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A continuing nuisance: *Jalla v Shell International Trading and Shipping Company Ltd* [2023] UKSC 16

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ABSTRACT

In *Jalla* the Supreme Court was required to decide whether the damage, which had been caused to the claimants' land by the continued presence of oil on the land, which in turn had been caused by a spill from the defendants' oil pipeline, constituted a continuing nuisance, the upshot of which was that a continuing cause of action accrued afresh from day to day. The court held that a continuing nuisance was a nuisance which continued day after day, or on another regular basis. In such cases, the cause of action continued afresh on a continuing basis. However, in *Jalla* the court held that there was no continuing nuisance, on the grounds that there was no repeated activity, or continuing state of affairs, which had been caused by the defendants. Rather, the leak was a one-off event, or isolated escape, which had been caused by the defendants. The cause of action was complete once the claimants' land was affected by the oil spill. In short, there was no continuing cause of action for as long as the oil remained on the claimants' land. Whereas the presence of the oil on the claimants' land may have ranked as a 'nuisance' in common parlance, the continuing presence of the oil on the land did not rank as a nuisance in law. The author concludes that *Jalla* illustrates the confusion which stems from the fact that the concept of nuisance is not clearly defined.

Keywords: private nuisance; oil; isolated escape; damage to land; commencement cause of action; limitation period.

BACKGROUND AND DECISION

An oil spill occurred approximately 120 kilometres off the coast of Nigeria when a large quantity of crude oil, which had been extracted from the seabed, leaked into the ocean from the flowline through which it was being transferred into a waiting tanker. Just under six years later, the claimants who owned land in Nigeria, said to be affected by the spill, issued a claim in private nuisance against various defendants for undue interference with the use and enjoyment of their land. In particular, the claimants alleged that, following the initial oil leak, which lasted six hours, oil migrated towards and reached

the Nigerian shoreline, and that the oil was still present on their land and had not been cleaned up. More than six years after the leak, the claimants applied to amend their claim form and particulars of claim, to substitute one of the original defendants for a new defendant. The claimants contended that their applications fell within the limitation period (a period of five years under Nigerian law) because as long as the undue interference of their land (presence of oil) was continuing, there was a continuing nuisance and thus, a continuing cause of action that was accruing afresh, from day to day.

On a preliminary issue as to limitation, the trial judge held that the oil spill was a single escape which could not constitute a continuing nuisance and that the claimants' right of action had accrued when the oil first struck their land. The Court of Appeal upheld that decision. The claimants appealed.

Lord Burrows delivered the judgment of the Supreme Court.

Lord Burrows stated that the oil spill occurred off the coast of Nigeria in December 2011. The substantive question which fell to be answered by the court was whether there was a continuing private nuisance, and hence a continuing cause of action. The relevant limitation period under Nigerian law was five years. The claimants submitted that there was a continuing cause of action because there was a continuing nuisance, so that the limitation period ran afresh, from day to day.

Lord Burrows stated that the tort of private nuisance was committed where the defendant's activity, or the state of affairs for which the defendant was responsible, unduly interfered with the use and enjoyment of the claimant's land.[1] Moreover, the creator of a nuisance could be sued whether or not that person still has, or had, any interest in land from which the nuisance emanates. The parties had agreed for the purposes of the appeal that a private nuisance could be created where a nuisance emanated from the sea. It was also assumed that the tort of private nuisance could be committed by a single one-off event, such as an oil spill.

Lord Burrows stated that the tort of private nuisance was actionable only on proof of damage and was not actionable *per se*.[2] This requirement was satisfied in nuisance by establishing the undue interference with use and enjoyment of land, as by the impact of noise or smell, notwithstanding the fact that there was no physical damage to the land itself. This included physical damage to the land itself, and also damage to buildings or vegetation growing on the land.

Lord Burrows stated that the core principles of the law of nuisance were set out in the recent Supreme Court decision of *Fearn v Tate*

1 [2023] UKSC 16 [2].
2 Ibid [3].

Galleries.[3] In that case, it was decided that the defendants were causing a private nuisance by using the top floor of their building as a public viewing gallery, which looked straight across into the living areas of the claimants' flats. First, *Fearn* decided that the private law of nuisance was a tort to land. Secondly, a nuisance could be caused by any means and did not require a physical invasion. The interference could be by something tangible (such as Japanese knotweed) or something intangible such as fumes, noise, vibration or an unpleasant smell. It could include intrusive overlooking. The interference also required to be substantial, and also to be an interference with the ordinary use of the claimant's land. At a general level, what was involved was the balancing of conflicting rights of landowners. In deciding whether there was a private nuisance, one was required to have regard to the character of the locality. Coming to the nuisance was no defence. Nor was it a defence to private nuisance that an activity which was being carried on by the defendant was for the public benefit.

Lord Burrows then referred to three House of Lords' decisions relied upon by the claimants.[4] The first was *Darley Main Colliery Co v Mitchell*.[5] In that case, the defendants had the right to extract coal from under the claimant's land. In doing so, they had caused subsidence to the claimant's land in 1868. Lord Burrows stated that, whilst the expression 'nuisance' was not used by the House, it was clear that it was a nuisance action. The defendants compensated the claimant. They carried out no further excavation work. However, in 1882 a further subsidence had occurred causing damage to the claimant's land. That subsidence would not have occurred if an adjoining owner had not carried out excavation work for coal on and under his land, or if the defendants had left enough support under the claimant's land. The majority of the House decided that the second subsidence constituted a new cause of action, separate from the first.[6] The facts fell outside, and therefore did not infringe, the general rule that damages for a cause of action must be recovered once and for all. The limitation period had not expired.

Lord Burrows then referred to *Sedleigh-Denfield v O'Callaghan*.[7] In that case, a local authority, had trespassed and placed a pipe in a ditch on the defendant's land, to carry away rain water. However, the work had been carried out negligently. The pipe became blocked with leaves and other debris. The defendants knew or should have known of the defective pipe. Three years later, after a heavy rainstorm, the

3 [2023] UKSC 4; ibid [18].
4 Ibid [19].
5 (1886) 11 App Cas 127.
6 Ibid [20].
7 [1940] AC 880; [2023] UKSC 16 [21].

ditch overflowed. The claimant's land was flooded, causing substantial damage. The House held that the defendants were liable to the claimant in the tort of private nuisance. Although the defendants had not created the nuisance, they had 'continued' the nuisance. In Viscount Maugham's opinion the defendants had also 'adopted' it by making use of the pipe. The defendants had continued the nuisance because, despite actual or presumed knowledge of the unguarded pipe, they did not take reasonable steps to remedy the position. However, Lord Burrows in the instant case, stated that Lord Atkin pointed out in *Sedleigh-Denfield* that it was inaccurate to talk about there being a nuisance on the defendant's land, given that the tort of private nuisance was not committed unless and until damage to the claimant's land was caused.[8]

Finally, Lord Burrows referred to the case of Delaware Mansions.[9] The roots of a plane tree which was situated on the pavement adjoining a block of flats had caused cracks which appeared in 1989 in the structure of the flats. The land on which the block of flats was built was then owned by the Church Commissioners. In 1990 they transferred the freehold to Fleckson Ltd (F) for £1. The defendant highway authority (Westminster City Council) refused to remove the tree. F carried out the necessary underpinning to protect its property. F claimed the cost from the defendant as damages, for the tort of private nuisance. The House held that F was entitled to recover damages. There was a continuing nuisance of which the defendant knew or ought to have known.

Lord Burrows then addressed the issue as to what constituted a continuing nuisance. He stated that part of the difficulty lay in the fact that, as a matter of ordinary language, one could naturally describe the effect of the interference or damage as still being present and not having been cleaned up, or otherwise dealt with, as being a continuing problem.[10] Therefore, in the instant case, one could describe the oil still present on the claimants' land as a continuing nuisance. However, that was wholly misleading when one was trying to clarify the meaning of a continuing nuisance, in a legal sense.

Lord Burrows stated that a continuing nuisance was one where, outside the claimant's land and usually on the defendant's land, there was repeated activity by the defendant, or an ongoing state of affairs, for which the defendant was responsible, which causes continuing undue interference with the use and enjoyment of the claimant's land.[11] He added that, for a continuing nuisance, the interference may be similar on each occasion. However, the important point was that it

8 Ibid [22].
9 [2002] 1 AC 321.
10 [2023] UKSC 16, [24].
11 Ibid [26].

was continuing day after day, or on another regular basis. In such cases, the cause of action therefore accrued afresh on a continuing basis.

Lord Burrows stated that a case on tree roots, such as *Delaware Mansions*, provided a good example of a continuing nuisance.[12] In that case, there was an ongoing state of affairs outside the claimants' land, constituted by the living tree and its roots, for which the defendant was responsible, and which caused, by extraction of water through its encroaching roots, continuing undue interference with the claimant's land. The cause of action therefore accrued afresh from day to day. It logically followed from the concept of a continuing cause of action that if a limitation period was one of six years from the accrual of the cause of action, damages at common law could not be recovered for causes of action (ie for past occurrences of the continuing nuisance) that occurred more than six years before the claim was commenced.[13]

Lord Burrows then drew attention to the importance of recognising the linguistic confusion concerning the concept of a continuing nuisance.[14] What was meant by that was clearly explained in *Sedleigh-Denfield*. It meant that a defendant who had not created a nuisance would be liable for it (if damage was caused to the claimant) where, with actual or presumed knowledge of the continued state of affairs, the defendant did not take reasonable steps to end it. However, the 'continuing' of the nuisance in that sense was not the same as there being a continuing nuisance, in the sense of there being a continuing cause of action, which the court was concerned with in the instant case. For example, in *Sedleigh-Denfield* the defendants had continued the nuisance created by the trespasser. They were, therefore, liable in the tort of private nuisance for the damage to the claimant's land caused by the flooding. However, that did not mean that there was a continuing cause of action. On the contrary, the cause of action accrued once the claimant's land was flooded.

Lord Burrows then applied the law to the facts of the instant case.[15] He stated that the claimants claimed that there was a continuing nuisance on their land because (on the facts which were to be assumed for the purposes of the appeal) the oil was still present on the claimants' land, and had not been removed or cleaned up. If that submission was correct, it would mean that, if the other ingredients of the tort of nuisance were made out and the claimants' land were to be flooded by an isolated escape on day 1, there would be a continuing nuisance, and a fresh cause of action accruing day by day, so long as the land remained flooded on day 1000. The effect of accepting that submission

12 Ibid [30].
13 Ibid [32].
14 Ibid [33].
15 Ibid [34].

would be to extend the running of the limitation period indefinitely, until the land was restored.[16] It would also impliedly mean that the tort of private nuisance would be converted into a failure by the defendant to restore the claimant's land. It might also produce difficulties for the assessment of damages, which require to be assessed once and for all. Where land was flooded on day 1, all the losses, past and prospective for that cause of action, could only be assessed on day 1. It was unclear how there could be a different assessment for damages, for a different cause of action, on day 2.

However, Lord Burrows added that there was no continuing nuisance in the instant case because there was no repeated activity by the defendants, or an ongoing state of affairs, for which the defendants were responsible, that was causing continuing undue interference with the use and enjoyment of the claimants' land.[17] The leak was a one-off event, or an isolated escape. The cause of the action accrued and was complete once the claimants' land was affected by the oil. There was no continuing cause of action for as long as the oil remained on the land.

Lord Burrows added that it was not necessary that the defendant had control over the continuing nuisance.[18] This was because the person who created the nuisance could be sued in the tort of private nuisance, even though that person no longer had control over the state of affairs which caused the continuing nuisance. Therefore, the fact that the defendant had no control over the oil on the claimants' land was not an additional reason for holding that there was no continuing nuisance.[19]

The claimants' appeal therefore fell to be dismissed.

COMMENT

In his seminal article on nuisance,[20] Newark observed that the boundaries of nuisance are blurred. Neither academic nor judge has been able to give a clear and comprehensive definition as to what constitutes a private nuisance. In *Jalla* the Supreme Court was required to address the ostensibly simple question as to whether the oil which remained on the claimants' land, after the oil had leaked from the defendants' oil pipe, constituted a private nuisance. The claimants had argued that the relevant nuisance continued each day the oil remained on the claimants' land, the upshot of which was that the limitation period ran afresh each day.

16 Ibid [36].
17 Ibid [37].
18 Ibid [44].
19 Ibid [46].
20 F H Newark, 'The boundaries of nuisance' (1949) 65 Law Quarterly Review 480.

Traditionally, for liability to lie in terms of the law of nuisance, there requires to be an adverse state of affairs (eg fumes, smoke, noise) which is present on the defendant's land, which unreasonably affects the enjoyment of the claimant's premises. However, the relevant state of affairs may consist of a latent defect which is present in the defendant's premises. For example, in *Sedleigh-Denfield* the adverse state of affairs consisted of a defective pipe or culvert. That case is also authority for the proposition that the harm or interference with the enjoyment of the claimant's land can be caused by a 'one off' event, such as an escape of water (or oil) from the defendant's land.

In *Sedleigh-Denfield* the escape of water only became an actionable nuisance after the water left the defendants' land and had entered and damaged the claimant's premises. In effect, the defendants had not continued the 'nuisance'. Rather, (as Lord Atkin pointed out) they had continued, or adopted, the relevant adverse *state of affairs*, after they had become aware (or should have become aware) of the existence of the defective culvert. The water only became a *nuisance* in law after it had entered and damaged the claimant's land. Similarly, in *Jalla* the isolated escape of oil from the defendants' oil pipe immediately became an actionable nuisance, after it had entered and damaged the claimants' land. Whereas the oil remained on the claimants' premises for some years after the leak, there was no continuation of a *nuisance* which would, of course, have been the case if the oil had continued to pour on to the claimants' land. Whereas the presence of the oil on the claimants' land may have been a 'nuisance' in common parlance, the presence of the oil did not rank as a nuisance in law. While *Jalla* does not take the law further forward, it is illustrative of the confusion which stems from the fact that the concept of nuisance is not clearly defined.