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Case No: FJ 31/19 & IHQ19/0293

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 December 2019

Before :

JASON COPPEL QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Between :

- (1) CHIEF ISAAC OSARO AGBARA
- (2) CHIEF VICTOR OBARI
- (3) CHIEF HUMPHERY OGITI
- (4) CHIEF F. N. OGUSU
- (5) CHIEF JOHN N. OGURU
- (6) HON. JOSEPH OGOSU
- (7) CHIEF G. O. NNAH
- (8) CHIEF GEORGE O. OSARO
- (9) CHIEF ADANTA OBELLE
- (10) MRS LALEOKA EJII

(For themselves and on behalf of the Ancient "Onne Eh Ejama" Stool-in-Council, Chiefs, Elders, Men, Women and Children of Ejama-Ebubu in Tai Eleme Local Government Area of Rivers State)

Claimants

- and -

- (1) THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED
- (2) SHELL INTERNATIONAL PETROLEUM COMPANY LIMITED
- (3) SHELL INTERNATIONAL EXPLORATION AND PRODUCTION BV

Defendants

Jacqueline Perry QC (instructed by **Johnson & Steller**) for the **Claimants**
Antony White QC (instructed by **Reed Smith**) for the **Defendants**

Hearing dates: 5-6 November 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Jason Coppel QC (sitting as a Deputy High Court Judge):**The application**

1. This is an application by the Defendants, whom I shall refer to compendiously as “Shell”, to set aside the registration of a judgment of the Federal Court of Nigeria dated 14 June 2010 by which the Claimants were awarded 15,407,777,246 Naira in damages in respect of the pollution of land occupied by them following the rupture of a pipeline maintained by Shell in 1969 or 1970 (“**the judgment**”). Before the addition of any interest, the judgment has a value at today’s exchange rate of approximately £33m.
2. The judgment was registered by order of Master Eastman dated 25 February 2019 following an *ex parte* procedure pursuant to s. 9 of the Administration of Justice Act 1920 (“**AJA**”). The amount of the judgment registered was based on a calculation by the Claimants which included the addition of compound interest, and was 182,768,696,651.89 Naira (approximately £393m at today’s exchange rate). The effect of registration is that the judgment in this amount may be enforced as if it were a judgment of the High Court (s. 9(3) AJA). Shell is entitled to apply to set aside registration (see s. 9(4)(b) AJA, CPR 74.7 and §3 of Master Eastman’s Order) and such an application is to be treated as a fresh and full hearing as to whether the conditions for registration set out in s. 9 AJA are satisfied (*Tenaga Nasional Bhd v Frazer-Nash Research Ltd* [2019] 1 WLR 946, §31).
3. Section 9 AJA provides, so far as material:

“(1) Where a judgment has been obtained in a superior court in any part of His Majesty’s dominions outside the United Kingdom to which this Part of this Act extends, the judgment creditor may apply to the High Court of England ... at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case they think it just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly.

(2) No judgment shall be ordered to be registered under this section if —

 - (a) the original court acted without jurisdiction; or
 - (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or
 - (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or
 - (d) the judgment was obtained by fraud; or
 - (e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or

- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.”
4. It is common ground that Nigeria is one of the former dominions to which the s. 9 AJA procedure applies and also that registration should not be set aside on the grounds that it is time-barred, pursuant to s. 9(1), even though applications to register should normally be made within one year of the judgment at issue and the application in this case, on 18 February 2019, was made more than 8 years after the date of the judgment. Shell did not take objection on that ground, no doubt because the application for registration followed shortly after a ruling of the Nigerian Supreme Court, of 11 January 2019, dismissing Shell’s appeal in respect of the judgment. I therefore extend time for the application pursuant to s. 9(1).
 5. Shell argues that the registration of the judgment should be set aside for two reasons. It argues:
 - (1) That s. 9(2)(e) AJA prohibits registration because it has an appeal pending before the Supreme Court of Nigeria (“**the Supreme Court**”).
 - (2) That it is not “*just and convenient*” for the judgment to be enforced in the UK because it suffered a substantial breach of natural justice during the proceedings in Nigeria which led to the judgment.
 6. Shell also argues that the quantum of the judgment registered is excessive having regard to (a) the inclusion of 10m Naira in punitive damages which ought not to be enforced in the UK, (b) significant calculation errors by the Claimants and (c) the unwarranted addition of compound as opposed to simple interest on the judgment sum. If Shell’s complaint as to quantum is the only complaint made out, it submits that the judgment should remain registered but that Master Eastman’s statement of the value of the judgment (§2 of his Order), reflecting the value stated in the application for registration, should be varied so as to state a lower amount.
 7. I shall consider these grounds in turn, after setting out the relevant factual background to the application.

Factual background

8. The proceedings which led to the judgment have been long and complex and it is not necessary for the purposes of the application to understand each and every turn of events. This account is confined, therefore, to the material facts.
9. The proceedings were commenced by a claim issued in the Federal Court of Nigeria in 2001, following two earlier claims in respect of the same events. The first of those earlier claims was settled and the second was initially successful following a contested trial but then judgment was set aside on account of lack of jurisdiction of the Court which had determined the claim in favour of the Claimants. In the 2001 claim, the Claimants, who are representatives of the Ejama-Ebubu community, complained that “*a major crude oil blow-out and spill involving over 2,000,000 barrels of oil had occurred from the defendant’s oil installations and facilities in Ejamah in Ebubu-Elеме which flooded the Ochani stream and permeated the soil of the [Claimants] to a point of saturation*” (Statement of Claim, §11) and that Shell had subsequently failed to clear

up the spill. They alleged that the surface and ground water of their area had been rendered unfit for human consumption (Statement of Claim, §17(c)). They sought approximately 1.7bn Naira in special damages, interest on that sum and also 10bn Naira “*in Punitive General Damages .. for General Inconvenience, acid rain, pollution of underground water and hardship to the population who have been deprived of the right to self sustenance, education and good life*” (Prayer to the Statement of Claim). They also sought an order compelling Shell to reinstate their land.

10. Shell filed a Defence disputing responsibility for the oil spill and claiming that it had already made substantial progress in clearing up the effects of the spill. Shell submits, and I accept, that it was ready and willing to defend the claim. However, it is also clear that Shell conducted its defence in such a way as to convince the Federal Court that its intention was to frustrate the determination of the claim. I have not been informed of the precise reasons for delay in the proceedings up to 2007, save that there were changes of Judge and a number of adjournments at the instance of Shell. On 2 August 2007, Buba J rejected an application for adjournment by Shell of the date for filing of written arguments, on account of unavailability of its Counsel. He noted that Counsel’s firm was comprised of 27 Counsel (the point being that alternative representation could have been arranged) and referred in disparaging terms to Shell’s “*antics*”. He adjourned the hearing of the claim to 2 October 2007, ordering that it be heard thereafter “*day to day as the business of the Court shall permit*”.
11. On 24 September 2007, Shell’s Counsel wrote to the Court requesting an adjournment of the 2 October hearing date on account of unavailability of its Counsel. It would appear that Shell had not turned up to Court on 2 August to hear the Judge’s ruling and had been trying unsuccessfully to obtain a transcript of what had occurred on that day. It was undoubtedly aware that a hearing had been listed for 2 October (hence the letter of 24 September) although it is not entirely clear that it knew that the trial was to begin on that day. It must, however, have known that its further application for adjournment was not guaranteed to succeed. Nevertheless, it chose to attend the hearing on 2 October without Counsel.
12. Buba J rejected the application for adjournment and decided to proceed with the hearing in the absence of Shell’s Counsel. The Claimants’ first witness gave evidence briefly, producing a survey plan of the area affected by the oil spill and the Court adjourned to 3 October for him to be cross-examined by Shell. Although it did have representatives in Court on 2 October and would have known that cross-examination was to begin on 3 October, Shell did not attend by Counsel on that day, with the result that the Claimants’ first witness was not cross-examined and nor was a second witness who was called on 3 October. On 4 October, Shell did attend by its Counsel, who applied to set aside the proceedings on 2 and 3 October on account of Shell being unrepresented. The Judge refused to hear Shell’s motion on that day, but adjourned it to be heard on 8 October and decided to proceed with the trial, at which point Shell’s Counsel left the Court. He was therefore unable to cross-examine the third and fourth witnesses for the Claimants who were called on 4 October. At the end of the hearing on 4 October, the Claimants’ case closed and the Judge adjourned the trial to 8 October for the defence case.
13. On 8 October the Judge was faced with a number of motions issued by Shell, including the motion to set aside the earlier days of the trial and also to disqualify himself from further conduct of the proceedings. The hearing of the motions was adjourned initially to 22 October and subsequently to 3 December. Shell also failed to attend the 3

December hearing by Counsel and the Judge struck out its motions and adjourned the case to the following day, 4 December, “*for defence*”. However, the trial did not proceed on 4 December on account of further motions filed by Shell on 3 December to set aside the proceedings on 2 October and for the Judge to disqualify himself and/or withdraw from further consideration of the proceedings. Buba J ruled on those motions on 11 January 2008. He dismissed them and adjourned the case to 15 January, directing that Shell open its defence on that day.

14. Rather than opening its defence on 15 January, Shell appealed the Judge’s rulings of 11 January and, on 14 January, issued a motion for stay of the proceedings before the Judge pending the outcome of its appeal. The motion was argued on 18 January, following which the Judge decided that the case be adjourned to 28 January “*for ruling*”. Due to unavailability of the Judge on that day, the Court in fact reconvened on 4 February 2008 at which hearing the Judge decided that “*Ruling in this matter is further adjourned to Monday the 11/2/08*”. Although I have not seen a transcript of the 11 February hearing, an Affidavit of Idongesit Uko (one of Shell’s lawyers) of 29 February 2008 states (§9) that on 11 February 2008 the case was once again adjourned “*for ruling*” until 25 February 2008 and this is not disputed by the Claimants. The cause list for 25 February 2008 lists the Claimants’ claim as being for “*Ruling*”. By contrast, another case listed for the same day was for “*Defence*”.
15. On 25 February 2008, Buba J gave a ruling in which he dismissed Shell’s motions. He then ordered that the defence proceed. Shell’s junior counsel, who was representing Shell at the 25 February hearing, responded that as the case had only been listed for a ruling on Shell’s motions and not for continuation of the trial, Shell’s witnesses were not in court and the defence could not proceed. He requested a short adjournment to allow Shell’s witnesses to get to Court but this was refused (§22 of his affidavit of 29 February 2008). When the Judge insisted that the defence proceed as he had ordered, Shell’s Counsel withdrew from the case. Julius Ejikonye, Shell’s in-house lawyer who attended Court on that day, then applied for an adjournment to instruct new counsel, which was also refused (§13 of his affidavit of 29 February 2008). The Judge then ruled that “*The defendant having accepted not to go on. The case of the defence be and is hereby closed*”. The Claimants’ counsel then made his closing submissions, following which the Court adjourned the case to 17 March 2008 for judgment.
16. Following the 25 February 2008 hearing, Shell issued further motions seeking to challenge the Judge’s rulings, and also appealed to the Court of Appeal against his rulings, and to seek an order transferring the case to another Judge.
17. On 17 March 2008 there was a further hearing before Buba J. He informed the parties that he was “*on transfer to another division of this Court*”, that he “*had been called by [his] Chief Judge over this matter to allow the Defendants to defend this matter*” and would be transferring the case file to the Chief Judge for “*possible re-assigning of this case*” and/or “*for re-assignment*”. It is common ground between the parties that if the case had been transferred to another Judge, it would have been heard afresh by the new Judge. On 27 March 2008, Shell proceeded to withdraw its appeal to the Court of Appeal which had challenged the 25 February 2008 rulings and had sought transfer of the case to another judge on the grounds that it was now academic.
18. The case then lay dormant until 25 May 2010 on which date a hearing took place before Buba J. It is unclear whether he had been re-assigned to the case, or had never released the case in the first place, although the two year delay since his previous

involvement suggests that the former is more likely. In either event, he rejected various outstanding motions which had been filed by Shell and listed the case for judgment on 14 June 2010. Shell then made various unsuccessful attempts to have the Judge removed from the case, including by way of seeking to resurrect its appeal to the Court of Appeal which had been withdrawn.

19. Buba J delivered the judgment on 14 June 2010. In the judgment, he relied heavily upon the absence of any challenge to the Claimants' evidence. He noted that "*the Defendants who were in Court, were called upon to enter their defence, but they walked away*" (p. 4); that "*since the Defendants elected not to call evidence, all facts raised in their defence go to no issue*" (p. 5); that he would rely upon the Claimants' expert valuation evidence because theirs was the only expert who gave evidence in the case (p. 10); and that "*the oral and documentary evidence of the Plaintiff remains unchallenged, uncontroverted and uncontradicted*" (p. 9). He concluded as follows (p. 15):

"I have upon a calm assessment on the unchallenged evidence of the Plaintiff, the cases cited and relied upon, which I read, and come to one and only inevitable conclusion that, the case of the Plaintiffs' have merit and accordingly accept the evidence that is capable of believe."

20. He accordingly upheld the claim and awarded the special and general damages which had been claimed, along with interest on the special damages. He stated (p. 18, 20):

"I have no doubt whatsoever that the special damages have been proved; as the burden on the Plaintiff is a minimal proof. I also assess and award punitive general damages as claimed having found out that the damages claimed is not exaggerated."

21. He then repeated and adopted the Claimants' claim for general damages, as set out in §9 above.
22. Shell appealed to the Court of Appeal against the judgment. The resolution of the appeal was delayed by an attempt by the Claimants to have the appeal struck-out on the grounds that Shell had failed to pay the appropriate fee, which required the final decision of the Supreme Court. On 7 June 2017, Shell's appeal was dismissed on the grounds that it had failed to file an Appellant's Brief of Argument despite having been ordered to do so by the Court on two occasions (which meant that its Notice of Appeal was invalid). Shell had filed an Amended Appellant's Brief of Argument but this had not been formally authorised by the Court and could not stand in circumstances where an original Brief had not been filed. The Court did not consider Shell's substantive challenge to the judgment.
23. Shell then appealed to the Supreme Court of Nigeria against the ruling of the Court of Appeal. On 11 January 2019, the appeal was dismissed because the grounds of appeal were "*grounds of fact or at best of mixed law and facts*" (p. 38 of the lead judgment) and therefore Shell required leave to appeal from the Court of Appeal or the Supreme Court which had been neither sought nor granted (pp. 39-40). Shell's Notice of Appeal was accordingly "*incompetent*" and fell to be struck out. On that basis, it was not necessary for the Supreme Court to consider the merits of the proposed appeal. However, one of the five Supreme Court Justices (Okoro SCJ) did so expressly and dismissed Shell's appeal on that basis. The lead judgment, of Supreme Court Justice Akaahs, did not reject Shell's submissions on the merits in terms but it is nevertheless reasonably clear that he agreed with the substance of what the Court of Appeal had

decided (p. 37). The other three judgments, including that of the Chief Justice of Nigeria, agreed with the lead judgment.

24. Shell responded to that judgment by filing, on 18 January 2019, a fresh application to the Supreme Court seeking leave to appeal from the Court of Appeal's judgment and an extension of time in which apply for leave to appeal, as well as an extension of time in which to appeal without leave. A further application was filed on 24 July 2019 to the same effect but in addition applying for an order setting aside the Supreme Court's ruling of 11 January 2019. The 18 January 2019 and 27 July 2019 applications have been listed for hearing by the Supreme Court on 27 January 2020.

Section 9(2)(e) AJA

25. The first issue is whether the judgment cannot be registered because there is an appeal against it pending before the Supreme Court of Nigeria. This turns on whether Shell's applications of 18 January and 24 July 2019 for leave to appeal and for extensions of time to seek leave to appeal and/or to appeal constitute an "*appeal*" within s. 9(2)(e) AJA.
26. In *State Bank of India v Mallya* [2018] 1 WLR 3865, Andrew Henshaw QC sitting as a Deputy High Court Judge considered the application of analogous provisions in s. 5(1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 to a situation where the judgment debtor had applied, out of time, to restore an appeal which had been dismissed. He stated (§87):

“An appeal cannot be regarded as “pending”, as a matter of ordinary language, in circumstances where no valid and timely appeal has been lodged. Nor in my view can a person be regarded for the purposes of section 5 as “entitled” to appeal in circumstances where the time for appealing has expired without an appeal having been filed or an application for permission to appeal having been granted.”
27. In *Tenaga*, Pepperall J held that the debtor did not fulfil the criterion in s. 9(2)(e) of “*is entitled and intends to appeal*” where it required permission to appeal out of time before an appeal could proceed (§54). Although Shell's application is not concerned with that limb of s. 9(2)(e), by the same logic an appeal cannot be “*pending*” where permission to appeal out of time is still required. The same logic is necessary since otherwise a judgment debtor who requires permission to appeal out of time would be in a fundamentally different position having filed an application to that effect, than if he intended to do so. In other words, as is apparent from the reasoning in *Mallya*, an appeal should only be regarded as “*pending*” where there is an entitlement to appeal which is not dependent on any permission or extension being granted by the appellate court.
28. On the basis of these authorities, Shell's applications to the Supreme Court do not constitute a pending appeal. Mr Antony White QC, who appeared on behalf of Shell, sought to distinguish the present case on the grounds that under the Supreme Court Rules of Nigeria, an appeal is defined so as to include an application for leave to appeal (order 1, §2). I do not regard that as a persuasive ground of distinction. The Nigerian rule has the effect that certain provisions of the Supreme Court Rules apply equally to appeals and to applications for permission to appeal (in the same way as our own Supreme Court Rules and Civil Procedure Rules, which regard “*appellants*” both as persons who are entitled to appeal and who seek permission to appeal). But the question

I have to answer is one of construction of s. 9(2)(e) and cannot be determined by the structure and approach of the Nigerian Supreme Court Rules. As a matter of authority and, I would add, of common sense, Shell's applications to the Supreme Court of Nigeria do not (yet) constitute a pending appeal within s. 9(2)(e) AJA and are not grounds on which to oppose registration of the judgment.

Breach of natural justice

29. Since s. 9(2)(e) is the only limb of s. 9(2) which is relied upon by Shell, the remaining question is whether it is "*just and convenient*" within s. 9(1) AJA for the judgment to be enforced in the UK. Shell submits that it is not, because it suffered a substantial breach of natural justice in the proceedings which led to the judgment.
30. Ms Jacqueline Perry QC, who appeared for the Claimants, did not dispute that if there had been a substantial breach of natural justice in the Nigerian proceedings then this would be material to the exercise of my discretion under s. 9(1). The Claimants' case was, rather, that no such breach of natural justice had occurred.
31. I accept Shell's submission of principle that I must take into account a breach of natural justice which has occurred in the Nigerian proceedings when deciding whether it is "*just and convenient*" for the judgment to be enforced in the UK. "*Just and convenient*" is a broad expression and if the judgment has been obtained following a breach of natural justice that must be of significance to the question whether it is just and convenient that the machinery of the High Court of England and Wales be made available for its enforcement. The learned authors of *Briggs on Civil Jurisdiction and Judgments* agree: they state (§7.88):

“A defence resembling that of lack of natural justice is framed [in s. 9(2) AJA] in terms of lack of due service. To the extent that the judgment did not fall within this provision, but was still rendered in breach of the rules of natural justice, it may well not be just and convenient to register it; and in any event, the Human Rights Act 1998 will apply to proceedings taken under this section.”
32. Further, breach of natural justice is a well-established defence to a common law action to enforce a foreign judgment: see, for example, *Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137, 141C-E; *Adams v Cape Industries* [1990] 1 Ch. 433, 559F. If it were established that a judgment obtained in similar circumstances in a jurisdiction whose judgments are not within a statutory enforcement regime would not be enforceable at common law then again that must, in my judgment, be at least material to the exercise of the s. 9(1) discretion. I would not go so far as to say that it must always be determinative against registration – that position would be difficult to reconcile with s. 9(2)(c) AJA, which provides that only a specific form of breach of natural justice will be a bar to registration in all cases. However, depending on the severity and materiality of the breach, it may be determinative in a particular case.
33. Whether or not there has been a breach of natural justice and whether such a breach should justify the exercise of discretion against registering the judgment must be determined with due regard to international comity and respect for the Nigerian legal system. I must also take into account that I am being asked to assess events in Nigeria which occurred in some instances more than 12 years ago, and without any prior knowledge or experience of the workings of Nigerian legal system. Ultimately, whether or not a breach of natural justice has occurred is to be judged according to the

standards of the English common law (*Adams v Cape Industries* at 559F), but it is necessary to have some understanding of Nigerian procedures in order to judge the extent to which Shell may have been unfairly treated.

34. In this regard, I have been greatly assisted by extensive written evidence from individuals who represented the respective parties during the Nigerian proceedings (Julius Ejikonye for Shell and Emmanuel Asido for the Claimants) and also by reports written by Nigerian lawyers opining on various matters arising out of the Nigerian proceedings (Miannaya Essien for Shell and Ade Innah for the Claimants). These reports have been described to me as “*expert evidence*”. No permission has been granted for such evidence to be adduced, and there is some doubt as to whether the requirements which must be met by expert evidence before it may be admitted as such have been fulfilled. Nevertheless, both the Claimants and Shell relied on this evidence and there was no objection to my considering the evidence of the other parties.

Inability to cross-examine Claimants’ witnesses

35. Shell’s first alleged breach of natural justice is that it was prevented from cross-examining the Claimants’ witnesses between 2-4 October 2007 due to the trial judge’s refusal to adjourn the trial. Ms Essien, Shell’s “*expert*” opines that the grounds put forward by Shell’s Counsel “*would ordinarily be considered to provide a legitimate basis for an adjournment*” (1st report, §44.1.1) but that is far from sufficient in my view. It will have been clear to Shell, following the Judge’ refusal of its adjournment application on 2 August 2007 that a further application, also made on grounds of unavailability of Counsel, was not guaranteed to succeed. The application had not been determined before the trial was due to begin and Shell therefore took a significant risk in not appearing by Counsel at the outset of the trial. I cannot find that it was a breach of natural justice for the trial to proceed without Shell’s Counsel when Shell had made a deliberate choice not to appear by Counsel notwithstanding the risk that the trial would proceed nevertheless.
36. The Judge then adjourned the trial after examination-in-chief in order to give Shell the opportunity to cross-examine the first witness on 3 October 2007 and again it was Shell’s choice not to take up that opportunity. Shell’s Counsel did attend on 4 October 2007 but then chose to leave Court rather than take up the opportunity to cross-examine the witnesses who appeared on that day. These were deliberate tactics on Shell’s part and cannot found an allegation of breach of natural justice at this stage.

Inability to present the defence case

37. There is more substance to Shell’s second natural justice complaint, that it was prevented from presenting its case in defence of the Claimants’ claim. In that regard, the Claimants do not seriously dispute that the proceedings were listed only for “*ruling*” on 25 February 2008 and do not suggest that there was any previous indication, either in the words of the Judge adjourning to that date, or in the cause list for that date, that the trial was liable to continue on that day should the ruling go against Shell. Nor have they expressed any disagreement with the opinion of Ms Essien, based on Nigerian authority, that a Judge in the position of Buba J is required to adhere to the cause list as notified in advance to the parties. Ms Perry QC argued that there was a risk of the trial continuing on 25 February 2008 which should have been apprehended by Shell. However, given the undisputed evidence of Ms Essien, this could have only have been a risk that the Judge would depart both from what was expected by the parties and what

was required of him by Nigerian law and practice. Given that, I could not criticise Shell for not being prepared to proceed with the trial immediately after the ruling was given.

38. Having decided to continue with the trial on 25 February 2008, the Judge then refused Shell's request for a short adjournment in order to enable its witnesses to get to Court and ruled that the defence had closed. The Claimants advanced no separate justification for that decision. Making all due allowances for the distance between my position and the proceedings which I am asked to rule upon, Shell's request appears to me to have been a reasonable one, both because it was, at the least, unorthodox to proceed with the trial in those circumstances and because of the very serious consequences for Shell of the defence not being able to be heard. There was no particular reason for urgency at that time and whilst it is clear that the Judge was frustrated with the conduct of Shell up to that point, his alacrity in ruling that the defence had closed was in stark contrast to the course of proceedings up to then, including his own delay between 18 January and 25 February 2008 in delivering a ruling on Shell's applications.
39. It is a fundamental tenet of natural justice that both sides of a dispute should have an opportunity to be heard. As a result of the events on 25 February 2008, Shell was not given that opportunity in this case. That was, in my view, a serious breach of natural justice. I have firmly in mind Shell's tactics earlier in the proceedings and the Judge's view that Shell had deliberately sought to delay their resolution. However, there would need to be a strong justification for a course of action which deprived Shell of its basic procedural right to be heard, particularly when it is clear from the eventual judgment that the absence of challenge to the Claimants' evidence and submissions was fundamental to the Judge's decision in their favour. The Claimants have not been able to suggest such a justification and I cannot identify one. I therefore conclude that the judgment was obtained in breach, and substantial breach, of natural justice.
40. The next question is whether the force of that breach is lessened or removed by Shell's unsuccessful appeal against the judgment. Shell has had the opportunity to appeal and the reasons for why no such appeal has succeeded have been procedural rather than substantive. Shell failed to file an Appellant's brief before the Court of Appeal and then failed to apply for permission to appeal to the Supreme Court when permission was required. Further, Shell withdrew its appeal from the decisions of the Judge made on 25 February 2008, ostensibly because it had become unnecessary in circumstances where a new judge was to be allocated to the claim and would hear it afresh.
41. I do not consider that Shell's failure to pursue an appeal in accordance with Nigerian procedural rules should lessen to any significant extent the force in the analysis under s. 9(1) AJA of the serious breach of natural justice which occurred on 25 February 2008. First, there is authority that a party complaining of a breach of natural justice in the obtaining of a foreign judgment which is of the most serious kind is not required to demonstrate that it has exhausted its remedies by way of appeal against that judgment in the jurisdiction in which it was obtained. In *Adams*, Slade LJ stated (p. 569A):

“It is at least clear that our law does not oblige a defendant who can show that a foreign judgment has been obtained by fraud to have used any available remedy in the foreign court with reference to that fraud if he is successfully to impeach that judgment in our courts: see *Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295* and *Jet Holdings Inc. v. Patel [1990] 1 Q.B. 335*. The position may well be the same in cases where there has been a breach of natural justice of the two primary kinds considered by Atkin L.J. in *Jacobson v. Frachon, 138 L.T. 386, 392*, namely, absence of notice of the

proceedings or failure to afford the defendant an opportunity of substantially presenting his case.”

42. It was not necessary for the Court of Appeal in *Adams* to reach a definitive conclusion on that point, because the alleged breach of natural justice in that case was not of the most serious kind. The breach in the present case does fall into the most serious category but, strictly, the point raised in *Adams* does not arise for determination here either, as I am only considering whether it would be “*just and convenient*” to register the judgment not whether there is an absolute bar to registration at common law. Nevertheless, it does seem to me that there is a material analogy between a judgment obtained by fraud and one which has been obtained following the other party being unjustly prevented from presenting its case, such that it ought not to be necessary for domestic remedies to be exhausted in the latter situation. In weighing up whether it is just and convenient for the judgment to be enforced in the UK, I should therefore be cautious in any criticism of Shell regarding its attempts to appeal the judgment.
43. Second, it was, technically, open to the Court of Appeal to consider the substance of Shell’s complaint of natural justice notwithstanding its failure to file an Appellant’s Brief (but only an Amended Appellant’s Brief). The Court exercised a discretion to permit the Claimants to take a late objection to Shell’s allegedly defective Appellant’s Brief, on the grounds that the justice of the case required it. Once the objection was permitted, and was found to be correct in substance, the Court had no discretion to permit the appeal to proceed. Nevertheless, Shell is entitled to say that – albeit imperfectly - it did give the Nigerian courts the opportunity to rectify the breach of natural justice by the Judge but has been rebuffed.
44. Third, Shell did file a valid appeal to the Court of Appeal against the rulings of 25 February 2008. That appeal was withdrawn, as I have explained, following the indication by the Judge that a new Judge would be assigned to the case, a decision which turned out to be premature. I cannot criticise Shell for taking that step, given the agreement between the parties that the assignment of a new Judge would, as Shell believed, have rendered the appeal academic. It would be harsh in the extreme if Shell were now unable to complain about the breach of natural justice which occurred on 25 February 2008 on account of the premature withdrawal of its appeal.

Conclusion on breach of natural justice

45. In summary, therefore: (a) Shell suffered a serious breach of natural justice through being prevented from presenting its defence to the claim, (b) such a breach would ordinarily lead to the conclusion that it is not “*just and convenient*” for the judgment to be registered, and (c) I would not regard the subsequent appellate process in Nigeria as militating against that conclusion to any significant extent. Nor, I should say, have the Claimants pointed to any other factors which could suffice to outweigh the impact in the “*just and convenient*” balance of the injustice suffered by Shell. In my view, it would not be just and convenient for the judgment to be enforced in the UK and I would therefore uphold Shell’s application and set aside the registration ordered by Master Eastman.

Quantum of damages

46. In those circumstances, it is not necessary for me to determine the remaining issues, which focus on the quantum of the judgment which was registered by the Claimants. It

suffices to record two points. First, following the oral hearing of the application, the parties have reached agreement as to a number of errors which were made by the Claimants in calculating the quantum of the judgment which was then registered by order of Master Eastman. One of these errors was an arithmetical error made in the calculation of special damages in the Claimants' Amended Statement of Claim, the relevant extract from which was copied into the judgment. The Judge then proceeded to award special damages as claimed. **The Claimants now agree that their claim for special damages was miscalculated and over-stated by 575,959,653 Naira.** Shell presented its arguments on quantum as going to the amount of the judgment which should be registered rather than whether the judgment should be registered at all. However, had it been necessary for me to decide this issue, I would not have regarded it as just and convenient for a judgment to be enforced in the UK which, the Claimants acknowledge, is materially over-stated on its face. Other errors arose from the calculation of interest on the sums awarded in the judgment, which formed part of the total amount registered by the Claimants, and could, in my view, have been taken into account by way of variation to Master Eastman's order if registration were otherwise appropriate.

47. Second, had it been necessary for me to decide this point, I would have held that the judgment should not be enforceable insofar as the Judge awarded 10bn Naira in "*punitive general damages*". It is far from clear whether this substantial sum was, as the label attached to it suggests, punitive in nature; if it was, there is no indication in the judgment as to what the Judge considered was the conduct of Shell which justified the award. Nor is it clear whether this sum was intended to be compensatory, as Ms Perry QC argued; if it was, there is no reasoning for the round figure awarded save for the words "*the damages claimed is not exaggerated*" and the Claimants were unable to point to any evidence as to the quantum of losses to which the Judge might have been referring at this juncture. The award of a substantial sum on such a precarious basis offends the principle relied upon by the Court of Appeal in *Adams* to the effect that a defendant, even one who has not appeared in the proceedings, is entitled to expect, as a facet of natural justice, that damages will be assessed by the Court on the evidence before it (at p. 568B-F). If the 10bn award was intended to be compensatory, there is no indication in the judgment that the Claimants' losses under this head were subject to judicial assessment.

Conclusion

48. For the reasons stated above, I allow this application and set aside the order of Master Eastman registering the judgment.