)**

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Hearing dates:
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Approved Judgment

This judgment was handed down remotely at 10.30am on 20th June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Contents

Introduction.....	6
The Preliminary Issues.....	6
Nigeria and the Nigerian system of government	9
The Nigerian legal system	9
The Constitution.....	10
The African Charter and sources of jurisprudence on Charter rights	11
The Oil Pipelines Act 1956 and the Petroleum Act 1969	12
Expert Evidence of foreign law – the court’s approach.....	14
Expert evidence at this trial.....	17
The current stage of proceedings	18
SECTION I: THE PRIVATE LAW ISSUES	20
PI 1 What limitation period (if any) applies to claims to be brought under (a) section 11 of the Oil Pipelines Act 1990 (“OPA”), (b) the Petroleum Act 1969, (c) the Nigerian common law (d) the Nigerian Constitution and (e) the African Charter of Human and Peoples’ Rights as incorporated in Nigerian law (“the African Charter” or “the Charter”)	20
PI2 In respect of each cause of action, as a matter of Nigerian law, can the limitation period (if any) be extended by reference to the doctrine of continuing torts?.....	25
PI3 In respect of each cause of action, as a matter of Nigerian law, can the limitation period (if any) be extended by reference to the doctrine of continuing statutory breach?	26
PI 4 In respect of claims under section 11 of the OPA:	28
(1) Does section 11 of the OPA enable compensation claims to be brought against a licence-holder in relation to pipeline spills caused by Third Party Interference?	28
(2) Is Third Party Interference a defence to a claim under the OPA?	28
(3) To what extent (if any) does Regulation 26(2) of the Oil Spill Recovery, Clean -up, Remediation and Damages Assessment Regulations 2011 (“the 2011 Regulations”) qualify, limit or inform the scope of s.11(5) of the OPA?	28
(4) Can a licence-holder be liable under the OPA for damage caused by oil that is removed from a licence-holder's oil pipeline or ancillary installation by Third Party Interference and subsequently used in illegal oil refining by third parties?	28
PI 4(1) and (2) – can an operator be liable under section 11(5) for failing to prevent TPI? ...	30
PI 4(3) - Regulation 26(2) of the 2011 Regulations	38
PI 4(4) – Liability under the OPA for damage caused by illegal refining.	38
PI 5 Insofar as a party alleges in the context of a claim under section 11 of the OPA that an oil spill was caused by Third Party Interference:	44
(1) What is the applicable law governing the burden and standard of proof?	44
(2) Pursuant to that law, what is the applicable burden and standard of proof?	45
PI6 Does s.11 OPA exclude a licence-holder’s liability to pay compensation in respect of damage that has been “made good”? If so, what is the proper interpretation of “made good” in this context and in particular:	47

Approved Judgment

(1) Does certification by the Nigerian Oil Spill Regulator that an oil spill has been remediated fall within the scope of damage being “made good” for the purposes of the OPA?	47
(2) Does payment of compensation to the relevant community/individual fall within the scope of damage being “made good” for the purposes of the OPA?	47
PI 7 Does the OPA oust claims in common law for oil pipeline spills against persons other than the licence-holder?.....	47
PI 8 Do the Petroleum Act 1969 (the "Petroleum Act") and/or the Petroleum Drilling and Production Regulations 1969 (the "Regulations") and/or the common law enable claims for damage caused by oil spills from non-pipeline assets?	52
PI9 What duties are imposed on a licence-holder pursuant to Regulations 23, 25 and 37 of the Regulations? Do breaches of those duties by a licence-holder give rise to a private law claim to compensation?	55
PI10 Do the Petroleum Act and/or the Regulations impose strict liability on a licence-holder for damage caused by oil spills not otherwise covered by the OPA regime (within the meaning of the Regulations)?.....	55
PI 11 Do the Petroleum Act and/or the Regulations enable claims to be brought for damage in relation to an oil spill from a non-pipeline asset caused by Third Party Interference? ..	55
PI 12 Is Third Party Interference a defence to a claim under the Petroleum Act and/or the Regulations?	56
PI 13 Does clean up or remediation provide a defence to a claim under the Petroleum Act 1969 and/or the Petroleum Drilling and Production Regulations 1969?.....	57
PI 14 Can a licence-holder be liable under the Petroleum Act and/or the Regulations for damage caused by oil that is removed from a licence-holder's infrastructure by Third Party Interference and subsequently used in illegal oil refining by third parties?	57
PI 15 In respect of causation:	58
(1) Where there are multiple sources of pollution or environmental damage, what is the applicable test for causation under Nigerian law?.....	58
(2) Is that test applicable to claims under the OPA, the Petroleum Act 1969, the Petroleum Drilling and Production Regulations 1969, the Nigerian Constitution and/or the African Charter?	58
(3) If not, what alternative test applies?	58
PI 18 What form or forms of interest in land are the Claimants required to establish to bring claims in common law for nuisance, trespass or <i>Rylands v Fletcher</i> liability?.....	62
PI 19 Is it possible to have a claim in negligence, nuisance, trespass, or under the rule in <i>Rylands v Fletcher</i> , as a matter of Nigerian law, against a licence-holder in respect of non-pipeline spills (a) caused by Third Party Interference, and (b) that have been remediated by the licence-holder?	63
PI20 Is it possible to have a claim in negligence, nuisance, trespass, or under the rule in <i>Rylands v Fletcher</i> in respect of damage caused by oil that is removed from a licence-holder's infrastructure by Third Party Interference and subsequently used in illegal oil refining by third parties?	66
SECTION II: THE FUNDAMENTAL RIGHTS ISSUES - CLAIMS UNDER THE NIGERIAN CONSTITUTION AND/OR AFRICAN CHARTER	75

Approved Judgment

PI 21	Do the Nigerian Constitution and/or African Charter enable claims to be brought against private companies for damage caused by oil spills?.....	75
PI22	What is the scope of the following rights under the Nigerian Constitution and the African Charter, as interpreted in Nigerian law, and do they enable claims for compensation to be brought in respect of oil spills?	86
(1)	The right to a clean and healthy environment under s.20 of the Nigerian Constitution.	86
(2)	The right to life under s.33(1) of the Nigerian Constitution.....	86
(3)	The right to respect for dignity of the person under s.34(1) of the Nigerian Constitution.	86
(4)	The right respect for life and integrity of the person under Article 4 of the African Charter.	87
(5)	The right to the best attainable state of physical and mental health under Article 16(1) of the African Charter.....	87
(6)	The right to economic, social and cultural development with due regard to freedom and identity in the equal enjoyment of the common heritage of mankind under Article 22 of the African Charter.	87
(7)	The right to a general satisfactory environment favourable to their development under Article 24 of the African Charter.....	87
PI 23	Do the Nigerian Constitution and/or African Charter enable claims to be brought for damage in relation to an oil spill caused by Third Party Interference?	98
PI24	(1) Is it permissible under Nigerian law for the Claimants to pursue claims under the Nigerian Constitution and/or the African Charter of Human and People's Rights in parallel with private law claims in tort or under statute in respect of the same alleged damage caused by oil spills?	99
(2)	If not, is such a prohibition applicable in these proceedings in the English courts?.....	99

Mrs Justice May:

Introduction

1. This group litigation concerns four separate claims arising from extensive oil pollution affecting two regions within the Niger Delta: the Bille and Ogale communities. A large number of individuals within each community have brought individual claims against the Defendants (the Bille individual and Ogale individual claims); in addition, there are representative/trust claims brought by certain individuals within the communities in a representative capacity on behalf of the whole community (the Bille community and the Ogale community claims). Each of the four claims seeks damages and other remedies from the Defendants (respectively “Shell Plc” and “SPDC”). SPDC is the Nigerian-based subsidiary of Shell Plc operating its oil business within Nigeria.
2. The Bille and Ogale peoples are among a number of local communities in the Niger Delta which have been affected by oil mining and refining in that region since the discovery of large oil reserves there in the 1950s. These proceedings were commenced in 2015 against Shell Plc and SPDC seeking compensation for the losses which the individuals and communities say they have sustained as a result of SPDC’s activities. The claims were originally pleaded in tort and breach of statutory duty (collectively “the private law claims”). However by a recent amendment in 2023, the pleadings were amended to include for the first time claims under the Nigerian Constitution and the African Charter (collectively “the fundamental rights claims”).
3. It is uncontroversial that, as the private law and fundamental rights claims arise from events occurring in Nigeria, Nigerian law applies. By a consent order dated 16 January 2024 the parties to this litigation identified 24 preliminary issues (“PI”s) to be determined in advance of the main trial which is currently scheduled to take place over four months from March 2027. Following a Court of Appeal decision last year (*Alame & Others v. Shell Plc & SPDC* [2024] EWCA Civ 1500), two of the preliminary issues (PIs 15 and 16) have fallen away. The remaining 22 issues for decision at this trial concern matters of Nigerian law, largely split as to the matters concerning private law claims in tort and breach of statutory duty (PIs 1-15 and 18-20) and those concerning fundamental rights claims under the Nigerian Constitution and African Charter (PIs 21-24).

The Preliminary Issues

4. The issues for determination at this trial are these:

PI 1 What limitation period (if any) applies to claims to be brought under (a) section 11 of the Oil Pipelines Act 1990 (“OPA”), (b) the Petroleum Act 1969, (c) the Nigerian common law, (d) the Nigerian Constitution, and (e) the African Charter of Human and People’s Rights as incorporated in Nigerian Law (“the African Charter”)?

PI 2 As a matter of Nigerian law, can the limitation period (if any) be extended by reference to the doctrine of continuing torts?

PI 3 As a matter of Nigerian law, can the limitation period (if any) be extended by reference to the doctrine of continuing statutory breach?

Approved Judgment

PI 4 In respect of claims under section 11 of the OPA:

- (1) Does section 11 of the OPA enable compensation claims to be brought against a licence-holder in relation to pipeline spills caused by Third Party Interference?
- (2) Is Third Party Interference a defence to a claim under the OPA?
- (3) To what extent (if any) does Regulation 26(2) of the Oil Spill Recovery, Clean-up, Remediation and Damages Assessment Regulations 2011 (“the 2011 Regulations”) qualify, limit or inform the scope of s.11 of the OPA?
- (4) Can a licence-holder be liable under the OPA for damage caused by oil that is removed from a licence-holder’s oil pipeline or ancillary installation by Third Party Interference and subsequently used in illegal oil refining by third parties?

PI 5 Insofar as a party alleges in the context of a claim under section 11 of the OPA that an oil spill was caused by Third Party Interference:

- (1) What is the applicable law governing the burden and standard of proof?
- (2) Pursuant to that law, what is the applicable burden and standard of proof?

PI 6 Does s.11 OPA exclude a license-holder’s liability to pay compensation in respect of damage that has been “made good”? If so, what is the proper interpretation of “made good” in this context in particular?

PI 7 Does the OPA oust claims in common law for oil pipeline spills against persons other than the licence-holder?

PI 8 Do the Petroleum Act 1969 (“the Petroleum Act”) and/or the Petroleum Drilling and Production Regulations 1969 (“the Regulations”) and/or the common law enable claims for damage caused by oil spills from non-pipeline assets?

PI 9 What duties are imposed on a licence-holder pursuant to Regulations 23, 25 and 37 of the Regulations? Do breaches of those duties by a license-holder give rise to a private law claim to compensation?

PI 10 Do the Petroleum Act and/or the Regulations impose strict liability on a licence-holder for damage caused by oil spills not otherwise covered by the OPA regime (within the meaning of the Regulations)?

PI 11 Do the Petroleum Act and/or the Regulations enable claims to be brought for damage in relation to an oil spill from a non-pipeline asset caused by Third Party Interference?

PI 12 Is Third Party Interference a defence to a claim under the Petroleum Act 1969 and/or the Regulations?

PI 13 Does clean up or remediation provide a defence to a claim under the Petroleum Act 1969 and/or the Petroleum Drilling and Production Regulations 1969?

Approved Judgment

PI 14 Can a licence-holder be liable under the Petroleum Act 1969 and/or the Regulations for damage caused by oil that is removed from a licence-holder's infrastructure by Third Party Interference and subsequently used in illegal oil refining by third parties?

PI 15 In respect of causation:

- (1) Where there are multiple sources of pollution or environmental damage, what is the applicable test for causation under Nigerian Law?
- (2) Is that test applicable to claims under the OPA, the Petroleum Act 1969, the Petroleum Drilling and Production Regulations 1969, the Nigerian Constitution and/or the African Charter?
- (3) If not, what alternative test applies?

PI 18 What form or forms of interest in land are the Claimants required to establish to bring claims in common law for nuisance, trespass or *Rylands v Fletcher* liability?

PI 19 Is it possible to have a claim in negligence, nuisance, trespass or under the rule in *Rylands v Fletcher*, as a matter of Nigerian Law, against a licence-holder in respect of non-pipeline spills (a) caused by Third Party Interference, and (b) that have been remediated by the licence-holder?

PI 20 Is it possible to have a claim in negligence, nuisance, trespass or under the rule in *Rylands v Fletcher* in respect of damage caused by oil that is removed from a licence-holder's infrastructure by Third Party Interference and subsequently used in illegal oil refining by third parties?

PI 21 Do the Nigerian Constitution and/or African Charter enable claims to be brought against private companies for damage caused by oil spills?

PI 22 What is the scope of the following rights under the Nigerian Constitution and the African Charter, as interpreted in Nigerian law, and do they enable claims for compensation to be brought in respect of oil spills?

- (1) The right to a clean and healthy environment under s.20 of the Nigerian Constitution
- (2) The right to life under s.33(1) of the Nigerian Constitution
- (3) The right to respect for dignity of the person under s.34(1) of the Nigerian Constitution
- (4) The right to respect for life and integrity of the person under Article 4 of the African Charter
- (5) The right to the best attainable state of physical and mental health under Article 16(1) of the African Charter
- (6) The right to economic, social and cultural development with due regard to freedom and identity in the equal enjoyment of the common heritage of mankind under Article 22 of the African Charter

Approved Judgment

- (7) The right to a general satisfactory environment favourable to their development under Article 24 of the African Charter

PI 23 Do the Nigerian Constitution and/or African Charter enable claims to be brought for damage in relation to an oil spill caused by Third Party Interference?

PI 24 (1) Is it permissible under Nigerian law for the Claimants to pursue claims under the Nigerian Constitution and/or the African Charter of Human and People's Rights in parallel with private law claims in tort or under statute in respect of the same alleged damage caused by oil spills?

- (2) If not, is such a prohibition applicable in these proceedings in the English Courts?

5. Before turning to the PIs and to the evidence on each individually, there are a number of matters of fact and law giving necessary background and context. Where these relate to Nigeria, Nigerian laws and the Nigerian legal system I have summarised from the helpful reports of the experts.

Nigeria and the Nigerian system of government

6. Like many other African countries, Nigeria is an amalgam of diverse ethnic groups originating from a number of differing geographical tribal areas joined together to form the Nigerian nation. Nigeria became a Republic on 1st October 1963 on which date the Judicial Committee of the Privy Council ceased to be a court for Nigeria, the country having its own Supreme Court as the final court of appeal.
7. Between 1966 and 1975 Nigeria experienced three military coups, during which time the country was ruled by decree. The current Constitution of the Federal Republic of Nigeria 1999 ("the Constitution") succeeded former written constitutions as the highest source of law in Nigeria. It is the legal and normative source of all other laws, institutions and administration of the state of Nigeria, often referred to as the "grundnorm". It is binding on every person in Nigeria. Any legislation which is inconsistent with the Constitution is null and void to the extent of the inconsistency.
8. Nigeria has a federal system of government, dividing powers between the federal government and the 36 states plus the FCT (the Federal Capital Territory in which the capital, Abuja, is located). The federal legislature is the National Assembly. Each state has a legislature known as a House of Assembly. Subject to other specific provisions of the Constitution, under section 4 the National Assembly has exclusive power to make laws for matters in the Exclusive Legislative List ("the ELL") in the Constitution. There is concurrent power with state Houses of Assembly for matters on the "Concurrent Legislative List" ("the CLL"). The states have power to make laws in relation to matters on the CLL and also for matters which are not identified on either legislative list (such matters are referred to as falling into the "residual list", although there is not a list as such).

The Nigerian legal system

9. Nigeria operates a common law system, derived from that of English law, under which judicial precedent is itself a source of law. Pursuant to section 32(1) of the Interpretation Act 1964 and subject to any Nigerian law, the common law of England and the doctrines

of equity together with the statutes of general application that were in force in England on 1 January 1900 have effect in Nigeria.

10. Nigeria has federal and state courts, operating at three levels:
 - (1) The Federal High Court and High Courts of the states are of coordinate jurisdiction. The Federal High Court sits in different locations and has exclusive jurisdiction to deal with the list of matters set out in section 251(1) of the Constitution, which include (at (n)) “*mines and minerals (including oil fields, oil mining, geological surveys and natural gas)*”. Accordingly, under the Constitution, only the Federal High Court has jurisdiction to hear claims alleging pollution by operators of pipelines and fields, irrespective of whether they arise under federal law (such as the Oil Pipelines Act 1990) or state law (including claims in tort for negligence and nuisance).
 - (2) There is a single Court of Appeal, split into various divisions, which has jurisdiction to hear appeals from both the Federal High Courts and the High Courts of the states.
 - (3) There is a single Supreme Court, the policy court and the highest court in Nigeria, which has jurisdiction to hear appeals from the Court of Appeal on private and constitutional matters.
11. Decisions of the Supreme Court are binding on all lower courts. As in the United Kingdom, the Supreme Court can depart from its own decisions but will do so only rarely. Decisions of the Court of Appeal are binding on all lower courts; its decisions can only be overturned by the Supreme Court. The principles of *ratio decidendi* and *obiter dicta* were largely agreed, save for one point on the extent to which dicta in concurring decisions constitute part of the *ratio*, arising in connection with PI 22, discussed further below.
12. The experts agreed that decisions of foreign, particularly English, courts can perform a useful and persuasive function in Nigeria where there is no known Nigerian decision on the point. Both experts referred to a number of Nigerian judgments which have emphasised that foreign decisions will be resorted to only where there is no Nigerian precedent: see, for instance the observations of the Nigerian Court of Appeal in *Ajalyn Shoes Ltd v. Akiawande* [1991] 2 NWLR (Pt174) 432:

“The Supreme Court has warned time without number that our courts should only resort to English Law when there are no adequate local provisions in Nigerian Law. In other words, where there are adequate local provisions on a matter, resort should not be made to English law”.

And the Supreme Court *Omega Bank Plc v. Govt., Ekiti State* (2007) 16 NWLR (Pt 1061) 445:

“[W]here there are no known Nigerian decisions on a principle of law, the court should be persuaded to apply the decisions of foreign courts, especially where the issue involved is common law ie tort of libel”.

The Constitution

Approved Judgment

13. The Constitution consists of eight chapters and seven schedules.
14. Chapter II of the Constitution provides Fundamental Objectives and Directive Principles of State Policy: developmental aspirations for Nigeria which the government is expected to pursue. These Chapter II rights are non-justiciable by application of section 6(6)(c) of the Constitution.
15. Chapter IV identifies a number of fundamental rights which are directly enforceable in Nigerian Courts, by virtue of s.46 (1) of the Constitution: “*Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in that State for redress*”.
16. The fundamental rights set out in Chapter IV include: right to life (s.33), right to dignity of human persons (s.34), right to personal liberty (s.35), right to a fair hearing (s.36), right to privacy (s.37), right to freedom of thought, conscience and religion (s. 38), right to freedom of expression and the press (s.39), right to peaceful assembly and association (s.40), right to freedom of movement (s 41), and right to freedom from discrimination (s.42).

The African Charter and sources of jurisprudence on Charter rights

17. The African Charter on Human and Peoples’ Rights was adopted in 1981 by (what is now) the African Union and was ratified by Nigeria in 1983. The Charter aims to protect and promote human rights and basic freedoms across Africa.
18. The African Commission was established under Articles 30 and following of the Charter. The Commission’s mandate under Article 45 includes interpreting the provisions of the Charter at the request of a state party. It is empowered to receive communications about alleged infringements and to issue reports and recommendations in response (Articles 51 and 52), along with guidance to member states.
19. The African Court was established by a Protocol to the African Charter. As Nigeria has not deposited the necessary declaration, the African Court does not have jurisdiction to hear claims by individuals against Nigeria. However, Nigeria is a member of ECOWAS (Economic Community of West African States) and subject to the jurisdiction of the ECOWAS Court. The ECOWAS Court is able to apply human rights treaties to which member states are parties, in particular the African Charter. Reports and/or guidance from the Commission, along with decisions of the African Court and the ECOWAS Court, are not binding on the Nigerian Supreme Court. There was some difference between the experts as to the extent to which the Nigerian Supreme Court would refer to and/or find such decisions persuasive in the domestic arena; this difference in the evidence is germane to PI 22 and discussed further under that PI, below.
20. The Charter applies in Nigeria at two levels: as a regional treaty having been ratified, and as domestic legislation having been domesticated through the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 1983 (“the African Charter Act”), making it directly enforceable in Nigeria. S.1 of the Act states that Charter rights “*have force of law in Nigeria*” and shall “*be applied by all authorities and person exercising legislative, executive and judicial powers in Nigeria*”.

Approved Judgment

21. As the Constitution is superior to all other law in Nigeria, the African Charter is subordinate to the Constitution. If anything in the African Charter is contrary to principles of the Constitution, it is void and of no legal effect. Contrary provisions would be unenforceable in Nigerian courts.

Enforcement of fundamental rights under the Constitution and African Charter – the FREP rules

22. The Fundamental Rights (Enforcement Procedure) Rules 2009 (“the FREP rules”) are rules of procedure made by the Chief Justice of Nigeria pursuant to section 46(3) of the Constitution. They provide a procedure for access to justice for claimants alleging that their fundamental human rights have been breached.

23. Order II, Rule 1 of the FREP rules provides

“Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and People’s Rights (Ratification and Enforcement) Act and to which he is entitled, has been is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress”

24. Overriding Objectives, contained within the FREP rules, include:

“(a) The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.”

25. Of particular relevance at this trial is Order III of the FREP rules, which provides that no limitation period will apply to fundamental rights claims.

26. Nigerian authorities produced and discussed by the experts demonstrate that not every claim which is started as a fundamental rights claim in Nigeria is permitted to proceed as such under the FREP rules. Nigerian courts will look to determine whether a claim for breach of fundamental rights is the main claim or ancillary or incidental to it. Where fundamental rights claims are found to be ancillary or incidental to the main claim, they cannot be brought under the FREP rules; they can only be presented in court through the normal procedure for the enforcement of civil rights as specified by the rules of the court in which the claim has been started. The application of this “ancillary claim” principle is discussed further below in relation to PI 24.

27. It is common ground between the parties that if the fundamental rights claims sought to be advanced by the claimants in these proceedings would be permitted by the Nigerian courts to proceed under the FREP rules then no limitation period would apply to those claims.

The Oil Pipelines Act 1956 and the Petroleum Act 1969

28. Since the discovery of oil in Nigeria in 1956 it has been, in the words of one of the experts, “a busy hive of oil exploration and production with thousands of kilometres of crude oil pipelines criss-crossing the Delta.” Discovery of large reserves in the Niger

Delta led to increased foreign investment and the need for robust regulatory frameworks to manage the exploration, production and transportation of oil.

29. Nigeria's Federal Government acted quickly to regulate the burgeoning oil exploration and production industry, enacting the Oil Pipelines Act 1956 ("the OPA"). The OPA is expressed to be an *"Act to make provision for licences to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and for purposes ancillary to such pipelines."*
30. At the second reading of the Oil Pipelines Bill on 2 August 1956, the Minister of Land, Mines and Power, Mr Muhammadu Ribadu, introduced it as follows to the House of Representatives:

"Mr Speaker, Sir, Hon Members will be aware that large oil companies are energetically exploring Nigeria for oil. Wells have been bored in a number of localities and traces of oil found, but unfortunately it is as yet too early to say whether it has been found in commercial quantities. But if, though I would much prefer to say when, it is found in such quantities it is essential that the company finding it should have facilities to convey the oil easily and cheaply to a place of shipment or to its place of utilisation."

The Minister went on:

"The Bill now before the house is designed, in view of the extremely heavy capital investment required before oil can be found, to give the discoverer of oil in commercial quantities the right to facilities for the installation of a pipeline for the conveyance of the oil. But though its right is granted, the actual route over which the pipeline will run must be approved by the Minister, and before it is so approved full opportunity must be given for the lodging and hearing of objections, the safeguarding of the rights of other interested parties and the payment of compensation..."

The grant will be one of an oil pipeline licence, which, I would stress, would convey no title to the land itself. The license will be held for any period up to 99 years, or during the currency of the relevant oil prospecting licence or oil mining lease, and will enable mineral oils, natural gas, their derivatives and components, and steam and water so far as that is incidental to the main purpose, to be conveyed. The licensee will be responsible for compensating not only those whose lands or interests in lands are dangerously [sic. Injurious] affected, but also for damage suffered by any innocent persons by and breakage or leakage of the pipe, unless maliciously caused by a third party.

The main principle behind the bill is not a new one. There are already examples in Nigerian law of rights to run electric cables or water mains across land not owned by the power or water authorities which control the cables or pipes. It is not only logical to extend this principle of oil pipelines but essential if Nigeria is to obtain the full benefit of any oil under her soil. Sir, the objects and reasons at the end of the bill clearly explain its various clauses, and honourable members will not wish it to go into further details at this stage."

31. Part III of the OPA provides for licences to be granted to the holder of a permit to survey, and for such licences to be granted in relation to oil pipelines. The exclusive right granted to an oil pipeline licence-holder is the right to construct, maintain and

Approved Judgment

operate an oil pipeline in Nigeria subject to the provisions of the OPA and the terms of the grant of the oil pipeline licence by the Minister responsible for matters relating to oil fields and oil mining.

32. The rights and powers given to a licence-holder regarding construction, maintenance and operation of an oil pipeline and any ancillary installations are made subject to obligations in Part IV of the Act, to make good and to compensate for any injury or environmental damage caused. Section 11(5) in Part IV is of particular relevance to many of the private law preliminary issues for determination at this trial.
33. The Petroleum Act 1969 (“the Petroleum Act”) provided for ownership and control of all petroleum to vest in the Federal Government of Nigeria. It creates various types of licence including an oil prospecting licence and an oil mining licence. The Act prohibits the construction or operation of a refinery or the importation, storage and distribution of petroleum products, without the grant of a licence from the Minister. Section 9 of the Petroleum Act gives the Minister power to make regulations about any matters requiring to be prescribed for the purposes of the Act, pursuant to which powers the Minister promulgated the Regulations contemporaneously with the Act in 1969.

Bodo v. SPDC [2014] EWHC 1973 (TCC) – decision of Akenhead J

34. In a set of proceedings issued by the Bodo community (another people’ inhabiting a different region within the Niger Delta) against SPDC for losses arising from two identified oil spills, Akenhead J considered and heard evidence in relation to eight preliminary issues, a number of which concerned the scheme of the OPA and the meaning of specific provisions under it. The second of the issues for his decision required him in particular to determine (i) the extent to which statutory duties imposed on a licence-holder under the OPA had replaced the common law, and (ii) the meaning and scope of section 11(5) of the OPA.
35. In his judgment Akenhead J undertook a detailed survey of the matters covered by the OPA, concluding (at [63]) that it provided a comprehensive code

“..to cover the whole operation of the searching for routes (the survey stage), the regulation of the licence holder by licence, by the statute itself and by statutory regulations, the taking possession of the requisite land, the construction, maintenance and operation of the pipeline, a broad, largely causation based compensation scheme, specific procedures relating to compensation such as were not available elsewhere at the time and procedures at the end of the licence”

He found that common law remedies vis a vis the licence holder had been superseded by the OPA, for the reasons which he set out in his judgment at [64].

36. Whilst Akenhead J’s findings were strictly ones of fact based on the expert evidence of Nigerian law which he heard at the trial before him in 2014, the parties have accepted them for the purposes of these proceedings, subject to one point on section 11(5) which the defendants have sought to revisit before me in connection with PI 4, discussed further below.

Expert Evidence of foreign law – the court’s approach

37. Foreign law is a matter of fact. It is proved by evidence adduced by the parties from suitably qualified experts. Proof is to the usual civil standard. The task of the court is to “evaluate the expert evidence of [foreign] law and to predict the likely decision of the highest court in the relevant [foreign] system of law if this case had been litigated there on each of the points in dispute” (*Dexia Crediop SpA v Comune di Prato* [2017] 1 C.L.C 969 at [34]).
38. The role of such expert is authoritatively stated in *MCC Proceeds v Bishopsgate Investment (No 4)* [1999] CLC 417 at [23] and [24]:
- “23. In our judgment, the function of the expert witness on foreign law can be summarised as follows:
- (1) To inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court’s approach to their construction,
- (2) To identify judgments or other authorities, explaining what status they have as sources of foreign law; and
- (3) Where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court’s ruling would be if the issue was to arise for decision there.
24. The first and second of these require the exercise of judgment in deciding what the issues are and what statutes or precedents are relevant to them, but it is only the third which gives much scope in practice for opinion evidence, which is the basic role of the expert witness. And it is important, in our judgment, to note the purpose for which the evidence is given. This is to predict the likely decision of a foreign court, not to press upon the English judge the witness’ personal views as to what the foreign law might be.”
39. The 22 preliminary issues which I have to decide at this trial all concern the proper interpretation and application of Nigerian law, requiring me each time to ask, “how would the Nigerian Supreme Court answer the question raised by this PI?” (see *Perry v Lopag Trust* [2023] UKPC 16 at [11]):
- “The task of the trial judge where there are disputed issues of foreign law is to determine what the highest relevant court in the foreign legal system would decide if the point were to come to it”.
40. The key principles which guide a court in performing its task were gathered and set out by Blair J in *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] 4 WLR 49 at [237]. It is unnecessary to rehearse them all here, but the following are particularly relevant (citations omitted):
- “(3) The court’s approach to conflicts of expert evidence is to resolve the conflicts in the same way that it approaches other conflicts of fact
- (4) In doing so, the court must bear in mind the purpose for which the evidence of foreign law is given: “This is to predict the likely decision of a foreign court,

not to press upon the English judge the witness's personal views as to what the foreign law might be"

...

(5) "If the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation and adjudication". If there is a conflict of evidence, the court must decide on the conflicting testimony. The court "is not entitled to construe a foreign code itself"

...

(8) The "function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents. In the former case, the expert tells the court what the statute means, explaining his opinion, if necessary, by reference to foreign rules of construction...".

(9) As to the identification of judgments and other authorities, the court "is not bound to apply a foreign decision if it is satisfied ... that the decision does not accurately represent the foreign law" (Dicey, Morris & Collins *ibid* at ¶9-020). In addition, "where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively settled" (*ibid* at ¶9-020).

(10) It is evident that the quality of expert evidence before the court varies from case to case, and the above principles have to be applied in that light. As has been held in the context of the construction of foreign statutes, the degree of freedom which the English court has in putting its own construction on the translation of foreign statutes, arises out of, and is measured by, its appraisal of the expert evidence.

...

(12) As the defendants point out, in the MCC Proceeds case the court also said that it was only where there is no authority directly in point that there is "much scope in practice for opinion evidence, which is the basic role of the expert witness"

(13) However, as the claimant submits (correctly in the court's view) in that case the Court of Appeal was discussing a jurisdiction (the United States) where the doctrine of precedent exists. Where there is a precedent, there may not be much scope in practice for opinion evidence..."

41. The PIs in this case raised a number of matters of law which have not as yet received consideration by the Nigerian Supreme Court. Where there are relevant decisions of courts below the Supreme Court, I have had regard to the observations of Simon J (as he then was) in *Yukos Capital SarL v OJSC Oil Company Rosneft* [2014] EWHC 2188 (Comm) at [29] indicating that asking what the highest court would decide might not be the correct approach if an issue has "been plainly decided by a court which is inferior in jurisdiction to the Supreme Court". Simon J went on to cite and approve this passage from *Dicey*:

“Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law...But the court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively decided.”

42. Where the foreign law is that of a jurisdiction where cases are decided in English and using the same principles e.g. of common law and statutory interpretation, as is the case in Nigeria, then the English court’s knowledge of its own law and principles can legitimately be brought to bear: *MCC Proceeds* at [13].

Expert evidence at this trial

43. The court heard from three experts at trial: Dr Babatunde Ajibade SAN (Senior Advocate of Nigeria), and Dr Olisa Agbakoba SAN, instructed by the Claimants to deal with the private law issues and the fundamental rights issues respectively; for the Defendants Mr Godwin Omoaka SAN gave evidence in relation to all the issues. All the experts produced reports and supplementary reports dealing with the issues in respect of which they had been instructed. There were Joint Statements and addendum reports, amounting to some 1000 pages of written evidence in all. I also heard oral evidence from each expert over two weeks during the trial.
44. Each of the three experts who have given evidence is a distinguished academic and/or senior practitioner in Nigeria. In assessing their evidence I did not expect to be, nor was I, concerned, as a court might be with factual witnesses in ordinary trials occurring in England & Wales, with matters of credibility, memory, demeanour, how they gave evidence or the like; rather I have sought to weigh up their learned, bona fide opinions on the law of their country bearing in mind such decided cases as they relied on in arriving at their opinions, applying the principles derived from the cases to which I have referred above.
45. I dismiss without hesitation the suggestion made by the Claimants in closing that I should reject Mr Omoaka’s evidence in its entirety. Serious allegations were levelled at the honesty and propriety of his conduct as an expert witness: it was said that he had wilfully concealed a relevant recent case (*Torchi* - in which he acted for Shell); further that he was obviously partisan, since his firm acts for a long list of oil company clients in Nigeria; lastly that he wrongly held himself out as an expert in constitutional law when he had an insufficient body of relevant, or at least relevant recent, experience in constitutional law cases.
46. I found these criticisms unfounded and unhelpful. As I observed during argument, if the Claimants really were of the view, for whatever reason, that Mr Omoaka could not properly assist the court, then it would have been more useful, and more consistent with the overriding objective, for that to have been raised and determined at a case management hearing before trial. The objections could then have been heard and dealt with before the court had read and considered the several long reports which Mr Omoaka prepared and before hearing his evidence on the range of preliminary issues over two weeks. Whilst Mr Omoaka’s omission to mention the Nigerian case of *Torchi* in his reports in this case was regrettable, I consider it to have been an oversight. I reject the suggestion that it was deliberate, or that he had wrongly concealed his

involvement when giving evidence in another case (*Bodo*, before Jefford J). As to whether Mr Omoaka was qualified to give evidence on the public law issues, his CV appeared to me adequately to have addressed this. Cases raising human rights claims under Part IV of the Constitution or the African Charter may not have featured largely in Mr Omoaka's recent practice but as a senior counsel in Nigeria, where the Constitution is the fundamental "grundnorm" for all laws, he is amply qualified to speak to how the courts will approach Constitutional and human rights.

47. I was likewise unpersuaded by Defence submissions seeking to minimise the weight of opinions expressed by Dr Agbakoba on the fundamental rights issues on the basis that he was a self-confessed "activist" in the field of human rights, too interested in telling this court how the law in Nigeria should be, rather than in assisting with how it is. Experts are human beings after all, and will have developed interests and opinions, particularly in areas of law in which they practise frequently. That does not prevent them from seeking to assist the court in accordance with the requirements set out in CPR Part 35, as I find that each of the experts sought to do here.
48. I decline therefore to dismiss any expert's evidence, whether wholly or partially, preferring instead to consider the competing positions they expressed on issues where they differed by reference to the merits of the points which they made, the cogency of the competing opinions they advanced and to such relevant Nigerian law as they produced and drew to my attention. I noted, as Mr Omoaka himself pointed out when grilled by Ms Kaufmann on the propriety of his acting and his competence to give evidence, that there were a great many points of private and public law on which the experts agreed; several indeed on which, after discussion or in cross-examination, the Claimants' expert moved nearer to the view expressed by the Defence expert, and vice versa.

The current stage of proceedings

49. Before turning finally to consider the preliminary issues themselves, it is important to record what stage the proceedings have reached. The key staging posts for present purposes are as follows:
- The four sets of claims were issued over two years between June 2015 and January 2017. The next 4 years were taken up with a jurisdiction challenge, finally resolved by the Supreme Court decision in *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3.
 - Jurisdiction having finally been resolved, the case came before O'Farrell J in the TCC for initial management in 2022. She made various orders, including a Group Litigation Order and for further particulars of the individual claims in the form of Schedules of Information. Proceedings were transferred to the King's Bench Division where I was appointed the managing judge. O'Farrell J's decision is at *Alame & Others v. Royal Dutch Shell Plc and another* [2023] EWHC 989 (TCC).
 - In 2023 Re-amended Particulars of Claim were served including amongst others things (i) claims in respect of illegal refining and (ii) the fundamental rights claims. I allowed the amendments: *Alame & Others v. Shell Plc & SPDC* [2023] EWHC 2961 (KB) . At a further hearing later in the year I ordered that the case should

proceed as a global claim: *Alame & Others v. Shell Plc & SPDC* [2024] EWHC 510 (KB).

- Both of these decisions were appealed and heard together, judgment being given in December 2024: *Alame & Others v. Shell Plc & SPDC* [2024] EWHC 510 (KB) (“the 2024 appeal”)
50. The 2024 appeal dismissed the appeal against the amendments. The appeal in relation to the global claim was allowed, the court determining that the impasse arising from insufficiently particularised claims should be resolved like this: disclosure should first be given after which lead claimants would be selected and only then would the case have to be pleaded “with sufficient particularity so that the Defendants know what case they have to meet and have a fair opportunity to meet it”: see the judgment of Stuart-Smith LJ at [86]. The parties have subsequently largely agreed a programme of disclosure, with the few outstanding points resolved at a recent CMC held in April 2025. In short, the position now is that disclosure will take place over the course of this year, with lead claimants being selected towards the end of the year. Particulars of claim, pleading a case which identifies the spill or spills relied on and “adopting conventional principles of causation” (per Stuart-Smith LJ at [78]) will thereafter be served for each of the lead claimants.
51. These preliminary issues accordingly fall to be determined at a stage before the claims have been fully pleaded and particularised. Although some 85 spills have (so far) been identified in general terms as responsible for the claimants’ losses, there is as yet no pleaded case connecting the event(s) said to have caused loss to a claimant to particular torts/breach of statutory duty by either defendant. In that sense, therefore, despite the years that have passed since issue, this case is still at a very early stage. During the trial and in preparing this judgment, I have anxiously reflected on the extent to which it is sensible, or even possible, to determine all the issues which the parties agreed (and which I ordered) now. My concerns are aptly captured in these remarks of Hildyard J in *Wentworth Sons v* [2017] EWHC 3158 (Ch):
- “29. But it is, I think, appropriate to acknowledge at the outset that preliminary issues often look more appealing and definitive in the early days of a case than when they come on later to be adjudicated. That which appeared to be conclusive, when a preliminary issue was directed, is not infrequently subsequently revealed to raise further questions; and that which appeared to be capable of discrete determination is often found later to be inextricably linked to issues whether of fact or law or both which cannot safely and satisfactorily be summarily determined.
30. Furthermore, where the issues are of both novelty and importance, the prospect of appeals is real; and a bifurcated process may result, with the preliminary issues on appeal and the trial which may or may not become necessary, being stalled in the meantime. It is a truism that preliminary issues are often a source of regret, as being an apparent short cut to what turns out to be a longer journey in the end.”
52. Having dealt with the necessary background matters, I turn now to a discussion of each of the preliminary issues upon which I heard evidence. In presenting the case at trial, the parties grouped the issues variously under different headings but in this judgment I shall take them in turn, in the order they were listed and agreed by the parties.

SECTION I: THE PRIVATE LAW ISSUES

PI 1 What limitation period (if any) applies to claims to be brought under (a) section 11 of the Oil Pipelines Act 1990 (“OPA”), (b) the Petroleum Act 1969, (c) the Nigerian common law (d) the Nigerian Constitution and (e) the African Charter of Human and Peoples’ Rights as incorporated in Nigerian law (“the African Charter”)

Does time run from the date of the oil spill or the date at which oil reaches and causes damage to a Claimant’s land or water source

53. The answers to (d) and (e), i.e. limitation for claims under the Constitution and/or African Charter follow from my findings in relation to the fundamental claims issues. The present section of the judgment deals only with the issues arising in relation to the private law claims, i.e. the claims in tort and breach of statutory duty.
54. Both experts were agreed that Nigerian courts will apply limitation to all private law claims, whether brought pursuant to the OPA, the Petroleum Act 1969 or at common law, and that the same limitation period will apply to all. But they disagreed about the length of the limitation period which the Nigerian courts would apply to these claims.
55. Dr Ajibade, the Claimants’ expert, maintained that the applicable limitation period is that prescribed by the English Limitation Act 1623, namely 6 years, given force in Nigeria by section 32(1) of the Interpretation Act 1964. Mr Omoaka, the Defence expert, took the view that as the causes of action arose in Rivers State, the Rivers State limitation law applies, which prescribes a period of 5 years.
56. Dr Ajibade’s evidence was that the Supreme Court would decide that state limitation laws could not apply to actions started in the Federal High Court, upon the proper application of section 254 of the Constitution. This section provides that:

“Subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court”.

57. On Dr Ajibade’s analysis of section 254 it is the National Assembly which has the legislative authority to legislate for the practice and procedure of the Federal High Court. Section 254 gives power to the National Assembly to make limitation laws which apply to actions in the Federal High Court. The National Assembly has not specifically enacted limitation legislation, therefore the 6 year period prescribed by the English Limitation Act of 1623 is applied by virtue of the Interpretation Act 1964. His evidence was that as limitation is a matter of practice and procedure, the correct limitation period depends upon the court in which the action is started. An action started in a state court will apply the state limitation period (where there is one), but for actions concerning oil/minerals which can only be issued in the Federal High Court, the correct limitation period is 6 years by application of the 1623 Act, as a federal limitation law of general application applicable in all federal courts:

“Given the provisions of [section 4(4)(b) and section 254] of the Constitution conferring legislative competence on the National Assembly to legislate for the practice and procedure of the Federal High Court, the Limitation Act of 1623 is to be deemed

an existing law passed by the National Assembly for this purpose.” (from Dr Ajibade’s first report).

58. Dr Ajibade relied on decisions of the Supreme Court in *Fasakin Foods Nigeria Limited v. Martins Shosanya* [2006] JELR 37376 (SC) and *Chigbu v Tominas (Nig) Ltd* [2006] 9NWLR 189. *Chigbu* concerned a claim brought in the High Court of Imo State on 23 December 1996 in respect of a cause of action which accrued on 17 July 1991. Between the accrual of the cause of action and the issuing of the claim, the Imo State legislature had passed a limitation statute which came into force on 30 December 1994. The statute prescribed a limitation period of 5 years, in place of the 6 years which formerly applied pursuant to the 1623 Act. The issue before the Supreme Court was whether the relevant limitation period was that prescribed by the law in force at the time the claim was issued or that in force when the cause of action accrued. Mr Chigbu argued that limitation was a matter of substantive law, such that a change of law after the accrual of the cause of action would not affect rights and obligations already accrued. By contrast, the procedural provisions governing determination of a claim will depend on when it is issued, rather than on when the cause of action accrued. Oguntade JSC, giving the lead judgment, rejected the claimant’s contention, holding that limitation was a matter of practice and procedure to which the Imo State law of 1994 applied. Having considered the cases relied on by counsel, Oguntade JSC observed as follows:

“A short statement as the above is certainly inconclusive to support the proposition that statutes of limitation are aspects of the substantive law. It seems to me that, such statutes only take away the right of action from a party without destroying that right since it can be enforced in other ways, for example by exercise of a right of lien. In Ojokolobo v Alamu (supra), this Court would appear to have accepted that limitation laws are matters of practice and procedure only by quoting with approval the observation of Vaughan Williams LJ in THE YDUN (1899) P.236 ... The court below, in the lead judgment per Ogebe JCA observed at page 80 of the record thus:

“The trial Judge failed to determine whether or not the Limitation Edict of 1994 is a substantive or procedural law. In the case of Ifezue v. Mbadugha (1984) 5 SC. 79 at P.82; (1984) 1 SCNLR 427. Obaseki JSC tried to define procedural law in the following words: ‘In the procedural law or adjectival law including rules of court, the law or rule normally fixed time for doing of an act or the taking of a step in the proceedings.’ ...I have no hesitation in holding that the Limitation Edict of 1994 of Imo State is a procedural law as defined above. It does not give any rights or obligations to the parties. It only limits the right of action by a party and that is purely procedural.” ...It is apparent that the court below correctly decided that the Limitation Edict 1994 of Imo State is a procedural law. Being such a procedural law, it operates retrospectively...”

59. *Fasakin Foods* is a decision of the Supreme Court holding that the power of transfer to a State High Court by sections 22(3) and (4) of the Federal High Court Act 1976 was ultra vires the National Assembly as it was only the State Houses of Assembly that had the legislative authority to make laws for the practice and procedure of the State High Courts. In the course of its decision the Supreme Court considered section 233 of the 1979 Constitution explicitly empowering the National Assembly to make law “with respect to the practice and procedure of the Federal High Court”. When challenged about the difference in wording between section 233 of the 1979 Constitution and

section 254 of the 1999 Constitution, Dr Ajibade said that despite the difference he regarded section 254 as having the same effect in empowering the National Assembly to make laws regarding practice and procedure, including limitation.

60. Dr Ajibade conceded that there is presently no authority, still less any Supreme Court authority, which has considered his analysis of the meaning and effect of section 254 of the Constitution but in his view the Supreme Court would accept it as

“a logical and clear interpretation of the law based on the case law that classifies limitation of actions as a matter of practice and procedure in Nigeria, and based on the Constitutional provisions that allocate legislative authority for prescribing the practice and procedure of the Federal High Court to the National Assembly”.

61. Dr Ajibade accepted that his view – that you cannot apply state limitation to actions in the Federal High Court – is inconsistent with a number of Court of Appeal decisions which have done just that. In his view these decisions were wrong and would be overturned by the Supreme Court.

62. Mr Omoaka’s evidence was that limitation is not mentioned in the ELL or the CLL and therefore falls into the residual list, as something on which state Houses of Assembly have the exclusive power to legislate. His view was that the National Assembly may prescribe limitation periods for actions arising under particular statutes on subject matter falling into the ELL, but it has no power to make general limitation laws covering all states; the states have powers to make limitation laws applicable to actions arising in that state, which is what Rivers State and many other states in Nigeria have done. In Rivers State, where the current causes of action arose, the limitation period is 5 years. Mr Omoaka drew attention to many decisions in the Court of Appeal and the Supreme Court involving cases in the Federal High Court which have applied state limitation periods, including:

- (1) *Etim v I.G.P.* [2001] 11 NWLR (Pt.724) 266. This was a decision of the Court of Appeal where the lead judgment was given by Justice Mahmud Mohammed (later a Supreme Court Justice and then Chief Justice of Nigeria) dealing with an appeal from a decision of Federal High Court, holding that the limitation law of Kaduna State *“applied to any action filed in a court of law in Kaduna State including of course the Federal High Court sitting in Kaduna...”*.
- (2) *Nigerian Agip Oil Co Ltd v Ogbu* [2017] LPELR045217 (CA). *Ogbu* was a claim under the OPA for compensation for damage by discharge of oil waste. The Federal High Court judge at first instance allowed the claim. On appeal, the Court of Appeal applied a 5-year Rivers State limitation period to find that the claim was time-barred. Counsel for the respondent had argued that the state legislature was *“not competent to legislate on such matters and so the [state] limitation law was inapplicable in this case...state limitation laws do not apply to matters covered by the [ELL] where the Federal High Court has exclusive jurisdiction”*. The Court of Appeal held in terms that *“the Limitation Law of a State applies to actions under the [OPA]”* (I note that in his evidence Dr Ajibade said that this decision is currently on appeal to the Supreme Court).
- (3) Further cases include: *SPDC v West* [2018] 39 WRN 119 (where the Court of Appeal allowed an appeal against the first instance judge’s refusal to apply Rivers

State limitation law); *SPDC v Zedie Williams* [2017] LPELR-49294 (CA) (applying Bayelsa State limitation law to a claim under the OPA); *Opuokolo & Ors v SPDC* [2022] LPELR-57301 (CA) (applying Rivers State limitation to a claim under the OPA).

- (4) *Frozen Foods v Ojomo* [2022] 14 NWLR (Pt.1850) 299 is a Supreme Court decision from 2022. The case involved a claim which started in the Federal High Court, where the judge held that the limitation point was premature. The Court of Appeal allowed the appeal and dismissed the claim as time barred. The issue for the Supreme Court was whether the Court of Appeal had been within its powers in deciding to take the point and make that decision. But the Court also looked obiter at whether the decision was correct, in the course of which it described limitation as “*a matter [which is] certainly not an ordinary point of law contemplated under the rules of court*”. The court went on to endorse the application of state limitation law, Justice Peter-Odili JSC observing “*The point must be made that the position of Nigerian law is now well settled that the issue of limitation law or statute bar is a jurisdictional issue which can be raised at any time...and must be heard and determined before any further proceedings*”, referring to the majority decision in *Elabanjo & Anor v. Dawodu* (2006) 15 NWLR.
- (5) *Onoita v Texaco (Nig) Plc* (2014) LPELR 62416 (SC). This was a claim issued in the High Court of Lagos State for payment of wages, salary and other benefits said to have accrued some 25 years previously. It seems that a limitation point had been taken and dismissed at an interlocutory stage, which was not then appealed. However on appeal to the Court of Appeal the respondent argued that the action was time barred, which the Court of Appeal accepted, allowing the appeal and dismissing the case. The issue for the Supreme Court was whether the Court of Appeal had been right to do so; it held that it had. In the course of her leading judgment Chioma Egongdu Nwoisu-Iheme JSC repeatedly emphasised the fundamental nature of limitation:

“*...the subject matter of the controversy herein lies in the propriety of the lower Court’s decision to consider a jurisdictional issue...Jurisdiction has been describe as a threshold issue. A threshold in the sense that it is the legal power which enables any Court or Tribunal to adjudicate over any dispute presented by by an aggrieved party, and as a consequence, proceedings conducted in its absence thereof are generally described as a nullity ab initio...*”

“*Indeed, jurisdiction is the livewire and soul of adjudication, and due to its innate significance and the need to protect the sanctity of our judicial system, this Court has numerously expressed the view that an inquisition into a jurisdictional question would not be impeded or curtailed by Rules of Court or procedure.*”

“*Again, and at the risk of repetition, a Court’s innate obligation to consider a jurisdictional issue would not be afflicted by the Rules of Court, conduct of the parties, or even an express submission to jurisdiction by a Defendant*”

(quoting from *MV Arabella* and other authorities emphasising that “*the question or issue of whether or not an action is statute barred is one touching on or goes to jurisdiction*”, and continuing)

“*The foregoing principle was reiterated and adopted by this Court.... lending further credence to the principle that the statute of limitation being jurisdictional*

and of a fundamental class, can be raised for the first time even orally before this Court.”

“As I have reiterated in no small measure, jurisdiction transcends the boundaries of regulations and procedural provisions. It is very much in a class of its own...”

All the other Justices agreed with the leading judgment. The concurring judgment of Helen Moronke Ji Ogunwumiju JSC included the following:

“The issue of jurisdiction is very vital and fundamental in our jurisprudence and it is settled law that a judgment or an order of Court given where such a Court lacks jurisdiction is a nullity...The issue of statute of limitation is one of jurisdiction”

63. When asked about the decision in *Chigbu* Mr Omoaka’s evidence was that it was restricted to a finding that a state limitation law can operate retrospectively.
64. In his report Mr Omoaka drew attention also to the decision of O’Farrell J in *Jalla & Ors* [2023] EWHC 424 (TCC) determining, on the expert evidence before her, that state limitation law applied. As foreign law is a matter of fact to be determined on the evidence I am not bound by O’Farrell J’s conclusion in *Jalla* but must make a determination based on all the evidence which I have heard at this trial.
65. Mr Omoaka identified a line of conflicting authority where the courts have declined to apply state limitation laws, on the basis that state laws could not apply to cases whose subject matter fell within the ELL. Both experts agreed that the subject matter argument underpinning this line of authority is wrong; Dr Ajibade agreed with the outcome in *Sampson & Ors v. SPDC* [2021] LPELR-53314 (where the Supreme Court refused to apply state limitation instead applying the 1623 Act to arrive at 6 years) but for different reasons than those given by the court in that case.
66. There is a clear distinction in the evidence between the two lines of reasoning telling against state limitation laws applying to cases in the Federal High Court (i) the subject-matter argument (that if the subject matter falls within the ELL then state limitation laws cannot apply) which is a line of reasoning that both experts agreed was wrong and would not now be followed and (ii) Dr Ajibade’s reasoning that state limitation cannot apply to actions started in the Federal High Court as limitation is a matter of practice and procedure in respect of which, by virtue of section 254, only the National Assembly has the right to legislate. As Dr Ajibade at one point described it, this is his “pet” point, it has not been raised before and has not therefore been considered by any court to-date. In cross-examination it was suggested to him that if section 254 did have the effect for which he contends, then one of the many justices of the many appellate courts which have considered the application of state limitation law to cases in the Federal High Court would have raised it. Dr Ajibade’s response was to repeat that Nigerian judges at every level will only address points which counsel put before them, and to deplore the conflicting decisions which he said could be resolved and explained by his section 254 point.
67. I remind myself that my task is to determine what decision the Nigerian Supreme Court is likely to come to on the question of what limitation period applies. I have concluded, on the evidence, that it is more likely that the Supreme Court will follow the long line of authority which has applied state limitation laws to cases in the Federal High Court. To my mind the best evidence of what the Supreme Court will do lies in the many

Approved Judgment

appellate decisions, handed down over a period of at least the last 20 years, which have unhesitatingly applied state limitation laws to actions in the Federal High Court. The only reason so far advanced by Nigerian courts for not applying state limitation has been disapproved and the experts are clear that no court today would follow it. The decision in *Sampson* is equivocal for although the result is one that Dr Ajibade's reasoning would produce, his was not the reasoning which the court adopted in that case.

68. I can see that Dr Ajibade's line of reasoning derives a measure of support from the cases he cited, but they are now of some age. I accept that *Chigbu* and *Fasakin Foods* taken together provide a basis for his argument that limitation is a matter of "practice and procedure" for the purposes of section 254, but that is to ignore the purport of more recent decisions which have emphasised the very particular nature of limitation, most recently the Supreme Court itself in *Frozen Foods* and *Onoita*. I agree with Mr Molyneaux's point made in closing, that the matter of procedure/jurisdiction terminology used in the cases is something of a red herring - clearly the courts have treated limitation on occasion as either, or both, of those things. But the real issue is whether the courts would treat limitation as a matter covered by the procedural rule-making power in section 254. Given the very trenchant observations of the Supreme Court on the singular and fundamental nature of limitation as recently as *Frozen Foods* in 2022 and *Onoita* in 2024 I cannot find that the same court would be likely in 2025 to hold that limitation is a matter covered by that power.
69. There is consensus on the second part of PI 1, the experts' agreed position is reflected in the answer, below.

Answer to PI 1

70. The answer to PI 1 is
- (1)(a) to (d) The limitation period which applies to claims under the OPA, the Petroleum Act and at common law is 5 years.
- (2) Time starts to run in respect of any cause of action in trespass from when oil enters a claimant's land. For every other cause of action time will start to run from the date on which any oil first causes damage to the particular claimant.

PI2 In respect of each cause of action, as a matter of Nigerian law, can the limitation period (if any) be extended by reference to the doctrine of continuing torts?

The experts were asked to consider the following factual scenarios when addressing this question.

Scenario 1

Oil is spilled from an SPDC operated asset (but there is no ongoing discharge of oil) and migrates from the place where the oil was originally spilt, for example through groundwater or an aquifer, to a different location and causes a Claimant damage there, some months or years after the oil was originally spilt.

Scenario 2

Approved Judgment

An oil spill from an SPDC operated asset (which does not involve the ongoing discharge of oil i.e. the oil is no longer leaking from an SPDC operated asset) (i) has not been cleaned-up and remediated and (ii) has caused and continues to cause a Claimant damage.

Scenario 3

Repeated (but separate) oil spills from SPDC operated assets (which do not involve the ongoing discharge of oil), caused and continue to cause a Claimant damage.

Scenario 4

A single oil spill from an SPDC operated asset which involves the ongoing discharge of oil (i.e. oil continues to leak from an SPDC operated asset), caused and continues to cause a Claimant damage.

PI3 In respect of each cause of action, as a matter of Nigerian law, can the limitation period (if any) be extended by reference to the doctrine of continuing statutory breach?

The same scenarios 1-4 above to be considered here.

71. The parties suggested that PI2 and 3 could usefully be considered together.
72. Both experts were agreed that when considering and applying the doctrine of continuing torts and/or continuing statutory breach, the Nigerian courts would apply the principles set out and discussed by the UK Supreme Court in the case of *Jalla v Shell International Trading and Shipping Co Ltd* [2024] A.C. 595. However, they did not agree as to the likely outcome of the application of those principles to each of the above scenarios.
73. The Claimants invited me to answer what in their closing argument counsel referred to as “points of abstract principle” but which on closer examination appear to me to call for detailed responses to hypothetical situations arising under each of the potential causes of action, viz: trespass, nuisance and *Rylands v Fletcher*, section 37 of the First Schedule to the Petroleum Act, section 11(5)(b) and (c) of the OPA and negligence, all (counsel suggested) to be addressed separately.
74. I am not going to address the torts/breach of statutory duty separately as suggested, nor to answer the hypothetical scenarios at 1 to 4 above in this judgment. I do not think that it would be helpful to do so in advance of detailed facts being (i) pleaded and (ii) found at trial, not least as the experts were not asked in advance of trial to address limitation in the context of a duty to clean up although, during the evidence and by the end of counsel’s closing argument, a considerable amount of time had been spent addressing limitation in that context.
75. As the Claimants have stressed many times, both here and in the Court of Appeal, each claimant intends to run a case that a particular spill or spills is/are responsible for their loss. The start-date for the running of limitation in respect of any individual claim will depend upon the nature of that individual claimant’s pleaded case in relation to the particular spill(s) which are said to have occasioned loss to them. As lead claimants have yet to be selected, the detailed particulars in relation to the individual claims have

not yet been prepared. It seems to me wholly premature to make findings before actual spills have been identified and any related facts pleaded.

76. I acknowledge that it may help to determine the broad principles that will apply, under Nigerian law, if and when a case is pleaded which is said to engage the principles of continuing torts/continuing statutory breach, but I am not prepared to address the various hypothetical scenarios which the parties asked the experts to consider, nor the further point arising from an alleged duty to clean up. There is a risk otherwise of precisely the kind of linguistic misunderstanding referred to by Lord Burrows in *Jalla*. The shape of this litigation is unlike previous oil claims tried in these courts (e.g. *Bodo*, *Jalla*) where specific spills responsible for the claimants' losses have been identified from the start. Here, whilst many spills have been identified in general in the Particulars of Claim, everyone recognises that a case linking duty/breach/loss has not yet been sufficiently pleaded. Instead, as the Court of Appeal has now directed, the Defendants are to give disclosure first after which detailed pleadings in respect of each of a number of lead claims will follow. Only then will the particular spills giving rise to specific allegations of torts/breaches of statutory duty, and the defences to them, have been identified. Limitation may or may not arise on the facts of the individual lead cases and if it does, then on those facts there may or may not be a live issue of repeated tortious activity engaging *Jalla* principles.
77. For these reasons I do not propose to engage with the detail of the hypothetical scenarios in this judgment. However, the following general points emerged from the evidence of the experts in relation to PIs 2 and 3:
- (1) The Nigerian Supreme Court has not so far addressed the principles applicable to continuing torts/continuing statutory breach directly. However, the experts agree that in the event that the court were to do so, it would have regard to the UKSC decision in *Jalla* and would find the reasoning in the judgment of Lord Burrows persuasive.
 - (2) The Nigerian Court of Appeal decision in *Effiong v Mobil Producing* (2024) LPELR-62930(CA) takes matters no further. *Effiong* was an appeal against a first instance decision of the Federal High Court. Mobil had taken a preliminary issue arguing that, on the pleadings, a claim against it in respect of an oil spill was statute-barred. The judge at first instance agreed, dismissing the claim, and the claimant appealed. (I note, incidentally, that the parties and both courts proceeded on the basis that the Akwa Ibom State 5-year limitation law applied to the claim). Although *Jalla* was cited to the appeal court in argument, the court did not refer to that case or the principles discussed in it when giving its decision. The reasoning, which is brief, indicates that the appeal turned on a pleading point. The case was sent back to the Federal High Court for trial.
 - (3) The experts agree that where trespass is relied on, and as trespass does not require damage to be proved, a new cause of action will arise each day that oil remains on a claimant's land.
 - (4) Where, as in all the remaining causes of action, damage is a necessary element of the accrual of the cause of action, the principles to be applied in determining when limitation has started to run, and whether the circumstances are such as to give rise to repeated accruals of causes of action, are as discussed by Lord Burrows in *Jalla*.

Approved Judgment

- (5) A claimant may sue in respect of causes of action which have accrued during the limitation period of 5 years (as decided under PI 1 above).
- (6) There will be a fresh cause of action per day or other regular period that the claimant establishes repetition of a relevant tort/breach of statutory duty, likely to be highly fact-dependent.

Answer to PI 2 and PI 3

78. The answer to PI 2 and PI 3 is that Nigerian courts will apply the principles governing the doctrine of continuing torts set out and discussed by the UK Supreme Court in *Jalla v Shell International Trading and Shipping Co Ltd* [2024] A.C. 595 when considering the application of limitation to common law claims or claims under the OPA. There will be a fresh cause of action per day or other regular period that the claimant establishes repetition of the relevant tort.

PI 4 In respect of claims under section 11 of the OPA:

- (1) Does section 11 of the OPA enable compensation claims to be brought against a licence-holder in relation to pipeline spills caused by Third Party Interference?**
- (2) Is Third Party Interference a defence to a claim under the OPA?**
- (3) To what extent (if any) does Regulation 26(2) of the Oil Spill Recovery, Clean-up, Remediation and Damages Assessment Regulations 2011 (“the 2011 Regulations”) qualify, limit or inform the scope of s.11(5) of the OPA?**
- (4) Can a licence-holder be liable under the OPA for damage caused by oil that is removed from a licence-holder's oil pipeline or ancillary installation by Third Party Interference and subsequently used in illegal oil refining by third parties?**

There were Assumed Facts and six Scenarios put forward for the experts’ consideration when addressing the four questions under PI 4 concerning the operation of s.11 of the OPA :

Assumed Facts

- (1) “Third Party Interference” or “TPI” refers to the interference with SPDC operated assets by third parties (i.e. not the Defendants) for the purpose of stealing oil (known as bunkering) or sabotaging such assets.*
- (2) A pipeline spill was caused by Third Party Interference*
- (3) “Illegal Refining” is the process by which oil which has been unlawfully abstracted from pipelines and infrastructure by third parties and/or refined locally by third parties – in illegal refineries – without an appropriate licence. The illegal refineries are operated by third parties outside the licence-holder’s control and without the licence-holder’s authority.*
- (4) Damage was caused by Illegal Refining.*

Scenario 1

Approved Judgment

It is shown that the spill was caused by TPI (which resulted in damage to one or more Claimants) in circumstances where the licence holder failed or neglected to adequately design and/or maintain or otherwise to protect the pipeline from a foreseeable risk of TPI (for example by burying it underground or safely decommissioning disused infrastructure). The scenario should also be considered in circumstances where it is found that the Claimants prevented the licence holder from carrying out maintenance and repairs of the relevant assets.

Scenario 2

It is found that the licence holder failed or neglected to timeously detect a leak or other form of oil releasing damage caused by TPI (for example by human oversight or a failure to have in place adequate lead detection systems). The scenario should also be considered in circumstances where it is found that the Claimant prevented the licence holder from carrying out inspections of the relevant assets.

Scenario 3

It is found that the licence holder failed or neglected to timeously stop, contain or repair a leak or other form of oil releasing damage caused by TPI. The scenario should also be considered in circumstances where it is found that the Claimants prevented the licence holder from stopping, containing or repairing the leak.

Scenario 4

It is found that employees, agents or contractors of the licence holder were part of an unlawful enterprise that led to an oil spill caused by TPI.

Scenario 5

It is found that the Claimants, or some of them, were part of an unlawful enterprise that led to an oil spill caused by TPI.

Scenario 6A

It is found to be foreseeable that crude oil stolen from the licence holder's assets (including as a result of a failure to protect/maintain/repair a pipeline from TPI) would be used by third parties in Illegal Refining in local areas (thus causing pollution damage).

Scenario 6B

It is found to be foreseeable that crude oil stolen from the licence holder's assets (including as a result of a failure to protect/maintain/repair a pipeline from TPI) could be used by third parties in various ways, including for (i) onward sale on the international market, and (ii) Illegal Refining in local areas (thus causing pollution damage).

Section 11(5) of the OPA

79. These PIs are concerned with the proper construction of section 11(5) of the OPA which provides as follows:

“The holder of a licence shall pay compensation –

(a) to any person whose land or interest in land (whether or not it is land respect of which the licence has been granted) is injuriously affected by the exercise of the rights conferred by the licence, for any such injurious affection not otherwise made good; and

(b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence, for any such damage not otherwise made good; and

(c) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage or any leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.”

80. The meaning and effect of this provision was considered at length by Akenhead J in *The Bodo Community and Ors v SPDC* [2014] EWHC 1973 (TCC), with the aid of expert evidence from two Nigerian law experts (both of them, in that case, retired Supreme Court Justices). Since questions of foreign law are to be determined upon expert evidence as issues of fact (see paras [37]-[42] above) this court is not bound by any conclusions which Akenhead J arrived at based upon the evidence before him. However, the parties are agreed, for the purposes of this PI trial, that Akenhead J’s conclusion on one issue represents the true position under Nigerian law, namely that damages in respect of pipeline spills are recoverable against SPDC by application of the provisions in the OPA and not at common law. Akenhead J found, and for the purposes of this trial it is accepted, that the OPA provides an exclusive code for the recovery of compensation or other remedies against the licence holder/operator of a pipeline. The passages of Akenhead J’s judgment setting out his reasoning and conclusions on this issue are to be found in *Bodo* at [21] to [69]. The Nigerian Court of Appeal has approved and applied Akenhead J’s reasoning and his decision: *Nigerian Agip Oil Co Ltd v Ogbu* [2017] LPELR-45217 (CA)

PI 4(1) and (2) – can an operator be liable under section 11(5) for failing to prevent TPI?

81. I take the questions posed by (1) and (2) under PI 4 together, beginning with the areas of agreement between the experts:
- (i) Both agreed with Akenhead J’s interpretation of section 11(5) (a) (b) and (c) as corresponding loosely to the common-law torts of nuisance/trespass, negligence and strict liability under *Rylands v Fletcher*.
 - (ii) There was further agreement that sub-section (a) is inapt to cover oil spills as this provision is concerned with injurious affection arising from “*the exercise of the rights conferred by the licence*”. There is no right to spill oil under the licence, accordingly no liability can arise for spills under sub-section (a).
 - (iii) The experts also agreed with Akenhead J’s interpretation of (c) as excluding liability for harm caused by oil spills resulting from TPI by reason of the express exclusion found in that sub-sub-section. Sub-sub-section (c) imposes a wider liability

on licence holders, as the exclusion of liability requires the licence holder to show that the acts of third parties have been “malicious”; at common law under the rule in *Rylands v Fletcher* any act of a third party may afford a defence, it is not necessary for a defendant to show that the third party acted maliciously. On the other hand, by its terms (c) removes the common law *Rickards v Lothian* qualification: under section 11(5)(c) it is not open to claimants to counter the third party defence by showing that the third party acts could reasonably have been foreseen and prevented.

82. The experts disagreed about whether an operator can be held liable under sub-section (b) for negligently failing to prevent oil being spilled from the pipeline as a result of TPI.

Meaning and effect of section 11(5)(b)

83. Three matters arose in the evidence in relation to PI 4 (1) and (2): (i) whether the exclusion in s.11(5)(c) applies also to (b); (ii) the meaning of “protect” as the word is used in s. 11(5)(b) and; (iii) the nature of the causation requirement imported by use of the words “by reason of”.

Does the exclusion of liability in s. 11(5)(c) apply also to (b)

84. Mr Omoaka’s evidence was that s.11(5)(b) would be construed as being subject to the same third party exclusion as in 11(5)(c). Dr Ajibade disagreed, he considered that (b) allows a claim where a spill results from a negligent failure to protect the pipeline from TPI. He pointed to the words of the provision at (b) as clearly and unambiguously conveying that effect.
85. This is a matter of statutory construction on which the principles to be applied are the same here as in Nigeria. I understood from the evidence that the Nigerian Supreme Court regularly cites not only English cases on statutory construction but also English books on the subject.
86. Mr Omoaka accepted that the “cardinal principle” of statutory construction is that where the language used is clear and unambiguous, effect should be given to the natural meaning of the words used. Nigerian cases have emphasised that where the meaning is plain, “no words can be imported into or exported out of or imputed in the provisions of the statute” (*NNPC v Fung Tai Eng Co Ltd* [2023] 15 NWLR 117). Mr Omoaka further accepted that the principles recently set out by the UK Supreme Court in *Manchester Ship Canal v United Utilities* [2024] 3 WLR 356 would be persuasive in the Nigerian Supreme Court. The Claimants pointed to two relevant passages:

“The third and most important consideration is the principle of legality: that fundamental common law rights, such as rights of action to protect private property, are not taken to be abrogated by statute in the absence of express language or necessary implication” (per Lords Reed and Hodge at [123])

and

“The second consideration is that the 1991 Act is detailed and elaborate. One would not expect that such a statute left an important change in the law to be a matter of implication” (also at [123])

87. Dr Ajibade's evidence was that the words in s.11(5)(b) would be given their literal interpretation, which does not include any exception in respect of the acts of third parties. On his view, third party acts would be factually relevant as to whether there was "neglect" but would not constitute a complete defence. Moreover since a common law action in negligence could lie in respect of third party acts in respect of non-pipeline assets (as the experts agree, see below) he said it must be presumed that the legislature would not have intended to remove such rights except by clear words. The National Assembly used such words in s.11(5)(c) but did not do so in (b).
88. Mr Omoaka's evidence was that the wording in s.11(5)(b) is ambiguous, because it is silent on the twin questions of protecting who and against what. Given that ambiguity, he believed that the Nigerian court would consider contemporaneous records of debates and questions at the time the OPA was being considered and passed. Mr Omoaka cited two instances in support of his interpretation:
- (1) At the second reading of the Oil Pipelines Bill, the Minister of Land Mines and Power stated: "*[t]he licensee will be responsible for compensating not only those whose lands or interests in lands are injuriously affected, but also for damage suffered by any innocent persons by any breakage or leakage of the pipe, unless maliciously caused by a third party*". Dr Ajibade suggested in evidence that the Minister was only referring to section 11(5)(c) but the statement itself did not pick out one aspect of liability, instead being a general indication of an intention to exclude liability altogether for malicious third party acts.
 - (2) A quote from the acting Attorney General during a debate on the Bill referring to "*asking the owners of the pipelines to be insurers of land owners*" and to it being "*unreasonable to ask for that form of indemnity.*"
89. Mr Omoaka also pointed to the Oil and Gas Pipeline Regulations 1995 ("OGPR") and the Oil Spill Recovery Clean-up, Remediation and Damage Assessment Regulations 2011 ("OSDAR") as giving an indication of how the obligation in section 11(5)(b) is to be understood:
- (1) The OGPR regulate the design and operation of oil and gas pipelines. Regulation 9 deals with the "*operation and maintenance of the pipeline*", requiring, under (h) that "*the right of way shall be regularly patrolled for prompt detection of any line break, encroachment or any other situation that may endanger the safety of the pipeline*" (ie to patrol for breaches but not to proactively protect against TPI). There are further requirements to do with how repairs are to be carried out and with "*cathodic protection and corrosion control*". Mr Omoaka said that the OGPR regulations would be used as a reference point and that if a licence holder has complied with the provisions of the OGPR then it will indicate a lack of neglect.
 - (2) OSDAR, the regulations enacted in 2011 by the specialist government agency concerned with oil spills (NOSDRA) to deal with remediation and compensation, provides that no compensation will be paid for spills caused by third party interference. It was said that as the body responsible for ensuring compliance with all existing environmental legislation it is to be expected that NOSDRA would have considered the OPA and passed regulations consistent with its understanding of that piece of legislation. Mr Omoaka pointed in particular to s.26(2) of the OSDAR

regulations providing that “*compensation shall not be paid for spills caused by third party interference or sabotage*”

90. Lastly Mr Omoaka relied on several decisions in Nigerian courts as demonstrating the interpretation of section 11(5)(b) which the courts would apply, that there can be no recovery under the OPA for damage resulting from the acts of third parties:

(i) *Firibeb v SPDC*. This is a decision of the Court of Appeal dismissing an uncontested appeal on section 11(5)(c). The claim had been brought under s.11(5)(b) and (c). The first instance judge dismissed the claim under s.11(5)(b), finding that members of the Ogoni community had prevented SPDC from maintaining the pipeline. He allowed the claim under (c), on the basis that although sabotage was alleged, it had not been proved. SPDC appealed the finding under section 11(5)(c), the respondents entering no response. In the course of his judgment Awotoye JCA set out both subsections (b) and (c) and went on to interpret them as follows:

“section 11(5)(b) and (c) of the [OPA] makes a holder of a license (in this case, the appellant) liable to pay compensation to any person suffering damages as a result of the negligence of the agent or servants or workmen of the appellant but excludes liability when the damage is caused by the default of the person suffering damage or the malicious act of a third person”

(ii) Dr Ajibade accepted that the court in *Firibeb* had addressed and interpreted both sub-sections but pointed out that sub-section (b) was not specifically engaged by the appeal, suggesting that it was a slip on the part of the judge in eliding both, when the appeal in fact engaged only (c).

(iii) *John Okeh v SPDC* is a first instance decision of the Federal High Court. The claim was a common law claim in negligence and *Rylands v Fletcher*, not for breach of statutory duty under the OPA, although it appears that the defendant nevertheless raised a successful defence under section 11(5)(c) of OPA and section 26(2) of OSDAR arguing that liability should not be imposed where a spill had been caused by third party interference or sabotage. In the course of its long judgment the court found that negligence was not proved. The judge proceeded to set out section 11(5)(c) recorded the reliance on section 11(5)(c) and section 26(2) before finding that the claim failed because the spill had been caused by third party interference. As Ms Day pointed out, there does not seem to have been any allegation by the plaintiffs in *Okeh* that third party interference should have been foreseen or guarded against. There is no mention of section 11(5)(b) in the judgment.

(iv) Similarly in *Agadia & Uruesheyi v SPDC*, another first instance decision in the Federal High Court, the claim was brought in common law negligence but the defendant relied on section 11(5)(c) as a defence. In his judgment the judge noted that the plaintiffs had “*anchored their claim on ... 'Res ipsa loquitor' as well as the Rule in Ryland v Fletcher (sic)*”. The judge set out the whole of section 11(5) in his judgment, though his underlining of (c) to give emphasis suggests that this was the provision on which he focussed in deciding that there was no liability. In any event, as Ms Day rightly pointed out, the judge was not asked to, and did not, consider whether the defence in (c) properly applied to (b).

91. There was one further case cited by Mr Omoaka on this point but which was not raised with Dr Ajibade in evidence: *Calmday v SPDC*, a Court of Appeal decision dealing with an appeal in a claim brought only under s. 11(5)(c). The court did not consider section 11(5)(b).
92. Having considered all the evidence I prefer Dr Ajibade's view that the words in s.11(5)(b) can and would be given their ordinary meaning by the Supreme Court in Nigeria, in accordance with the "cardinal principle" of statutory interpretation which Mr Omoaka accepted. I do not consider that there is ambiguity which would entitle a court to have regard to contemporaneous questions or debates at the time the Bill was being considered. But these do not assist very far in any event: the Ministerial statement, in the language used, appears to have been paraphrasing sub-sections (a) and (b) in the course of a general introduction to the Bill; the acting Attorney General was responding to a question expressly concerned with section 11(5)(c), during a debate about section 11(5)(c).
93. Like Akenhead J in *Bodo* I dismiss the wording of subsequent regulations as providing assistance in assessing how the courts would construe the legislature's intention at the time of enacting section 11(5)(b), since they were enacted so many years afterwards. I also put to one side the slightly different point which Mr Willan drew from the wording of s.26(2) of the OSDAR Regulations ("*Compensation shall not be paid for spills caused by third party interference or sabotage*"), namely that it is evidence of how knowledgeable and experienced regulators interpreted section 11(5) when making the regulations, and therefore supportive of Mr Omoaka's interpretation. The regulations are subsidiary legislation and would be subject to the OPA; the key is how section 11(5)(b) would be interpreted by the Supreme Court, applying ordinary principles of statutory construction. Dr Ajibade, citing *Shell (Nig) Exploration and Production Co Ltd v NOSDRA* (2021) LPELR-53068 (CA), suggested that the Court of Appeal had already struck down section 26(2) as *ultra vires*, but when taken to the judgment in that case he acknowledged that it was directed at another point, not at any inconsistency of section 26(2) with section 11(5)(b). So there is no direct finding by a Nigerian court that section 26(2) is contrary to the meaning and effect of section 11(5)(b) but all I can take from this, consistent with the expert evidence of how the courts in Nigeria approach cases, is that no party has yet invited a court to determine the point.
94. As to the cases, strongly urged upon me by Mr Willan as providing the best evidence of how the Nigerian Supreme Court would determine the issue, to my mind they are far from providing the unequivocal indication he suggested. In *Firibeb* the only point raised for the Court of Appeal's consideration was to do with section 11(5)(c), the court was not addressed as to the precise interpretation of (b), as distinct from (c). Again I agree with Akenhead J in *Bodo*, that (b) and (c) have been mistakenly elided at this point in the judgment, with no reason given for including (b). The first instance judgments in *Okeh* and *Agadia* take matters no further as both involved common law claims in negligence, not for breach of statutory duty under section 11(5)(b) and in both cases the judges appear to have determined that the negligence claims failed as no negligence had been proved; in neither case did the court consider the true interpretation of sub-sub-section (b), still less was the court addressed on whether liability under that provision could be defeated by proof of malicious third party acts.
95. I acknowledge Mr Willan's point made to, and accepted by, Dr Ajibade that his reading of (b) effectively makes 11(5)(c) subject to (b), but without any words to that effect

appearing in (c). Also, as both experts agreed that a claimant could not recover at all in respect of their “own default”, it seems that the first half of the bracketed exception in (c) (“*other than on account of his own default...*”) would apply to (b), whilst on Dr Ajibade’s view the other half of the bracketed exception would not. These are inconsistencies, but in my view the Supreme Court would not find them sufficient to override the absence of plain wording in (b) referring to the actions of third parties.

Meaning of “protect”

96. Moving to the meaning of “protect” in section 11(5)(b), again the experts differed. Dr Ajibade considered that the meaning of the phrase “*neglect...to protect*” is plain and capable of applying to TPI, depending on the facts. Mr Omoaka’s evidence was that courts would interpret it as imposing an obligation to protect the pipelines and ancillary installations from general wear and tear, including corrosion, saying that it was a misinterpretation to regard it as creating an obligation to guard or protect from the malicious acts of third parties.

97. Akenhead J, considering the meaning of the phrase in *Bodo*, reached this conclusion (at [92(g)] and [93]):

“(g) Short of a policing or military or paramilitary defence of the pipelines, it is my judgment that the protection requirement within Section 11(5)(b) involves a general shielding and caring obligation. An example falling within this would be the receipt by the licensee of information that malicious third parties are planning to break into the pipeline at an approximately definable time and place; protection could well involve informing the police of this and possibly facilitating access for the police if requested. Other examples may also fall within the maintenance requirement such as renewing protective coatings on the pipeline or, with the advent of new and reliable technology, the provision of updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline.

93. The answer to Issue 2 is strictly speaking “No”; there has to be neglect on the part of the licensee. It is conceivable however that neglect by the licensee in the protection of the pipeline (as defined above) which can be proved to be the enabling cause of preventable damage to the pipeline by people illegally engaged in bunkering which causes spillage could give rise to a liability; this may be difficult to prove but there is that theoretical possibility. I cannot at the moment see that damage caused from illegal refining by criminal gangs of crude oil criminally taken from pipelines which have been broken into could fall within a duty “to protect...any work structure or thing executed under the licence” because (I assume) that the illegal refinery has not been executed under licence by the licensee.”

98. As I have already indicated, I am not bound by what Akenhead J found on the factual evidence of law which he heard. Nevertheless, particularly as his judgment has been cited and approved by the Nigerian Court of Appeal in the *Ogbu* case (albeit specifically in relation to the OPA being treated as a complete code), it is an important decision which has been and is likely to be influential in the Nigerian appellate courts.

99. Dr Ajibade accepted in his evidence that there would be some things a licence holder would not be under a duty to protect, some others about which there may be legitimate disagreement. He agreed that there could be no duty to post guards or exercise military or paramilitary guarding of the pipeline, or to run a private police force. He also conceded that the National Assembly could not have intended the obligation to extend to lobbying the Nigerian Government (the relevance of this being to currently-pleaded allegations of breach which include that SPDC “*did not take sufficient steps to ensure that any member of the [Joint Task Force] who were ineffective at detecting or preventing TPI were promptly removed.*”).
100. Mr Omoaka pointed to the context in which the OPA was enacted – the contemplation of thousands of kilometres of pipelines and ancillary installation crossing the Delta, often through difficult and inhospitable terrain, pointing out that it would be physically impossible to guard the length and breadth. He said that the National Assembly cannot have intended that outcome. This is a point also made by Kolawole J at first instance in *Agadia*, cited above:
- “...what the plaintiffs require...is that the Defendant should post security men on all paths/routes where it had laid pipes and to keep a 24 hour vigil to ensure that 3rd parties – which is the main plank of the Defendant's defence, do not tamper with its facilities: This, if it is to be done, I believe must be in respect of not only the Ughelli-Rapele Pipeline, but for all pipelines laid and buried throughout... the country where oil or oil products are conveyed via the same medium. That, I hold the view is neither practicable nor realistic.”*
101. Dr Ajibade acknowledged the practical difficulties of protecting in the sense of guarding pipelines, and the point that the National Assembly cannot have intended s.11(5)(b) to have encompassed that, when cross-examined by Mr Willan:
- “Q And it would have been obvious, wouldn't it, that if oil took off in Nigeria, you would need hundreds of thousands of miles of pipelines*
- A: Yes*
- Q: And obviously pipelines aren't like a refinery where you can just build a giant concrete wall around them, The legislature would never have expected that you could effectively run a fence straight across the Niger Delta, would they? Build a giant wall across the Niger Delta?*
- A: No, No, that would have been unreasonable.”*
102. Mr Omoaka also drew attention to the principle of *noscitur a sociis* (“it's known by its associates”), saying that the Nigerian courts would apply this principle to interpret “protect” consistently with the words “maintain and repair” which follow and which are clearly to do with physical works on the pipeline. Dr Ajibade accepted that this is a principle which the courts in Nigeria know and apply where the meaning is otherwise ambiguous, but he did not accept that there was any ambiguity here.
103. Ms Day drew Mr Omoaka's attention to the definition of “protect” in the National Learner's Dictionary (a source to which Mr Omoaka had referred for the meaning of other words in section 11(5)) as “*to make sure that somebody/something is not harmed,*

injured, damaged etc”. She submitted that this definition would be applied to the obligation under s. 11(5)(b), subject to the ordinary qualification of reasonableness implicit in an action for negligence. She pointed out that “protect” is qualified by “neglect”, so a licence holder would not be required to do anything it had no power to do, for instance operate its own police force, or anything which it was not reasonable for it to do in the particular circumstances.

104. Mr Willan argued that Akenhead J’s interpretation of “protect” had been too broad. His primary submission, based on Mr Omoaka’s evidence, was that “protect” is confined to an obligation to ensure that SPDC’s pipeline and ancillary structures are not damaged by natural risks such as corrosion or landslip. On that reading, the provision is simply not concerned with TPI. Alternatively, he argued, the duty imported by the term “protect” is concerned only with physical works to the pipeline and ancillary structures, to ensure that they remain in good working order. Mr Willan pointed out that beyond saying that policing or paramilitary defence was outside scope, Akenhead J’s decision had not indicated precisely where the line was to be drawn, and invited me to draw that line in this judgment.
105. I concluded as follows:
- (1) The word “protect” as it is used in section 11(5)(b) would not be interpreted as ruling out all possibility of liability for TPI. I think that the Supreme Court would be likely to concur with Akenhead J’s conclusion that it involves a “shielding and caring obligation”, also with the examples he gave of what that might mean in practice. I recognise that the OGPR do not include anything beyond physical protection against the elements but these regulations made in 1995 cannot be taken as any indication of what the legislature intended many years before; although compliance with the regulations may be strong evidence of a lack of neglect on the part of a licence holder.
 - (2) The Claimants accept that there cannot be any obligation to operate a police force to guard the pipeline. Dr Ajibade accepted that the wording could not connote any obligation to lobby or influence the National Assembly. The key is what, in any given set of circumstances, it will be reasonable to expect SPDC to have done in the way of “shielding and caring”.
 - (3) I agree that the section is manifestly dealing with structures already in existence. Dr Ajibade seemed to suggest at one point that “protect” may extend to a design obligation prior to construction of the pipeline but I do not consider that the Supreme Court would be likely to accept that. In this respect, “protect”, like “maintain and repair” refers to a post-construction obligation.
 - (4) I decline to be any more specific at this preliminary stage on how the Supreme Court would be likely to construe the meaning of “*neglect...to protect*”, specifically what it will and will not cover as regards TPI. I was not invited to go through each of the currently alleged particulars of breach of section 11(5)(b) nor have I done so, to rule whether or not each would be capable of falling within the meaning of that provision. In any event, as I have indicated elsewhere in this judgment, the properly particularised allegations have yet to be made.

Causation

106. Section 11(5)(b) imposes a causal requirement that damage must have been suffered “by reason of” the licence-holder’s neglect. Dr Ajibade accepted that this causation requirement equates to that at common law, including the same principles of foreseeability, remoteness and novus actus. As the principles are the same, both parties dealt with causation under PI 15; I do the same in this judgment. Mr Willan accepted that the application of principles of causation/recoverability of damage from spills coming directly from a pipeline due to TPI may be fact-sensitive, thus needing to await trial for resolution. However he stressed the difference between the Defendants’ position on damage from spills caused directly by TPI and damage caused by spills from illegal refineries.

Answer to PI 4(1) and (2)

107. The answers to PI 4(1) and (2) are
- (1) Subject to relevant neglect being established, a claim may be brought against a licence-holder under section 11(5)(b) of the OPA in relation to pipeline spills caused by TPI.
 - (2) The fact that a spill was caused by TPI is not of itself a defence to such a claim.

PI 4(3) - Regulation 26(2) of the 2011 Regulations

108. The OPA is primary legislation dating from 1956. The 2011 OSDAR Regulations came into force over 50 years later. As indicated above, Mr Omoaka suggested that the Regulations were consistent with his interpretation of section 11(5) of the OPA, however he conceded that to the extent that regulation 26(2) was inconsistent with the OPA, it is *ultra vires*. This was Dr Ajibade’s view.

Answer to PI4(3)

109. Having found (above) that TPI does not of itself provide a defence to a claim under section 11(5)(b), it follows that regulation 26(2) cannot qualify or limit the scope of recovery under that sub-section.

PI 4(4) – Liability under the OPA for damage caused by illegal refining

110. The experts disagreed as to the answer to PI 4(4). Dr Ajibade’s view was that a licence holder could be liable for losses arising from illegal refining, where illegal refining is a reasonably foreseeable consequence of oil theft and there is, or under the right circumstances there could be, a duty to protect against such theft. Dr Ajibade thought that recoverability would be subject to principles of foreseeability, remoteness and novus actus but observed that these are essentially fact-sensitive questions. Mr Omoaka’s evidence was that the Nigerian courts never had and never would find the licence-holder liable for the consequences of illegal refining. He gave a number of reasons including that the damage occasioned by illegal refining is outside the scope of section 11(5)(b) (contrary to Ms Day’s submission I read reason (i) at para 212 of Mr Omoaka’s first report as addressing the scope of the duty to protect, rather than as a separate duty to protect against illegal refining which appears from reason (iv) at para

212). Mr Omoaka gave as a further reason for his view that the Nigerian courts would not hold a licence-holder liable for damage caused by illegal refining the fact that any criminal act would automatically be found to be a novus actus, breaking the chain of causation.

111. I address the issues concerning the common law liability of the defendants for harm resulting from the illegal refining of stolen oil under PI 20 at paras [232]-[261] below. Ms Day's position was that identical principles of causation and recoverability – foreseeability, remoteness, novus actus – apply to liability for illegal refining at common law as to liability under the OPA. Mr Willan fundamentally disagreed, pointing out that both at common law and under the OPA, the Claimants' analysis of the issues omitted the necessary first step of considering whether the type of loss – harm arising from the operation of illegal refineries – falls within the scope of the duty. As indicated in the discussion of liability under common law below, Mr Willan's position is that the court can and should decide now that the Nigerian courts would find that harm arising from the operation of illegal refineries falls outside the common law duty of care to protect non-pipeline assets from TPI.
112. So far as the duty under the OPA is concerned Mr Willan submitted that, even if the court were to decide that the question of the scope of the common law duty of care cannot be determined until trial, that is not so as regards the scope of the duty under section 11(5)(b). The scope of the statutory duty is a matter of statutory interpretation, Mr Willan emphasised, where the facts can make no difference to the exercise upon which the court is required to engage, namely to determine what the legislature intended section 11(5)(b) to cover. He submitted that, as a matter of the proper construction of 11(5)(b), the harm caused by the actions of illegal refineries using oil stolen as a result of TPI is either within the scope of the statutory duty or it is not and that the court should determine this question now.
113. In *Bodo*, Akenhead J expressed a brief conclusion on the matter of illegal refining, at [93]:

“It is conceivable however that neglect by the licensee in the protection of the pipeline (as defined above) which can be proved to be the enabling cause of preventable damage to the pipeline by people illegally engaged in bunkering which causes spillage could give rise to a liability; this may be difficult to prove but there is that theoretical possibility. I cannot at the moment see that damage caused from illegal refining by criminal gangs of crude oil criminally taken from pipelines which have been broken into could fall within a duty “to protect...any work structure or thing executed under the licence” because (I assume) that the illegal refinery has not been executed under licence by the licensee.” (emphasis added)
114. Akenhead J's point was that the duty under section 11(5)(b) is concerned with the work, structure or things executed under the licence; where harm comes from an illegal refinery which is not operated under the licence it is outside the scope of the statutory duty. Akenhead J did not expand on his view that “at the moment” he could not see how damage caused by illegal refining could fall within the section 11(5)(b) duty; his words suggest a provisional view. Nevertheless Mr Omoaka's evidence was that the Nigerian Supreme Court would find this conclusion persuasive and would follow it. Mr Willan submitted that as Mr Omoaka was not challenged specifically on his evidence

about the scope of section 11(5)(b) as it related to illegal refining it is not open to the Claimants to invite me to reject that evidence.

115. Dr Ajibade disagreed with Akenhead J's conclusion, as he explained in his evidence:

"Q: ..can I suggest that that is a perfectly correct analysis that the Nigerian Supreme Court would very likely adopt, for all the same reasons that we went through in relation to the common law, which is that it is a harm that really emanates not from the licensed activity but from a separate illegal enterprise of illegal refining.

A: No I don't agree. And I think...with the greatest respect to Justice Akenhead, I think the gap in the analysis is by reason of. This portion of his judgment seems to be talking about protect, and limiting the scope of the duty to protecting, basically transposing the illegal refinery into Shell's facilities, and saying, well there is no obligation to protect the illegal refinery. But that to my mind...doesn't appear to be logical.

What the protect – it talks about the holder of a licence shall pay compensation to any person suffering damage "by reason of any neglect", it's not talking about the protection of the third party's facilities, it is talking about the consequences of failure to protect the licence-holder's own facilities"

116. Mr Willan made the point that, applying a "but for" analysis to the scope of section 11(5)(b) is illogical and inconsistent with the approach which has been agreed in relation to section 11(5)(a), which is that as spills cannot result from the lawful exercise of rights under the licence, this provision cannot give rise to a claim. He argued that the court must look at what the sub-section is targeted at: s.11(5)(a) is targeted at the lawful acts of the operator, (b) is about the pipeline itself, not about what is done with the stolen oil.
117. Ms Day rejected the suggestion that she had not challenged Mr Omoaka on his evidence about section 11(5)(b). She argued that in circumstances where the possibility of a claim for TPI in negligence had been accepted, it could not properly be suggested at this stage that damage caused by illegal refining could never be recovered. She pointed to the observations of Males LJ in the Court of Appeal decision allowing the illegal refining amendments, to the effect that this would all be a matter of fact for trial.
118. In the end, the opposing views resolved to this: is illegal refining to be seen as a category of harm resulting from bunkering, against the risk of which, as I have found above, there may theoretically be a duty to protect depending on the facts (Dr Ajibade's view), or is the harm resulting from illegal refining such a different type of loss that it is necessary to step back and ask first whether that type of loss is within the scope of the duty imposed by section 11(5)(b) (Mr Omoaka)? And can those opposing positions be resolved without full pleadings and without a full examination of the facts at trial?
119. As to the last of these questions, Mr Willan argued that this trial of preliminary issues is not a summary judgment hearing: the questions and the factual assumptions underpinning them were agreed by the parties and ordered by the court (albeit by consent) so as to provide a useful framework now for the onward path of the litigation. The whole purpose of posing factual scenarios was to obtain an answer now to how the Nigerian courts would address and decide difficult questions of law on assumed facts. The facts at trial may or may not be the same, but having an answer now to what the

Approved Judgment

answer would be on this set of facts will be an invaluable guide to the parties going forward.

120. After careful consideration, and whilst I fully appreciate the logic of Mr Willan's argument, I decline to reach a final view now on how the Nigerian Supreme Court is likely to determine the question of whether there can be liability for illegal refining under section 11(5)(b) of the OPA. For all the reasons Mr Willan gives, there appear to me to be very significant hurdles in the way of any claimant successfully pursuing a claim under section 11(5)(b) (or indeed at common law) for damage caused by illegal refining. "[A]t the moment" (to use Akenhead J's phrase) I cannot see how a claim in respect of damage caused by illegal refining could fall within the duty to protect under section 11(5)(b) but at this preliminary stage I do not think it would be sensible or right to give a definitive answer to the question of what the Nigerian Supreme Court would find. Nigerian courts have to-date clearly treated common law and OPA claims as effectively interchangeable and the evidence before me was that the Nigerian Supreme Court would approach causation in the same way for both. At this stage no claimant has yet identified the particular spill or spills that is/are said to have caused their loss, so that the factual circumstances of any claim for damage resulting from spills from illegal refineries (assuming that any lead claimant eventually pleads such a claim) are as yet unknown. On one view, the specific case in respect of any spill or spills not yet having been pleaded, these proceedings have not reached even the summary judgment stage. The assumed facts agreed for the purposes of this PI are scant, giving nowhere near the detail that a pleaded case would be expected to give. I am not prepared to reach a concluded view now on a broadly based, hypothetical claim for breach of statutory duty when I am not prepared to do so (and I am not, see below) in relation to a claim in negligence at common law. Having now heard all the evidence and argument I am quite sure that this is an example of a preliminary issue which, though it may have appeared promisingly definitive when drafted and agreed by the parties, and ordered by the court in January, is in fact far more complex and difficult, making it unsafe and unsatisfactory to determine it now rather than waiting for trial.
121. I recognise the possibility that there may have to be further expert evidence as to how the Nigerian Supreme Court is likely to decide this issue, in the light of (a) the fully pleaded (lead) cases and/or (b) facts found at trial.

Answer to PI 4(4)

122. For the reasons I have given I decline to give an answer now to PI 4(4)

Applying the principles to the Scenarios

Scenario 1A (TPI – no involvement of Cs)

123. It follows from the above that in the straightforward case of a spill from the pipeline being caused by TPI, resulting in damage to one or more claimants, SPDC will be liable if its neglect has caused the damage. However, if SPDC has been prevented from carrying out maintenance/repairs or otherwise to have protected the pipeline, then it will not be liable under s.11(5)(b). This is the reason why the claims failed in the case of *Firibeb*, above.

Scenario 1B (TPI – Cs' prevented maintenance/repair)

Approved Judgment

124. The experts agreed that a claim would fail where a claimant themselves prevented SPDC from carrying out maintenance/repairs. This is by operation of the familiar *ex turpi causa* (loosely translated as “a person cannot benefit from a wrongful act”) principle, which applies equally in Nigeria. Mr Omoaka’s principal view was that there could be no liability for TPI under section 11(5)(b) in any event (see above) but if, contrary to his primary position, section 11(5)(b) enabled a licence-holder to be liable for a negligent failure to prevent/protect, then a person who prevented the licence-holder from acting would not be able to recover. Dr Ajibade accepted further that it would not matter whether the person(s) acting to prevent SPDC from carrying out repairs/maintenance were claimants or non-claimants.

Scenario 2 (failure timeously to detect a leak) and Scenario 3 (failure timeously to stop/fix/repair)

125. The experts agreed that the licence-holder is under an obligation to use reasonable diligence to stop a spill caused by TPI and to repair the damaged pipeline. Detection is necessarily linked to the issue of when a leak should reasonably have been fixed; accordingly, it is the latter issue on which the court will focus at trial.

Scenario 4 (operator’s employees, agents or contractors part of unlawful enterprise leading to TPI)

126. Under section 11(5)(b) a licence-holder is liable for any neglect by its “agents, servants or workmen”. It will be a question of fact in any case as to whether a “contractor” is to be regarded as an agent, servant or workman.
127. The experts were asked about the principles by which liability would attach to SPDC in any given situation, that is to say when a person’s acts are to be regarded as having been performed as an agent, servant or workman, or as an unconnected third party. Mr Omoaka’s view was that the common law principle of vicarious liability would apply to the statutory wording of section 11(5)(b); in his oral evidence Dr Ajibade agreed with this. There was disagreement between them, however, on the approach to vicarious liability which Nigerian courts would take, Mr Omoaka contending for a narrower application than Dr Ajibade.
128. Mr Omoaka relied on the Nigerian Supreme Court decision in *Ifeanyi Chukwu (Osondu) Co Ltd v Soleh Boneh (Nig) Ltd* [2000] 5 NWLR 322 where Iguh JSC, in a concurring judgment enunciated the principle of vicarious liability as follows (at p.365):
- “[a]ccordingly, a master, which in an appropriate case may include a company or corporation, is liable for the tort, negligence or wrongful act of its servant or agent so long as the same is committed in the course of his employment, namely the authorised master’s business, or the master’s business which he was held out as authorised.”*
129. More recently, in *Total Exploration & Production (Nig) Ltd v Okwu* (2024) LPELR-62623 (SC) when considering liability for the acts of a registered contractor the Supreme Court stated:

“...the law stipulates that a principal will only be vicariously liable for the acts of the agent where they were done in fulfilment of the terms and conditions of the agency.”

130. Relying on these pronouncements by the Supreme Court, Mr Willan argued that it would be unsafe to assume that Nigerian courts will apply the principle of vicarious liability in the same way as would an English court. Mr Omoaka’s view, citing the decision of the Nigerian Court of Appeal in *Bisi Salawu v Union Bank* [1986] 4NWLR 701, was that a licence holder would never be held responsible for a crime committed by one of its agents or employees.
131. Ms Day suggested that Nigerian courts would have regard to the principle as discussed in *Clark & Lindsell*, which is a textbook well-recognised in Nigeria as “*an authoritative representation of the common law of torts*” (as Mr Omoaka stated in his supplementary report).
132. In the end, there appeared to me to be no great difference between the experts on this question. Both agreed that vicarious liability would apply. It is apparent from the discussion of the principles of vicarious liability in the leading judgment of Ogundare JSC in the *Ifeanyi Chukwu* case that English common law principles will apply, since he referred to a number of English authorities, without narrowing their application in the way Mr Willan suggested. Where the line will be drawn between acts deemed to be those of the licence-holder and those of an employee acting “*on a frolic of his own*” (a phrase used in the English authorities and also by the Nigerian Court of Appeal in *Salawu*) will depend on the particular facts. It is not possible, at this stage, to be any more specific than that. In particular, I decline to find that the Supreme Court would in every case of TPI committed by, for example, an employee, find that the acts were not those for which the licence holder was liable under section 11(5)(b).

Scenario 5 (some or all claimants part of unlawful enterprise leading to TPI)

133. As I have noted above, the experts agree that an individual claim will fail where the claimant is found to have been involved in an unlawful enterprise causing a spill. However, Dr Ajibade and Mr Omoaka disagreed as to the impact upon the community claim if members of the community are found to have been involved in an unlawful enterprise which caused the spill(s).
134. Mr Omoaka’s view was that community members share a common interest in the claim so that the claim would fail if even one of them were found to have been involved in causing the spill. Dr Ajibade considered that the community claims could continue even if some or even most of the members were found to have contributed to the unlawful enterprise. It would be for the court to make an appropriate order for compensation of the innocent whilst withholding any benefit from those who had participated. Insofar as the spill(s) was covered by the OPA, then Dr Ajibade was of the view that section 21 would enable money to be paid to a chief or into a trust scheme.
135. The community claims are pleaded as a species of trust. However, both experts agreed that a claim brought by chiefs on behalf of the community would be regarded as a representative action. Mr Omoaka’s view was that, as such, the actions of one or more members would defeat the community claim, leaving innocent members to make individual claims. He relied for this purpose on the Nigerian case of *Ighedo v Power Holding Co (Nig) Plc* [2018] 9 NWLR 51 where the Supreme Court held that where a

representative action succeeds, every member of the represented class will “reap the fruits of victory”. By the same reasoning, he said, all must fail where the actions of some contaminate the claims of the whole.

136. Dr Ajibade disagreed, citing *Otapo v Sunmonu* (1987) 2 NWLR (Pt. 58) 587 (SC) as a better authority in this context. *Otapo* involved a chieftaincy dispute, where the issue was whether the representative party could concede the claim on behalf of the represented cohort. The Supreme Court held that he could not, observing that;

“Where several sue, they have the like power as a single representative plaintiff but they must act together.....A representative plaintiff is the sole plaintiff and is Dominus litis until judgment, he can discontinue, compromise, submit to dismissal and other things as he decides during the course of the proceedings....After judgment, a representative plaintiff has no such power; he cannot deprive others in the same interest of the benefit of the judgment if they think fit to prosecute it, for after judgment, no further action can be brought by others.”

137. Whilst recognising that *Otapo* was dealing with a situation post-judgment, Dr Ajibade’s view was that it demonstrated a principle which the Nigerian court would adopt, namely that as a matter of equity and fairness the actions of one or more members could not prejudice the whole community. Ms Day referred also to a decision of the Nigerian Court of Appeal in *Nkwocha v. Ofurum* (2002) 5 NWLR (Pt. 761) 506 (CA) citing the above passage from *Otapo* as authority for the principle that: “*named representatives must act in concert before the action taken can bind the unnamed parties or the other named ones*”.
138. Mr Willan suggested that there is no prejudice to community members whose claim is prevented by the actions of certain members, as the innocent members can still pursue an individual claim. But (i) the community members include minor parties who have no individual claim and (ii) the community claims include damage to community assets eg shrines and wells, damage to which would give rise to no individual claim.
139. Where there are criminal acts of third-party members of a community, the facts may well preclude proof of negligence on the part of the licence-holder. This is what happened in *Firibeb*. As for the effect of the actions of a minority on a community claim as a matter of law, I prefer the opinion of Dr Ajibade that a Nigerian court would not dismiss the community claim outright but would look to make an order which allowed reparation to be made to the assets and to the innocent parties within a community. This view is supported by the flexibility of the compensation provisions within the OPA and by the observations of the Supreme Court in the *Otapo* case indicating their reluctance to allow the actions of one or more members of a community to prejudice the whole.

Scenario 6A and 6B (illegal refining)

140. For the reasons given above, I decline to give a definitive answer now to the hypothetical scenarios at 6A and 6B.

PI 5 Insofar as a party alleges in the context of a claim under section 11 of the OPA that an oil spill was caused by Third Party Interference:

- (1) What is the applicable law governing the burden and standard of proof?**

(2) Pursuant to that law, what is the applicable burden and standard of proof?

141. The parties are agreed that the applicable law governing the burden and standard of proof is a matter of English private international law. As to that:

(a) Insofar as the event giving rise to damage occurred on or after 11 January 2009, the choice of law is governed by the Rome II Regulation (“the Regulation”). The parties agree that under Article 22 of the Regulation burden of proof is governed by the law of the claim, here Nigerian law. There is a dispute between them as to what law governs the standard of proof.

(b) Insofar as the event giving rise to damage occurred before 11 January 2009, choice of law is governed by Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (“the 1995 Act”). Both sides agree that, under English choice of law principles, rules of evidence are a matter for the law of the forum, covering both burden and standard of proof: *Dicey, Morris and Collins on the Conflict of Laws*, 16th Edn. Para 4-034.

142. The burden of proof under Nigerian law is identical to that under English law; the joint evidence of both experts was that under Nigerian law a party asserting a fact must prove it.

143. If the standard of proof is governed by Nigerian law, then both experts agree that the consistent practice of the Nigerian courts is to apply the criminal standard of proof (i.e. beyond reasonable doubt), whether the allegation is made against a party or a nonparty. Under English law, the standard of proof is the civil standard i.e. balance of probabilities.

144. Thus the single contentious point for determination under this PI is whether the standard of proof in relation to post-11 January 2009 events, where choice of law is covered by the Regulation, is a matter governed by English law as the law of the forum or by Nigerian law as the law of the claim.

145. Mr Willan contended that standard of proof is a matter of evidence which is excluded from the scope of the Regulation by Article 1.3. Article 1.3 provides that “*this Regulation shall not apply to evidence and procedure, without prejudice to articles 21 and 22*”. As indicated above, Article 22 deals specifically with the burden of proof, applying the law of the claim.

146. Mr Willan referred to the decision of Dingemans J (as he then was) in *Marshall v MIB* [2015] EWHC 3421 (QB). The case concerned a motor accident occurring in France, raising issues concerning the applicable law relating to burden and standard of proof. At [25] Dingemans J said this:

“The standard of proof is a matter for the national Courts which are determining the issue of liability, whether they are applying the laws of France or their own national law. Rome II specifically identified the burden of proof as being for the law determining the issue of liability and did not mention the standard of proof. There are very good reasons for that. It is clear that the manner in which matters are proved in civil law jurisdictions and common law jurisdictions can be very different, with a much greater emphasis on oral evidence in common law

jurisdictions. Rome II was not intended to deal with the manner in which matters are proved, which remains for national Courts applying their own rules of evidence and procedure. This is different from the question about which party has the burden of proof, which is intimately connected to the law governing the issue of liability.”

147. Ms Day contended that the approach of Dingemans J in *Marshall* was wrong in principle and should not be followed. She argued that Article 1(3) of the Regulation is concerned with the manner in which matters are proved rather than the standard to which they must be proved, submitting that the degree to which the court must be satisfied of a relevant matter (ie standard of proof) is an indivisible part of the burden of proof and should be regarded as part of the same rule of law under Article 22, applying the law of the claim. Alternatively, if the analysis in *Marshall* is accepted and standard of proof is to be determined under English common law, she suggested that the court should adopt a flexible approach – referring to the observations of Andrew Smith J in *Fiona Trust v Privalov* [2010] EWHC 3199 - and apply Nigerian law to both burden and standard of proof where a party raises an allegation of loss caused by TPI.
148. Intrigued though I was by Ms Day’s invitation to take a flexible approach to proof of TPI, I unhesitatingly adopt the approach of Dingemans J in *Marshall*, noting that it was followed subsequently by Nicol J in *Folkes v Generali Assurances* [2010] EWHC 3199 at [12]. The editors of *Dicey, Morris and Collins on the Conflict of Laws*, 16th Edn. at para 34-068 adopt the same analysis:

“Although the Regulation is expressed not to apply to “Evidence and procedure”, this is without prejudice to Art.22, headed “Burden of proof”. According to Art.22(1), the law governing a non-contractual obligation “shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.” Thus, if the applicable law contains, say, a presumption of contributory negligence which the claimant has to disprove, that presumption should be given effect. Similarly, if the applicable law places the burden of disproving negligence on the defendant, as opposed to the position in English law where the burden of proving negligence normally lies on the claimant, then effect should be given to the rule concerning burden of proof contained in the applicable law. By contrast, rules concerning the standard of proof are matters of evidence and procedure. In the English courts, the civil standard of proof will ordinarily apply.”

Answer to PI5

149. The answer to PI 5 is
- (1) Burden of proof is governed by English law for events occurring before 11 January 2009; thereafter Nigerian law applies. Standard of proof is governed by English law.
 - (2) The party making the allegation of TPI bears the burden of proving it (under English and Nigerian law). The standard of proof is the civil standard (under English law).

PI6 Does s.11 OPA exclude a licence-holder's liability to pay compensation in respect of damage that has been "made good"? If so, what is the proper interpretation of "made good" in this context and in particular:

- (1) Does certification by the Nigerian Oil Spill Regulator that an oil spill has been remediated fall within the scope of damage being "made good" for the purposes of the OPA?**
- (2) Does payment of compensation to the relevant community/individual fall within the scope of damage being "made good" for the purposes of the OPA?**

Assumed facts

- (1) An oil spill from a pipeline (operated by a licence-holder) has been certified as remediated by one of the Nigerian oil spill regulators (i.e. NOSDRA or the Department for Petroleum Resources). That oil spill may or may not have been remediated as a matter of fact.*
- (2) Compensation for the damage caused by an oil spill from a pipeline (operated by a licence-holder) has been paid to the relevant individual/community by the licence-holder.*

Answer to PI6

150. The experts are agreed on the answer to this preliminary issue. A certificate that damage has been "made good" may be good evidence but it is not necessarily conclusive. Where liability is established then the principle of *restitutio in integrum* applies. A claimant is entitled to be put back in the position they were before the event(s) causing loss occurred. Whether payment of compensation is sufficient will be a matter of fact. Certification by NOSDRA that a spill has been remediated raises a rebuttable presumption that the spill has been remediated, however that presumption can be rebutted by contrary evidence.

PI 7 Does the OPA oust claims in common law for oil pipeline spills against persons other than the licence-holder?

151. It is agreed (at least for the purposes of these proceedings) that the OPA provides an exclusive code for claims against a licence-holder, preventing any claim for oil spills against the licence holder at common law. This was the finding of Akenhead J in *Bodo*. The reasons for his decision are summarized in his judgment at [64]. The Nigerian Court of Appeal has subsequently adopted Akenhead J's conclusion, finding his reasons "highly persuasive": *Nigerian Agip Oil Co Ltd v Ogbu* [2017] LPELR-45217 (CA) per Danjuma JCA at pp.39-40. The issue arising under PI 7 is whether, on its proper construction, the OPA ousts common law claims in respect of pipeline spills against all other parties, including in particular claims against the first defendant, SPDC's parent company.
152. I start by considering two Nigerian court decisions drawn to my attention as bearing on this point:

(1) *Nigerian Agip Oil Company v Ogbu*, cited above, is a decision of the Nigerian Court of Appeal. It was brought as a representative action claiming damages for oil pollution affecting the plaintiffs' lands. The first instance court allowed the claim and awarded very substantial damages; the oil company appealed. One of the issues on the appeal concerned the court's ability to entertain the claim where the procedures for obtaining compensation under the OPA had not first been pursued and exhausted. In allowing the appeal on this point Danjuma JCA, giving the judgment of the court explained his reasons as follows:

"...the reason for the incompetence of the suit is not because i[t] alludes to the common law Rule in Rylands v Fletcher...No! It is incompetent because the strict provisions of the Oil Pipelines Act analyses the right of Action by stipulating the prior presentation of a complaint or damage and where not agreeable or quantum then a suit may ensue in respect of compensation.

Secondly, the Oil Pipelines Act would appear to have taken away the right of action in nuisance and replaced same with a claim for compensation and under the procedure specifically provided in the Act.

The Plaintiff/Respondent's claim as endorsed in the Writ of Summons and Statement of Claim and as accepted by the trial Court is based on the common law of nuisance as enunciated in the case of Rylands v Fletcher. The Oil Pipelines Act, in the plenitude of its preamble and Section 11 thereof has clearly shown that every claim appertaining [to] damage from oil installation of ancillary installation, injurious affectation, on/and or interest in land as in the Appellants Ebocha Oil well location, may only be made under the Act. It is for compensation.

...

Where a statute has provided for certain actions, resort must had to the statute and not to common law remedies."

- (2) *Torchi v SPDC & Ors* (2020) Federal Court decision, involved a claim in respect of oil pollution against SPDC as licence holder and another Shell company ("Shell International") for compensation for pollution alleging that they had "jointly orchestrate[d]" an oil spillage. Shell International brought a jurisdiction challenge (on the basis that it was not a company resident in Nigeria) which the court easily dismissed, granting the claim and ordering damages to be paid by both companies.
153. In neither of these cases was the ouster point raised by this PI 7 directly considered by the court: In *Ogbu* the claim was against the licence-holder; in *Torchi*, whilst a jurisdiction point was taken, it was to do with Shell International being a company resident outside Nigeria; the court was not required to consider whether the OPA only permitted claims against a licence-holder and precluded common law claims against anyone else. On one reading of Justice Danjuma's lead judgment in *Ogbu* (referring to "the plenitude" of the OPA and that "every claim may only be made under the Act") his words might appear to support the implied ouster of common law rights for which the Defendants contend, but no issue had been raised in that case about the possibility of common law claims being brought against parties other than the licence holder. Nor can I consider the first instance decision in *Torchi* as establishing a readiness to entertain common-law claims against a non-licence holder, as Ms Day suggested, since

it appears from his judgment that Justice Ringim awarded damages under the OPA against both defendants in that case.

154. The expert evidence on this point was not always easy to follow: Dr Ajibade agreed with Mr Willan that the Supreme Court, looking at the OPA would agree that the legislative intention was to ensure that victims of a spill (from a pipeline) had to observe the rights and remedies only in accordance with the Act, because that was intended to provide a comprehensive code. But he did not agree that the Supreme Court would go on to find that no one other than the licence holder could be held responsible for anything to do with the maintenance or operation of the pipeline, in other words that the OPA had implicitly removed all common law rights whatsoever. In cross-examination Dr Ajibade drew back from this position to some extent when expressing the view that agents, servants or workmen of the licence-holder would have a defence if they were sued at common law for matters arising from the maintenance or operation of the pipeline (a concession that Ms Day in closing suggested had been wrongly made) but he continued to maintain the view that common law rights would remain vis a vis others, eg a parent company of the licence holder.

155. Mr Omoaka's evidence in his first report seemed clear (at para. 280):

"The OPA ousts claims in common law for oil pipeline spills against the licence-holder and any other person acting in concert with or under the control of the licence holder, such as its workmen, agents or servants of the licence-holder...but does not oust claims in common law against any other person not included in this list. It is also important to state that an agent of a licence holder may include another company or even its parent company, provided that such company acted in the place of, or under the instructions of the licence-holder"

I concluded from this that Mr Omoaka's evidence did not support the Defendants' case on PI 7. But the evidence in his supplementary report was more equivocal (at para.154):

"I do not consider it follows that, because the OPA does not make provision against parties other than the licence-holder in respect of the matters governed by the OPA..., the conclusion must be that the common law remedies continue to apply. Whilst that is one possible reading of the OPA, the other is that the OPA ousted the common law for matters within its scope and replaced the common law with a statutory right of action only against the licence-holder."

Mr Omoaka's oral evidence did not seem to me to resolve the apparent differences in the above passages of his two reports. But as he pointed out in his supplementary report, this is a novel point.

156. As this is a point which the appellate courts in Nigeria have not directly considered, both counsel addressed me on the matters of principle which they put to the experts, and suggested to me, that the Supreme Court would apply. Ms Day referred me to ordinary principles of statutory construction starting from the position that a statute will not be taken to have removed existing rights unless by the use of clear words, or by necessary implication. She relied on this as a standard principle, applicable under both English and Nigerian law, citing a decision of the Nigerian Supreme Court in *Adeshina v Lemonu* [1965] LPELR 25222, in which the court stated as follows:

“It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.”

157. Ms Day referred me also to the passages from the UK Supreme Court judgment in the *Manchester Ship Canal* case cited at [86] above to the effect that where a statute is “detailed and elaborate” it will not have “left an important change in the law to be a matter of implication”. Dr Ajibade’s evidence was that the Nigerian Supreme Court would follow the same reasoning; Mr Omoaka accepted that “in general” the Nigerian courts will adopt the same principles of statutory construction as English courts.
158. Ms Day pointed out that the OPA contains no express wording removing common law rights in respect of oil spills against parties other than the licence holder. She emphasized that although the OPA has implicitly removed common law rights vis-à-vis the licence-holder (as Akenhead J found), it had replaced them with a broad and generous statutory provision, and that, by contrast, there is nothing in the OPA to indicate that the legislature intended a wholesale removal of the right to bring common law claims in respect of oil spills against persons other than the licence-holder.
159. Ms Day also argued that there are strong policy reasons why there should be a parallel/residual right to claim against other parties at common law: there is no provision under the OPA for a guarantee of the licence-holder’s liabilities, and no evidence before the court as to the manner in which solvency issues are addressed at the time a licence is granted. Where the losses are huge, there may well be cause to fear for the licence-holder’s solvency; she referred here to Sales LJ’s (now Lord Sales) dissenting judgment in the Court of Appeal on the jurisdiction challenge in these proceedings: *Okpabi & Ors v Royal Dutch Shell Plc & Anor v RDS & SPDC* [2018] EWCA Civ 191 at 150:

“It is perfectly possible to have two persons legally liable for the same damage. Indeed, if SPDC became insolvent (which is at least a possibility, given the size of the claim), it would be very important to recognize the liability of others as well, if the relevant test for liability is satisfied.”

160. Mr Willan began from the point that, as provided under section 7(4) of the OPA, “No person other than the holder of a licence shall construct, maintain or operate an oil pipeline”, submitting that this, taken together with the codification of common law in section 11(5), indicated the legislature’s intention to have a single route and single defendant in respect of damage arising from pipeline spills. Mr Willan drew attention to the reasons given by Akenhead J for his decision that the OPA was a comprehensive scheme, ousting common law rights against the licence holder (at *Bodo*, [63]), particularly the following:

“(d) There are substantial differences between the statutory scheme and the common law both in terms of substance and in terms of procedures. The statutory scheme goes much wider in terms of liability (both as to scope and to what has to be established) than the common law. The statutory scheme is compensatory in nature and therefore excludes any entitlement to aggravated, exemplary or punitive damages otherwise available under some of the common law remedies. There is a much wider range of potential claimants (based largely on the causation test). The procedures were novel (and sensible). Taken overall, the differences are substantial

albeit that if one looks at some of the individual differences (for instance, payment of compensation in instalments) they are not on their own substantial enough.

(e) There could be a form of chaos or setting at nought if both common law and statutory regimes co-existed with, for instance, there being no or only a restricted *res judicata* regime in place for the statutory claim but a fully rigorous *res judicata* regime deployable for the common law claim. There could be some very real tension if the court thought that on a valid statutory claim the compensation should in total or in part be paid to the local headman, but this policy would be defeated if there was a parallel valid common law claim pursuant to which no such provision could be made.”

161. In his evidence Dr Ajibade agreed that these were all legitimate considerations to which the Supreme Court would have regard, and that these were cogent reasons for an ouster of all common law claims arising from the maintenance or operation of the pipeline. Mr Willan made the point to him that unless common law claims were excluded, a person would be able to bring a common law claim against an employee, for instance, in respect of which the employee would be entitled to be indemnified by their employer, the licence holder, thereby evading the provisions of the OPA. He suggested that it logically followed from Dr Ajibade’s acceptance that the OPA would give agents, workmen and servants a defence to a common law claim that this would extend to anyone sued at common law in respect of anything arising from the operation or maintenance of the pipeline. Dr Ajibade was not prepared to follow his argument that far.
162. I have concluded that the Nigerian Supreme Court would apply the principles of statutory construction identified by Ms Day to find that the OPA replaced common law claims against the licence holder but that the legislature did not thereby intend to remove all common law rights against persons other than the licence holder. Common law claims against any other party in respect of pipeline spills, assuming a case can be made on the facts, are not excluded. This interpretation accords with the evidence of Dr Ajibade and with the initial position of Mr Omoaka, as I understood it.
163. It does not follow (still less as a matter of *necessary* implication) from the fact that section 7(4) permits only the licence holder to construct, maintain or operate a pipeline that it is only the licence holder and no one else who can be sued. It is right that it is only the licence holder that can be sued under section 11(5) of the OPA, but that does not mean that the OPA must necessarily have excluded common law rights against everyone else. As Ms Day pointed out, the purpose of section 7(4) is to prohibit persons without licences from setting up or operating their own unlicensed pipeline, it is not concerned with the liabilities of persons who in some way assist or oversee a properly authorised licence-holder’s construction, maintenance or operation of its pipeline.
164. I can see that, in principle at least, there is a possibility of different claims and differing awards being made in respect of the same spill(s) against SPDC and its parent company, insofar as the regimes, under the OPA and the common law, afford separate and distinct routes to liability. Mr Willan suggested that this would lead to “a form of chaos or setting at nought” (referring to Akenhead J’s reasoning in *Bodo*). But I do not believe that that possibility would be sufficient to displace a key principle of statutory construction, emphasized recently by the UK Supreme Court in the *Manchester Ship Canal* case, that clear words are required to remove existing rights. The omission of

such clear words from an otherwise detailed and comprehensive statute is significant. I acknowledge that common law rights against the licence holder are removed implicitly under the OPA, but then they are removed to be replaced by the arguably more generous scheme. Bearing all this in mind I think it more likely than not that the Nigerian Supreme Court would follow the *Manchester Shipping* principles and permit common law claims against persons other than the licence holder in respect of damage from pipeline spills.

Answer to PI 7

165. The answer to PI 7 is that the OPA does not oust claims in common law for oil pipeline spills against persons other than the licence-holder.

PI 8 Do the Petroleum Act 1969 (the "Petroleum Act") and/or the Petroleum Drilling and Production Regulations 1969 (the "Regulations") and/or the common law enable claims for damage caused by oil spills from non-pipeline assets?

166. In addressing this PI I have followed the parties' lead in considering only spills from non-pipeline assets not resulting from any third-party activity. Spills resulting from TPI and illegal refining are dealt with under PIs 19 and 20 respectively, at paragraphs [215] to [261] below.

Common law claims

167. The experts agree that there can be claims in negligence, nuisance and under the rule in *Rylands v Fletcher* in respect of spills from non-pipeline assets. I discuss claims in trespass below.

Claims under the Regulations

168. The experts also agree that the Regulations cannot give rise to private law claims in respect of damage caused by oil spills (see further PI 9 below). It follows that the Claimants' claims under Regulations 23, 25 and 37 must be dismissed.

The Petroleum Act

169. Paragraph 37 of Schedule 1 to the Petroleum Act ("para 37") provides as follows:
- "The holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands."*
170. The experts disagreed about the extent to which para 37 enables claims by private individuals for damage caused by oil spills.
171. Dr Ajibade's view was that para 37 enables claims in respect of damage caused by all oil spills from non-pipeline assets. In his opinion it operates as a strict liability provision, mirroring the rule in *Rylands v Fletcher* and subject to the same exceptions. He referred to the Nigerian cases of *SPDC v Farah* [1995] 3 NWLR (Pt.382) 148 and *Asaboro & Anor v Pan Ocean Oil Corporation (Nig) Ltd & Anor* [2006] 4 NWLR 595

(CA) (in the Court of Appeal) [2017] LPELR-41558 (SC) (in the Supreme Court) in support of his view.

172. Mr Omoaka's evidence was that para 37 only relates to the licence-holder's lawful activities, that is to say it is designed to ensure that a landowner is compensated for activities otherwise authorised by statute, for which compensation would not be available at common law. The provision accordingly performs a function in respect of non-pipeline spills similar to section 11(5)(a) of the OPA in respect of pipeline spills.
173. On one view it is unnecessary to determine whether Dr Ajibade's or Mr Omoaka's opinion as to the effect of para 37 is to be preferred as, even if para 37 does afford a claim in respect of non-pipeline spills, Dr Ajibade agreed that it adds nothing to the common law. Nevertheless, as the claimants have pleaded a separate claim in reliance on para 37, I have considered the competing positions and conclude that the Nigerian court is more likely to arrive at Dr Ajibade's conclusion. Mr Willan's principal criticism was that there would be no need for the legislature to enact a provision which simply replicated the common law, the force of which Dr Ajibade accepted in cross-examination. But as Ms Day pointed out in closing, the broad terms of para 37 do not restrict it to oil spills alone; "surface or other rights" may be disturbed in ways other than by oil spills. Moreover there is nothing in the wording of para 37 itself, or any other provision referring to para 37, which restricts the award of compensation to damage resulting from the exercise of lawful rights under the licence.
174. The Nigerian Court of Appeal decision in *Farah* provides some support for Dr Ajibade's view. *Farah* concerned a spill from an oil well in respect of which SPDC had accepted liability, the only issue before the court related to the proper level of damages. In the course of his judgment Edozie JCA noted that the wording - "fair and adequate compensation"- used by the parties to the claim appeared to have been drawn from para 37. The most that can be said of this decision is that the Court of Appeal did not expressly disapprove the application of para 37 in the context of a claim arising out of an oil spill; on the other hand, the applicability of the provision was not an issue put before the court for its decision. Thus I cannot regard the decision in *Farah* as conclusive on the point, nevertheless it is at least consistent with Dr Ajibade's view. Neither the Court of Appeal nor the Supreme Court decision in *Asaboro* assists one way or the other: the courts were addressing a limitation point in the context of a claim under para 37 for compensation arising from oil drilling activities. As such the activities were of a kind which would have been undertaken pursuant to a licence and para 37 would have applied even on Mr Omoaka's analysis.
175. It is important to record, before leaving para 37, Dr Ajibade's evidence that the Supreme Court would adopt the same approach and apply the same principles to a claim under para 37 as it would to a common law claim under *Rylands v Fletcher*. The possibility of a claim under *Rylands v Fletcher* in respect of damage from illegal refining is discussed further under PI 20, below.

Trespass

176. There are no decided Nigerian cases where trespass has been advanced as a cause of action in the context of an oil spill. Whilst the experts drew the court's attention to a great many cases brought by claimants in Nigeria seeking damages and/or other

remedies where spills have occurred, neither was able to point to a case in which a claim has been advanced in trespass.

177. Both experts agreed that in the absence of Nigerian decisions, the Supreme Court would have regard to *Clerk & Lindsell on Torts* as a text to which the court would accord great weight. Dr Ajibade was taken to the following passages in his evidence, which he accepted the Supreme Court would follow:

“It is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary. Thus there will be liability where the boundary between the claimant’s and the defendant’s land is ill-defined and the defendant, in mowing his own grass by mistake mows some of the claimants...”

In short, as Akenhead J made clear “a negligent incursion on to and damage of, a claimants land or property can in law be a trespass”

(Clerk & Lindsell on Torts, 24th Edn, para 18-06, referring to Network Rail Infrastructure Ltd v. Conarken Group Ltd [2010] EWHC 1852 (TCC), at [67])

“Trespass differs from nuisance in that trespass involves a direct as opposed to a consequential infringement of another’s right, and is actionable without proof of damage, whereas damage must be proved in nuisance.”

(Clerk & Lindsell on Torts, 24th Edn, para 18-08)

178. In his evidence Mr Omoaka accepted that an operational failure could potentially give rise to an action in trespass, depending on the particular facts:

Ms Day: ...We have a piece of infrastructure which SPDC knows has numerous holes in it and will leak oil if the oil is put through it. If SPDC chooses, with knowledge, to put that oil through the infrastructure and the oil then leaks onto the claimant’s land, that would also be a trespass, wouldn’t it?..Chooses with knowledge to put the oil through, that would be a trespass.

Mr Omoaka: That would be a deliberate act of SPDC. A direct act of SPDC. Yes.

Ms Day: Okay, so SPDC is aware that there may be holes...but fails to check whether there are in fact holes. And then, if SPDC chooses with that knowledge to put the oil through, so deliberately puts oil through despite knowing that, so negligence, then that is also going to be a trespass if the oil then escapes through the holes?

Mr Omoaka: If that is a direct act of SPDC?

Ms Day: Yes.

Mr Omoaka: Yes.

179. This and other hypothetical scenarios were put to the experts in evidence. I indicated that I would not express a definitive view on them, and I do not do so. The PI asks whether there can be a claim in trespass; by the end of the evidence there was agreement

Approved Judgment

that such a claim would be possible depending upon the facts and subject to these principles being satisfied: (i) there must be a direct projection of oil onto the claimant's land by a physical act, and (ii) the physical act causing the oil to be projected must be a voluntary act, albeit that it may be negligent.

Answer to PI 8

180. Confining the question asked to spills from non-pipeline assets not involving third party interference and excluding damage resulting from illegal refining, the answer to PI 8 is as follows:

- (1) The Petroleum Drilling and Production Regulations 1969 do not enable claims for damage caused by oil spills from non-pipeline assets.
- (2) Paragraph 37 of Schedule 1 to the Petroleum Act 1969 enables claims to be made for damage caused by oil spills from non-pipeline assets only to the extent that there would be liability at common law under *Rylands v Fletcher*.
- (3) Common law claims for damage caused by oil spills from non-pipeline assets may be brought in negligence, nuisance, *Rylands v Fletcher* and trespass, in each case depending upon the particular facts.

PI9 What duties are imposed on a licence-holder pursuant to Regulations 23, 25 and 37 of the Regulations? Do breaches of those duties by a licence-holder give rise to a private law claim to compensation?

Answer to PI 9

181. The experts are agreed that Regulations 23, 25 and 37 impose duties in accordance with their terms. Regulation 23 can give rise to a private law claim for compensation, but does not apply to oil spills. Regulations 25 and 37 cannot give rise to a private law claim for compensation.

PI10 Do the Petroleum Act and/or the Regulations impose strict liability on a licence-holder for damage caused by oil spills not otherwise covered by the OPA regime (within the meaning of the Regulations)?

182. The answer to PI 10 follows from PIs 8 and 9 above.

Answer to PI 10

183. The Regulations do not give rise to any claim for damage caused by an oil spill.

184. Paragraph 37 of Schedule 1 to the Petroleum Act can give rise to a claim for damage caused by oil spills. Liability under paragraph 37 is subject to the same principles and exceptions as those which apply to a common law claim under *Rylands v Fletcher*.

PI 11 Do the Petroleum Act and/or the Regulations enable claims to be brought for damage in relation to an oil spill from a non-pipeline asset caused by Third Party Interference?

PI 12 Is Third Party Interference a defence to a claim under the Petroleum Act and/or the Regulations?

The experts were asked to address PIs 11 and 12 by reference to Scenarios 2-5 at PI 4 but applying these to the Petroleum Act rather than the OPA, i.e on the basis that spills occurred from non-pipeline assets. The scenarios are set out again here, for convenience:

Scenario 2

It is found that the licence holder failed or neglected to timeously detect a leak or other form of oil releasing damage caused by TPI (for example by human oversight or a failure to have in place adequate lead detection systems). The scenario should also be considered in circumstances where it is found that the Claimant prevented the licence holder from carrying out inspections of the relevant assets.

Scenario 3

It is found that the licence holder failed or neglected to timeously stop, contain or repair a leak or other form of oil releasing damage caused by TPI. The scenario should also be considered in circumstances where it is found that the Claimants prevented the licence holder from stopping, containing or repairing the leak.

Scenario 4

It is found that employees, agents or contractors of the licence holder were part of an unlawful enterprise that led to an oil spill caused by TPI.

Scenario 5

It is found that the Claimants, or some of them, were part of an unlawful enterprise that led to an oil spill caused by TPI.

185. As the parties have done, I take these two PIs together.
186. Given the agreed position that the Regulations do not give rise to any relevant cause of action in these proceedings, it is unnecessary to address TPI by reference to the Regulations.
187. As I have already found, liability under paragraph 37 of Schedule 1 to the Petroleum Act would be treated by the Nigerian Supreme Court as co-extensive with *Rylands v Fletcher* liability at common law and subject to the same principles. Accordingly actions of third parties would be a defence, subject to the *Rickards v Lothian* exception, namely that the acts were ones that the licence-holder could reasonably have foreseen and guarded against. That will be a matter of fact in any given case.

Answer to PI 11 and PI 12

188. These questions are inapplicable to the Regulations, which give rise to no private law claim for compensation in respect of oil spills.
189. A claim can be brought under section 37 of Schedule 1 to the Petroleum Act in respect of oil spills from non-pipeline assets caused by TPI. The fact that the spill resulted from

Approved Judgment

the acts of third parties will be a defence save insofar as the claimant can show that the acts were of a kind that the licence-holder could reasonably have foreseen and guarded against.

Application to Scenarios 2-5

190. The answers to the scenarios follow from the application of the principles already discussed.
191. Scenario 2 (failure timeously to detect a leak caused by TPI): Dr Ajibade's evidence was that the licence holder would be liable under paragraph 37 if it could reasonably have foreseen and prevented third party actions resulting in disturbance of the particular claimant's surface or other rights. This will be for the claimant to demonstrate, applying *Rylands v Fletcher* principles, and will depend on the facts. As to a claimant who has prevented inspections, their actions may make it more difficult to establish that the defendant could reasonably have foreseen and guarded against the TPI; it may also enable the defendant to argue that the claimant should not recover by application of the principle of *ex turpi causa*, explained as follows by Dr Ajibade: "[that the claimant] had caused or contributed to their own loss and so were not entitled to compensation".
192. Scenario 3 (failure timeously to stop a leak caused by TPI): Liability under paragraph 37 will depend on the claimant showing that the TPI was reasonably foreseeable and that the defendant could reasonably have guarded against it.
193. Scenario 4 (employees, agents or contractors part of unlawful enterprise leading to spill caused by TPI): The answer to this will depend upon the facts. But if on the facts the TPI is not the act of an independent third party, then SPDC will be unable to establish the third party defence under *Rylands v Fletcher* and will be strictly liable.
194. Scenario 5 (the claimants, or some of them were part of an unlawful enterprise leading to a spill caused by TPI): On the application of the relevant principles I have already dealt with, individual claimants who are part of the unlawful enterprise will be prevented from recovering any loss. Other claimants would be entitled to pursue their claims, but the evidence may, as indicated above, render it more difficult for these others to show that the defendants could reasonably have been expected to foresee or guard against the third party actions.

PI 13 Does clean up or remediation provide a defence to a claim under the Petroleum Act 1969 and/or the Petroleum Drilling and Production Regulations 1969?

Answer to PI 13

195. The answer follows from those already given above. There is no claim under the Regulations. Remediation will not provide a defence to a claim under paragraph 37 of Schedule 1 to the Petroleum Act but may be relevant to assessing what (if any) loss has been suffered.

PI 14 Can a licence-holder be liable under the Petroleum Act and/or the Regulations for damage caused by oil that is removed from a licence-holder's infrastructure by Third Party Interference and subsequently used in illegal oil refining by third parties?

Approved Judgment

196. The Regulations give rise to no claim for damage from oil spills, see above. Given my conclusion that the Nigerian Supreme Court would treat liability under paragraph 37 of Schedule 1 to the Petroleum Act as mirroring *Rylands v Fletcher* liability at common law, my conclusions at [218] below apply equally here.

Answer

197. A licence-holder cannot be liable under paragraph 37 of Schedule 1 to the Petroleum Act for damage caused by oil taken by TPI and subsequently used in illegal oil refining by third parties.

PI 15 In respect of causation:

(1) Where there are multiple sources of pollution or environmental damage, what is the applicable test for causation under Nigerian law?

(2) Is that test applicable to claims under the OPA, the Petroleum Act 1969, the Petroleum Drilling and Production Regulations 1969, the Nigerian Constitution and/or the African Charter?

(3) If not, what alternative test applies?

198. It is common ground that the principles of causation applied in Nigerian courts will be the same whether the claims are made under statute, or pursuant to common law. Given my findings on the fundamental rights issues in Section II of this judgment, I do not need to, and do not, make any findings about causation in relation to fundamental rights claims under the Constitution and African Charter.
199. In opening the Claimants indicated that they intended to ask the court to find that Nigerian courts would apply a “material contribution” test in certain circumstances involving multiple sources of pollution. By closing, however, Ms Day had moved to inviting me simply to state that Nigerian and English law on causation will be the same, allowing the court at trial to come to its own conclusions by applying English principles to the facts as found.
200. Mr Willan objected to this as a generality, submitting that whilst there may be some areas – claims for trespass in the context of oil spills, for instance – where in the absence of any relevant Nigerian precedent this court could legitimately say that a Nigerian court would apply the same principles as an English court, causation as a generality is not one of them. He pointed to a number of Nigerian appellate decisions on causation, from which relevant principles may be drawn and which were discussed with the experts in their evidence. It is not the case, he argued, that Nigerian law is exactly the same as English law; he pointed to the expert evidence as demonstrating that there are principles of causation in Nigeria that do not find a parallel in English law.
201. Mr Willan emphasised the evidence of both experts that, where there exist relevant Nigerian decisions, the Nigerian courts will follow those and will not have regard to decisions of English courts (see [12] above).
202. The key Nigerian authority on causation to which I was referred was *ANTS v Atoloye* [1993] 6NWLR (Pt 298) 233. This is a Court of Appeal decision in a case concerning

a car accident where there were, on the evidence, competing causes. The plaintiff's case was that the driver had been driving at an excessive speed and carelessly; the driver said that the car had suffered a sudden and unexpected brake failure. In delivering the lead judgment Tobi JCA (as he then was) gave this exposition of the law of causation (at pp.247-248):

*"With time, the determining factor was whether the defendant's fault caused the accident. In a further effort to determine negligence, the courts draw a dichotomy between the *causa causans*, that is the effective factor and the *causa sine qua non*, that is the factor without which the damage could not have occurred...*

*Causation, as a fault-finding placing mechanism, whether in criminal law or in the law of tort, has an element of fluidity in its practical application to any given situation as it lacks specific fixation. It does not therefore serve any useful purpose to seek a precise test. **The more acceptable criterion is to identify first, the factor or factors but for which the damage complained of should have not occurred and then "to select what appears to be the most responsible cause"**. By and large, the selection process is not a matter of law but one of common sense borne out from the rich experiences of human interaction in society, tailored to the facts and circumstances of the case with a view to arriving at what is essentially a value judgment.*

If in the process of the application of common sense and a value judgment, the court identifies the negligent party, the issue of apportionment abates. This is because the court can only apportion causative responsibility if it cannot locate which of two or more factors caused the accident. Where the court identifies the negligent party, it will quietly leave the fault where it rightly belongs and give judgment accordingly.

In arriving at the decision, the court must determine the primary or effective cause of the accident. In other words, the court will ask the question: 'whose negligence substantially caused the accident?' In Nwabuoeki v Iwenjiwe (1978) 2 SC 61 the Supreme Court moved further and held that liability for negligence must turn not simply on causation but on responsibility and therefore the party primarily liable in negligence for the accident bears the responsibility for it whether the responsibility for the primary negligence is as a result of express finding of the trial court or that the circumstances warrant the conclusion."

(emphasis in bold added)

203. Based on ANTS Mr Omoaka's evidence was that in order to establish causation a claimant would need to prove that the defendant's actions were both a "but for" cause and the "most responsible" cause – referring to these as the factual causation and the legal causation tests. In his evidence, however, he accepted that a "but for" test does not have to be satisfied in every case, specifically in the "hunter" example (where two hunters shoot simultaneously, each shot on its own capable of instantly killing the target). He also accepted that a defendant could be liable even if their wrongdoing was not the most proximate cause of the damage. Ms Day asked about the court's approach where it was not possible to identify a single most responsible cause:

"Q: the second paragraph (of ANTS) refers to there being no need for apportionment when the negligent party is identified. But it is implicit in that, isn't it that..there may need to be apportionment where you have more than one person treated as a legally effective cause of the damage?

A: well it says that if the negligent party can't be identified then you can apportion.

Q: Yes. If they can't be identified and you have two or three or more people in play, then it is possible that questions of apportionment may arise.

A: Questions of what?

Q: Apportionment.

A: Apportionment of liability?

Q: Yes, of liability between different tortfeasors.

A: Yes, but here it says you have to look for the person who is the primary and most effective responsible person.

A: Yes, but you might have scenarios in which you can't do that. If you cant do that, that is what you look for, but you may equally have situations where you cant do that, correct?

A: Yes, in that situation, I think again you will have to - - the Nigerian court will look at what is fair and just in the circumstances and apply that principle"

204. Dr Ajibade accepted that the default position in Nigerian courts is the “but for” test and that this is entrenched in Nigerian law. He also accepted that Tobi JCA was laying down general principles, albeit indicating a degree of flexibility in their application to the facts of any particular case. He agreed that the Supreme Court would apply *ANTS* in any case where it was clear, on the evidence, that there was one spill which was more responsible for the harm than another.

205. Dr Ajibade drew attention to the Nigerian case of *Kabo Air Ltd v Mohammed* (2005) 5 NWLR (Pt) 1451 38, and to the reasoning of Abiru JCA (as he then was) suggesting that the Court of Appeal in that case was applying a “material contribution” test. The case concerned a flight attendant who was arrested and imprisoned in Saudi Arabia. He claimed against his employers alleging that they had been negligent in failing to take steps to have him released. At trial his claim was allowed. The employer appealed, contending that its actions were not the cause of its employee’s detention, which had been due to his own activity. In giving judgment Abiru JCA said:

*“The law states that an employee alleging negligence on the part of his employer need not strictly prove that the breach of duty of care was directly responsible for his injuries.... [referring to English industrial disease cases including *McGhee v National Coal Board* [1972] 3 All ER 1008] In the last case, the House of Lords held that a defendant was liable to the plaintiff if the defendant’s breach of duty had caused, or materially contributed to, the injury suffered by the plaintiff notwithstanding that there were other factors, for which the defendant was not responsible, which had contributed to the injury”*

I doubt that a general principle is to be derived from *Kabo Air* as (i) on the facts of that case the court was dealing with two identifiable “but for” causes and (ii) Abiru JCA’s observations were expressly made in the context of an employer/employee setting.

206. There are two further Nigerian cases to which I was referred: *International Equitable Association (Industrial & Commercial Ltd) v Nwankwo* (11 December 2017) and *SPDC v Nwagbara* [2018] LPELR-43732 (CA). Both involved allegations of polluting

discharges. The claims failed on the facts but in both cases the Court of Appeal identified a “material contribution” test as an exception to the “but for” test, by reference to English cases on claims arising from industrial diseases. However, although relying on principles derived from English authorities, in none of the above cases did the Nigerian court draw a distinction between divisible and indivisible injury, as discussed in the recent English Court of Appeal decision in *Holmes v Poeton Holdings* [2024] KB 521.

207. Mr Omoaka’s evidence (which Dr Ajibade accepted) was that the Nigerian Supreme Court would be likely to apply the principles derived from the English Court of Appeal’s decisions in *Rahman v Arearose* [2001] Q.B. 351 and *Holmes*. These authorities establish that where injuries are divisible the court will make an apportionment of the damages according to the relative causative contribution of the different sources of pollution, even if the apportionment is imprecise or evidentially challenging. But where damage constitutes an “indivisible” injury then English law recognises a “material contribution” approach, the Court of Appeal in *Holmes* citing well-known industrial disease cases in this connection.
208. Both experts also agreed that the Nigerian Supreme Court would be likely to follow the Court of Appeal decision in *Halsey v Milton Keynes* to the effect that where polluting events operate sequentially, the later polluter will not be held liable to the extent that the damage had already been caused by the earlier pollution even if, had the earlier pollution not occurred, the later pollution would itself have caused that damage.
209. English authority, following the discussion in *Holmes*, will look to distinguish between divisible and indivisible injury, apportioning where injuries are divisible. But as Ms Day points out, how distinctions between divisible and indivisible injury are to be drawn in the context of environmental pollution is a complex and difficult topic. There is no Nigerian authority dealing with multiple sources of pollution which have combined to cause harm but where no individual source was either necessary or sufficient on its own. This is the example discussed in the English Supreme Court case of *Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2021] UKSC 1. The case concerned the interpretation of clauses in policies providing business interruption cover under which claims had been made for losses experienced during COVID. In the course of their judgment the Supreme Court considered causation in the context of the insured perils, referring to an article by Professor Jane Stapleton in which a number of examples are given, including this one, cited in the judgment of Lord Hamblen and Lord Leggatt at [185]:
- “Another example is where multiple polluters discharge hazardous waste into a river. In all these cases each individual contribution is reasonably capable of being regarded as a cause of the harm that occurs, even though it was neither necessary nor sufficient to cause the harm by itself”.*
210. Drawing all this together I conclude that the following is the approach, on the evidence, that the Nigerian Supreme Court is likely to take to causation where there are multiple potential sources of loss:
- (1) the court will start by looking for the “most responsible cause”, following the judgment of Tobi JCA in *ANTS*.

Approved Judgment

(2) If the court is unable, on the facts, to identify the most responsible cause, then it is likely to apply principles derived from English authority, including apportionment, in its endeavour to reach a fair and just result, as Mr Omoaka said it would seek to do. As English law in this area is evolving it is “*impractical, and perhaps even impossible, to address [the question of causation] at a preliminary issues trial*” (per Males LJ in the 2024 appeal). This judgment is not the place for a detailed discussion of English law on causation.

211. In closing Mr Willan suggested that it may be necessary to have additional expert evidence on the Nigerian Court’s approach to causation in the light of the facts, if the parties are unable to agree what the law should be at that time. But given the view I have taken that if it cannot apply Justice Tobi’s test in *ANTS* the Nigerian court is likely to find English law persuasive and to follow that, I would hope that further evidence of Nigerian law on causation will not be needed.

Answer to PI 15

212. The answer to PI 15 is that the Nigerian Supreme Court will first seek to apply the test of “most responsible cause”, identified by Tobi JCA in the case of *ANTS v Atoloye*. If the facts do not permit the “most responsible cause” to be identified then the court will apply principles of causation derived from English authority.

213. The same approach to causation applies to all the private law causes of action. I make no finding about causation in relation to the fundamental rights under the Constitution and the African Charter.

[PIs 16 and 17 have fallen away, following the 2024 appeal]

PI 18 What form or forms of interest in land are the Claimants required to establish to bring claims in common law for nuisance, trespass or *Rylands v Fletcher* liability?

Assumed facts: The Claimants’ interest/s in land include the following: (a) legal title (b) customary ownership (c) leasehold ownership (d) ownership of a room in a property (e) customary occupation (f) spousal occupation (g) exclusive possession (either by allotment, allocation or apportionment) (h) tenancy (i) licence to dwell on, access, fish or farm on the land, and/or (j) riparian rights.

Answer to PI 18

214. The experts are agreed as to the nature of interest in land required to bring a claim in each separate tort:

Trespass: claims can be brought either by the owner or a person in exclusive possession of the land.

Nuisance: any person who owns land either legally or equitably, any person in actual possession of land or any party with a right to use land for a specific purpose or profit may bring a claim.

Rylands v Fletcher: a claimant must have possession or be in lawful occupation of the affected property.

PI 19 Is it possible to have a claim in negligence, nuisance, trespass, or under the rule in *Rylands v Fletcher*, as a matter of Nigerian law, against a licence-holder in respect of non-pipeline spills (a) caused by Third Party Interference, and (b) that have been remediated by the licence-holder?

The experts were asked to address PI 19 by reference to Scenarios 2-5 at PI 4 but applying these to the common law causes of action rather than the OPA, i.e on the basis that spills occurred from non-pipeline assets.

215. This preliminary issue is concerned with claims against SPDC (as the licence holder) in respect of oil spilt from non-pipeline assets. All parties accept that claims against SPDC in respect of spills from the pipeline and associated infrastructure are exclusively covered by the provisions of the OPA, see above. The Nigerian common law will apply to any claim in respect of spills from non-pipeline assets (eg wells, wellheads).

216. As a reminder, TPI is defined for the purposes of all the preliminary issues as:

Interference with SPDC operated assets by third parties... for the purpose of stealing oil (known as bunkering) or sabotaging such assets.

Negligence

217. The experts' Joint Statement records their agreement that a claim could lie in negligence in respect of TPI.

Rylands v Fletcher

218. There was initial disagreement between Dr Ajibade and Mr Omoaka as to whether there could be a claim under the rule in *Rylands v Fletcher* for TPI, Mr Omoaka's original opinion being that the Nigerian courts would not entertain a claim under the rule for an escape caused by a third-party act. However, in his oral evidence Mr Omoaka accepted that Nigerian law is the same as English law when considering the application of the rule. Under English law, there is strict liability under *Rylands v Fletcher* for an escape of a dangerous thing held on the defendant's land, however that escape is caused, but liability may be rebutted "*where a defendant can show that the escape resulted from the act of a third party whose presence and intervention the defendant could not reasonably have anticipated*" (*Clerk & Lindsell on Torts*, 24th Edn, para 1-81, referring to *Rickards v Lothian* [1913] A.C. 263). The acts of third parties in interfering with non-pipeline assets will provide SPDC with a defence, save where the particular claimant can show that the interference was foreseeable and of a nature that SPDC should have guarded against.

Trespass

219. The parties were not agreed as to whether spills caused by TPI could give rise to a claim in trespass. Mr Willan argued that, on the basis of the *Clerk & Lindsell* characterisation of trespass as requiring a "direct and voluntary act", spills caused by TPI could not be said to have resulted from a direct or voluntary act by SPDC. He pointed to Dr Ajibade's acceptance in evidence that the act of someone taking a sledgehammer to a piece of equipment, causing oil to spill, could not be said to be the direct act of SPDC.

220. On this basis Dr Ajibade also accepted that a spill caused by TPI would not constitute a voluntary act by the operator and could not therefore give rise to a claim in trespass. But Ms Day submitted that this concession had been wrongly made, suggesting that it would be a question of fact whether SPDC had been negligent in failing to protect the pipeline against such an attack and pointing out that once the asset had been punctured, SPDC would be liable in trespass if it put oil through in the knowledge that there was a breach (by reference to the example put to, and accepted by, Mr Omoaka as capable of constituting trespass, depending on the precise facts, in his evidence).
221. The essential requirements for a claim in trespass are as I have set out above under PI 8: (i) a direct projection of oil by a physical act on the part of the licence holder and (ii) the physical act must be a voluntary act, even if negligent. I find it difficult to conceive of a realistic factual scenario where both requirements would be met in circumstances where the asset has been damaged by TPI, but I accept that it could theoretically be possible.

Nuisance

222. It was common ground between the parties that SPDC could be liable in nuisance for a spill arising from the actions of third parties if it continued or adopted it, that is to say where SPDC knew or ought to have known that third parties had breached the asset causing a nuisance to emanate from its land but did nothing to stop it.
223. The residual dispute between the experts related to whether a claim in nuisance can arise before the point at which SPDC becomes aware that oil is spilling from a breached asset, causing damage. Under English law the position is as set out by Lord Goff in *Smith v Littlewoods Organisation Ltd* [1987] A.C. 241 at 274D-G:

*“There is another basis upon which a defender may be held liable for damage to neighbouring property caused by a fire started on his (the defender’s) property by the deliberate wrongdoing of a third party. This arises where he has knowledge or means of knowledge that a third party has created or is creating a risk of fire, or indeed has started a fire, on his premises, and then fails to take such steps as are reasonably open to him (in the limited sense explained by Lord Wilberforce in *Goldman v Hargrave* [1967] 1 AC 645, 663-664) to prevent any such fire from damaging neighbouring property. If, for example, an occupier of property has knowledge, or means of knowledge, that intruders are in the habit of trespassing upon his property and starting fires there, thereby creating a risk that fire may spread to and damage neighbouring property, a duty to take reasonable steps to prevent such damage may be held to fall upon him. He could, for example, take reasonable steps to keep the intruders out. He could also inform the police; or he could warn his neighbours and invite their assistance. If the defender is a person of substantial means, for example a large public company, he might even be expected to employ some agency to keep a watch on the premises. What is reasonably required would, of course, depend on the particular facts of the case. I observe that in *Goldman v Hargrave*, such liability was held to sound in nuisance; but it is difficult to believe that, in this respect, there can be any material distinction between liability in nuisance and liability in negligence.”*

224. As Lord Goff makes clear in this passage, English law permits a claim in nuisance based upon a negligent failure to prevent the actions of third parties regardless of whether the

defendant knows, or ought to know, that a nuisance has been caused. Whether such a claim will succeed is fact-dependent in any case. Dr Ajibade relied on English law in giving his opinion that a claim in nuisance could lie for damage arising from spills caused by TPI, stating that the Nigerian Supreme Court would follow the decisions of the House of Lords in *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880 and *Smith v Littlewoods*.

225. Mr Omoaka's view was that, wherever English law may lead, a claim in nuisance arising from the actions of third parties could not succeed in Nigeria, relying on a passage from the (concurring) judgment of Oguntade JSC in *UTB v Ozoemena* [2007] 3 NWLR 448. *UTB* concerned a fire which spread from a vacant plot of land owned by the defendant bank to burn down the claimant's house. The claimant alleged that the defendant was liable in nuisance and/or negligence for allowing the fire to spread to her land. The defence was that the fire had been started by unknown third parties against whose entry reasonable precautions had been taken. The leading judgment in the Supreme Court was given by Kalgo JSC, reversing the trial courts's finding of liability, holding as follows:

"...the [bank] had done everything necessary that a reasonable person would do to prevent the reasonable possibility of entering the plot and setting fire to the grass or bush in the plot concerned.

If this had happened it cannot be within the reasonable contemplation of the [bank] and the [bank] cannot in my view be held responsible for this and be found to have breached the duty of care to [the claimant]" (at 470G-H).

226. Kalgo JSC did not explicitly address nuisance in his judgment, however in a concurring judgment Oguntade JSC did so. Having referred to passages in *The Torts Law of Anambra State* as encapsulating the common law principles of negligence and nuisance (at 474G to 475F) Oguntade JSC held that:

"A person who carries on himself or causes to be carried on by his servants, agents or independent contractors any operation which involves the creation of fire is under a duty to see that the fire is harmless to third parties [referring to English authority] ... But a man could not prevent a fire about which he knew nothing of, or which he could not have known of even with reasonable care [again referring to an English case]. In the same way, a person who is not responsible for causing the act which is the foundation for an action in nuisance could not be liable to a third party. The defendant in this case was shown to be a banker not a rabbit hunter. The use of small fires to catch rabbits does not fall within its daily routine. It seems to me that it could not therefore be held liable for a nuisance caused by strangers." (emphasis added)

227. Two important points appear from this passage in Justice Oguntade's judgment: first, his use of English authority as support for his conclusions; second, his reference to "daily routine". As Ms Day pointed out, if the highlighted passage relied on by Mr Omoaka represented an absolute rule, there would have been no need to consider what was the bank's "daily routine". The citation of English authority supports Dr Ajibade's evidence that the Nigerian SC would follow English common law principles in relation to a claim in nuisance. Moreover, as appears from the passage in Lord Goff's judgment in *Smith v Littlewoods*, above, in the context of damage to neighbouring land caused by

Approved Judgment

the acts of third parties, there is unlikely to be any distinction between liability in negligence and liability in nuisance. This would also explain the absence of any explicit reference to nuisance in the lead judgment of Kalgo JSC.

228. I conclude (i) that Nigerian law is the same as English law in respect of the acts of third parties causing a nuisance and (ii) applying that law, it is possible to have a claim in nuisance against a licence-holder in respect of non-pipeline spills caused by TPI.
229. The experts agree in respect of the second part of the question posed by PI 19, relating to remediation. Consistent with their approach to all of the questions posed involving remediation their joint view is that remediation will only be a complete answer to a claim where it has put the particular claimant(s) back into the position they were in prior to the tort having been committed.

Answer to PI 19

230. My answer to PI 19 is:

(a) It is possible to have a claim in negligence, nuisance, trespass, or under the rule *in Rylands v Fletcher*, as a matter of Nigerian law, against a licence-holder in respect of non-pipeline spills. There is no difference between Nigerian and English law regarding the requisite elements of each tort.

(b) Clean up or remediation does not provide a defence, but may be relevant to assessing what (if any) loss has been suffered.

Application to the Scenarios

231. The experts were asked to address PI 19 by reference to Scenarios 2-5 at PI 4, applying common law rather than the OPA. To the extent that they did so, their evidence did not add to the above analysis and conclusions. Whether any of the common law causes of action are made out in relation to damage resulting from TPI will be a matter of fact to be determined at trial.

PI20 Is it possible to have a claim in negligence, nuisance, trespass, or under the rule in *Rylands v Fletcher* in respect of damage caused by oil that is removed from a licence-holder's infrastructure by Third Party Interference and subsequently used in illegal oil refining by third parties?

232. It should be noted that of the many hundreds, even thousands, of claims against oil company defendants which have been brought in Nigeria arising out of oil spills, none has yet sought to recover damages in respect of harm caused by illegal refining. The fact that no such claim has yet been advanced in Nigeria is not to say that such a claim could not be made, as the defendants themselves pointed out in opening there may always be a first time. But what it does mean is that there is no Nigerian decision which has considered whether such a claim could properly be brought and, if so, under which of the various common law routes. Accordingly the experts expressed their views as to the viability under Nigerian law of a claim under common law in respect of illegal refining by reference to the application of general principles.

233. *Trespass*: The experts agreed that claims could not be brought in trespass for harm caused by oil spilled in the course of illegal refining of stolen oil.
234. *Nuisance*: The experts initially disagreed as to the possibility of a claim in nuisance for harm arising from illegal refining. In closing Mr Willan submitted that this was now resolved, as although Dr Ajibade had initially expressed the view that the release of oil from an illegal refinery could give rise to a liability in nuisance, in cross-examination he accepted that there could be no nuisance at the point at which the oil was stolen from the operator and that there would be, at most, a claim in negligence:

Q: it's like my manufacturer example isn't it? There may have been carelessness that leads somebody else to commit a nuisance, but that's not a claim against the enabler in nuisance; it's, if anything, a claim against the enabler in negligence. Do you agree?

A: I think that's fair.

235. Ms Day submitted that Dr Ajibade's concession had been wrongly made given the possibility of an action in nuisance for TPI founded upon a negligent failure to protect (see above). She submitted that, as with the tort of negligence, harm from illegal refining is simply a category of loss arising from an alleged failure to protect the asset from TPI, so if there is a valid claim in nuisance for TPI, then it must follow that there could be a claim for losses arising from illegal refining, subject to the ordinary constraints of foreseeability, remoteness and novus actus, all of which are fact-sensitive matters for trial.
236. In my view Dr Ajibade's concession was rightly made. Taken together with Dr Omoaka's evidence, I found it indicative of how the Nigerian Supreme Court would be likely to decide the possibility of a claim in nuisance for harm caused by illegal refining. It is also logically consistent with principle: as Mr Willan pointed out, nuisance is a tort designed to regulate relationships between neighbours, being essentially concerned with the impact of a defendant's activities on their land affecting a nearby claimant's enjoyment of theirs. It is not SPDC's activity which itself interferes with a claimant's land where oil is spilled from an illegal refinery, whether those refineries are near to or far from the site of the theft. The persons causing the nuisance are the third-party refiners. On the assumed facts, they are nothing to do with SPDC.
237. *Rylands & Fletcher*: The experts disagreed as to whether there could be liability under *Rylands v Fletcher* for harm resulting from oil being released from an illegal refinery. The Defendants' position, supported by Mr Omoaka's evidence, is that there can be no relevant "escape" when oil is stolen from an operator and taken elsewhere for the purposes of illegally refining it. The "escape" causing harm is the release of the oil from premises owned and operated by third parties outside SPDC's control.
238. Dr Ajibade's initial view was that there is an escape at the point the oil is stolen from the pipeline with the result that the operator would be liable for any harm caused by the oil thereafter, however that harm came about. However, Dr Ajibade accepted in cross-examination that the following passage from the speech of Lord Bingham in *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61 is an authoritative statement of the rule in *Rylands v Fletcher* which would be followed by the Nigerian Supreme Court:

Approved Judgment

“the rule in *Rylands v Fletcher* is a sub-species of nuisance, which is itself a tort based on the interference by one occupier of land with the right in or enjoyment of land by another occupier of land as such.” (at [9])

239. Dr Ajibade also agreed in cross-examination that oil purchased from a garage or petrol station could not properly be described as “escaped” oil, though he resisted Mr Willan’s further point that there could be no logical difference between purchased oil and stolen oil when considering whether oil has “escaped” in law.
240. Ms Day relied on the definition of “escape” adopted by Lord Scott in *Transco* (at [76]) from Viscount Simon in *Read v Lyons* [1947] A.C. 156 at 167, as “escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control”. She argued that it is enough for the *Rylands v Fletcher* tort that oil, as a dangerous thing, has left the place where SPDC was keeping it. The defendant may be able to raise a defence if the escape is owing to third party acts, but the tort is nevertheless engaged, in principle, she argued.
241. I conclude, based upon the expert evidence, that the Nigerian Supreme Court would be more likely than not to reject a claim under *Rylands v Fletcher* for harm arising from pollution caused by the dumping of by-product from illegal refining. First, on the basis that the *Rylands* and *Fletcher* tort is a sub-species of nuisance which, as indicated above, I have found the Supreme Court would be likely to reject as an applicable tort in these circumstances; second, because as a matter of logic, I think Mr Willan is right and that “escape” necessarily connotes the dangerous thing becoming unconfined, out of control. The oil is not out of control when it is stolen, confined, and taken to the illegal refinery. It is not out of control when it is refined. It only becomes unconfined, out of control, when it is released by the third-party refiners as an unwanted by-product of the refining process.
242. I do not believe that the English case of *Read v Lyons* [1947] A.C. 156, to which my attention was drawn by Ms Day, would cause the Nigerian Court to alter that view. The case concerned an explosion in a munitions factory, injuring the claimant. The House of Lords rejected the claim brought under *Rylands v Fletcher* on the basis that there had been no escape as the event had taken place entirely on the defendant’s land. But it does not follow from a finding that there is no escape when something occurs on the land, that everything which does leave a defendant’s land is capable of giving rise to the tort. Whether there is a relevant “escape” will depend, as Dr Ajibade (partially) accepted, upon the circumstances under which the dangerous thing leaves and how and where it becomes unconfined.

Negligence

243. The currently pleaded case claims loss resulting from oil pollution caused by illegal refineries as a category of consequential loss resulting from the Defendants’ negligence in failing properly to protect its assets from theft. The case is put on the basis that as one of the known purposes of bunkering is to take the stolen oil to be refined at “artisanal” (ie illegal) refineries, the dumping of waste from those refineries can properly be recovered as consequential loss, subject to ordinary principles of foreseeability, remoteness and novus actus (independent intervening act).

244. It is agreed that the acts of third parties in breaching the pipeline or other assets to steal oil is a serious felony in Nigeria, incurring severe penalties up to life imprisonment. The operation of an unauthorised refinery is also an offence, incurring equally serious penalties, as is the act of pollution by dumping by-product. Whilst there have been very many cases brought against oil companies in Nigerian courts for a variety of remedies arising from oil pollution, none has to-date sought to hold an oil company responsible for the harm resulting from illegal acts of third parties in stealing oil, operating an illegal refinery, and then dumping the by-product, polluting the water/land in doing so. In his oral evidence Dr Ajibade suggested that this was because claimants in Nigeria do not have the same access to superior legal representation as wealthy oil companies. His opinion, set out in his initial and supplemental reports, was that once a claim in negligence for TPI is accepted as possible, then damages for losses sustained by reason of the further use of the stolen oil in illegal refineries is recoverable subject to fact-sensitive issues of foreseeability and remoteness, the law in Nigeria relating to the application of these limiting principles being the same as English law. Dr Ajibade suggested that the right argument has not yet been made in the Nigerian courts; his view was that, if it were to be made and depending on the facts, the Nigerian Supreme Court could hold SPDC responsible for pollution caused by the dumping of oil from illegal refineries.
245. Mr Omoaka strongly disagreed: in his view there are no circumstances under which the Nigerian Supreme Court would hold an oil company liable for the criminal acts of third parties in stealing the oil, still less the further criminal activities of refining the stolen oil and dumping the by-product. In his reports he advanced these reasons why a claim in negligence in respect of illegal refining would fail: he said it was “inconceivable” that a licence-holder would be found to owe a duty to prevent harm caused by illegal refining using stolen oil as such harm would be held to be unforeseeable and/or too remote. He said that Nigerian courts would adopt a cautious approach to the imposition of any new or expanded duty of care, particularly in an area where the National Assembly has been so active in passing primary and secondary legislation to regulate the competing rights and obligations of all interested parties. He considered Nigerian courts would hold that the chain of causation between any negligent act on the part of the licence holder and the pollution caused by the refiners dumping by-product would be broken “*by a whole series of third-party acts including the oil theft itself, the transportation of the oil, the illegal refining and the polluting discharges from the illegal refineries*”. In his opinion a Nigerian court would never consider it fair, as a matter of legal causation, to hold the licence-holder liable for damage caused by illegal refining.
246. These opposing positions were explored with each expert in cross-examination. Dr Ajibade, when taken to the recent UK Supreme Court authority of *Meadows v K* [2022] A.C. 852, accepted that the Nigerian Supreme Court would be likely to adopt the reasoning of the court in that case, in particular the six-question framework set out by Lord Burrows and Lord Leggatt in their joint judgment at [28]:
- “(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)
- (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different executive cause (including *novus actus interveniens*) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question).”

247. However, Dr Ajibade qualified his agreement by saying that the Nigerian Supreme Court would be likely to follow the *Meadows* analysis only “in a case with similar facts”. Indeed, he was anxious, throughout his evidence on this point, to stress that this area of the law is so fluid that it is difficult to draw clear lines. Nevertheless, he accepted that the appropriate question would be to ask what are the risks of harm against which the defendant owed a duty of care and more specifically whether the risk of third parties dumping stolen oil is one that falls within the duty of care. But in answering this question Dr Ajibade was of the view that geographical distance and the identity of the parties involved (for instance if the persons stealing the oil were also the persons that went on to refine it) would be significant considerations in arriving at the answer as to whether or not the activities fell within the scope of the duty owed.
248. Mr Omoaka in his evidence said that the Nigerian SC would adopt the reasoning in *Meadows*, referring also to the earlier decision of the House of Lords in *Lamb v Camden* [1981] 1 QB 625.
249. Although the experts adopted opposing positions as to the likely outcome in the Nigerian Supreme Court of a case brought in negligence to recover harm resulting from pollution caused by illegal refining of stolen oil, they were agreed that the court would apply the same common law principles as the English Supreme Court in determining the issue.
250. Accordingly, in closing I heard arguments from both sides as to the application of English common law principles.
251. Ms Day characterised the defendants’ case as suggesting the existence of a separate duty to prevent illegal refining. She stressed that the case as pleaded was not that there was a separate duty, but that the harm caused by illegal refining was a foreseeable consequence of TPI and recoverable as a category of loss resulting from a failure to prevent TPI. She relied in this respect on the observations made by the Court of Appeal when dismissing the defendants’ appeal against amendments extending the claim to harm caused by illegal refining, see the 2024 appeal per Stuart Smith LJ at [118]:

“I am satisfied that no enlargement of duty or breach is effected by allowing the Illegal Refining Amendments”

And per Males LJ at [91]

“Unlawful bunkering may lead to environmental damage in two distinct ways. The first is that oil spills may occur during the process of diverting oil from Shell-operated pipelines or infrastructure. Such spills will necessarily occur in the vicinity of the pipeline or infrastructure from which the crude oil is diverted. It should therefore be possible, with expert assistance once all relevant spills and the quantity spilled to have been identified, to identify the damage likely to have been caused by any particular spill. The second is that waste products may be deliberately dumped after the illegal refining process has taken place. That will not necessarily occur anywhere near Shell-operated pipelines or infrastructure. Where it occurs will depend on the location of the illegal refinery to which the stolen oil is conveyed. I can envisage, particularly if an illegal refinery is receiving stolen crude oil from more than one source, that it may be impossible to identify with precision the source of any particular waste product which is subsequently dumped. Whether that is fatal to the claim will depend upon the facts: for example, it will not necessarily be fatal if all of the oil received by the refinery is ultimately derived from Shell and if the Claimants are able to prove a systemic failure by the Defendants to prevent third party interference.”

252. Ms Day sounded a note of caution regarding the six-stage framework set out by the Supreme Court in *Meadows*, pointing out that that case, and the one decided and handed down with it (*Manchester Building Society v Grant Thornton* [2021] UKSC 20) involved claims in respect of harm arising from negligent professional advice. She drew attention to the subsequent decision of the Supreme Court in *Armstead v Royal & Sun Alliance* [2024] 2 W.L.R 632, and to the comments of Lord Leggatt and Lord Burrows in that case to the effect that the *Meadows* analysis has no place in cases concerning physical damage and bodily injury:

“the term scope of duty is sometimes used to refer to the concept of “remoteness” ... As a concept separate from remoteness, a contention that the loss is outside the scope of the duty of care refers to the principle recognised in *SAAMCO*. However, this principle has no application here. There can be no issue about the scope of the relevant duty, being the commonplace duty to take care to avoid causing physical damage to another person’s property.”

253. Ms Day sought to emphasise that there is no issue in the present case as to whether certain categories of loss, as distinct from others, fall inside or outside the Defendants’ duty to protect non-pipeline assets.
254. Mr Willan submitted that this was simply wrong. There is an issue, he said, as to whether the risk of loss caused by the criminal acts of third parties in refining stolen oil and dumping the by-product is one that is covered by a duty to protect against TPI. The damage from illegal refining results from separate third-party acts causing separate spills and therefore gives rise to a distinct category of loss. It is not a question of a separate duty, but rather whether the (theoretically possible) duty to protect against TPI will, as a matter of legal principle, extend to cover losses resulting from pollution caused by illegal refining. Mr Willan argued that one cannot jump straight to causation, remoteness and foreseeability. It is a necessary first step in analysing a claim in negligence that the court examine the scope of the duty of care, asking to whom it is owed and in respect of what risks of harm. Dr Ajibade had been right to accept that the

question of whether the defendant owed a duty of care in the case of any given claimant must be assessed by reference to the particular risk of harm that has injured the particular claimant; further that the answer as to whether there is a duty of care will not necessarily be the same in respect of different types of harm, such as (i) oil spills caused by TPI and (ii) discharges of pollutants from illegal refineries. Mr Willan drew attention to the observations of the Supreme Court in *Meadows* as to the particular utility of the scope of duty principle when addressing claims for losses caused by the actions of third parties:

“37. The scope of duty principle may also be of analytical value and of central importance in other circumstances, such as where a claimant seeks to establish liability arising from a defendant’s omissions. One example is when the court is considering whether a defendant owed a duty to prevent injury or damage to the person or property of a claimant which has been caused by a third party. [citing *Smith v Littlewoods*, *Mitchell v Glasgow City Council* [2009] A.C. 874 and *Michael v Chief Constable of South Wales Police* [2015] A.C. 1732]

38. In our view it is often helpful to ask the scope of duty question before turning to questions as to breach of duty and causation. It asks “what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?”

255. Mr Willan dismissed the suggestion that the decision of this court allowing the amendments, as approved by the Court of Appeal in the 2024 appeal, had somehow determined the point. The fact that the Claimants had been permitted to run a case in respect of illegal refining had not decided anything about whether that is a viable claim as a matter of Nigerian law, he submitted. He argued that the proper analysis to be followed was as follows:

- (1) As Dr Ajibade accepted, the factors identified in *Caparo v Dickman* relevant to the existence of a duty of care will include proximity, foreseeability and whether it is fair, just and reasonable to impose a duty against the particular type of risk. It follows that foreseeability alone will not be sufficient to give rise to a duty.
- (2) As Dr Ajibade also agreed, the *Caparo v Dickman* factors fall to be considered and applied in the context of the situation in Nigeria and the public policy of Nigeria.
- (3) The Nigerian Supreme Court would start from the same general position as under English law, that liability is not generally imposed on a defendant for injury or damage to the person or property of the claimant caused by the conduct of a third party, as explained by Lord Toulson in the Supreme Court decision in *Michael* at [97]:

“English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party(T) [...] The fundamental reason, as Lord Goff explained, is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is

another matter to hold a person liable in damages for failing to prevent harm caused by someone else”.

- (4) The Nigerian Supreme Court would recognise, in the same way that English law does, that this general rule is subject to certain exceptions, one of these being where the defendant has control over the third party, as in the *Dorset Yacht* case (*Home Office v. Dorset Yacht Co. Ltd.* [1970] A.C. 1004). In the present case it is expressly accepted for the purposes of this PI that the Defendants have no control over the refiners or refineries. Mr Willan pointed out that even where there is control over third parties, the authorities suggest a requirement for “close proximity”, showing that the courts have been careful to draw the limits closely. Mr Omoaka relied on the decision of the Court of Appeal in *Lamb v Camden LBC* [1981] 1 QB 625 in this respect, saying that the Nigerian Supreme Court would follow the same reasoning. Whilst reluctant to accept that the Nigerian Supreme Court would draw the limits so closely as to exclude liability for illegal refining, Dr Ajibade did accept in his evidence that the Supreme Court would want to ensure that there were reasonable limits to liability.
 - (5) When considering proximity, the Nigerian Supreme Court would consider what measure of control the defendant had over the potentially dangerous situation, referring to the English House of Lords decision in *Sutradhar v Natural Environment Research Council* [2006] UKHL 33. Mr Willan submitted that it was plainly an error to resort, as Dr Ajibade had in his evidence, to a species of “but for” reasoning by saying that Shell had control over its infrastructure.
 - (6) Any development or extension of established duties of care will be incremental and cautious. Dr Ajibade accepted this. Mr Omoaka’s view given in his report, and unchallenged in his evidence, was that Nigerian courts have generally taken a cautious approach and have generally decided cases based on established duties. Mr Willan suggested that the Nigerian cases to which the court has been referred in determining all of the PIs here show the courts taking a relatively conservative approach to the common law.
256. The possibility of making a claim for losses from illegal refining under one or more of the common law torts identified is a critical issue for both sides, given the acknowledged extent of illegal refining in the Niger Delta and the pollution caused thereby. Mr Willan urged me to decide now that the Nigerian court would not hold the Defendants liable under any of the torts for harm resulting from illegal refining.
257. I am satisfied having considered the evidence of the experts, in particular Dr Ajibade in cross-examination, that neither nuisance nor *Rylands v Fletcher* can properly be engaged in respect of harm caused by illegal refining, and that that is what the Nigerian Supreme Court would be most likely to decide. Neither of these torts is apt to cover oil being stolen and taken from SPDC’s property to another place away from SPDC’s control where the oil is then subjected to an illegal process after which it (or its refined by-product) is spilled from the refinery by third parties. The fact that it was SPDC’s oil when it was taken from the asset cannot make the Defendant responsible for a nuisance created later by third parties when the refined by-product is released. The same reasoning applies to *Rylands v Fletcher* liability as a sub-species of nuisance. I think

Approved Judgment

Mr Willan is right to say that considerations of proximity, public policy, fairness and justice which must necessarily be brought to bear when considering the extent of an operator's liability for harm in these circumstances, are most properly located in the tort of negligence. The tort of negligence, and that alone, is the route by which liability for the consequences of illegal refining, if any, is to be examined and determined.

258. I found Mr Willan's analysis of the correct approach to negligence set out under [255] (1) to (6) above compelling. I conclude, on the evidence of the Nigerian law experts, that the English authorities on this point would be highly persuasive in the Nigerian Supreme Court and that this approach is one which the Nigerian court would be likely to follow. I take Ms Day's point that the six-step analysis in *Meadows* was directed to a case involving negligent professional advice, but the principles there elucidated by Lord Hodge and Lord Sales were plainly not restricted to cases involving those facts. Indeed, their Lordships (with whom the majority agreed) observed in the course of their judgment that a scope of duty enquiry was likely to be particularly useful in a case involving damage caused by the actions of a third party.
259. Applying the above analysis it is clear that there are significant legal barriers to be overcome before any claimant could make good a claim in negligence to recover for loss arising from illegal refining of stolen oil. But having said that, I am quite sure that the final answer to the question of whether damages could be recovered in negligence for losses arising from illegal refining ought not to be determined without all the facts having first been found. The Defendants have accepted the possibility of a claim in negligence for TPI, based on a failure adequately to protect non-pipeline assets from oil theft. However doubtful I may be now about the possibility of a claimant successfully being able to recover in negligence in respect of pollution caused by illegal refining of the stolen oil, I am quite sure that it would be wrong to rule definitively before the facts are known. There is a (generally) pleaded case against Shell of complicity in the thefts by members of its workforce; I cannot say now where evidence of such complicity, if there is any, might lead or what outcome the application of legal principles in a difficult and still developing area of law might give rise to in this case. I do not think it would be right to follow Mr Willan's suggestion of making a decision now on the (very limited) assumed facts, ignoring entirely the further circumstances which the claimants will be obliged to plead (in respect of lead claimants) in due course. It remains to be seen whether, in respect of any particular claimant, the alleged facts will be sufficient to underpin the requisite duty of care/breach/causation and loss, and then whether those facts will be made out at trial.
260. As I have noted above under PI 4(4), it may be necessary for there to be further expert evidence as to the likely approach of the Nigerian Supreme Court to the duty of care question once the case is fully pleaded and the facts are determined.

Answer to PI 20

261. The answer to PI 20 is that it is not possible to have a claim in nuisance, trespass, or under the rule in *Rylands v Fletcher* in respect of damage caused by oil that is removed from a licence-holder's infrastructure by Third Party Interference and subsequently used in illegal oil refining by third parties. I decline to give a definitive answer now to the question posed by PI 20 in respect of the tort of negligence.

SECTION II: THE FUNDAMENTAL RIGHTS ISSUES - CLAIMS UNDER THE NIGERIAN CONSTITUTION AND/OR AFRICAN CHARTER

262. The PIs in this section relate to the claims for breach of fundamental rights under the Nigerian Constitution and/or African Charter. The fundamental rights claims were added by amendment for the sole purpose (as the Claimants accept and assert) of seeking to take advantage of the disapplication of any limitation period by application of the FREP Rules.

PI 21 Do the Nigerian Constitution and/or African Charter enable claims to be brought against private companies for damage caused by oil spills?

263. This PI addresses the issue of “horizontal effect”, namely whether the rights relied on under Nigerian Constitution and/or African Charter are enforceable against private persons, in this case a private oil company.

Constitutional rights - sections 33 and 34 of the Constitution

264. The constitutional rights relied on in these proceedings appear in Chapter II (section 20) and Chapter IV (sections 33 and 34) of the Constitution. As I have noted at [14] above, Chapter II of the Constitution sets out aspirational rights which are non-justiciable. By contrast Chapter IV rights are enforceable in the courts, where appropriate under the FREP rule procedure. PI 21 raises the issue of whether Chapter IV rights, in particular sections 33 and 34, are able to be enforced against the defendants as private companies.
265. The claimants contended that Nigerian courts will apply a wholly textual test for horizontal enforcement of Chapter IV rights. Ms Kaufmann argued that, consistent with the broad and expansive approach to Chapter IV rights enunciated by the Nigerian Supreme Court in *Rabiu v Kano State* (1980) LPELR-2936 (SC) and applied since, the Nigerian courts would adopt the approach that all Chapter IV rights are capable of horizontal enforcement unless the particular right contains a positive prohibition against it. She relied for this on four cases: *Uzuokwu & Ors v Ezeonu II* [1991] 6 NWLR 708; *Kelvin Peterside v International Merchant Bank (Nigeria) Limited* [1993] 2 NWLR 712; *Theresa Onwo v Nwafor Oko and 12 ors* [1996] 6 NWLR (Pt 456) 584 and *Abdulhamid v Akar and ors* [2006] 13 NWLR 127.
266. The judgments in *Uzuokwu* express no general test in the lead judgment of Nasir PCA, although there is a clear decision that section 34 of the Constitution is capable of horizontal enforcement.
267. In *Peterside* Tobi JCA dealt with an argument that Chapter IV rights could only be enforced against the government (note that this case was dealing with similarly worded rights under a previous constitution). Starting the discussion he said this:

“While some of the provisions of Chapter IV can only be enforced against the Government, there are some others which can be enforced against both the government and the individual. Whether a fundamental right is enforceable against the government or against the individual or against both depends upon the particular wordings of the right... “

He then referred to *Uzuokwu*, before going on to state

“And what is more the generic wording of section 42 of the Constitution [the forerunner of section 46 in the 1999 Constitution] lends credence to the position taken that the rights could be enforced against a private individual, depending upon what right is involved and in what circumstance or situation”.

Tobi JCA proceeded to consider the proper meaning of “authority” in the interpretation clause of the Constitution, as relevant to the s.36 equivalent (right to fair hearing) under the previous constitution

“the word... means the main government departments, including parastatals, as well as other bodies exercising any form of authority, power or right, over and above any person or individual. [H]ere the authority need not be governmental or quasi-governmental, in so far as it has the right to exercise some power, implement, enforce or exact some obedience or command, or control over and above some person or individual, that is an authority within the meaning of section 33(1). In the light of the foregoing I am of the opinion that the respondent qualifies as an authority within the meaning of section 33(1) of the Constitution and can therefore be sued, all other things being equal.”

This passage shows Tobi JCA considering the circumstances in some detail, as well as the wording of the particular right, in this case the right to a fair hearing, in order to discern whether the character of the relationship was sufficiently one of authority for the purposes of the right in question.

268. In *Onwo* the Christian widow of a Moslem husband had been forced by his relatives after his death to isolate herself and shave her head. She brought a claim against a number of individuals under the FREP rules alleging breach of sections 34 (right to dignity), 35 (right to liberty) and 36 (right to fair hearing) under Chapter IV. Achike JCA gave the lead judgment, observing as follows:

“..the spirit behind the declarations in the bills of right of various governments...was to eschew arbitrariness, despotism absolutism or dictatorship by the ruler. But in actual practice, it has become necessary to extend the protection of individuals within the state against the excesses of fellow citizens. The result is that where fundamental rights are invaded not by government agencies but by ordinary individuals, such victims have asserted similar rights against the individual perpetrators of the acts as they would have done against state actions, Therefore, in my opinion, it seems clear to me that in the absence of clear positive prohibition which precludes an individual to assert a violation of invasion of his fundamental right against another individual, a victim of such invasion can also maintain a similar action in a court of law against another individual for his act that had occasioned wrong or damage to him or his property in the same way as an action he could maintain against the state for a similar infraction... “

Later in his judgment, having reviewed a number of authorities he summarised the position thus:

“The opinion of the Court [in Uzuokwu] is that from the wordings of some of the provisions of Chapter IV...that violations of fundamental rights may entitle an individual to seek redress against an individual or state, having regard to the circumstances of the right violated. To this view, and for reasons earlier state...I subscribe”

269. In a supporting judgment Tobi JCA (as he then was) observed:

“..in the interpretation of the provisions of Chapter IV..the courts must lean in favour of the protection of the rights of the individual, unless there is a contrary intention in the Constitution. In other words the Courts do not have jurisdiction to restrict the fundamental rights of the individual by a miserly demarcation of the constitutional freedoms beyond the traditional derogation clauses contained in the Constitution...”

And later in his judgment:

“There are quite a load of rights [relied on by the appellant]. But that is not important. What is important is the wording of the rights in the Constitution, ...I have carefully examined the wordings of the above sections of the Constitution and I do not see any restrictive provision to the effect that the rights contained therein could only be enforced against Government and not against private persons. In the light of the omnibus and generic wording of the sections, I am of the view that they can be enforced against both Government and private persons if a case of breach or violation is made out by an applicant....

...

It appears from the submissions of [the respondent] that the appellants rights are in tort and not in the Constitution. While I agree with learned counsel that the appellant can commence action on tort against the respondents, that does not deny her of the constitutional right which is available under the [FREP rules].”

270. A more recent case relied on by the Claimants is *Abdulhamid v Akar* [2006] 13 NWLR (Pt 996) 127, where the lead judgment in the Supreme Court was given by Kutigi JSC. The claim at first instance was brought under the FREP rules for injunctive relief and damages arising from incidents where a dealer in skins had been detained along with members of his family, assaulted and his car and goods taken by servicemen at the behest of an (alleged) creditor. The first court allowed the claim and granted the reliefs sought. The defendants appealed, arguing that the principal claim was not a fundamental rights claim. The Court of Appeal agreed and set aside the judgment. There was an appeal and cross-appeal to the Supreme Court. Kutigi JSC recorded the parties’ arguments, including the respondents’ submissions (i) that the reliefs sought (for assault and battery, trespass to land and to goods, detainee and false imprisonment) were torts covered by a different procedure and (ii) that *“the competency of suits and indeed the jurisdiction of courts are determined by the claims and or reliefs of the plaintiff or applicant and nothing else”*. He went on expressly to agree with these arguments. Referring to the cases on the ancillary principle (discussed further below) including *Tukur v Government of Taraba State* [1997] 6 NWLR 549 he emphasised that *“It is settled and a fundamental principle that jurisdiction is determined by the plaintiff’s claim or relief”*. He then went on to consider whether the Court of Appeal had reached

the right decision upon a review of the reliefs claimed. He concluded that the tortious claims were the principal claims *“even if there existed some fundamental rights infringement as found by the trial judge”*.

271. Pats-Acholonu JSC concurred with Achike JSC and deplored in strong terms what he saw as the *“fashionable”* tendency to bring an action for breach of fundamental rights *“where the facts reveal that an action should conceivably lie in tort or contract”*.
272. Akintan JSC identified the main issue to be resolved on the appeal as whether the applicant had been right in commencing the action under the FREP rules. Having referred to the facts indicating that the harassment and intimidation was at the behest of a private party and were not state actions as such, he went on to cite *Onwo*, saying:

“The position of the law is that where fundamental rights are invaded not by government agencies but by ordinary individuals, as in the instant case, such victims have rights against the individual perpetrators of the acts as they would have done against state actions. It follows therefore that in the absence of clear positive prohibition which precludes an individual to assert a violation or invasion of his fundamental right against another individual, a victim of such invasion can also maintain a similar action in a court of law against another individual for his act that had occasioned wrong or damage to him or his property in the same way as an action he could maintain against the state for a similar infraction”

Justice Akintan went on

*“The next question to be resolved is whether the appellant’s claim comes within the type that is enforceable as an infraction of fundamental right. The position of the law is that for a claim to qualify as falling under fundamental rights, it must be clear that the principal relief sought is for the enforcement or for securing the enforcement of a fundamental right and not from the nature of the claim, to redress a grievance that is ancillary to the principal relief which itself is not ipso facto a claim for the enforcement of fundamental right. Thus, where the alleged breach of a fundamental right is ancillary or incidental to the substantive claim of the ordinary civil or common law nature, it will be incompetent to constitute the claim as one for the enforcement of a fundamental right [referring to the cases of *Turkur* and *Sea Trucks* discussed below]. Out of the four reliefs sought by the appellant, two are for an order restraining the respondents from harassing and intimidating...while the others are for compensation for acts of harassment and intimidation...and release of the seized vehicles...”*

273. It was in reliance on these authorities, in particular the dicta of Akintan JSC in *Abdulhamid*, above, that Ms Kaufmann argued for a general test for horizontal application of Chapter IV rights based entirely upon the wording of the particular right and whether it included a positive prohibition against such enforcement. If the wording did not positively preclude horizontal enforceability of the right, she said, then the Supreme Court would find the right enforceable against private persons, including in particular private companies. She argued that section 33 falls within the “family” of key fundamental rights, including section 34 (right to dignity) and section 35 (right to liberty), both of which have already been held to be horizontally enforceable. She submitted that since the wording of section 33 does not prohibit horizontal enforcement it would be treated as equally enforceable against private persons.

274. The difficulty for Ms Kaufmann’s argument is that her own expert agreed in his evidence that the Nigerian Courts would adopt the wider test taken from *Peterside*, namely that Chapter IV rights will only be enforced horizontally where it is justified (i) on the particular wordings of the right and (ii) “*depending upon what right is involved and in what circumstances or situation*” (per Tobi JCA). Dr Agbakoba specifically confirmed this in cross-examination::

“Q: So Peterside says horizontal enforceability depends on the right and the circumstance?”

A: Absolutely

Q: Do you accept that that is still the law?

A: That is the law, generally.”

275. Mr Omoaka’s evidence was that the approach to horizontal enforceability in Nigeria has evolved over time: originally, fundamental rights could only be enforced against the state and state bodies but over the years, slowly and incrementally in relation to particular rights, Nigerian courts have entertained claims against private persons, *Onwo* being an example of such a case.
276. I accept this evidence since (i) it coincides with what the judges in the cases discussed above have said about the original position as to enforceability and (ii) it reflects the approach of Nigerian appellate courts in relation to fundamental rights, at any rate in the decisions helpfully produced to me by the experts, which appears to me to be an incremental and a careful one, where attempts by counsel to frame claims in terms of fundamental rights are frequently deprecated and where the courts can be seen to be considering carefully the facts of the individual case in order to determine whether the fundamental rights relied on are properly engaged, and whether they may be enforced against private persons.
277. The two-factor test, as accepted by Dr Agbakoba, also appears to me to be logical and sensible: in a developing area of the law, as the engagement and enforcement of fundamental rights plainly is, the facts and circumstances of an individual case will really matter. Or to put it another way, as Dr Blake pointed out during the course of argument, scope/content of a right or obligation and who bears that obligation (including in what circumstances) are obviously linked questions.
278. With that in mind, I turn to the particular Chapter IV rights relied on by the Claimants in their pleadings in the present case: sections 33 and 34.

Section 33 (right to life)

279. Section 33 of the Constitution provides that:

“(1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

(2) *A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as area permitted by law, of such force as is reasonably necessary –*

(a) for the defence of any person from unlawful violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

(c) for the purpose of suppressing a riot, insurrection or mutiny”.

280. No Nigerian appellate court has to-date applied section 33 horizontally to private persons. There is one first-instance decision (*Gbemre v SPDC & ors* [2005] FHC/B/CS/53/05 unreported) where the High Court appears to have done so but the decision is unreasoned, it is under appeal and, perhaps most importantly for present purposes, the claimants did not seek at the hearing to rely on it as authoritative or even persuasive (*Gbemre* was not put to Mr Omoaka in cross-examination, for instance).

281. There is, by contrast, one appellate decision where the Nigerian Court of Appeal has considered the issue directly and has ruled that section 33 cannot be enforced horizontally: *Agbeniga v Adejimiroye & anor* [2016] LPELR-40138 (CA). *Agbeniga* involved a dispute between neighbours in which a woman was assaulted and beaten with a horsewhip, seriously injuring her. She brought a claim alleging breach of sections 33, 34 (right to dignity) and 37 (private and family life), seeking a restraining order and damages. The High Court dismissed her claim, finding that in what was essentially a street fight her fundamental rights were ancillary to the main claim which was for a restraining order and damages. The plaintiff appealed. As appears from the report, one of the arguments made by the respondent was that, applying *Peterside*, section 33 could not be enforced against individuals. The decision of the court dismissing the appeal was given by Owoade JCA, with whom the other two justices agreed. His reasoning on the s.33 point raised by counsel was brief:

“Besides, I do agree with the Learned Counsel for the Respondents relying on the decision [in Peterside] that certain provisions of the chapter IV of the Constitution can only be enforced against government depending on the wording of such rights and that the provision of Section 33...cannot be enforced against individuals because there is a sanction prescribed in the Criminal Code for whosoever threatened the life of another, the right to life is only enforceable against the State or any of its agencies.

The above position of the law is shared by academic writers...(referring to an article by a Dr J M Elgido)”

282. Dr Agbakoba accepted that the Court of Appeal in *Agbeniga* effectively ruled against horizontal enforceability of the right to life under section 33, however his view was that the Supreme Court would not follow *Agbeniga* today on that point; Mr Omoaka’s evidence was that it would.

283. Ms Kaufmann made a number of cogent points in support of her case that section 33 would be given horizontal effect were the Supreme Court to determine the question now:

- (1) Of all the rights the right to life is the most fundamental of all. It would be illogical to enable a claim against a private person/company which imprisoned and/or tortured an individual (under sections 34 and 35 of the Constitution, which the courts have already indicated may be applied horizontally) but not where the individual was killed or nearly killed in circumstances which would engage section 33 (leaving arguments about scope to one side for these purposes).
- (2) Section 33 deploys the same generous language as in sections 34 and 35, and the clawbacks which follow are in all three rights largely directed at actions of the state which are deemed not to contravene the right. The clawbacks in ss.34 and 35 have not been interpreted so as to prohibit the right from having horizontal effect; there is no apparent reason why the clawback in section 33 should do so either.
284. Like Ms Kaufmann, I did not entirely follow the succinct reasoning of the court in *Agbeniga*, based as it was around the existence of criminal sanctions for murder. There are, as Mr Omoaka accepted, also criminal sanctions in Nigeria in respect of torture (section 34) or false imprisonment (section 35) so if the availability of a criminal sanction were a reason not to find a right horizontally enforceable then that should have precluded the horizontal enforceability of duties under sections 34 and 35 but it has not. Moreover the article which Justice Owoade cited as support for his finding that section 33 was not enforceable against a private party did not, as I read it, appear to me to deal with horizontal effect but was rather identifying rights which are absolute. These were identified in the article as ss.33, 34 and 35, the last two of which have been given horizontal effect in the courts.
285. As I have said, these are cogent and logical points. On the other hand, although I was not taken to all the authorities individually, Mr Omoaka's opinion (that section 33 would not be held to be horizontally enforceable) was based on a number of past judicial decisions in Nigeria, which he referred to in his report. In his original report Dr Agbakoba identified a line of authority supporting the proposition that section 33 was only enforceable against the state and state bodies, although in his view this line of authority no longer represented the current state of the law given what Akintan JSC had said in *Abdulhamid*, above. But in cross-examination Dr Agbakoba's evidence was more equivocal:
- “Q: So there is a line of authorities that section 33 cannot be enforced against individuals?”*
- A: Yes*
- Q: Right. You say though that line has been overtaken by the decision in Abdulhamid?*
- A: Yes*
- Q: Do you say Abdulhamid overruled Peterside?*
- A: Abdulhamid is a Supreme Court decision, yes.*
- Q: Did you say it overruled Peterside?*
- A: No, no, it didn't overrule*
- Q: Is it consistent with?*
- A: Consistent,. Yes.*

Q: You need to look at the right and the circumstances?

A: Yes”

286. If, as both experts confirmed, the courts will look at both the wording of the right and the circumstances in which it is sought to be exercised, then that could go some way to reconcile the decisions of the courts in relation to the horizontal enforceability of sections 34 and 35 and that of the Court of Appeal on section 33 in *Agbeniga*. I note that *Abdulhamid* was extensively cited to the Court of Appeal in *Agbeniga*, and that *Agbeniba* is the most recent appellate authority on this point.

287. I am also acutely conscious of the importance of these observations of Tobi JCA (as he then was, he was subsequently appointed as a Justice of the Supreme Court) in *Onwo*:

“There is yet another important area of the principles of interpretation of our Constitution. Ours is a Nigerian Constitution, written in a Nigerian background, with a Nigerian Sociology and Nigerian experience. In the interpretation of the Constitution, Judges must have at the back of their minds the unique Nigerian nature and character of the Constitution. What this means is that a Nigerian Judge should not find himself importing a foreign decision given in a country which fundamental rights provisions are not similarly worded as ours...”

288. A judge of the High Court of England and Wales - being a jurisdiction in another country, indeed on another continent to Nigeria, and one which has no written constitution - must be very careful in entering into the arena of the Nigerian Constitution as interpreted by the Nigerian courts. As Tobi JCA’s comments in *Onwo* so powerfully emphasise, the particular societal norms and mores which underpin the Constitution and the courts’ decisions on constitutional rights, are best known to Nigerian judges. They are rightly proud and protective of their knowledge and experience as Nigerians. Where a senior court in Nigeria, such as the Court of Appeal in *Agbeniga*, has determined a point directly and there is no conflicting authority, then this court must be very slow to find that three Court of Appeal judges erred and, in effect, to overrule that decision by finding as a matter of fact that the Supreme Court would be likely to decide differently.

289. Thus although the points which Ms Kaufmann makes may appear logical to me, as an English judge, I cannot find that the Supreme Court would restrict the test for horizontal enforceability in the way she has suggested, nor that it would reverse the Court of Appeal’s decision in *Agbeniga* restricting section 33 to actions against the state. Given the evidence of the experts together with the current state of the authorities, I cannot conclude that the Supreme Court would today be likely to find section 33 horizontally enforceable.

Section 34 (right to dignity)

290. The position in relation to section 34 is much more straightforward. Mr Omoaka expressed the personal view that the courts in Nigeria have been wrong to depart from the original position that fundamental rights under the Constitution are only enforceable against the state, but he readily accepted that they have done so in respect of a number of Chapter IV rights, including in particular the right to dignity under section 34.

291. The relevant part of Section 34 provides as follows:

“(1) Every individual is entitled to respect for the dignity of his person and accordingly

—
(a) No person shall be subject to torture or to inhuman or degrading treatment;

(b) no person shall be held in slavery or servitude; and

(c) no person shall be required to perform forced or compulsory labour”

The scope of this duty is discussed further under PI 22 below. In short, if the matters complained of fall within the scope of the duty, then it is capable of horizontal enforcement against a private company.

Rights under the African Charter

292. As discussed above, the African Charter was domesticated in Nigeria by the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 1983 (“the African Charter Act”). The African Charter Act is a simple piece of legislation, providing under a single substantive provision, section 1, as follows:

“1. Enforcement of provisions of African Charter on Human and Peoples’ Rights

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples’ Rights which are set out in this Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria. (emphasis added)

[Schedule.]”

293. The Schedule to the African Charter Act sets out, unchanged, the full text of the African Charter. Article 1 of the Charter provides as follows:

“The Member States of the Organization of African Unity Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them”

294. It is common ground between the parties that, as an international treaty, the African Charter only imposes obligations on States. In his evidence Dr Agbakoba readily agreed that the international treaty cannot impose duties on private companies. However his view was that domesticating the treaty under the African Charter Act permitted Nigerian courts to “*give[n] full recognition and effect*” to relevant rights by enforcing them horizontally against private companies as well as the State. He pointed to the generous terms of section 1 of the African Charter Act, comparing them with section 46 of the Constitution, as interpreted by the Nigerian Court of Appeal in *Peterside* when deciding on the horizontal effect of section 34 and other Chapter IV rights. His evidence was that the Nigerian Supreme Court would interpret and apply the domesticated Charter rights consistently with Chapter IV rights when determining whether they have horizontal effect.

295. The Defendants’ case, supported by the evidence of Mr Omoaka, was that the African Charter Act made no change to the provisions of the Charter or the established

international jurisprudence on the way in which the Charter operates. Article 1 of the Charter makes it clear that it is the Member States which are legally obliged to “*recognise the rights duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them*”. Article 1 is the “normative lynchpin” of the Charter, as Mr Omoaka described it, determining the content and scope of the substantive rights set out therein. He drew attention to the decision of the African Commission in Communication 323/06 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, 12th October and to decisions of the ECOWAS Court for example in *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, 14 December 2012. In the latter case the court observed that “*the scope of...provisions [of the Charter] must be looked for in relation to Article 1 of the Charter.*” Mr Omoaka explained that, as these and other decisions demonstrate, the Charter rights only become binding and enforceable through Article 1, which in turn mandates that “*the rights, duties and freedoms enshrined in this Charter*” shall be recognised and implemented by “*Member States*”.

296. Mr Kaufmann suggested that the Article 1 mandate to implement rights had been performed by Nigeria in enacting the African Charter Act; having done that, then the *Onwo/Abdulhamid* textual test would apply in determining whether a Charter rights is horizontally enforceable. Save where the wording of a Charter right, or any part of a right, indicates that it can only be performed by the State, then the right, or part of it, would be horizontally enforceable.
297. Logically, applying ordinary rules of statutory interpretation I do not think that this can be right. The wording of section 1 of the African Charter Act specifically includes the words “*...subject as thereunder provided..*”, referring to the entire Charter, not to selected parts of the Charter. Nothing in the African Charter Act changed the wording or structure of the African Charter itself; instead by a single provision it simply imported the entire text, unchanged, into Nigerian law including, in particular, Article 1 by which all the duties are expressed to be State duties. In cross examination Dr Agbakoba agreed that this was the effect of Article 1 of the Charter:

“Q: And article 1 tells you, doesn’t it, who has to recognise the rights, duties and freedoms under the African Charter?”

A: Yes

Q: And the person who has to recognise them is the state?”

A: Yes, the member state.”

298. It would have been open to the Nigerian National Assembly, when enacting the Charter into domestic law, to have derogated from, or changed, the terms of Article 1 but it did not. Dr Agbakoba agreed that the effect of the African Charter Act was to say that the Nigerian State in the form of “*all authorities and persons exercising legislative, executive or judicial powers*” had to give effect to the Charter rights, however he said that the cases in Nigeria had not followed that interpretation. Whilst it is right that the evidence of both experts was that when counsel bring fundamental rights cases in Nigeria they routinely plead reliance on rights under the Constitution and African Charter, I was pointed to no appellate decision in which the court has directly

considered the issue of whether African Charter rights are enforceable against private persons. When challenged, Dr Agbakoba was unable to cite any case save *Ajanaku* which, as discussed further below, was a High Court decision overturned on appeal (albeit on a technical point to do with adequacy of service). In closing Ms Kaufmann referred me to two first instance decisions of the Nigerian Industrial Court (a specialist employment tribunal) which appear to have found breaches of section 34 of the Constitution and Article 5 of the African Charter but it is unclear from those decisions whether a separate point was taken or considered as to the enforceability of an African Charter right against a private employer. In one of the two (*Sunday Ukpai v Ajuba Nig Ltd* NICNLA772015), whilst the court apparently found breaches of Charter rights, relief was expressed to be granted under section 34 of the Constitution alone.

299. Ms Kaufmann described sections 33 and 34 of the Constitution and Articles 4 and 5 of the Charter as equivalent rights which the Supreme Court would approach in an identical fashion, based on Dr Agbakoba's evidence that these provisions were each "*in pari materia*". Yet the right to dignity in Article 5 in particular is drafted in very different terms to section 34 of the Constitution. Article 5 provides that:

"Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of degradation and exploitation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"

This wording may be compared with section 34 of the Constitution set out at [291] above. As discussed further under PI 22 below, the right to dignity under section 34 of the Constitution has been interpreted by the Nigerian Courts as being restricted to the three types of activity specifically referenced at (a) to (c) of subsection (1) of section 34. This is far more restricted than the broadly worded right conferred by Article 5 of the African Charter. Dr Agbakoba accepted that differently worded provisions would not necessarily be interpreted in the same way by Nigerian courts. Even disregarding the wording of section 1 of the African Charter Act and Article 1 of the Charter, the fact that the rights are differently worded tends against the straightforward read-across that Ms Kaufmann suggested. As Dr Blake pointed out, the wording of the Charter rights is in general state-centric, looked at together. It is possible, in respect of some of the rights, to isolate certain parts and say that there is nothing in the wording that would prevent horizontal enforcement, but this parsing approach is (a) an unusual approach to statutory construction and (b) anyway not an approach seen in the Nigerian authorities.

300. Ms Kaufmann pointed also to the joint treatment of rights under the Constitution and the Charter in the FREP rules, in particular to the overriding objective at 3(a):

"The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them"

Ms Kaufmann argued that a purposive interpretation applies as much to the question of horizontal enforceability as it does to the scope of the rights themselves. She stressed Dr Agbakoba's evidence that the Supreme Court will take the same approach to the domesticated African Charter as it has taken to the horizontal effect of equivalent Chapter IV rights in the Constitution. She submitted that there was nothing about

Article 1 of the Charter which has any application when it comes to the domestication of the rights under the African Charter Act, arguing that although the entire Charter was put into the Schedule to the Act, Article 1 can be disregarded in the same way as the provisions relating to, for example, the setting up of the Commission. She suggested that it was necessary to read the provisions of the African Charter Act in a common sense way, applying the parts that sensibly apply to the rights as domesticated and leaving aside the others. But this would be to ignore the whole body of jurisprudence emanating from the Commission, as the body specifically tasked with interpreting the African Charter, to the effect that Article 1 is the foundational provision. As Dr Blake pointed out, applying a purposive interpretation to the wording of rights is distinct from reading words into or out of the Constitution or, as here, the African Charter Act. That Act expressly incorporated the full text of the Charter, unchanged, including Article 1. The Act says nothing about horizontal enforcement nor anything which could in any way detract from Article 1 as the basis of all the Charter rights.

301. Finally Ms Kaufmann referred me to a decision of the Hague District Court in *Kiobel v Shell* (2019) (Netherlands, Hague District Court) finding that fundamental rights, specifically section 33 of the Constitution together with Articles 4 and 5 of the Charter, have horizontal effect. The result in that case is of some passing interest, of course, but it cannot affect my view on the evidence I heard at this trial. I do not know the circumstances of the Dutch case, nor do I have any information about the Nigerian law experts from whom that court heard, or the evidence which they gave.
302. On the evidence which I heard and bearing in mind the ordinary principles of statutory interpretation (which the experts both confirmed are the same in Nigeria as in this jurisdiction), I conclude that the Nigerian Supreme Court would be most likely to construe section 1 of the African Charter Act as having the effect which, on its face, Dr Agbakoba accepted it had, namely that the Charter obligations are State obligations. I did not see anything in the evidence or in the Nigerian cases to which I was taken which persuaded me that the Supreme Court presented with all the arguments would be likely to take a different view.

Answer to PI 21

303. The answer to PI 21 is that the Nigerian Constitution enables claims alleging breach of section 34 to be brought against private companies and other persons but does not currently enable claims for alleged breaches of section 33. African Charter rights cannot be enforced against private companies. Whether section 34 is in fact capable of being engaged by damage caused by oil spills is discussed below under PI 22.

PI22 What is the scope of the following rights under the Nigerian Constitution and the African Charter, as interpreted in Nigerian law, and do they enable claims for compensation to be brought in respect of oil spills?

- (1) **The right to a clean and healthy environment under s.20 of the Nigerian Constitution.**
- (2) **The right to life under s.33(1) of the Nigerian Constitution.**
- (3) **The right to respect for dignity of the person under s.34(1) of the Nigerian Constitution.**

(4) The right respect for life and integrity of the person under Article 4 of the African Charter.

(5) The right to the best attainable state of physical and mental health under Article 16(1) of the African Charter.

(6) The right to economic, social and cultural development with due regard to freedom and identity in the equal enjoyment of the common heritage of mankind under Article 22 of the African Charter.

(7) The right to a general satisfactory environment favourable to their development under Article 24 of the African Charter.

304. Given my decision that section 33 of the Constitution and the rights under the African Charter are not horizontally enforceable it is not strictly necessary to determine whether these provisions are engaged by the damage caused by oil spills. Nevertheless, since issues of scope and in particular the proper analysis of two decisions of the Nigerian appellate courts (*Opara* and *COPW*, below), occupied so much of the evidence, I will set out the conclusions I reached, and why.

(1) The right to a clean and healthy environment under section 20 of the Constitution

305. Section 20, taken alone, is not subject to the jurisdiction of the courts, as all parties recognise. Section 20 falls within Chapter II of the Constitution; all rights in this chapter are, by operation of section 6(6)(c), expressly rendered non-justiciable in the courts. It follows that section 20 does not enable claims to be brought in respect of oil spills.

(2) to (7) Scope of rights under the Constitution and the African Charter

306. There are two Nigerian decisions which it is necessary to consider in some detail when addressing how the Nigerian Supreme Court is likely to determine the broad subject matter issue arising in relation to scope, namely whether any of the pleaded rights arising under the Constitution or the African Charter are capable of being engaged by the subject matter of oil pollution. The cases are:

(1) The decision of the Nigerian Court of Appeal in *Opara & 3 Ors v S.P.D.C.N Ltd* [2015] 14 NWLR (Pt 1479) 307 ("*Opara*")

(2) The decision of the Nigerian Supreme Court in *Centre for Oil Pollution Watch v N.N.P.C.* [2019] 5 NWLR 518 ("*COPW*")

307. *Opara* appears to be the only appellate decision which has to-date directly considered the engagement of fundamental rights in connection with oil exploitation activity, in that case pollution from gas flaring. The claim was brought by the lead plaintiff and three others, both for themselves (as individual claims) and representing three communities (as community claims) affected by gas flaring from facilities operated by SPDC. It was framed as a breach of fundamental rights, brought in the Federal High Court under the FREP rules. Relief was sought pursuant to ss.33 and 34 of the Constitution and Articles 4, 16 and 24 of the African Charter, as domesticated by the African Charter Act. At first instance the judge struck out the claim. The claimants appealed. The key issue before the Court of Appeal for present purposes was framed in

the lead judgment of Adah JSC as “[w]hether the case and or the reliefs of the applicants as constituted at the lower court can properly be maintained by an action under the [FREP rules]”. The Court of Appeal upheld the first instance decision, inter alia holding that environmental pollution could not give rise to causes of action under the Constitution and the African Charter. The lead judgment was given by Justice Adah who, having set out the arguments of counsel on the issue, concluded as follows:

“A cursory look at the claim filed in the case...shows that the appellant’s main grouse is about pollution generated from gas flaring. This without mincing words is a matter that cannot be knighted as a fundamental right under Chapter IV...and under the African Charter... The fundamental rights to life and dignity of human person as prescribed in sections 33 and 34...are very clear, specific and identifiable. The issues of gas flaring, oil exploration and environmental impact assessment which are the substantive complaint of the appellants in this case, are not issues of fundamental right. There is no legal craftsmanship found in this case that can weave them into fundamental rights to life and dignity of human person under Chapter IV ..or under the African Charter”

In his concurring judgment Justice Eko agreed, stating that

“The cause of action for the suit, the subject matter of this appeal, is environmental pollution from oil and gas exploration. The cause of action in the circumstance situates the dispute in the tort of nuisance, which in my firm view does not fall within any of the fundamental rights either under Chapter IV of the Constitution...or [AC Act]”

308. Both sides at this trial agreed that *Opara* is to be treated as a decision about the scope of the various rights relied on. As such, *Opara* is a clear decision, at appellate level in Nigeria, that oil pollution (in that case by gas flaring) will not engage fundamental rights, specifically ss.33 and 34 of the Constitution and Articles 4, 16 and 24 of the African Charter. It was a unanimous decision of a strong court, as Dr Agbakoba in his evidence accepted, two of the justices later going on to become Justices of the Supreme Court (Adah and Eko JJCA). The Claimants nevertheless submit that *Opara* was unreasoned and wrong, and that it has effectively already been overturned by the later decision of the Supreme Court in *COPW*; alternatively that the judgments in *COPW* contain strong dicta which indicate that the Supreme Court would decide differently from *Opara* today.
309. The claimant in *COPW* was a non-governmental community organization which had sought to bring a private law claim for breach of statutory duty and negligence against NNPC (note: a Nigerian State-incorporated oil company) seeking restoration or reinstatement of particular land and water courses affected by oil pollution as a result of NNPC’s activities in Abia State. At first instance and in the Court of Appeal the case was dismissed on the basis that *COPW* lacked standing to bring the claim. The Supreme Court treated the issue of whether or not locus standi should be extended to an NGO as a policy issue of considerable significance, sitting as a bench of seven rather than five, and inviting no fewer than five senior counsel to appear as amici curiae to assist. The amici were asked to address the court on the single issue, recorded in the judgment of Onnoghen CJN (Chief Justice of Nigeria) as “*Whether the learned Justices of the Court of Appeal were right in dismissing the appellant’s appeal for want of locus standi to*

maintain the suit”. In a unanimous decision, the court allowed the appeal, holding that locus should be extended to allow COPW to bring the claim against NNPC.

310. The lead judgment in *COPW* was given by Nweze JSC who set out a detailed history of the case law on locus before concluding that the public interest in environmental matters required that NGOs should have standing to bring a claim. The other six justices concurred, each giving reasons of their own for doing so.
311. As already indicated, *COPW* was not a fundamental rights claim but rather a private law claim for breach of statutory duty/negligence. The relevance of the Supreme Court decision for present purposes comes from the court’s treatment of the context – allegations of environmental pollution by NNPC’s oil extraction activity – and from the observations made by some of the justices in relation to submissions advanced by one of the amici in particular (Abubakar B. Mahmoud SAN, at that time President of the Nigerian Bar Association) on the role/engagement of fundamental rights under the Constitution/African Charter as underpinning the public interest in extending locus in that context. Mr Mahmoud’s arguments in this respect are recorded most extensively in the judgment of Aka’ahs JSC:

“[Mr Mahmoud] equated environmental rights with human rights and argued that while he was aware that the provisions of Chapter II of the Constitution are ordinarily non-justiciable but pointed out that there seems to be a shift in the thinking of the courts which make the provisions of Chapter II of the Constitution justiciable...He pointed out that the present action is an oil pipeline that burst, allegedly spilling crude into waterways, polluting drinking sources and destroying aquatic life, plant and fauna and also endangering the health and lives of the people of the community. In this regard section 33 of the Constitution provides for the right to life and any act or omission, which threatens the health of the people of the community also threatens their lives and is in breach of the guarantee to right to life provided by the Constitution. He then referred to sections 13 and 20 of the Constitution which empower the National Assembly to enact laws and in exercise of that mandate promulgated the [OPA]....He maintained that the Oil and Gas Pipeline Regulation 9(a)(ii)(b)(ii)(iii) read together requires the oil pipeline licence holder to institute mechanisms for prevention of accidents (like crude oil spill) and for remedial action for the protection of the environment and control of accidental discharge from the pipeline. He then referred to National Policy on the Environment...which recognizes the role of NGOs in protecting the environment...On this basis learned senior counsel is of the view that there is enough to invite this court to hold that the National Assembly having promulgated the [OPA] with its environmental protection provisions with regard to oil pipelines have made sections 13 and 20 justiciable and consequently required the courts to give vent to the said sections 13 and 20 of the Constitution and protect the environment by applying the [OPA]”

I have reproduced this argument in some detail to give context to the observations made by two of the justices concerning fundamental rights: Justices Kekere-Ekun and Eko. Kekere-Ekun JSC (now the Chief Justice of Nigeria) dealt with the principle of locus standi and the history of its development before emphasising that “[a]t this stage, all that is being determined is whether the appellant has the locus standi to sue. Whether the suit will ultimately succeed is not for consideration at this stage”. Having laid down this marker, she went on to record that there were national agencies whose purpose was

to address issues of environmental degradation. She referred to s.17 of the OPA with its reference to licences being subject to regulation including prevention of pollution before referencing the right to life under section 33 of the Constitution, the obligation of the state to protect the environment under section 20 and Article 24 of the African Charter providing for people to have the right to a satisfactory environment, going on to state:

“These provisions show that the Constitution, the legislature and the African Charter on Human and People’s Rights, to which Nigeria is a signatory, recognise the fundamental rights of the citizenry to a clean and healthy environment to sustain life”.

The second judgment in *COPW* to make a direct reference to specific fundamental rights under the Constitution and African Charter is that of Eko JSC (one of the court which decided *Opara*, above), who stated as follows:

“Mr Mahmoud...submits, and I agree, that in order to broadly determine locus standi under environmental rights as human rights, Article 24 of the African Charter...should be read together with sections 33(1) and 20 of the “Constitution on the role of the State in preserving the environment for the health and by extension (lives) of Nigerians”, and that “it is apparent that the right to a healthy environment is a human [right in] Nigeria”.

Having referred to various cases on the grant of locus to NGOs in other jurisdictions Eko JSC went on to note the obligations on owners/operators of pipelines under the OPA and at common law before concluding:

“Once in his pleadings, it is disclosed that the defendant is transgressing the law or is about to transgress it by his objectionable conduct which injures or impairs human lives an/or endangers the environment the plaintiff, be he an individual or an NGO should be accorded the standing to enforce the law and ... thereby save lives and the environment”

None of the other judges explicitly referenced either section 33 of the Constitution or Article 24 of the African Charter, although three others noted that environmental degradation can endanger life and four referred in general terms to constitutional rights being engaged.

312. The experts expressed very different views as to the likely impact of the above cases on the Nigerian Supreme Court if called upon to determine whether oil pollution is capable of engaging fundamental rights today. Dr Agbakoba accepted that *Opara* had been decided by a strong court but expressed the view that the decision on scope had been *per incuriam*. Insofar as I was able to follow his reasoning on this point it appeared to be that (i) having found the African Charter was enforceable in Nigeria as a result of the African Charter Act the Court of Appeal did not go on to apply it and (ii) as the Court of Appeal had said the lower court ought to have followed an earlier first instance decision in *Gbemre* (which had found a breach of fundamental rights from gas flaring) its comments on the scope of rights were made without regard to that decision. Mr Omoaka’s view was that the clear ratio of *Opara* was that fundamental rights are not capable of being engaged by oil pollution, a decision by which lower courts and the Court of Appeal would be bound. He agreed that, by application of the doctrine of

precedent, it would be open to the Supreme Court to depart from the decision in *Opara*, but he did not think that they would do so (I deal with his and Dr Agbakoba's views on *COPW* further below). On the question of what status the *Opara* decision would have in Nigeria, I prefer Mr Omoaka's evidence that the ratio of *Opara* was that oil pollution claims are outside the scope of fundamental rights, in particular ss.33 and 34 of the Constitution and Articles 4, 16 and 24 of the Charter.

313. But what the Court of Appeal determined in *Opara* is not necessarily an answer to the issue of what the Supreme Court would decide if the question were to come before it now, not least as decisions of the Court of Appeal cannot bind the Supreme Court, as the ultimate appellate and policy court in Nigeria. Dr Agbakoba's evidence was that the Supreme Court decision in *COPW* had overturned *Opara*, taking Nigerian law on pollution and fundamental rights in an entirely different direction. His evidence was that the references to "*mutual conflation*" in the lead judgment of Nweze JSC in *COPW*, taken together with the observations of Justices Kekere-Ekun and Eko, set out above, should be understood as the court having determined that, at least as regards section 33 and Article 24, fundamental rights are engaged by oil pollution. He accepted that *Opara* had not been cited to or considered by the Supreme Court in *COPW*, but was nevertheless of the view that the court had impliedly overturned that decision. Alternatively, even if the Justices' observations had been obiter and not binding as such, Dr Agbakoba's evidence was that they would be treated as highly persuasive by the Supreme Court today.
314. Mr Omoaka took a very different view: *COPW* had concerned a narrow point on locus, he said, and could not be read as having made any decision on the scope of fundamental rights, in particular whether rights under the Constitution and/or the African Charter are capable of being engaged by oil pollution. When taken to the case of *Emeka Nwana v Federal Capital Development Authority & 5 Ors* [2004] 13 NWLR (Pt.889) 128, and to observations of the Supreme Court in that case as to the effect of reasoning contained in a concurring judgment, Mr Omoaka's evidence appeared to be that Justices Kekere-Ekun and Eko's judgments should be treated as dissenting judgments on this point, but he came back to saying that in his view the points which each made on fundamental rights were obiter. His firm view was that *Opara* remained good law and that today's Supreme Court would follow it. He resisted the suggestion put to him by Ms Kaufmann that *Opara* was essentially an unreasoned decision, pointing to the court's description of the rights arising under sections 33 and 34 as "*clear, specific and identifiable*"; he was constrained to accept, however, that the judgments in *Opara* contain no reasons for holding that African Charter Rights could not be engaged by pollution.
315. In her closing submissions, Ms Kaufmann referred to the decision of the Nigerian Supreme Court in *Nwana* as indicative of an important point of difference between English and Nigerian courts' treatment of remarks in concurring judgments as ratio or obiter dicta. She suggested that under Nigerian law the combined reasoning of the lead and concurring judgments together form the ratio, since lead and concurring judgments are given equal weight. This was supported by Dr Agbakoba's evidence at trial, although in his reports prior to trial he had said only that the observations of Justices Kekere-Ekun and Eko were highly persuasive obiter dicta. Ms Kaufmann argued that, applying *Nwana* principles, *COPW* was a conclusive decision on scope.
316. Having heard the expert evidence and having considered carefully the judgments in *COPW* and the observations of the court in *Nwana*, I conclude that the remarks of

Justices Kekere-Ekun and Eko would be treated as obiter in Nigeria and not part of the ratio of *COPW*. As noted above, this was Dr Agbakoba's original view and I prefer this view because:

- (1) the issue being decided was explicitly restricted to whether the lower courts had been right to dismiss the case for want of standing. Justice Kekere-Ekun emphasised this immediately before she went on to make her remarks about fundamental rights (see above).
- (2) the case of *Opara* was not cited to the court in *COPW* and the court did not consider it; this notwithstanding that Justice Eko had been a member of the court which decided *Opara*.
- (3) the underlying claim in *COPW* was a private law claim, there was no substantive issue about the engagement of fundamental rights and neither of Justices Kekere-Ekun or Eko addressed the scope of the rights in any detail.

317. It follows that I cannot regard *COPW* as having directly overturned *Opara* or, taken on its own, as providing a definitive indication that the Nigerian Supreme Court would find rights under section 33 of the Constitution and Article 24 of the African Charter engaged by oil pollution were the issue to come before it today. However, although I decline to find that *COPW* is to be treated as a definitive Supreme Court decision that these fundamental rights are capable of being engaged by environmental pollution, I accept Dr Agbakoba's evidence that *COPW* is an important indicator of the Supreme Court's "direction of travel" in relation to cases involving pollution, at least so far as state responsibilities are concerned. It is apparent from many of the judgments in *COPW* that the fact that the proposed defendant NNPC was effectively an emanation of the Nigerian State was an key element in the view the court took of the case.
318. The Claimants pointed me to two cases in Nigeria after *COPW* in further support of their argument that the Supreme Court would today decide the scope of rights differently from *Opara*: *Mobil Producing v Ajanaku & Anor* [2021] LPELR 52566 and *Torchi*, a Federal High Court decision which I have set out above at [152(2)].
319. The claim in *Ajanaku* was not brought under the FREP rules but on a writ of summons making a tort claim under *Rylands v Fletcher*, also relying on breach of fundamental rights under section 33 of the Constitution and Articles 22 and 24 of the African Charter. At first instance the plaintiffs in *Ajanaku* obtained declarations that Mobil's failure to remediate in respect of oil pollution violated their right to life under, and to live in, an environment favourable to their socio-economic development, as guaranteed by these provisions. The High Court made an award of special and general damages. Mobil appealed on a number of points, the first raising a technical issue regarding the signature on the writ and others including whether the damages awarded were justified "in law". The appeal was allowed on the first, technical, point but the Court of Appeal went on to consider other issues raised. The course of the argument on the appeal, and points taken, are not entirely clear from the report, but it appears that Mobil unsuccessfully argued a point about whether the first instance court had been right to grant the declaratory relief concerning breach of fundamental rights.
320. Mr Omoaka dismissed *Ajanaku* as of no import whatsoever, given that the appeal had been allowed. Dr Agbakoba ultimately accepted that the judgment had not entered into

any reasoned analysis of the scope of the pleaded rights and agreed that the reference to *COPW* had been in connection with duties under the OPA. I did not conclude from this evidence that *Ajanaku* added very significantly to the “direction of travel” argument, nevertheless I noted the absence of any categorical dismissal by the Court of Appeal in 2021 of a case based on section 33 of the Constitution and Articles 22 and 24 of the African Charter.

321. *Torchi* is a first instance decision of the Federal High Court. The plaintiffs brought a claim against SPDC, other Shell companies, the Attorney General and NNPC seeking a declaration and compensation in respect of oil pollution. The judgment of Justice Ringim deals at length with a number of technical pleading and other points apparently raised as preliminary issues by the parties such that the final basis for his conclusion on liability is not immediately apparent. At the outset of his judgment he records the issues raised by the plaintiffs, which included “*the proper construction and interpretation of section 20..., section 44..., section 33..., section 36 of the 1999 Constitution...[Article] 24 of African Charter*” in the context of “*a continuous injury of hydrocarbon oil spillage, rain acid pollution, non-cleansing, non-maintenance of ruptured pipes...across the Plaintiff’s farmlands and causing a lot of killing of the Plaintiffs amateur [i.e young] children, economic trees, contamination of drinking water causing irreparable damage...*”. However, although it is reasonably clear that this was the basis for the original claim, as the judgment progresses it is less plain whether Justice Ringim heard arguments about, or even considered, whether the pleaded rights were properly engaged. It is possible (as Mr Willan contended) that in the course of dealing with the technical preliminary objections Justice Ringim may have put issues concerning the pleaded fundamental rights to one side; by the end of his judgment, when awarding damages, he appears to have done so by reference only to the OPA. I was left unclear as to what, if anything, *Torchi* decided about the scope of the fundamental rights on which the plaintiffs in that case had sought to rely. As with *Ajanaku*, above, the evidence respecting *Torchi* left me very little further forward, save only that I noted again the absence of any reference to, or reliance on, *Opara* as a “knock out point” on scope, though I accept that that may have been for any number of reasons, including a simple failure to produce the authority to the court. I am told that there is an appeal pending in *Torchi*.
322. The Claimants also referred me to decisions which the experts produced and discussed emanating from the African Court/African Commission/ECOWAS Court dealing with the scope of rights under the African Charter. I have dealt with these bodies and the status of their decisions in Nigerian courts in the introductory sections of this judgment at [18] to [19] above.
323. As Mr Omoaka accepted, there are a number of decisions of the Court/Commission/ECOWAS Court which establish that certain of the African Charter rights, in particular Article 4 (right to life), are capable of being engaged in the context of environmental harm, though he repeatedly emphasised that these were decisions against a state party. An important example is *LIDHO v Cote d’Ivoire App No 041/2015*, a case arising out of the dumping of toxic waste by Trafigura off the Ivory Coast. At paragraph 141 of its decision the African Court addressed the scope of Article 4:

“On the issue of the scope the law to life in the instant case, the Court recalls that the dumping of he toxic waste led to the death of at least seventeen (17) people with more than one hundred thousand (100 000) contaminated, There is,

therefore, no argument as to the fact that the dumping of the waste violated the right to life. Furthermore, the Court is of the view that the obligation to prevent the violation of the right to life is applicable not only in cases of death but also to all victims. Though the toxic waste had different effects on victims, it was a automatically violated the right to life for all persons who [were] exposed to it. The Court finds, therefore, that the obligation of the States to respect and guarantee the right to life stands in the face of threats and situations which put life in danger even though the threats may not result in death”

324. In *Social and Economic Rights Action Center (SERAC) v Nigeria* (Comm 155/96), 27 October 2001, a case about oil pollution impacting the Ogoni people, the Commission found a violation of Article 4, amongst other things noting “*the pollution and environmental degradation to a level humanly unacceptable has made.. living in the Ogoni land a nightmare*”.
325. Mr Omoaka’s evidence was that Nigerian courts have never yet had cited to them, or relied upon, decisions of international bodies such as those set out above. He acknowledged that such decisions could be put before the Nigerian Supreme Court but stressed that the court would make its own decision. Mr Agbakoba’s evidence was that international decisions on the scope of Charter rights would be highly persuasive to the Supreme Court, not just on the scope of those rights as domesticated under the African Charter Act, but also by analogy on equivalent rights under the Constitution, in particular section 33 (right to life). I concluded that Dr Agbakoba is right and that today, particularly after the domestication of the African Charter rights by the African Charter Act, the Supreme Court in Nigeria is likely to find the international Charter jurisprudence persuasive when approaching the scope of similarly worded duties owed by the state under Chapter IV of the Constitution.
326. So far as section 33 is concerned, therefore, I conclude that if the issue came before the Supreme Court today it is likely to find that the section 33 right to life is capable of being engaged by environmental pollution, at the state level. The Defendants, relying on Mr Omoaka’s evidence and observations of Tobi JCA in cases of *Ezeadukwa v Maduka* [1997] 8 NWLR (Pt 518) 635 and *Uzoukwu & Ors v Ezeonu II* [1991] 6 NWLR 708, suggested that the court would require proof of an intentional act in every case but I do not accept that: the observations of Tobi JCA in those cases do not to my mind conclusively establish the need for an intentional act and in any event these are Court of Appeal decisions which are now of some age. As *COPW* and the international cases to which I refer above demonstrate, knowledge about the impact of environmental harm has moved on such that there is now a greater readiness to see polluting activities as capable of engaging the right to life. Whether or not the polluting activities complained of will be found to engage the section 33 right (at the state level) in any given case will depend on the facts.
327. Given my decision on the horizontal effect of African Charter rights, I do not propose to deal in any detail with the arguments addressed to me about the scope of rights arising under Articles 16, 22 and 24 of the African Charter, relied on in the pleadings in this case. At the state level Articles 16 and 24 have been found by Charter organs to be capable of being engaged by environmental degradation; on the evidence, I think it likely that the Nigerian Supreme Court would find these decisions persuasive and would adopt the same approach. No international decision to-date has addressed whether Article 22 (right to economic development) is capable of being engaged by

environmental damage. There is no pleaded reliance on Article 4 (right to life) in the present proceedings, which seems a strange omission, particularly given the emphasis laid on impacts to life and health in the facts of this case by Ms Kaufmann in her final reply in closing, but as I have found that the Supreme Court is unlikely to determine that any of the African Charter rights are capable of horizontal enforcement against private companies the absence of a pleaded reliance on Article 4 has no material bearing.

Section 34 right to dignity

328. This leaves just section 34 of the Constitution “live” as the sole pleaded fundamental right which may be horizontally enforced against a private company. The question for me to determine is whether the Nigerian Supreme Court is likely to find that the section 34 right is capable of being engaged by pollution claims such as those pleaded against the Defendants here.

329. The experts agreed that respect for the dignity of persons under section 34 has been interpreted by the Nigerian courts not as a general right but as restricted to the specific matters in sub-paragraphs (1)(a) to (c):

“(1) Every individual is entitled to respect for the dignity of his person and accordingly

—

(a) No person shall be subject to torture or to inhuman or degrading treatment;

(b) no person shall be held in slavery or servitude; and

(c) no person shall be required to perform forced or compulsory labour”

330. Ms Kaufmann confirmed that the Claimants rely on the right not to be “*subject to... degrading treatment*” under (a). I was taken to two decisions in particular dealing with the courts’ interpretation of this aspect of the s.34 right:

(1) In *Uzuokwu*, above, Tobi JCA described degrading treatment as “[*having*] the element of lowering the societal status, character, value or position of a person. It makes the victim have some form of complex which is not dignifying at all”.

In the same case Nasir PCA added that “*person*” includes not only the physical body but also “*the psyche and other mental attributes*”

(2) *Total v Okwu* (2024) LPELR-62623 (SC) is a recent decision of the Supreme Court. The case was brought under the FREP Rules in the High Court by six claimants alleging that they had been brutally assaulted and shot at by members of a private security force guarding the premises of one of the defendants, and that one of their members had been apprehended and their van had been taken. They sought declarations that the defendants’ activities had breached their rights under sections 34 and 35 and orders for compensation and release of their vehicle. The High Court made the orders and the Court of Appeal dismissed the appeal. The defendants appealed to the Supreme Court which affirmed the Court of Appeal’s decision. One of the issues concerned the proper jurisdiction of the

court to determine the claim. In the course of considering this issue Abiru JSC, giving the leading judgment, considered and applied the definition of degrading treatment given in Blacks Law Dictionary as “*Reviling, holding one up to public obloquy; lowering a person in the estimation of the public; exposing to disgrace dishonor or contempt*”. Justice Abiru went on:

“Thus any action which inflicts intense pain to the body or mind of a person or any act of physical cruelty which endangers the life or health of a person or creates a well-founded apprehension of danger or an act done in such a manner as to bring a person to public ridicule, disgrace, dishonor or contempt comes within the provision of Section 34(1)(a) of the 1999 Constitution (referring to Uzuokwu).”

331. Dr Agbakoba’s view was that the effect of oil pollution on individuals and communities is capable of coming within the meaning of degrading treatment discussed by the Nigerian courts in the above cases. In his report he rejected Mr Omoaka’s view that the Supreme Court would restrict section 34 to intentional acts, stressing that the courts would apply a liberal interpretation, in Nasir PCA’s words “*in such a way that it protects what it sets out to protect or guides what it sets out to guide*”.
332. Mr Omoaka’s evidence was that, as an additional point to the interpretation of section 34 as restricted to intentional acts, the Supreme Court would treat the non-justiciability of section 20 as precluding any environmental claim from being enforced by the courts, however this was not a point on which the Defendants sought to rely in closing. When cross-examined about the need to show intention Mr Omoaka accepted that the definitions given by the judges in the above cases said nothing about intention in connection with degrading treatment, but expressed the view that intent was implicit in the use of the word “treatment”. However he went on to agree that the description used by the judges in the cases focussed on the effect of the treatment and accepted that “*it would all depend on the facts*”.
333. Ms Kaufmann submitted that degrading treatment could clearly sit within the context of the effects of oil pollution, giving the example of a massive oil spill impacting homes and livelihoods, resulting in degradation and poverty to the residents of the region affected. The mental and physical effect on a community of such damage would plainly constitute degradation, in accordance with the definition given by Tobi JCA in *Uzuokwu*, above, she argued.
334. I find it difficult to accept that the Nigerian Supreme Court would focus on the effects of pollution alone for the purposes of the section 34 right to dignity. The words “subject to treatment...” in my view logically connote a deliberate act or acts directed at the person whose dignity is thereby impacted. The courts deciding *Uzuokwu* and *Okwu* did not need to address this aspect of the section 34 wording in any detail as the acts complained of in those cases clearly were directed intentionally at the complainants. Nevertheless, the explanation which the Supreme Court in *Okwu* gave, referring to “*any action which inflicts...*” itself suggests the need for a deliberate action; the court does not, for instance, refer to “*any action which results in...*”, which is what Ms Kaufmann’s interpretation would suggest.
335. But even if Ms Kaufmann is right, asking the question whether it is possible to envisage a situation where pollution is sufficiently grave to result in degradation is a very

different question from, and cannot greatly assist in, addressing whether the Nigerian Supreme Court is likely to find that section 34 is capable of being engaged by oil pollution. Addressing that issue requires me to look at the evidence. As to that:

- (1) Although Dr Agbakoba in his written evidence suggested that the Nigerian courts have interpreted section 34 broadly “*including its application to environmental contexts*”, he agreed in cross-examination that the courts had adopted a more restricted approach, by reference to the particular matters identified in s.34(1)(a) to (c).
 - (2) Save for *Opara*, above, none of the many Nigerian cases alleging breach of section 34 has been a pollution case. None of the amici or the justices in *COPW* mentioned section 34. The court in *Ajanaku* did not consider section 34 as it was not relied on in that case. As indicated above, although the claimants in *Torchi* appear to have pleaded reliance on section 34, it is not at all clear what Justice Ringim did with this, if anything, when granting relief under the OPA. The cases produced to me simply did not support Dr Agbakoba’s evidence that Nigerian courts have interpreted section 34 broadly “*in its application to environmental contexts*”.
 - (3) None of the international pollution cases to which I was referred (eg LIDHO, SERAC), held that the right to dignity under Article 5 of the African Charter was engaged. Many of the Charter rights are discussed as having been breached in those cases, but the Article 5 right to dignity is not mentioned.
336. When it comes to section 34, therefore, there is very little in the evidence to set against the Court of Appeal decision in *Opara*. Even if I had been persuaded that the Supreme Court in *COPW* had impliedly overturned *Opara* so far as section 33 is concerned, it could not be said to have disapproved or reversed the Court of Appeal’s decision on the scope of section 34. The absence of any reference to Article 5 in the decisions of the African Court/Commission/ECWAS Court concerning pollution means that there is no body of international jurisprudence which the Nigerian Supreme Court could treat as persuasive regarding the application of section 34 to environmental degradation.
337. I bear in mind, again, the comments of Justice Tobi (see [287] above) to the effect that matters concerning the Nigerian Constitution are quintessentially for Nigerian judges. Where there are no contradictory dicta in other Nigerian cases, nor any contradictory Charter jurisprudence, I do not consider it likely that the Nigerian Supreme Court would take a different view to the Court of Appeal in *Opara* to hold that the section 34 right to dignity is capable of being engaged by oil pollution. It does not follow that because I have found that the Supreme Court is likely now to decide differently on the possible engagement (depending on the facts, and only at the state level) of section 33 in connection with oil pollution, that they are bound also to do so vis-a-vis section 34.

Answer to PI 22

338. The answer to PI 22 is

(1) The right to a clean and healthy environment under s.20 of the Nigerian Constitution is not justiciable and does not enable claims for compensation to be brought in respect of oil spills.

(2) The right to life under s.33(1) of the Nigerian Constitution enables claims for compensation in respect of oil spills (depending on the facts and not against private companies, see above).

(3) The right to respect for dignity of the person under s.34(1) of the Nigerian Constitution does not enable claims for compensation in respect of oil spills.

(4),(5),(6) and (7) The rights under Articles 16, and 24 of the African Charter enable claims for compensation in respect of oil spills (but not against private companies, see above). I make no decision in respect of Article 22.

PI 23 Do the Nigerian Constitution and/or African Charter enable claims to be brought for damage in relation to an oil spill caused by Third Party Interference?

339. Even if pollution claims were held by the Nigerian Supreme Court to be within the scope of relevant rights, the ability to use fundamental rights to ground a claim against the Defendants in respect of the actions of third parties would require the Claimants to establish that the Nigerian Supreme Court would be likely to (i) find that the rights are horizontally enforceable and (ii) that the rights not only impose negative obligations (for example *not* to take life, or *not* to subject someone to torture or to inhuman or degrading treatment) but also correlative positive duties to protect against the risk of breach – a duty of “due diligence”, as Ms Kaufmann termed it.
340. For the reasons given above, I have concluded that the fundamental rights upon which the Claimants have relied in their pleaded case are either (i) presently unlikely to be found by the Nigerian Supreme Court to have horizontal effect (section 33 of the Constitution and all African Charter rights), or (ii) (in the case of section 34) are unlikely to be found to be engaged by oil pollution. That being so it is unnecessary for me to decide whether any of the rights would be found by the Nigerian Supreme Court to impose positive obligations of due diligence in the way Ms Kaufmann suggested.
341. However, since I heard evidence and argument on this issue I will set out my conclusions shortly. It is plain from decisions such as *LIDHO and Communication 245/02 Zimbabwe Human Rights NGO Forum v Zimbabwe* 15 May 2006 that the African Court and Commission have viewed Charter rights as imposing a duty on States to “*respect, protect, promote and implement*” the right and that Charter rights “*entail a combination of negative and positive duties*”. In the *Zimbabwe* case, for instance, the state was found responsible for failing to protect citizens against reasonably foreseeable threats to life arising from politically-motivated attacks on white farmers and their farm-workers.
342. Mr Omoaka agreed that, viewed at the state level, positive obligations inhere in all Charter rights. But he was clear that the Nigerian Supreme Court would be highly unlikely to find that Chapter IV of the Constitution imposed positive duties, still less that they would find positive duties enforceable against private companies. Dr Agbakoba’s evidence was far from definite: he described the issue for the Nigerian Courts as “*entirely novel*” and volunteered during cross-examination that it was “*very difficult terrain*”, accepting that it would require “*leaps and bounds*” on the part of the Supreme Court but expressing the hope that they would get there.

Approved Judgment

343. I had no difficulty in concluding, on this evidence, that the Nigerian Supreme Court would not at present permit fundamental rights claims to be brought against the Defendants, as private companies, to recover damages in respect of pollution caused by third party acts. I need not get into the evidence of the experts in relation to causation in the event of such claims being possible.

Answer to PI 23

344. The answer to PI 23 is that neither the Nigerian Constitution nor the African Charter enable claims to be brought for damage in relation to an oil spill caused by TPI.

PI24 (1) Is it permissible under Nigerian law for the Claimants to pursue claims under the Nigerian Constitution and/or the African Charter of Human and People's Rights in parallel with private law claims in tort or under statute in respect of the same alleged damage caused by oil spills?

(2) If not, is such a prohibition applicable in these proceedings in the English courts?

345. Both sides have treated PI 24 as addressing the question of whether the fundamental rights claims pleaded by reference to the Constitution and the African Charter would be permitted to proceed under the FREP Rules had the claims been brought in Nigeria, or whether they would be struck out on the application of the "ancillary principle".
346. As Ms Kaufmann emphasized, this point is only reached if the court has found that the claim is within the scope of one or more of the pleaded rights, and also that the right(s) in question is/are horizontally enforceable. Given my findings, above, on horizontal enforcement and scope it is strictly unnecessary to decide this PI. Nevertheless, as the evidence addressed the ancillary principle and I was addressed on it in argument, I will set out the conclusions I reached.

Nigerian Supreme Court decision in Sea Trucks and Turkur

347. The Nigerian rules of procedure relating to fundamental rights claims – the FREP rules – are designed to enable claims to be brought easily and quickly on written evidence (although I understood that the procedure is sufficiently flexible to enable longer hearings with oral evidence). As the cases referred to by the experts demonstrate, the courts guard the FREP rule jurisdiction carefully, Nigerian judges being astute to prevent cases proceeding under the FREP rules which they consider should not be brought using the special procedure. There are two seminal Supreme Court decisions on the operation of the ancillary principle in Nigerian law: *Turkur v. Government of Taraba State* [1997] 6 NWLR 549 and *Sea Trucks (Nig.) Ltd. V. Panya Anigboro* [2001] 2 NWLR (Pt. 696) 159 (SC).

(1) *Turkur* involved a claim arising from a chieftaincy dispute. The appellant had been deposed from his position as Emir of Muri, a chieftaincy office, detained and then banished to another state. He brought a claim to be reinstated and alleging breaches of his fundamental rights to liberty and freedom of movement. The Supreme Court upheld the Court of Appeal's decision refusing jurisdiction on the basis that the reliefs claimed for declarations of violation of fundamental rights were on grounds connected to and bound up with the chieftaincy claim. The statement of principle is found in the leading judgment of Ogundare JSC at

574, adopting this passage from the decision of Adio JCA in *Borno RTC v Egbuonu* (1991) 2 NWLR (Pt. 171) 81 at 89:

“When an application is brought under the [FREP rules], a condition precedent to the exercise of the court’s jurisdiction is that the enforcement of fundamental right or the securing of the enforcement thereof should be the main claim and not an accessory claim. Enforcement of fundamental right or securing the enforcement thereof should, from the applicant’s claim as presented, be the principal or fundamental claim, and not an accessory claim”.

- (2) *Sea Trucks* was a claim brought under the FREP rules for wrongful termination of employment, raising claims in breach of contract and for violations of the fundamental rights to freedom of movement and association. The key, and oft-quoted passage setting out the ancillary principle comes from the leading judgment of Ogundare JSC in *Sea Trucks* at p.175:

“I think the proper approach is to examine the reliefs sought by the applicant. The grounds for such reliefs and the facts relied upon. If they disclose that breach of fundamental right is incidental or ancillary to the main complaint it is incompetent to proceed under the [FREP] rules”

Adopting this approach, the Supreme Court held that the principal complaint was one for wrongful dismissal and that “[t]he alleged breaches of his fundamental rights flowed from this main complaint”.

348. The experts were agreed that the *Sea Trucks* principle, above, is the one which courts in Nigeria will apply. However they were not agreed as to the analytical approach the courts would take in applying the *Sea Trucks* principle to the claims in the present proceedings.
349. Dr Agbakoba’s initial evidence was that the court would look at the fundamental rights claim separately, and alone, and ask itself whether it was a “free-standing” or a “tag-along” claim; if the latter, then it would decline to entertain the claim under the FREP rules. But in cross-examination he agreed with Dr Blake that the Supreme Court in *Turkur* had looked at all of the claims, chieftancy and fundamental rights, together. He also agreed that the court in *Akinola v VC Unilorin* [2004] 11 NWLR (Pt. 885) 616 (a case where separate claims had been issued relying on identical facts, one on a standard writ and another under the special procedure provided by the FREP rules) had looked at both sets of pleadings, assessing them qualitatively in determining that the student’s claim to be reinstated was the main claim and striking out his fundamental rights claims. By the end of his evidence on the ancillary point Dr Agbakoba appeared to agree with Dr Blake’s suggestion that the court would adopt an evaluative approach, looking at the claim as a whole, to determine where the centre of gravity was:

“Q: We saw that in Sea Trucks. The court looked at relief 3 and relief 4 and contrasted that with relief 2. So what it is doing is weighing them and asking itself what is the centre of gravity of this claim because if the fundamental rights are not the centre of gravity, I don’t have jurisdiction under the FREP rules.

A: *Absolutely*”

350. Mr Omoaka’s view was that the court would look at the whole claim and all the reliefs to compare the nature of the private law/fundamental rights claims relative to each other. In these proceedings, he said, the court would look at the pleaded case and find that the fundamental rights claims were essentially parasitical on the private law claims, relying on precisely the same facts and alleged breaches, and would conclude that the fundamental rights claims were ancillary. At one point in his evidence Mr Omoaka appeared to suggest that the absence from the pleaded reliefs of a claim for a declaration would be treated as conclusive, but he stepped back from this when pressed in cross-examination and I was not persuaded. Nevertheless, the Court of Appeal’s approach to the application of the *Sea Trucks* principle in *Akinola* plainly involved an examination of the relative amounts of different types of relief claimed, as Dr Agbakoba accepted:

Q: ..They are literally looking at all the reliefs and almost tallying them and saying, well, you have four reliefs for studentship, one for breach of fundamental rights. It is easy for the court to say in that case that the main complaint is studentship, not breach of fundamental rights, and one out of five is clearly ancillary. Isn’t that what they are really doing here?

A: *Absolutely*”

351. In closing Ms Kaufmann proposed a test derived from dicta of the Court of Appeal in *Akinola*, adopted by the Supreme Court in *Total Exploration v Okwu*, to the effect that the court would look to see if the public law claims were “birthed from or adjectival to”, the private law claim. She pointed out that in *Okwu*, a Supreme Court decision from last year, the court had specifically rejected an argument that the claims were tortious and for that reason the FREP rules could not apply. Dr Blake responded that if the ancillary test were as restricted as Ms Kaufmann had suggested then the fundamental rights claims in *Turkur* and in *Abdulhamid* should have been allowed to proceed, as they existed separately from the claim for chieftaincy (in *Turkur*) or detainment (in *Abdulhamid*). In reply Ms Kaufmann suggested that *Abdulhamid* was a case exclusively about scope, but I disagree: there were two issues on jurisdiction before the court in *Abdulhamid*, the first was indeed about scope but the second concerned the application of the *Sea Trucks* ancillary principle, which the Court of Appeal had addressed and which the Supreme Court discussed in the course of dismissing the appeal.
352. I concluded that the evidence of the experts at trial taken together with the evidence of the Nigerian courts’ approach in the decisions produced to me more strongly suggested that the Supreme Court would adopt the broader, qualitative approach. I think Dr Blake is right and that the narrower “birthed from” approach is but one permutation adopted by the Court of Appeal in *Akinola* because the facts of that case permitted it, but the Supreme Court citation of *Akinola* in *Okwu* did not have the effect of restricting or changing the original, broad *Sea Trucks* test.
353. In any event even applying the narrower test it seems clear to me that the Nigerian Supreme Court looking at the fundamental rights claims as advanced by the claimants on the pleadings here would conclude that they are not freestanding but are parasitic on the facts, remedies and grounds of the private law claims. The fundamental rights claims are a “tag-along”, to use Dr Agbakoba’s term: see for instance the *Bille*

Individual Re-Amended Particulars of Claim at paragraphs 82A to 82D, cross-referring to the particulars of negligence at paragraph 79.

Answer to PI24

354. The answer to PI 24 is that even if the Nigerian Supreme Court were to be satisfied that oil pollution is within the scope of one or more of the pleaded fundamental rights and were to find the rights to be horizontally enforceable against private companies, it would nevertheless find the fundamental rights claims in this case to be ancillary to the private law claims.

Answer to PI 1 (5) and (6) (limitation in relation to the fundamental rights claims)

355. It follows from the above that even if the claims in these proceedings could succeed as claims for breaches of fundamental rights under the Constitution and/or African Charter, they would not be permitted to proceed under the FREP rules in Nigeria, with the consequence that they would remain subject to a 5-year limitation period.

Conclusion

356. I will leave it to counsel to draw up the proper order reflecting the above decisions.
357. I am immensely grateful to the counsel teams on both sides for their expertly-drafted, interesting and comprehensive written submissions on all the issues, and for their assistance during the examination of the experts and in closing; also both sets of solicitors for the preparation of bundles which were straightforward to navigate (not always the case where there is such a vast volume of material), and to the transcribers from Opus for indefatigable, prompt and accurate recording of all that went on at the hearing.
358. My final thanks are reserved for the three experts, whose reports and further explanations at trial enabled me, from a standing start, to become sufficiently well acquainted with Nigerian law and Nigerian courts. In this judgment I have only referred to a small proportion of the hundreds of Nigerian cases which their diligent research uncovered and made available to me, but I was greatly assisted by considering the many more mentioned in their reports and raised with them (or by them) during their evidence. Where, in making my decisions, I have had to differ from one or more of their views, they will understand that I have done so diffidently and always with the utmost respect for their seniority and their advanced experience of the laws of their country.