**COURT OF APPEAL THE HAGUE**

Civil Law Division

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| Date of ruling | : | 29 January 2021 |
| Case numbers | : | 200.126.804 (case a) + 200.126.834 (case b) |
| Cause list number District Court | : | C/09/365498 / HA ZA 10-1677 (case a) + |
|  |  | C/09/330891 / HA ZA 09-0579 (case b) |

**Ruling**

in the cases of:

1. **Fidelis Ayoro OGURU,**

residing in Oruma, Bayelsa State, Federal Republic of Nigeria,

1. the late **Alali EFANGA,**

having resided in Oruma, Bayelsa State, Federal Republic of Nigeria,

1. the association with legal personality **FRIENDS OF THE EARTH NETHERLANDS (‘VEENIGING MILIEUDEFENSIE’)**, having its corporate seat in Amsterdam,

the appellants, also the respondents in the cross-appeal, hereinafter referred to as: Oguru, Efanga and MD, and collectively: MD et al. (in the plural), lawyer: *Meester* Ch. Samkalden in Amsterdam,

versus (case a)

1. **SHELL PETROLEUM N.V.,**

having its corporate seat in The Hague,

1. the legal person under foreign law **THE “SHELL” TRANSPORT AND**

**TRADING COMPANY LIMITED,**

having its corporate seat in London, United Kingdom, the respondents, also the appellants in the cross-appeal, hereinafter referred to as: Shell NV and Shell T&T, and collectively: Shell (in the singular), lawyer: *Meester* J. de Bie Leuveling Tjeenk in Amsterdam,

and versus (case b)

1. the legal person under foreign law **ROYAL DUTCH SHELL PLC.,**

having its corporate seat in London, United Kingdom, having its place of business in The Hague,

1. the legal person under foreign law **SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD.,**

having its corporate seat in Port Harcourt, Rivers State, Federal Republic of Nigeria, the respondents, also the appellants in the cross-appeal, hereinafter referred to as: RDS and SPDC, and collectively: Shell (in the singular), lawyer: *Meester* J. de Bie Leuveling Tjeenk in Amsterdam.

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Course of the proceedings

General

The cases a and b to be assessed in this ruling are part of six cases of MD and Nigerian claimants / farmers against Shell. The present cases a and b regard a leakage at the Nigerian village of Oruma in 2005. The cases c and d regard a leakage at the Nigerian village of Goi in 2004. The cases e and f regard a leakage at the Nigerian village of Ikot Ada Udo in 2007.

The appellant under 2, Alali Efanga, deceased in 2016. The proceedings were continued in his name (reference is also made to section 47 of the statement of defence, also statement of cross-appeal phase 2, of Shell).

The course of proceedings in the cases a and b

For a detailed overview of the course of proceedings thus far reference is made to the last interlocutory ruling of 31 July 2018 and the preceding interlocutory rulings of 27 March 2018, 11 October 2016, and 18 December 2015. Below, a summary of the entire course of the proceedings is provided.

MD et al. lodged an appeal against the ruling of the District Court in The Hague (hereinafter referred to as: the District Court) of 30 January 2013 in a timely fashion. The said ruling is based on, inter alia, the following documents:

* the originating summons of MD et al. (OS);
* the statement of defence of Shell (SoD);
* the statement of reply of MD et al. (SoR);
* the statement of rejoinder of Shell (SoRJ);
* the memoranda of oral arguments of MD et al. (MOA-MD) and of Shell (MOA-S) of 11 October 2012.

On appeal the following procedural documents were submitted / the following procedural events took place:

* the statement of production of exhibits on cross-appeal of MD et al. (SPE);
* the statement of defence in the procedural issue pursuant to Section 843a of the Dutch Code of Civil Procedure also comprising a motion contesting jurisdiction in the procedural issue of Shell (SoD-Jur);
* the statement of defence in the motion contesting jurisdiction pursuant to Section 843a of the Dutch Code of Civil Procedure of MD et al. (SoD-M/Jur);
* the official report of the personal appearance of 30 June 2014 (PA-2014), from which it becomes apparent that the procedural arrangement was agreed on to divide the appeal proceedings into two phases, in the course of which (phase 1) an opinion is first provided on the jurisdiction of the Dutch court, simultaneously with a decision on the (interlocutory) claim(s) pursuant to Section 843a of the Dutch Code of Civil Procedure and subsequently (phase 2) the case shall be decided on the merits;
* the statement of cross-appeal in phase 1 of Shell (S-CA/1); the statement of appeal regarding the dismissal of the claim pursuant to Section 843a of the Dutch Code of Civil Procedure in phase 1 of MD et al. (SoA/1);
* the statement of defence in phase 1 of Shell (SoD/1);
* the statement of defence with the statement of appeal on the part of Shell (phase 1) of MD et al (SoD -CA/1);
* the memorandum of oral arguments in phase 1 of MD et al. (OA/l-MD) and of Shell (OA/l-S);
* the interlocutory ruling of this Court of Appeal of 18 December 2015 (the 2015 ruling) in which it was ruled (i) that the Dutch court has international jurisdiction to take cognisance of any and all claims, and (ii) that MD has a cause of action in respect of the claims filed by the same by way of a class action, and in which (iii) the claims of MD et al. pursuant to Section 843a of the Dutch Code of Civil Procedure were partly sustained;
* the interlocutory ruling of 27 March 2018 (the 2018/1 ruling) in which – after a personal appearance of the parties and an exchange of documents – an expert examination was ordered by the court into the cause of the leakages in Oruma and Goi;
* the interlocutory ruling of 31 July 2018 (the 2018/2 ruling), in which a further application of MD et al. in the procedural issue pursuant to Section 843a of the Dutch Code of Civil Procedure was dismissed;
* the expert opinion of 17 December 2018 (the expert opinion);
* the decision of this Court of Appeal of 25 January 2019 in which the costs of the experts were assessed at € 44,840.18 for D. Koster and W. Sloterdijk and at £ 17,000.00 for T. Sowerby;
* the statement of appeal in phase 2 of MD et al. of 260 pages (SoA/2);
* the statement of defence / the statement of cross-appeal in phase 2 of Shell of 375 pages (SoD/SoA-CA/2);
* the statement of defence in the cross-appeal in phase 2 of MD et al. (SoD-CA/2);
* the deed commenting on exhibits in the principal appeal phase of MD et al. (DE-MD/2) in which they address the exhibits 56-67 with the SoD/SoA-CA/2;
* the deed regarding submission of exhibits Q.72-Q.80 of MD et al.;
* the additional exhibits 77 and 78 of Shell;
* the exhibits Q.81 and Q.82 of MD et al.;
* the exhibits 79 and 80 of Shell;
* the exhibits Q.83 and Q.84 of MD et al.

On 8 and 9 October 2020 the lawyers of the parties argued the cases (the 2020 hearing). In this respect they used memoranda of oral arguments (OA/2-MD and OA/2-S). They were submitted to the court. An official report was drawn up of the hearing (OR-2020). The objections that were brought to the fore at the hearing against submission of exhibits and positions presented at the hearing were withdrawn.

The Parties also submitted a folder (digitally and in hard copy) containing the conducted correspondence, numbered 1 up to and including 113. This folder also contains the report of findings of 18 July 2017 of *Meester* B.E. ter Haar with regard to the confidential documents filed by Shell. Shell also made these documents available on a USB stick.

The exhibits of MD et al. were provided with a letter and a number (e.g. M.1 and .83), the exhibits of Shell were only provided with a number (e.g. 66).

Below, where reference is made to the procedural documents, this must be understood as the procedural documents of case b, unless expressly indicated otherwise.

The further assessment

1. The facts
   1. The following facts are qualified by the Court of Appeal as established facts:
2. For a long time there has been question of considerable issues in Nigeria for people and the environment during the oil extraction by oil companies, one of which is the Shell group. The Shell group, a multinational with headquarters in The Hague, has been engaged in oil extraction in Nigeria since 1958. Every year, many oil leakages occur in Nigeria from oil pipelines and oil installations. Oil leakages occur due to defective and/or aged material of the oil companies or due to sabotage, in the course of which actually insufficient security measures can play a role. Sabotage is often committed to steal oil or to receive compensation for the oil contamination from the oil companies in the form of money or paid contracts for the performance of decontamination work after a leakage.
3. Up to 20 July 2995, Shell NV in The Hague and Shell T&T in London were, as parent companies, jointly at the head of the Shell group. Through subsidiaries, they held shares in SPDC, the Nigerian legal person that is engaged, for the Shell group, in the oil extraction in Nigeria. Since the restructuring of the Shell group of 20 July 2005, RDS – established in London but with headquarters in The Hague – has headed this group. Ever since RDS has, through subsidiaries, held the shares in SPDC.
4. Oguru is, and Efanga who deceased in 2016 was, a Nigerian farmer from the village of Oruma in Baysela State in Nigeria. MD is a Dutch organisation with the objective of protecting the environment worldwide and supports Oguru and the late Efanga in these proceedings.
5. On 26 June 2005 SPDC received the notification of an oil leakage in an underground oil pipeline exploited by SPDC near Oruma (hereinafter for the sake of brevity also: the leakage). The said pipeline of 37.10 kilometres runs between Kolo Creek and Rumuekpe. There is a *manifold* at these locations, which is the installation where supply pipes and main pipes are connected to each other. The leakage, which was verified by SPDC on 29 June 2005, took place at approximately 7.7 kilometres from the Kolo Creek *manifold* and was caused by a, more or less, round hole. The top side of the pipe was, at the location of the leakage, at a depth of slightly more than a metre. As a consequence of the leakage, the oil seeped to the surface. Below a photo of the leakage is provided:



1. The leaked oil seeped outside the strip of land in respect of which SPDC holds *right of way*. A right of way is the exclusive right to use land by having pipes in the land, in the course of which the owner can no longer use the land.
2. On 7 July 2005 the so-called ‘Joint Investigation Team’ (JIT) visited the location of the leakage, in the course of which, inter alia, the thickness of the pipe wall was measured with an ultrasonic measuring device, the so-called UT (*‘Ultrasonic thickness’*) measurements. The JIT consisted of representatives of the relevant ministries, of the Oruma community, and of SPDC as the operator of the pipeline. After that, still on 7 July 2005, the leakage was sealed; first provisionally with a wooden plug so that residual oil could no longer seep out of the pipe, and then definitively by placing a round clamp (a so-called PLIDCO split *sleeve clamp*) around the pipeline at the location of the leakage.
3. The JIT drew up a report that was, in any case, signed by representatives of the Nigerian ministries and of SPDC. In part A of the report the following can, inter alia, be read: ‘*Estimated quantity of oil spilled: 400 BBLS'* (i.e. 400 barrels of 159 litres each). Part B of the report includes, inter alia, the following.

Evidence of previous excavation noticed at leak site.

Diving excavation to expose pipe, the soil text we at the leak spot was softer than the surrounding soil.

The pipe is coated with coalton emanel material. During de-coating, there was satisfactory coating adhesion to the pipe, however, there was coating damage around the leak spot - suspectedly caused by a third party interference.

The leak hole was at 8.30 o ’clock position. The hole measuring 8 mm in diameter was round and circular in shape with smooth edges consistent with damage done with a drilling device by unknown persons.

Ultrasonic thickness measurement taken with a (,..)-meter around the leak hole and around the circumference of the pipe indicated no significant wall loss.

UT. Around leak hole: a-9.7 b - 9.6 c - 9.6 d - 9.6 e - 9.5 f- 9.6

1. On 9 July 2005 SPDC contained the leaked oil. On 18 August 2006 the mobilisation in view of the decontamination took place. In the period between August and October 2005 oil was collected and disposed of and cleaning activities were performed in the period from October to November 2005. Remedial activities were performed during the period between November 2005 and April 2006 according to the RENA method (*Remediation by Enhanced Natural Attenuation through land and farming process*), which implies that the contaminated soil is mixed with clean material after which nature should develop self-cleaning ability in due course. In this respect the contaminated soil was excavated up to a depth of 30 centimetres. The decontamination was concluded in April / June 2006. On 2 May 2006 Normal Nigeria Enterprise prepared a *Report on Recovery, Clean Up and Remediation Project at 20” Kolocreek-Rumuekpe Trunkline at Oruma* (hereinafter referred to as: the Clean-up Report) for the benefit of SPDC.
2. In August 2006, a *Clean-Up* *and Remediation Certification Format* (hereinafter referred to as: the Clean-up Certificate) was prepared by the *Joint Federal and States Environmental Regulatory Agencies* in respect of the decontamination of the contamination at Oruma and signed by three Nigerian official authorities. This certificate includes, inter alia, the following:

B. Cause & Date of Spill: SABOTAGE 2005

C. Area (...) of Impact: 60.000 M2

(...)

Completion date: June 2006

(...)

STATUS: Site Certified

1. The pipeline as intended under d. (hereinafter also referred to as: the Oruma I pipeline or pipe) had been operational since 1994 and was, at the time of the leakage in 1995, the only operational oil transport pipeline in the area. Alongside this pipeline was a spare pipeline, which was replaced by a new main pipeline, which was put into use in July 2009, (hereinafter referred to as the Oruma II pipeline or pipe). Ever since the Oruma I pipeline has been operational as a spare pipeline for the Oruma II pipeline.
   1. As exhibit Q.59 A and B – more about this in legal grounds 4.5 and 4.6 – MD et al. submitted *survey plans* with maps of the area around the leakage. This also includes (also see point 7 of the legend) two adjacent pipelines of SPDC marked as S1 and S2. Certainly in this light, the Oruma I and the Oruma II pipelines can be qualified as a unit with one length (37.10 kilometres between Kolo Creek and Rumuekpe) in which the said pipelines changed function in 2009. The parties also qualify this as one pipeline, at least in their considerations they did not link any consequences to the fact that there is, strictly speaking, question of two adjacent pipelines. The Court of Appeal shall therefore, for the sake of brevity, refer to the said unit as the ‘Oruma pipe(line)’ and only refer to the Oruma I pipe(line) and the Oruma II pipe(line) where this is required for reasons of clarity.
2. The claims of MD et al. and the rulings of the District Court
   1. According to MD et al. Shell is liable for the occurrence of the leakage, did not react adequately to the leakage, and did not decontaminate properly after the leakage. MD et al. claim, after a change of claim III on appeal, outlined in a slightly abbreviated manner (where ‘Shell’ must be understood as the four summoned Shell legal persons), provisionally enforceable, that:
3. it is ruled that shell acted unlawfully vis-à-vis Oguru and/or Efanga on the basis of the positions in the procedural documents of MD et al. and is jointly and severally liable vis-à-vis Oguru and/or Efanga for the damages that they incurred and shall yet incur as a result of the said unlawful conduct of Shell, which damages shall be assessed during separate follow-up proceedings and to be settled according to the law, all to be increased by the statutory interest from the day of summons up to that of satisfaction in full;
4. it is ruled that Shell is liable for the violation of the physical integrity of Oguru and Efanga due to living in a contaminated living environment;

III.a it is ruled that Shell acted unlawfully by having the leakage in dispute occur and/or by not reacting adequately to the leakage in dispute and/or by not properly decontaminating the (agricultural) land and fish ponds that were contaminated as a result of the leakage in dispute, for the benefit of the local community and to prevent (further) environmental and health damages incurred (and yet to be incurred) by the persons who live in the vicinity of the leakage in dispute in Oruma, whose interests – which are identical to the interests of the individual claimants – MD is also looking after in these proceedings, in conformity with its statutory objectives; and/or

III.b it is ruled that Shell violated the right to a clean living environment as enshrined in Sections 20, 33 and 34 of the Nigerian Constitution and Article 24 of the *African Charter on Human and Peoples' Rights,* by having the leakage in dispute occur and/or by not reacting adequately to the leakage in dispute and/or by not properly decontaminating the (agricultural) land and fishponds that were contaminated as a result of the leakage in dispute, for the benefit of the local community and to prevent (further) environmental and health damages incurred (and yet to be incurred) by the persons who live in the vicinity of the leakage in dispute in Oruma, whose interests – which are identical to the interests of the individual claimants – MD is looking after in these proceedings, in conformity with its statutory objectives;

1. Shell is ordered to, within two weeks after service of the ruling, start decontamination of the soil around the oil leakage in order that it shall comply with international and locally applicable environmental standards, and to complete the said decontamination within one month after the start;
2. Shell is ordered to, within two weeks after service of the ruling, start the purification of the water sources in and near Oruma and to complete the said purification within one month after the start;
3. Shell is ordered to, after replacement, keep the oil pipeline near Oruma in a good state;
4. Shell is ordered to implement an adequate plan for reaction to oil leakages in Nigeria and to ensure that any and all conditions are met for a timely and adequate reaction in the event that an oil leakage again occurs near Oruma; MD et al. do, in any case, understand this as the availability of sufficient equipment and resources – as proof of which Shell shall provide overviews to MD et al. – in order to limit the damages of a potential oil leakage as much as possible;
5. Shell is ordered to pay MD et al. a judicially imposed penalty of € 100,000.00 (or another amount as determined by ruling in the proper administration of justice) for each time that Shell, individually or collectively, acts in violation of (as the Court of Appeal understands it) the orders as intended under IV, V, VI and/or VII;
6. Shell is, jointly and severally, ordered to pay the extrajudicial costs;
7. Shell is awarded the costs of these proceedings in both instances, including those of the experts, at least to compensate the costs of the parties.
   1. The District Court dismissed all the claims of MD et al. To this end it considered, inter alia, that MD et al. rebutted the defence of Shell that the leakage was caused by sabotage in an insufficiently substantiated manner (legal grounds 4.20 and 4.27 of the ruling), that SPDC actually stopped and remedied the leakage as soon as possible on 29 June and 7 July 2005 so that it cannot be said that its reaction had not been adequate (legal ground 4.53 of the ruling) and that it has not been established that decontamination took place insufficiently (legal ground 4.60 van het ruling).
8. The appeal; introductory considerations

Applicable law

* 1. As already established in legal ground 1.3 of the 2015 ruling, the claims of MD et al. must be assessed substantively according to Nigerian law and Dutch (procedural) law – as laid down in (inter alia) the Dutch Code of Civil Procedure – is applicable to the course of the proceedings, cf. Section 3 of Book 10 of the Dutch Civil Code. In this respect it is, however, noted that substantive aspects of the law of procedure, including the question what sanctions can be imposed, are governed by the *lex causae* (hence, in the case at hand Nigerian law), as well as, as presently expressed in Section 13 of Book 10 of the Dutch Civil Code, substantive case law, including special rules for the division of the onus of evidence that are related to a certain legal relationship and that have the scope of further determining substantive rights deriving from the said legal relationship. For the remainder, the division of the onus of evidence, as well as the obligation to furnish facts, is governed by the *lex fori,* hence, in the case at hand Dutch (procedural) law.
  2. In Dutch procedural law an appeal is qualified as a continuation of the proceedings in the first instance where on appeal A) new (actual and legal) positions can be brought to the fore, also if they could have been brought to the fore earlier (the re-examination function), and B) (also for that reason) the ruling pronounced in the first instance is not so much assessed, however the claims are re-assessed, and in principle according to the situation at the time the ruling on appeal is pronounced (*ex nunc*). Feature B) bears particular relevance in the situation – occurring here – where the claim was dismissed in the first instance.

Renewed assessment of the claims

* 1. With the grounds for appeal on the merits of MD et al. and the grounds for appeal in cross-appeal of Shell the dispute was submitted to the Court of Appeal in (almost) its entire scope. Hence, the Court of Appeal shall not discuss the grounds for appeal individually, but shall re-assess the claims of MD et al.
  2. The actual foundation of the claims is the ‘leakage in dispute’ / the ‘oil leakage’ (see the text of claims III and IV). This regards, considering the procedural documents, the leakage that occurred ‘in Oruma’ / ‘(in and) near Oruma’ on 26 June 2005. The said positioning can also be found, in so many words, in claims III and V up to and including VII. On account of the correlation described below in legal grounds 3.8 and 3.9 between these claims and the claims I and II, this date and positioning should also be read in the two latter-mentioned claims.
  3. The claims of MD et al. are based on three (groups of) (unlawful) acts, namely (unlawful) acts that are related to i) the occurrence of a leakage, ii) the reaction of Shell once a leakage has occurred, and iii) the relevant decontamination. In claims III.a and b this is mentioned expressly, as also in claims IV and V (about decontamination), VI (about occurrence) and VII (about reaction). The statements in claim I and the actions on which claim II is based should, in consideration of the same, be understood in the same manner. Below, the Court of Appeal shall assess the claims of MD et al. on the basis of these three themes: ‘Occurrence’, ‘Reaction’, and ‘Decontamination’, in the course of which it is also noted that – as Shell also understood (section 620 of the SoD/SoA-CA/2) – Reaction also regards measures that should have been taken prior to the leakage in order to enable Shell to react in a timely and adequate fashion after the occurrence of a leakage.
  4. Claim I – which was only filed by Oguru and Efanga, and not also by MD – extends, literally, to issue of a declaration of law that Shell is liable for the damages on account of an unlawful act in respect of the three indicated themes. However, the Court of Appeal understands from, inter alia, section 201 of the MOA-MD, that with this claim MD et al. intend to refer to the – as part of the Dutch procedural law applicable here – separate follow-up proceedings for the determination of damages pursuant to Sections 612 ff. of the Dutch Code of Civil Procedure. Shell also understood this accordingly (sections 12 and 264 of the SoD/SoA/CA/2). This claim regards the situation in the years 2005-2006 when the alleged unlawful acts took place.
  5. The claims IV up to and including VII were filed by Oguru and Efanga and by MD and extend to injunctions / orders. These orders – which were not issued by the District Court – must be assessed on the basis of the state of affairs at the time this ruling is pronounced (see legal ground 32.). The injunction claims IV and V extend to clearing of the residual damages after the decontamination (section 444 of the SoR). Injunctive claim VI extends to keeping the pipeline near Oruma in a good state (section 437 of the SoR). Claim VII extends to, inter alia, ensuring that Shell can react in a timely and adequate fashion if a leakage again occurs near Oruma.
  6. The Court of Appeal deduces from sections 768, 780, 784 and 789 of the SoA/2 that there are two intentions with claim III.a – which was only filed by MD and not also by Oguru and Efanga. The requested declaration of law serves:

1. as a prelude to compensation to be obtained by the residents (not being Oguru and Efanga) for (already incurred and yet to be incurred) damages;
2. to look after the general (environmental) interest / the interest of the said residents in (yet / further) clearing of the oil contamination and in prevention of new oil contamination.

Aspect a) regards the premises that are also covered by claim I and accomplishes that this claim is also filed for the benefit of residents (see section 854 of the SOA/2). To the said extent, claim III.a corresponds with claim I. Aspect b) regards the premises that are also covered by the order claims IV up to an including. To the said extent claim III.a corresponds with claims IV up to and including VII. A difference between claim I and aspect a) of claim III.a is that claim III.a does not comprise a reference to separate follow-up proceedings for the determination of damages but regards future claims of the residents. The defence of Shell, that the claims for compensation of the individual residents have meanwhile expired (legal ground 4.8 of the 2015 ruling; section 123 of the SOA/CA/1 and section 907 of the SoD/SoA/CA/2), can, other than Shell apparently assumes, not alter the fact that MD still has an interest in claim III.a due to the future damages of the residents for which it also instituted this case, and due to aspect b). It may well be, as noted by Shell in section 122 of the SoA/CA/1, that the Dutch court shall not have international jurisdiction in respect of the claims filed by the said residents vis-à-vis SPDC, however this does not imply that the position connected to it by Shell, that the declaration of law claimed in claim III.a cannot form the basis for these kinds of claims for compensation, is correct. Foreign rulings of *'superior courts’* (i.e. courts with general jurisdiction, also including this Court of Appeal) can be recognised in Nigeria on the basis of the Nigerian *Foreign Judgments (Reciprocal Enforcement) Act* (from 1961, now *Chapter C35 in the Laws of the Federation of Nigeria 2004*) and there are no reasons (no reasons were brought to the fore) to assume why this would not apply to the decision to be reached in this case on claim III.a. In this respect it should be taken into account that foreign rulings are basically recognised in the Netherlands (Dutch Supreme Court 26 September 2014, ECLI:NL:HR:2014:2838 (*Gazprombank*)), so that the reciprocity requirement pursuant to the aforementioned Nigerian Act cannot be qualified as an impediment for recognition in Nigeria of the decision in this ruling on claim III.a.

When the difference between both aspects of claim III.a bears relevance then the said claim shall be referred to as ‘III.a-a’, when it refers to aspect a), and as ‘III.a-b’, when it refers to aspect b).

* 1. Claim III.b – which was only filed by MD and not also by Oguru and Efanga – extends to a declaration of law that Shell violated, through its actions in respect of the three themes, the fundamental right of the residents to a clean living environment. Claim II – which was only filed by Oguru and Efanga – extends to this kind of declaration of law in their favour, as the Court of Appeal understands from section 854 of the SoA/2. Initially, this claim also regarded future health damages (section 442 of the SoR), however by deed of 11 September 2012, fourth page, MD et al. dropped this element of their claim, also see section 215 of MOA-MD.
  2. All claims were filed against the Nigerian operating company SPDC and against the parent companies. In the period up to 20 July 2005 that were Shell NV and Shell T&T together, after that RDS became the (sole) parent. RDS is not the result of a merger of Shell NV and/or Shell T&T (section 17 of the SoD). With the claims directed at compensation on account of the Occurrence and Reaction, which regard the period up to and including 9 July 2005, Shell NV and Shell T&T are therefore exclusively in the picture.

Nigerian law; general

* 1. The Federal Republic of Nigeria consists of federal states. The Nigerian legal system has Federal Courts and State Courts. The Federal Courts are, from high to low: the Supreme Court, the Court of Appeal, and the Federal High Court. The highest State Courts are the State High Courts. When reference is made to these courts below without any addition then the references are deemed to be made to the Nigerian courts. When English courts (of the same name) are meant then this is indicated with the addition: “UK”.
  2. The sources of Nigerian federal civil law include, inter alia, English law and Nigerian legislation and case law. The English law applicable in Nigeria comprises *'the common law of England and the doctrines of equity'* (Section 32 (1) of the *Interpretation Act Chapter 192 Laws Of Nigeria, 1990*), with the understanding that rulings of English courts that date back to after the independence of Nigeria in 1960 do, formally, not have binding authority on the Nigerian court (*no binding authority*), but do have *persuasive authority* and are often followed in the Nigerian case law.
  3. Common law applies damages, including the variant merely directed at compensation, as a legal remedy. A mandatory injunction is based on equitable remedy and only qualifies when damages are not sufficient. Principles of equity, including the *'he who comes to equity must have clean hands'* principle, can further limit equitable remedies. In Supreme Court 10 February 2012, C 112/2002, LOR (10/2/2012) (*Military Governor of Lagos State vs. Adebayo Adeyiga*) the Supreme Court considered the following (page 26):

The court will always invoke its equitable jurisdiction and exercise its discretion to grant a mandatory injunction where the injury done to the plaintiff cannot be estimated and sufficiently compensated by damages and the injury to the plaintiff is so serious and material that the restoration of things to their farmer condition is the only method whereby justice can be adequately done.

MD et al. therefore rightly pointed out in section 846 of the SoA/2 that the adjudication or dismissal of injunctions pertains, according to Nigerian law, to the discretionary authority of the court. It can, moreover, be deduced from the legal ground of the Supreme Court quoted above that a Nigerian injunction is meant to restore (*'restoration of things'*) an unlawful condition, which also includes a continuous unlawful omission. In addition, Nigerian law comprises a declaration of law (*declaratory relief*) as an equitable remedy, see Supreme Court 13 April 2007, S.C. 243/2001 (*Ibator vs. Barakuro*).

* 1. The Nigerian (federal) legislation includes the *Nigerian Evidence Act 1945*, which was replaced in 2011 by the Evidence Act 2011. In Section 135(1) of the 1945 version and Section 131(1) of the 2011 version, the main rule of the division of the onus of evidence is provided:

Whoever desires any court to give judgment as to any legal right or liability dependent on the facts which he asserts, must prove that those facts exist.

As considered in legal ground 3.1 *in fine*, the ‘normal’ division of the onus of evidence should be determined on the basis of Dutch law as *lex fori*, hence on the basis of Section 150 of the Dutch Code of Civil Procedure in which it is determined as the main rule that the party who relies on the legal consequences of facts or rights alleged by the same, shall bear the onus of evidence of the said facts or rights.

* 1. The Nigerian (federal) legislation moreover comprises the *Oil Pipelines Act 1956* (OPA). In Section 11(5) of it – on which MD et al. the following is determined:

The holder of a licence shall pay compensation -

(a) to any person whose land or interest in land (whether or not it is land in respect of which the license has been granted) is injuriously affected by the exercise of the right 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 of or 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.

In Section of the 19 OPA, which is part of Part IV ("*Compensation'*), the following is, inter alia, determined:

If there be any dispute as to whether any compensation is payable under any provision of this Act or if so as to the amount thereof, or as to the persons to whom such compensation should be paid, such dispute shall be determined by (...) the High Court exercising jurisdiction in the area concerned (...) there shall be an appeal to the Court of Appeal:.

Section 20(2) of the OPA, which is also part of Part I, determines the following:

If a claim is made under subsection (5) of section II of this Act, the court shall award such compensation as it considers just having regard to (...).

* 1. SPDC - the operator of the Oruma pipeline – is the holder of a licence in respect of the said pipeline within the meaning of Section 11(5) of the OPA. Pursuant to (a) of it, the owner, possessor or user of land is entitled to compensation if he experiences nuisance as a result of the activities of the holder of a licence (*statutory nuisance*). Pursuant to (b) the holder of a licence is subject to a statutory duty of care to protect, maintain and repair their pipelines and compels them to, failing the same, pay compensation for the damages (*statutory negligence*). Pursuant to (c) the holder of a licence is subject to strict liability for damages as a result of leakage from their pipeline (*statutory strict liability*), from which they shall only be released if they successfully argue that the damages are the result of actions of the prejudiced party or of a malicious act of a third party, e.g. sabotage. This regards an affirmative (‘yes but’) defence for which the holder of a licence bears the onus of evidence (and Shell accordingly in section 355 of the SoD/SoA/CA/2).
  2. MD et al. moreover relied on a number of torts (unlawful acts under common law), i.e.: the tort of negligence, the tort of nuisance, and the tort of trespass to chattel.
  3. A tort of negligence (comparable to the violation of the standard of due care under Dutch law) requires that:

1. there is question of a duty of care,
2. the said duty of care was violated,
3. as a result of which damages were incurred.

Whether there is question of a duty of care must be determined on the basis of the so-called *Caparo* test:

1. are the damages foreseeable?
2. is there proximity?
3. is the assumption of a duty of care fair, just and reasonable?

Under Nigerian law the claimant is also subject to the onus of evidence in respect of a), b), and c), see legal ground 3.14 and, inter alia, Supreme Court 6 June 2008, [2008] 13 NWRL (*Abubakar vs. Joseph*) (schedule 1 with exhibit 19), legal ground 14 on page 317, legal ground 20 on page 318 and page 341 – barring in the event of *res ipsa loquitur* (‘the case speaks for itself’), which is a common law doctrine that refers to the situation where it already follows from the actual event, without direct or further evidence, that there is question of negligence. In the ruling just mentioned above, the following was moreover determined about the meaning of negligence (legal ground 12 on page / page 350):

Negligence is the omission or failure to do something which a reasonable man under similar circumstances would do, or the doing of something a reasonable man would not do.

The opinion expressed by Shell in section 320 of the SoD/SoA-CA/2 that Nigerian law does not comprise liability for pure omissions is therefore incorrect. The proximity requirement shall usually be met in case of physical proximity, however if it is absent then there can nonetheless be question of proximity, the term regards a multitude of relationships. In the ruling of the predecessor of the UK Supreme Court (House of Lords 8 February 1990, [1990] ALL ER 568, [1990] 2 AC 605 (Ca*paro Industries pic vs. Dickman*) – from which the ‘*Caparo’ test* derives its name – the following was noted about the proximity requirement (page 633):

"Proximity" is no doubt a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.

* 1. MD et al. also founded their standpoints in this case on soft law, including in particular the *Environmental Guidelines and Standards for Petroleum Industry in Nigeria* (EGASPIN), issued by the *Department of Petroleum Resources* (DPR), revised edition 2002 (exhibit G.2 and exhibit 13), which their expert E. Duruigbo refers to as ‘*recommendations’* that reflect the ‘*industry custom*’ (exhibit M.l, no. 60). It is obvious to assume that, also under common law as applied in Nigeria, these kinds of non-binding standards, depending on their nature and content, can serve to concretise or colour a duty of care. This is confirmed in section 50 of the opinion of M.T. Ladan and R.T. Ako of 13 December 2011, submitted to the court by MD et al. as exhibit L.l.
  2. The tort of nuisance was described by MD et al. as: nuisance (section 125 of the SoR), the tort of trespass to chattel as: violation of goods or properties that are not land (e.g. trees, crops, and fish), where a violation is to be understood as: the infliction of damages or a disruption in the use (section 134 of the SoR, section 827 of the SoA/2). Intent or negligence is required for the tort of trespass to chattel, unreasonable actions of the person causing the nuisance is required for the tort of nuisance (sections 825 and 817 of the SoA/2).
  3. Component of common law is, moreover, the rule of the English case *Ryland vs. Fletcher* (House of Lords 17 July 1868, (LR 3 HL 330)). In the description of the Court of Appeal in this case this rule is as follows:

The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at this peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

The House of Lords at the time confirmed this rule, whilst adding that the said rule only regards ‘*non -natural use’* of the land. The *Rylands vs. Fletcher* *rule* imposes a – for that matter not unlimited – strict liability on the occupier of a land for the damages that occur when the conditions of this rule are met. The strict liability of Section 11 (5)(c) of the OPA can be qualified as the elaboration of this rule in the event of pipeline damages.

Exclusivity of the OPA

* 1. Shell argued that Section 11 (5)(c) of the OPA provides an exclusive regulation for the liability of the holder of a licence for the damages that are caused by a leakage from a pipeline, and that there is, consequently, no room for liability for these kinds of damages on a common law ground like negligence, nuisance or trespass. In this respect it refers to the following rulings:
* UK High Court 20 June 2014, (2014) EWHC 719 (TCC) (Bodo vs. SPDC) in which (in legal ground 64) the said exclusivity of the OPA is assumed;
* Court of Appeal 25 July 2017 (*Nigerian Agip Oil Co vs. Ogbu*) (exhibit 61, schedule 2) in which, on page 29 in an obiter dictum, with reference to, inter alia, *Bodo vs. SP DC*, it was noted that Section 11(5) of the OPA set aside the common law;
* High Court 15 January 2019 (*Johnson vs. SP DC*) (exhibit 61, schedule 4) in four consolidated cases in which it was ruled that the OPA ‘*has provided a comprehensive compensation regime*'.
  1. Prior to *Bodo vs. SPDC* the OPA, or Section 11(5) of it, was not deemed to be exclusive in the Nigerian case law. This follows from, for instance, the ruling *SPDC vs. Otoko* (Court of Appeal 25 May 1990, [1990J6 NWLR 693) (exhibit J.5). This regarded leakages of pipelines so that this case (also according to Shell; section 291 of the SoD/SoA-CA/2) fell under the scope of application of the OPA. Nonetheless, the Court of Appeal did not apply the OPA but common law (tort of negligence) (see, inter alia, sections 19 ff. of the operative part). In the ruling *SPDC vs. Edamkue* (Supreme Court 10 July 2009, 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74) (schedule 1.12 with exhibit M. 1)) the common law rule of *Rylands vs. Fletcher* was used in a case about a pipeline leakage. In a ruling issued after *Bodo vs. SPDC* (Supreme Court 5 June 2015, LOR (5/6/2015/SC) (*SPDC vs. Anaro*) the Supreme Court ruled in a case that (also according to Shell; section 291 of the SoD/SoA-CA/2) fell under the scope of application of the OPA that the rule of Rylands vs. Fletcher had rightly been applied (exhibit Q.24, particularly see page 13 of this ruling). This shows that the Supreme Court did not deem the OPA to be exclusive, neither before nor after Bodo vs. SPDC. A Federal High Court (14 December 2016 (*Ajanaku vs. Mobil*) (exhibit Q.23) considered: ‘*It is settled law that victims of oil operations spillage/damage can maintain an action for compensation under the rule in Rylands vs. Fletcher'.*
  2. The OPA originates from 1956. The considerations above indicate that the argument that the said Act is exclusive was first brought to the fore, at least was first embraced, during the UK High Court proceedings that resulted in *Bodo vs. SPDC* in 2014, and has ever since occasionally been applied in the lower Nigerian case law, however not by the Supreme Court, which continued to depart from non-exclusivity. This Court of Appeal should, in consideration of the system of precedent, follow the Supreme Court. All the more so because the only higher Nigerian court that assumed the said exclusivity, the Court of Appeal in *NAOC vs. Ogbu*, did so in an obiter dictum (see, inter alia, section 37 of the opinion of Shell’s expert F. Oditah submitted to the court as exhibit 61), which has no binding force (see Uniken Venema / Zwaive, *Common Law & Civil Law,* 2008, page 80). The line of reasoning of Shell, mentioned in legal ground 3.22, does, therefore, not hold water. The OPA is not exclusive, so that common law actions are also possible, with the thereto-pertaining legal and equitable remedies.
  3. The standpoint taken by Shell – following on from exhibit 61 just mentioned above – that there is no room within the OPA for a declaration of law and only for compensation (section 74 of the OA/2-S and section 262 of the SoD/SoA-CA/2) is dismissed. In the rulings that were discussed in sections 44 up to and including 47 of the exhibit 61 opinion, it is merely mentioned that the OPA, because reference is made to compensation, does not permit (other) damages. This does not imply that a declaration of law (whether or not by way of prelude to compensation) would be in violation of the wording, the system or the objective of the OPA. A declaration of law can actually be an appropriate way to settle or streamline a dispute as intended in Section 19 of the OPA, for instance a declaration of law in a dispute about the question whether a compensation obligation exists pursuant to the OPA, after which the amount of the said compensation can either be agreed between the parties as intended in the last sentence of Section 11(5) of the OPA or be determined by the court in pursuance of Section 20(2) of the said Act.

Liability of a parent company under Nigerian law

* 1. The claims of MD et al. against the parent companies of Shell are governed by Nigerian law. The parties agree on this (also see legal ground 1.3 of the 2015 ruling as well as legal ground 3.32, cf. also Section 6 of the Dutch Unlawful Act (Conflict of Laws) Act, Article 14 of the Rome II Regulation). The said claims are not based on a direct piercing of the veil of immunity from liability (*piercing the corporate veil*; eliminating the difference in identity between parent and subsidiary), but on what is referred to as indirect piercing, namely the liability of the parent company – on the basis of negligence / violation of a duty of care – for its own actions or omissions in vis-à-vis third parties who are / were affected by actions or omissions of their subsidiary (inter alia, sections 126 and 127 of the SoA/1).
  2. Shell commented that there is no Nigerian precedent for this liability of a parent company. To a question raised by the Court of Appeal following on from the said comment at the 2020 hearing the answer on behalf of Shell was that, to its knowledge, there had not been a case in Nigeria with a context as the case at hand in which a parent company was addressed / also summoned (OR-2020, page 13). It must therefore be established that a comparable case of parent liability has not been settled in court in Nigeria. In this situation the English case law that, after all, has persuasive authority in Nigeria should be consulted.
  3. The relevant recent English rulings in this area are:
* UK Court of Appeal 25 April 2012, [2012] E WCA Civ 525 (*Chandler vs. Cape*) (exhibit 25), in which in proceedings on the merits liability of the parent in respect of employees of the subsidiary was assumed;
* UK Court of Appeal 14 February 2018, [2018] EWCA Civ 191 (*Okpabi vs. RDS*) (exhibit Q.34), in which in the context of the question of jurisdiction it was ruled that the claimant did not have an arguable case against the parent (appeals is still pending before the Supreme Court, case identification UKSC 2018/0068));
* UK Supreme Court 10 April 2019, [2019] UKSC 20 (*Vedanta vs. Lungowe*), in which the opinion, in the context of the question of jurisdiction, that the claimant had an arguable case against the parent company was upheld.
  1. In this respect, most weight is attributed to the UK Supreme Court ruling (delivered unanimously). In it the following is, inter alia, considered:

44. (...) In the present case the critical question is whether Vedanta sufficiently intervened in the management of the Mine owned by its subsidiary KCM to have incurred, itself (rather than by vicarious liability, a common law duty of care to the claimants (...).

49. (...). (...) the liability of parent companies in relation to the activities of their subsidiaries is not, of itself a distinct category in common law negligence. Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such opportunity.

50. (...) the (...) in my view correct summary of this point (...):

“There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-a-vis persons affected by those activities. (...). The legal principles are the same as would apply in relation to the question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary.

(…)

51. (...). (...) I would be reluctant to seek to shoehorn all cases of the parent’s liability into specific categories (...). There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries, At the other extreme, the parent may carry out a thoroughgoing vertical reorganization of the group’s businesses so that they are, in management terms, carried as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant (...).

52. (...) In the Chandler case (this is the ‘Chandler vs. Cape’ case mentioned in legal ground 3.28, the Court of Appeal), the subsidiary inherited (by taking over a business formerly carried on by the parent) a system for the manufacture of asbestos which created an inherently unsafe system of work for its employees, because it was carried out in factory buildings with open sides, for which harmful asbestos dust could, and did, escape. As a result, and after a full trial, the parent was found to have incurred a duty of care to the employees of its subsidiary, and the result would surely have been the same if the dust had escaped to neighbouring land where third parties worked, lived or enjoyed recreation. (...).

(…).

54. Once it is recognized that, for these purposes, there is nothing special or conclusive about the bare parent/subsidiary relationship, it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all. (...).

* 1. The rule of law provided by the UK Supreme Court in *Vedanta vs. Lungowe* (hereinafter referred to as: the *Vedanta* rule) boils down to the fact that according to the ordinary criteria - the *Caparo* test, see legal ground 3.18 – it must be assessed whether a parent is subject to a duty of care in respect of third parties who are in a relationship with its subsidiary, that a further division into *Fallgruppen* is not indexed in this respect, and that involvement with the subsidiary is the basic condition (cf. section 8 of the OA/2-S). In legal ground 80 of *Chandler vs. Cape* the additional condition for a duty of care of the parent was imposed, namely that the parent was or should have been familiar with the unsafety of the system applied by the subsidiary. The said knowledge requirement must be deemed to be part of the *Vedanta* rule. If the parent is or should not be familiar with the harmful actions of the subsidiary then it cannot be appreciated that, in terms of the parent, the foreseeability requirement – step a) of the *Caparo* test – is met and neither that it would be fair, just and reasonable – step c) of the *Caparo* test – to impose a duty of care on the same.
  2. Including the knowledge requirement, the *Vedanta* rule can be represented as follows: if the parent knows or should know that its subsidiary is inflicting unlawful damages on third parties in an area in which the parent has involvement in the subsidiary then the guiding principle is that the parent is subject to a duty of care in respect of the said third parties to intervene.
  3. Certainly considering legal ground 54 of the *Vedanta vs. Lungowe* ruling quoted above, there is no reason to assume that the Nigerian court would not adopt the *Vedanta* rule, as outlined above. The said rule should therefore be deemed to be part of Nigerian law. Because Nigerian law is identical on this point to English law, it would make no difference at all if the parent liability would not need to be assessed under Nigerian law (see legal ground 3.26) but under English law.
  4. In this respect the following can, moreover, be noted:
* The Shell parents are not holders of a licence within the meaning of the OPA; hence, the said Act is not applicable to them;
* Having regard to the opinion in legal ground 3.24 that the OPA is not of an exclusive nature, the said Act does – contrary to the opinion of Shell (section 770 of the SoD/SoA-CA/2) – not oppose the assumption of liability of the parent company on the basis of common law;
* With Shell (section 770 of the SoD/SoA-CA/2) it must be assumed that if, tailored to this case, tort of negligence / nuisance / trespass to chattel of the subsidiary is out of the question, a violation of a duty of care of the parent can – perhaps barring special circumstances that did not become apparent here – neither be assumed.

The scope of the contamination

* 1. It is mentioned in the JIT Report that with the leakage of 26 June 2005 approximately 400 barrels of oil were spilled, which amounts to approximately 64,000 litres. In the Clean-up Certificate it is stated that an area of approximately 60,000 m2 was consequently contaminated, this is about the size of ten football pitches. MD et al. call the correctness of these figures into question (see, inter alia, section 10 of the SoA/2 and sections 139 ff. of the OA/2-MD), however they did not argue what figures should then (approximately) be assumed, although it had been up to them to do so (legal grounds 3.14 and 3.18), certainly when it comes to the size of the contaminated area, which they could have established on the basis of their own investigation. The Court of Appeal does, however, understand from sections 79-88 of the MOA-MD, section 10 of the SoA/2 and sections 146 and 157 of the PA/2-MD, that the line of reasoning of MD et al. about the incorrectness of the figures merely serves to substantiate their standpoint that the JIT Report and the Clean-up Certificate are unreliable (cf. section 53 of the OA/2-S).

1. Preliminary defences of Shell

Introduction

* 1. Shell raised a number of preliminary defences, which have mostly already been handled in the 2015 ruling. In the said ruling the reliance by Shell on the absence of a right of action on the part of Oguru and Efanga was discussed (see legal grounds 4.1 up to and including 4.3 of the said ruling), but no definitive decision was reached yet. In the 2015 ruling the reliance by Shell on the complete absence of cause of action on the part of MD was dismissed definitively (legal grounds 3.1 up to and including 3.4 of the said ruling). After that, in sections 223-230 and 932 and 933 of the SoD/SoA-CA/2, Shell also specifically argued that MD et al. have no cause of action in respect of the claims on the basis of the OPA on account of the fact that a condition precedent is not met. The Court of Appeal shall (further) assess the preliminary defences in respect of which no (definitive) decision has been reached yet, and the latter in the order outlined above.

Right of action of Oguru and Efanga

* 1. MD et al. argued the following. Oguru and Efanga use and occupy the land on which they cultivated crops and commercial trees (collectively: the plants). The said land was located near the right of way of SPDC. Due to the leakage of 26 June 2005 oil was spilled on this land, as a result of which the land and the plants (which were owned by them) were affected and destroyed. In addition, Oguru and Efanga own a number of fishponds that they constructed in the bush along both sides of the Olumogbogbo-Gbara creek. The oil that was spilled into this creek was spread as a result of the current and the effect of the tides and, consequently, also partly ended up in the fishponds of Oguru and Efanga. As a consequence, the fish in these ponds died and the ponds can no longer be used for the cultivation and catching of fish.
  2. Shell presented three arguments to challenge the right of claim of Oguru and Efanga, i.e. a) that they should have submitted documents from which it becomes apparent how they acquired the possession / right to use of the land and the fish ponds, b) that it had not been rendered clear where the land and the fish ponds are located exactly, and c) that it did not become apparent that the oil was spilled up to this land and these ponds and resulted in damages (inter alia sections 243, 244, 253, 254, 562 and 564 of the SoD/SoA-CA/2).
  3. In Section 11 (5)(b) and (c) of the OPA a right of claim is allocated to *'any person suffering damage'*. It follows from the words ‘*any person'* that the circle of parties entitled to a right of claim is defined in an extremely broad manner and that no specific requirements are imposed on the capacity of the prejudiced party. This cannot be reconciled with the fact that a prejudiced party who can evidence that he even has the (not required) capacity of possessor or (lawful) user, would also need to evidence that he acquired his possession of right to use. The same applies to a claim on the basis of negligence. In this respect specific requirements are neither imposed on the capacity of prejudiced party. To the extent that the claims of Oguru and Efanga are based on Section 11 (5)(b) and (c) of the OPA and on the tort of negligence, argument a) of Shell already fails on these grounds. Whether this argument holds water in respect of the other foundations of the claims of Ogura and Efanga can remain unanswered, having regard to the considerations to be made in legal grounds 5.30, 6.29, 8.29 and 9.6.
  4. In the first instance, MD et al. submitted, as exhibit M.4, signed statements of the Oruma community from 2012 in which the said community declares that the land and fishponds that are circled on the attached Google Earth maps ‘*are owned and used by'* Oguru and Efanga with ‘*the right to do so'* (hereinafter referred to as: the M.4 statements). On appeal, with the SoD-CA/2, MD et al. submitted survey plans with maps of 4 October 2019 as exhibit Q.59 (A and B), which mention: ‘*shewing property area'* of Oguru and the late Efanga. On these maps their land and the fishponds are depicted within red lines. A survey plan is, according to the positions of MD et al. – following on from sections 91 and 106 of the SoD-CA/2 – an official, certified document on which the location and demarcation of a plot of land is indicated, comparable to a land registry map in the Netherlands. This was not disputed by Shell. It can be deduced from the last sentence of section 61 of the OA72-S that Shell deems the M.4 statements to be incorrect on account of the fact that on the map with these statements the lands and fishponds of Oguru are positioned differently than on the map of the survey plan – which Shell apparently does deem to be correct. In section 92 (with note 102) of the SoD-CA/2 and section 17 of the OA/2-MD, MD et al. provided the plausible explanation that the person who drew the circles on the map in the M.4 statements, erroneously mistook a path between the lands of Oguru and Efanga as the right of way and that, if the map with the M.4 statements is turned to the right by 45°, it then, as made clear by the photo on page 8 of the OA/2-MD, corresponds with the maps in the survey plans. Whatever may be of this, it does in any case sufficiently follow from the non-disputed survey plans where the lands and fishponds of Oguru and the late Efanga are located and that they were, in any case, the users of them (‘*property area'*). Hence, argument b) neither holds water.
  5. In the maps of the survey plans the location of the leakage (spill point) is indicated. The land of Oguru starts, as follows from the scale on the map, approximately 100 metres from the spill point, and the land of Efanga borders this.

The land and the fishponds of Oguru and Efanga are, therefore, located so close to the location of the leakage that, having regard to the considerations in legal ground 3.34, it is impossible for the oil spillage not to have reached the said land and the said ponds and did, in any case, partly cover them, also in consideration of the fact that Shell did not argue that the oil exclusively spilled in the other direction. The fact that as a result of the leakage at least some damages were caused at Oguru and Efanga can therefore be assumed as an established fact. Argument c) of Shell also fails.

* 1. Oguru and Efanga are, as must be concluded, entitled to a right of action on account of Section 11 (5)(b) and (c) of the OPA and the tort of negligence. This also applies to MD where it looks after the interests of the other, yet unknown, persons who live in the vicinity of the spill point, within the 10 football pitches, and after the environment affected by the leakage.

Right of action of MD et al. pursuant to the OPA

* 1. Shell argues that MD et al. are not entitled to a right of action pursuant to the OPA on account of the fact that, according to Shell, the condition precedent that it believes derives from the last sentence of Section 11(5), in combination with Sections 11(6) and 20(2), of the OPA to claim compensation on the basis of the same in court, i.e. that the parties must first have entered into discussions in an attempt to reach agreement about the level of the same, is not met. MD et al. challenge this, inter alia, by arguing that the OPA does not contain this kind of condition precedent and, alternatively, that they cannot be blamed for the same because the level of the compensation is not relevant yet (sections 14 and 21-32 of the SoD-CA/2).
  2. When assessing this point of dispute, the Court of Appeal first and foremost notes that Shell did not argue that MD can, in its capacity of interest group, not rely on Section 11(5) of the OPA. The fact that Shell deems MD not to have cause of action (see the header of section 223 of the SoD/SoA-CA/2) on account of non-compliance with the (argued) consultation condition of the said Section, and the latter not alternatively, indicates that it – rightly – assumes that there is, otherwise, no objection to deem MD entitled to file claims on the basis of the said Section. In this respect reference is made to legal ground 3.3 of the 2015 ruling (a+b).
  3. In Section 19 of the OPA a distinction is made between (inter alia) *'any dispute as to -whether any compensation is payable under any provision of this Act*' and *'any dispute'* *'as to the amount thereof*. The last sentence of Section 11(5) of the OPA, in which the argued condition precedent is included, only regards disputes about *'the amount of such compensation'*. The claims I and III.a-a (also) based on the OPA extend to, subsequent, declarations of law with referrals to the follow-up proceedings for the determination of damages and declarations of law that serve as a prelude to / a basis for claims yet to be filed. These claims are therefore related to disputes about the question ‘*as to -whether any compensation is payable’* and not (yet) about the question regarding '‘*the amount of such compensation*". The (argued) condition precedent is not relevant here. MD et al. therefore rightly argued that this cannot be enforced against them.
  4. Needlessly, reference is also made to the following. Prior to the writ of summons in case b MD et al. sent notices of liability to SPDC and RDS, to which SDPC reacted with the comment that it is "*under no obligation to compensate your clients for the damage claimed* (...)'. During the proceedings on appeal the Court of Appeal repeatedly (urgently) requested the parties to examine whether an amicable settlement is possible (see, inter alia, page 6 of the official report of the personal appearance of the parties of 24 November 2016 and page 18 of the OR-2020). During the 2020 hearing it was noted by Shell that – as the Court of Appeal understands: for Shell – a settlement is, in this case, not one of the possibilities because MD also looks after the interests of three communities, including the Oruma community, and not just for some individual claimants. Considering everything, Shell actually broke off the discussions, emphasised by the same, in advance. With this state of affairs, the condition precedent must deem to be met, having regard to the principle on which, in terms of Dutch law, Section 23 Subsection 1 of Book 6 of the Dutch Civil Code is based.

1. The claims on account of the Occurrence (of the leakage)

The claims I and III.a-a against SPDC on account of the Occurrence

* 1. The Court of Appeal shall now first assess the claims I and III.a-a of MD et al. against subsidiary SPDC, in so far as they are related to the theme Occurrence. These claims are – also in terms of claim III.a, see legal ground 4.9 – in the first place based on Section 11(5)(c) of the OPA, which imposes strict liability on SPDC for damages resulting from a leakage in a pipeline. The said strict liability is, however, not applicable in an unlimited manner; it does not apply, inter alia, when the damages are the result of a malicious act of a third person, e.g. in case of third party sabotage.

Sabotage defence: onus of evidence & threshold of evidence

* 1. SPDC argues that the leakage was caused by sabotage. MD et al. dispute this. According to them, the leakage is the result of maintenance arrears. Shell did not argue that the sabotage assumed by it was committed by Oguru and/or Efanga or by the residents whose interests MD looks after. Hence, Shell founds its defence on third party sabotage.
  2. It is – rightly – not disputed that Shell bears the onus of evidence in respect of the third party sabotage argued by the same (also see legal ground 3.16 *in fine*). It is, however, disputed what criterion applies to the evaluation of the evidence (threshold of evidence): is that the special criterion of *beyond reasonable doubt* applicable to civil cases, as argued by MD et al., or the regular criterion of *preponderance of weight of evidence*, argued by Shell?
  3. The following is, inter alia, determined in the Nigerian *Evidence Act 2011* already discussed in legal ground 3.14:

**134 Standard of proof in civil cases**

The burden of proof shall discharge on the balance of probabilities in all civil proceeding.

**135 standard of proof where commission of crime in issue and burden where guilt of crime etc. asserted**

(a) If the commission of a crime by a party to any proceedings is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

(…)

Section 138(1) of the 1945 version of the Act determined the same as Section 135(a) of the 2011 version.

These statutory texts create, as noted by Shell (inter alia in section 15 of the OA/2-S), the assumption that in case of criminal offences committed by a non-party (e.g. in case of third party sabotage) the special criterion of *beyond reasonable doubt* is not applicable. According to MD et al. Nigerian courts do, however, apply the said special criterion in case of third party sabotage.

* 1. As a preliminary point, the Court of Appeal points out that in the ruling of the Supreme Court in the *SPDC vs. Edamkue* from 2009 mentioned in legal ground 3.23 the *beyond reasonable doubt* criterion was applied in a civil oil leakage case in which, as the Court of Appeal understands it, party sabotage was relied on. This is nothing special, considering Section 138(1) of the *Evidence Act 1945*.
  2. It follows from the ruling of a Court of Appeal (7 December 2011, (2011 )LPELR- 9783(CA) (*SPDC vs. Firibeb*) (schedule 1 with exhibit 60)) about Section 11(5)(b) and (c) of the OPA that in the first instance the Federal High Court ruled (page 8): ‘*I do agree (...) that the standard of proof required for claims of vandalisation and acts of a third party are high. Vandalization and acts of a third party conno[n]tes criminality and the standard of proof required is beyond reasonable doubt'.* On appeal in this case SPDC did not submit grounds for appeal against this opinion.
  3. In the ruling of a Court of Appeal of 17 December 2018 (2018) 17NWLR (Pt. 1649) 420 (*SPDC vs. Okeh*) (exhibit Q.60, schedule A) it also regarded third party sabotage. In the elaboration about the law on pages 436/437 reference is made to the *beyond reasonable doubt* criterion from *SPDC vs. Edamkue* and to Section 138(1) of the *Evidence Act*. It can be deduced from this that the said Court of Appeal actually applied the *beyond reasonable doubt* criterion. The fact that on page 439, second section, reference is made to *reliable proof* does not alter this, certainly not now that this section emphasises that in the said case there was actually no evidence for sabotage ("*little or no iota of proof*’).
  4. Also another case between SPDC and Okeh, in which a Federal High Court ruled on 20 February 2018 (exhibit Q.60, schedule B), regarded a third party sabotage. This court considered about the evidence to be furnished for this: ‘*I entirely agree with the submission of (...) that allegations of crime in civil matters must be proved beyond reasonable doubt and specially pleaded and particularized'*. It was then ruled that the said threshold was met.
  5. In I.T. Amachree, *Compensation claims relating to cruel oil spillage & land acquisitions for oil & gas fields in Nigeria* *(A Suggested Practice Guide)*, Peral Publishers, 2011, page 315 (exhibit Q.14) the following can be read:

Ordinarily, where a criminal allegation forms part of a civil action, the standard of proof of that allegation is beyond reasonable doubt by virtue of section 138(1) of the Evidence Act. Pipeline vandalism is a criminal offence by virtue of section 3 (7) (a) and (b) of the Special Tribunal (Miscellaneous) Act, 1984. It is therefore, submitted that companies alleging this criminality of sabotage must prove beyond reasonable doubt that the particular spillage complained of was caused by the act of third parties and without their negligence.

* 1. As opposed to the sources of law discussed in legal grounds 5.6 up to and including 5.9, which strongly indicate that in the legal practice in case of third party sabotage the *beyond reasonable doubt* criterion is applied, Shell and its experts Oditah and Ayoola were unable to mention any judicial ruling in which in case of third party sabotage not the said criterion but the regular criterion of Section 134 of the *Evidence Act 2011* was applied. In its exhibit 77 opinion (under section 224) Ayoola acknowledged that there is question of a "*temptation for civil courts'* to read Section 138(1)/l 35(1) of the *Evidence Act* in such manner that evidence *beyond reasonable doubt* is required, also in instances of non-party sabotage. The Court of Appeal is of the opinion that according to applicable Nigerian law, hence as applied by the Nigerian courts, in case of third party sabotage the said high threshold of evidence must be assumed. The fact that Oditah and Ayoola deem this to be incorrect, shall not alter this. The opinions of the said party experts can, compared to the legal practice that follows from legal grounds 5.6 up to and including 5.9, not carry enough weight for it.
  2. In Nigeria there is, as follows from the above, question of a specific threshold of evidence in the event that sabotage needs to be evidenced. This kind of specific rule should, as it is closely related to substantive law, be deemed to be part of substantive case law, which is subject to the *lex causae* (see legal ground 3.1). It is therefore – contrary to the arguments of Shell (inter alia sections 11-14 of the OA/2-S) – not true that (also) in this (special) situation the threshold of evidence to be applied is determined by Dutch law as the *lex fori*.
  3. At present it shall be assessed whether it was evidenced by Shell *beyond reasonable doubt* that the leakage of 26 June 2005 at Oruma was caused by sabotage.

The assessment of the evidence

* 1. To rebut the position of MD et al. that the leakage at Oruma was caused by maintenance arrears, more in particular by corrosion, Shell presented the following evidence in the first instance for the sabotage argued by the same:
* the JIT Report in which it was concluded that there was question of recent excavation traces and a round hole (incompatible with corrosion) with smooth edges (drill hole), and therefore of sabotage;
* the video recordings made during the JIT visit, which would confirm the conclusions from the JIT Report;
* the UT measurements carried out during the JIT visit from which it would become apparent that the thickness of the wall around the leak had not, or barely, reduced compared to the original wall thickness, as a result of which internal corrosion could be excluded as a cause;
* the results dated 6 April 2005 of a measurement carried out by the company Rosen in December 2004 – whilst making use of the *Magnetic Flux Leakage* (MFL) technique - with the help of a type of robot (a so-called *intelligent pig*) that moves through the pipeline and inspects it from the inside (a *pig-run*, also referred to as an *inline inspection* (ILI) run), which results would show that at the time (six months prior to the leakage) there had not been any thinning of the pipe at the location of the leakage, as a result of which it would not be obvious that the damage of the pipeline is the result of corrosion.

The court considered that the said evidence was sufficient to qualify the sabotage as an established fact.

* 1. In the 2018 ruling the Court of Appeal ordered an expert opinion with the following questions requiring research:

1. To what degree does the available material enable you to obtain a complete picture of the potential cause of the leakage? If the material is not sufficient then what information do you still require for it?
2. If the present material does enable you to provide an opinion: what is, in your expert opinion, the cause of the leakage? What do you base this on?
3. Are there, in your expert opinion, still other potential causes of the leakage? If yes, which ones and what do you base this on?
4. Is it possible on the basis of the available material to give a definitive answer about the cause of the leakage?
5. Are there other facts and circumstances that you deem to be relevant for the answering of the questions?

Initially, it was the intention to submit the relevant hole in the pipeline to a physical research by the experts (legal ground 5.3 of the 2015 ruling), however on account of the (too) unsafe situation on location, this was abandoned (see, inter alia, section 2.2 of Shell’s ‘Memorandum for the benefit of the personal appearance of the parties of 24 November 2016 (in cases a up to and including e))’. The experts therefore conducted a desk research.

* 1. Prior to the 2020 hearing, MD et al. submitted, at the request of the Court of Appeal, also (partly digital) – as schedules 1 up to and including 18 – the relevant documentation with regard to the realisation of the expert opinion (hereinafter referred to as: S-E 1 up to and including 18). This includes S-E 12, the draft report of the experts of 18 September 2018, to which Shell (S-E 13) and MD et al. (S-E 15) reacted on 16 October 2018. After that MD et al. also sent an email with questions and comments following the S-E 13 input of Shell (S-E 16). S-E 17 contains an email exchange between the parties and the experts. S-E 18 is an email from expert Sowerby addressed to the Court of Appeal.
  2. On 3 November 2017 Shell (S-E 2) provided the experts with (new or further) data regarding ILI runs carried out in 2000, 2004, 2011 and 2016 (in the expert opinion referred to as: B (2000), E/F/G/AG/AH (2004), M/AG/AH (2011) and U/AG/AH (2016). When requested, Shell provided the experts with further information on 23 August 2018 (S-E 10 and 11) about the ILI runs of (inter alia) 2005 (in the expert opinion referred to as: Z). On 16 October 2018 (S-E 14 Exhibit A) – hence after the draft report – Shell provided additional information from Rosen about the ILI runs (in the expert opinion referred to as: AJ). MD et al. complained that Shell did partly not provide the information requested by the experts at all, and partly too late (section 88 of the OA/2-MD).
  3. On 17 December 2018 the experts issued their final report. The parties both interpreted it in their own way. According to MD et al. the experts have too many doubts in order to be able to assume sabotage, according to Shell the experts reach, also in case of the *beyond reasonable doubt* criterion, the conclusion that the leakage was caused by sabotage. Upon first reading, the final report allows both interpretations. For instance, on the one hand it mentions that the experts have not been able to reach a definitive conclusion about the cause of the leakage and that it is merely their *'impression'* that sabotage has been the cause (page 18, section 4), which is in line with the interpretation of MD et al., however, on the other hand, that there doubts about it *'is now very low'* (page 16, second paragraph), which is more in line with Shell’s interpretation. A further analysis of the expert opinion teaches the following (references regard the final report, unless indicated otherwise).
  4. First of all the experts determined that the ILI reports *'clearly'* indicate where the 2005 leakage is located (page 11, last paragraph), namely at 7749.68-7750.04 metres downstream of the Kolo Creek *manifold* (page 8, seventh asterisk in conjunction with page 7, second asterisk). In addition, they specified the position of the leak at 07:55 o’clock (where the JIT Report refers to 08:30 o’clock), see page 8, seventh asterisk. Moreover, the experts determined unsparingly that external corrosion cannot have been the cause of the leakage, so that only internal corrosion or external interference can qualify as causes, with the understanding that external interference *'by* *plant machinery* *and tractors etc'* is (probably) also excluded, so that, as the Court of Appeal understands it, ultimately internal corrosion and sabotage remain as the only potential causes (page 12, seventh paragraph; page 18, section 3).
  5. The experts labelled the JIT Report as *'of very poor quality'* (page 12, third paragraph): it is not sufficiently detailed, it does not contain good photos, and does, in general, not comply with the requirements imposed on this kind of report (page 16, third paragraph). The experts also deemed the UT measurements of the JIT to be *'questionable as to their accuracy'* (page 12, fifth and sixth paragraph; page 16, third paragraph) because they, due to the corrosion present in the pipe (see legal ground 5.21 below), should have demonstrated a larger variation in wall thickness. Hence, the experts, as the Court of Appeal understands, answered question 2 regarding the cause of the leakage from 2005, exclusively on the basis of the information that they obtained from the ILI runs from 2005, 2011 and 2016.
  6. In this respect the experts concentrated on the 2016 ILI measurements because they show a lower number of corrosion sites than the previous ILI measurements and Rosen provided, in S-E 14 Exhibit A (= AJ), a convincing explanation for it (page 11, paragraphs 2 up to and including 6; page 8, seventh asterisk).
  7. The experts determined that over the entire length at the bottom ‘*the 6 o’clock position'* of the pipeline shows internal corrosion, however that in the first 15 kilometres (in which the Oruma leakage took place, see legal ground 5.18, first sentence) the relevant depth was in ‘*general'* less than 40% (page 10, last paragraph; page 12, sixth paragraph). The experts moreover reached the establishment, on the basis of ‘Z’, that it is clear that the area around the location of the leakage was ‘*clean'* ‘*with no corrosion evident around the leak'* (page 16, fifth paragraph). In this respect it, therefore, regards the situation in the direct and broader surroundings of the leakage.
  8. In addition, the experts addressed the situation on location of the leakage, under the clamp (the PLIDCO *split sleeve clamp*). In this respect the experts initially had the question whether ‘*at'* the location of the leakage there had not been question of three ‘*defects'*, this would, according to the experts in their draft report, be suggested by the ILI reports that do, however, simultaneously not suggest ‘*significant areas of internal corrosion'* ‘*at the position of* the location of the leakage and that, still according to the experts in the draft report, therefore provide conflicting information in this respect (see page 13, third and fourth paragraphs of the draft report S-E 12). Shell then noted that this regarded two ‘*minor indications'* that were the result of corrosion and a ‘*larger indication'*, this is the leakage relevant in this case (S-E 13, page 27 under 2). On page 8, seventh asterisk, of the final report this comment of Shell was, apparently, accepted as correct on the basis of the statement of Rosen S-E 14 Exhibit A (= AJ), which ‘*suggests that the additional corrosion features under the repair clamps are very low level < 10%'*. The problem of the conflicting information has consequently been removed.
  9. The establishments mentioned in legal grounds 5.20 up to and including 5.22 implied that in the final report the exports reached the conclusion that ‘*the most likely cause of the leak is external interference rather than corrosion'* (page 16, sixth paragraph). On page 18, section 4, of the final report the same is mentioned in slightly different words: ‘*it is our impression that everything we have seen points to external interference as being the likely cause of the leak'*. The said conclusion / impression had already been included in the draft report (S-E 12) in identical words (page 14, second paragraph; page 16, section 4). The Court of Appeal understands that the line of reasoning of the experts behind this conclusion / impression is that, because an extremely minor corrosion was detected under the clamp (not at the location of the leakage), no corrosion in the direct surroundings of the leak, and at most less deep corrosion in the broader surroundings of it, it is not probable that (under the clamp) at the location of the leakage such a deep corrosion had occurred that a hole was created.
  10. The experts did, however, also indicate that the available material, supplied by Shell, does not unable them to obtain a complete picture of the potential cause of the leakage, in particular on account of the absence of photos and good-quality measurements (page 15, last paragraph / page 16, first paragraph of the final report; page 13, second paragraph of the draft report) and the only way "*to absolutely confirm'* that the leakage was caused by sabotage, is to remove the clamp of the leakage, to re-examine the area of the leakage, and to prepare a relevant good-quality report, with good photos and research information (page 19, third bullet point of the final report; page 16 at 5, 5th bullet point of the draft report S-E 12). The Court of Appeal understands that the experts thus meant to express that information about the corrosion situation in the (immediate and broader) surroundings of the location of the leakage can, perhaps, say something about the probability that at the said location there was question of deep corrosion (indirect information), however that a definitive answer can only be obtained through information about (the location of) the leakage itself, e.g. photos and measurements (direct information), which was, however, not supplied by Shell.
  11. On page 16, second paragraph, of the final report the experts – following on from their previously mentioned sigh heaved because, due to the absence of good photos and measurements, they were unable to gain a complete picture – noted the following:

The latest ILI data supplied by Shell on 16 October 2018 does however, provide a full set of good quality data around the leak points which gives us a high level of confidence as to the cause of the leaks but without a good investigation report as mentioned above there is some remaining doubt as to the cause although this doubt is now very low (underlining by the Court of Appeal).

When assessing the meaning of this passage, two things should be considered first: i) this passage did not occur in the draft report, and ii) the "*latest ILI data supplied by Shell on 16 October 2018'* refers to the statement of Rosen S-E 14 Exhibit A (in the expert opinion referred to as: AJ). S-E 14 Exhibit A/AJ was only mentioned in the expert opinion – barring for justification of the concentration on the 2016 ILI run (legal ground 5.20), which is not relevant in this context – as a solution for the ‘conflicting information’ problem signalled in the draft report (see legal ground 5.22). Against this background, the passage quoted above should be understood in such manner that, despite that a complete picture is not possible due to the absence of good photos and measurements, "*the latest ILI data supplied by Shell on 16 October 2018'* do, however, provide sufficient data to be able to ignore the problem of the conflicting information, as a result of which the doubt (raised by the said problem) is now exceptionally low. Having regard to and in consideration of the fact that ignoring the ‘conflicting information’ problem did not lead to an adjustment of the conclusion / impression as intended in legal ground 5.23 – after all, they had already been included in the same words in the draft report – the comment that the *'doubt is now very low'* cannot be qualified as a tightening of it.

* 1. To the extent that specific objections against the expert opinion can be read in the positions of Shell (in, inter alia, section 90 of the SoD/SoA-CA/2), the considerations above indicate that they do not hold water.
  2. The Court of Appeal accepts the expert opinion, as indicated and understood above, and adopts these grounds. This brings the Court of Appeal to the opinion that on the basis of the available indirect information sabotage can, perhaps, be qualified as the most probably hypothesis for the occurrence of the leakage, but that due to the absence of direct information it could not have been established / evidenced beyond reasonable doubt that sabotage was also actually the cause of the leakage.

Conclusion in respect of the claims I and III.a-a against SPDC on account of the Occurrence

* 1. On the basis of Section 11(5)(c) OPA SPDC is therefore strictly liable – vis-à-vis Oguru, Efanga and MD as the interest group of the other residents – on account of the occurrence of the leakage. The Court of Appeal shall rule accordingly, to this degree sustaining the claims I and III.a-a, in the course of which the possibility is taken into account that Oguru and Efanga and the other residents incurred damages as a result of this leakage is plausible (damages are even an established fact, see legal grounds 4.6 and 4.7), which again underlines their interest in the declaratory decisions. This also implies that the referral to the follow-up proceedings for the determination of damages, as also intended by Oguru and Efanga with their claim I, can be sustained. In the said proceedings the questions shall be addressed what damages (loss items) qualify for compensation and how the damages should be assessed under Nigerian law – applicable to the said questions.
  2. Above section 284 of the OS in case a (against two parents) and in case b (against SPDC and RDS) the header *'Alternatively: insufficient security of the pipeline'* is mentioned. In section 214 of the SoA/2 MD et al. indicated that – as the Court of Appeal understands: only – if it is an established fact *beyond reasonable doubt* that there is question of sabotage, it still needs to be examined whether ‘Shell’ has been negligent in terms of the relevant prevention. The Court of Appeal deduces from this that the positions of MD et al. on negligence of SPDC and the Shell parent companies to sufficiently secure (have secured) the pipeline against sabotage, were filed in the event / on the condition that sabotage was evidenced *beyond reasonable doubt*. As the said condition is not met, these positions of MD et al. can otherwise remain undiscussed.
  3. When assessing claims I and III.a-a against SPDC on the basis of tort / the rule of *Rylands vs. Fletcher*, MD et al. no longer have an interest in the light of the considerations set forth in legal grounds 5.28 and 5.29. For that matter, on the basis of the torts of negligence, nuisance or trespass to chattel the said claims could not be sustained because, according to legal ground 5.27, not defective maintenance but sabotage – although not evidenced *beyond reasonable doubt* – is the most probably hypothesis for the occurrence of the leakage, as a result of which it cannot be assessed that the leakage can be blamed on negligence or unreasonable actions of SPDC.

The claims I and III.a-a against the parent companies on account of the Occurrence

* 1. To be able to assume a duty of care of the parent(s) MD et al. – which bears the relevant onus of evidence – must at least evidence that the subsidiary SPDC acted negligently or unreasonably (see legal ground 3.33 *in fine*). The said evidence was, however, not furnished, as just elucidated in legal ground 5.30. This implies that claims I and III.a-a on account of the Occurrence cannot be sustained in respect of the parent(s).
  2. In this respect it should also be noted that in this context the defence of Shell, that the leakage can (not be blamed on insufficient maintenance but can) be blamed on sabotage, does not need to be evidenced beyond reasonable doubt. This threshold of evidence must be deemed to exclusively apply to the party that bears the onus of (furnishing) evidence, e.g. the holder of a licence / *occupier* (SPDC), in the context of Section 11(5)(c) OPA / the rule of *Rylands vs. Fletcher*. In the context of parent liability the said onus is not vested in Shell but in MD et al.

Claim VI: keeping the pipe(s) in a good state of repair

* 1. Claim VI extends to the issue of an order to the Shell parent(s) and subsidiary to – from today (see legal ground 3.7) – keep the Oruma pipe in a good state of repair, the latter against the background of the leakage occurring in the same in 2005.
  2. It is also important when assessing this claim that it is has not become an established fact that this leakage is a result of negligence or unreasonable actions of SPDC. Its liability for compensation in connection therewith is based on strict liability. MD et al. did, indeed, argue that in the direct surroundings of Oruma, also in the period between 2010 and 2020, many leakages took place (section 226 of the SoA/2, sections 19, 20 and 110 of the OA/2-MD) – in, as the Court of Appeal understands, the Oruma I pipeline and/or (mostly) the Oruma II pipeline – however in this respect they noted that “according to Shell” these were ‘all instances of sabotage’, without disputing this standpoint of Shell. These leakages can therefore, in consideration of legal ground 5.29, neither be traced back to negligence / unreasonable actions of SPDC. In short, with regard to the Oruma pipeline an unlawful situation on account of the Occurrence is out of the question. Adjudication of the injunctive orders filed against the parent(s) and the subsidiary on account of the Occurrence is therefore not appropriate. Claim VI shall be dismissed.

1. The claims against SPDC on account of the Reaction

Background and guiding principles

* 1. The claims on account of the Reaction are based on the course of affairs in and before the period between the notification of the leakage on 26 June 2005 and the definitive closing of the leakage on 7 July 2005 / the containment of the spilled oil on 9 July 2005 (section 282 of the SoR).
  2. The following can be said about the events during the said period.

1. After the receipt of the notification on 26 June 2005 SPDC did not instantly close the oil supply but it sent employees to Oruma to verify the leakage. The reason for this fixed mode of action of SPDC is that false and incorrect notifications are received regularly. That is why the oil supply is only discontinued after confirmation of the leakage. However, the SPDC employees were refused access by Oguru, in his capacity of deputy tribal chief, so that verification could not take place. MD et al. argue that Oguru did this because SPDC did not bring a traditional access gift (OS under 295; section 32 of the SoD). In accordance with traditional custom, foreigners must request the paramount ruler for consent before they are granted access to the land and the village of the local residents, according to MD et al., who add that requesting consent is a formality; consent is always granted if a small gift (e.g. a small amount of alcohol or a monetary sum of approximately 1 dollar) is brought along (section 294 of the OS).
2. According to Shell, two days later, on 28 June 2005, SPDC was again refused access by Oguru, where this time Oguru argued that SPDC had not complied with the promise, made after a previous leakage in 2000, to asphalt the access road to Oruma (section 55 of the SoD/SoA-CA/2). In section 310 of the OS MD et al. – who indicate that SPDC ‘returned only three days later (...)’ (section 295 of the OS) and did not make any serious attempt between 26 and 29 June 2005 to obtain access (section 308 of the OS) – also pointed to this promise, which is, for that matter, refused by Shell (section 63 of the SoD; section 55 of the SoD/SoA-CA/2).
3. The parties agree that on 29 June 2005 SPDC was granted access to the location of the leakage and that it then established that there was, indeed, question of a leakage. The interpretations vary about what then happened. Shell argues that the said access was only granted to verify the leakage and on the strict condition that SPDC would not carry out (repair or containment) activities (section 54 of the SoD; section SoD/SoA-CA/2). MD et al. argued that SPDC did not bring material along to stop the leakage or to limit the damages as a result of the leakage and then left (section 296 of the OS).
4. After 29 June 2005 SPDC, as argued by Shell, continued to make attempts to obtain access to the location of the leakage, which attempts did, however, encounter resistance and even aggression of the Oruma community. Then, still according to Shell, a meeting (meetings) took place between SPDC and the Oruma community, which resulted in an agreement, comprising that SPDC would obtain access and would, by way of quid pro quo, again construct a certain road – apparently a different road than the road as intended under b. – during the dry season. In article 6 of the said agreement, which was submitted to the court by MD et al. as exhibit A.8, the following can be read (section 308 of the OS; section 62 of the SoD/SoA-CA/2):

(...) Oruma community shall not prevent SPDC from carrying out the Joint Inspection Visit (JIV) and commence the clamping/repair of the SPDC oil pipeline spill incident of on or about the 26th of June 2005 starting from 7.00 hours on the 6lh of July 2005.

Shell also noted that Oguru and Efanga were involved in the negotiations about this agreement.

1. According to MD et al., SPDC then ‘decided’ to show up in Oruma on 6 July 2005 in the afternoon in order to then determine that it had meanwhile been too late to start the activities on that same day, and the repairs consequently only took place on 7 July 2005 (section 309 of the OS). Shell (also) interprets this differently: when SPDC reported in Oruma in the morning of 6 July 2005, the Oruma community imposed new conditions for access again. The negotiations about this lasted until 15:00 o’clock after which it was practically no longer possible to start the work on that same day, as a result of which the repairs were postponed until the next day (section 63 of the SoD/SoA-CA/2).
2. Shell emphasised (section 36 of the SoD; section 59 of the SoD/SoA-CA/2) that it, after it had verified the leakage on 29 June 2005, stopped the oil flow through the affected pipeline on that same day, by halting the four upstream flow stations (i.e. installations where the first separation of oil, water, and gas takes place) and stopping the relevant *manifold* (section 31 in conjunction with section 21 of the SoD; section 59 of the SoD/SoA-CA/2). MD et al. argue (sections 30 and 107 of the OS; section 282 of the SoR) that SPDC only halted the oil flow on 7 July 2005, and not earlier. They present two arguments for this:
3. when closing the leakage on 7 July 2005 oil was still spilling from the hole in the pipe;
4. Oguru and Efanga observed that between 26 June and 7 July 2005 gas was flared uninterruptedly from the nearby *manifold*, and this shows that the oil flow through this *manifold* to the Kolo Creek-Rumuekpe pipeline continued.

In the vision of Shell these arguments do not hold water, in which context it brings the following to the fore. Argument i) fails to appreciate that after the halting of the oil flow on 29 June 2006 a large amount of oil was still present and that, consequently, during the closing on 7 July 2005 residual oil was still present that was spilling from the leakage. Argument ii) departs from the incorrect assumption that the flaring of gas takes place at *manifolds*; facilities for this only occur at *flow stations*, whilst the fact that gas is flared in a *flow station* does not imply that the oil flow through the pipe was not halted (sections 37-38 of the SoD).

* 1. All in all it took eleven days before the leakage had been sealed. In the opinion of MD et al. this amounts to *'disproportionately much time’* (section 319 of the SoA/2). During these eleven days at least 64,000 crude oil were spilled, see legal ground 3.34. According to MD et al. SPDC was subject to the obligation to make the necessary efforts to limit the damages resulting from leakages of its pipelines – also when the relevant occurrence cannot be blamed on the same (see, inter alia, section 125 OA/2-MD) – as much as possible (sections 284 and 369 of the SoA/2) and it did not comply with the said obligation. MD et al. based their claims on account of the Reaction on the following specific actual positions – hereinafter referred to as: the Positions I up to and including IV – (see, in general, section 370 of the SoA/2):

1. SPDC should have taken measures to be informed fast (faster) of the leakage (also see section 335 of the SoA/2);
2. SPDC should have installed a *Leak Detection System* (LDS) as a result of which verification of the notification was no longer required (inter alia section 290 of the SoR, section 63 of the OA/l-MD, sections 312, 335 and 336 of the SoA/2, and sections 68, 74-76 and 121 of the OA/2-MD);
3. SPDC should have halted the oil supply sooner and should, to this end, have used a *flow restriction system* with a proper pressure measuring system and remotely controllable *valves* (also see sections 314 and 357-366 of the SoA/2 and sections 77 and 78 of the OA/2-MD);
4. SPDC should have contained the oil sooner (also see section 127 of the MOA-MD).

If (one or more of) these measures had been taken then, as can be deduced from the positions of MD et al., the harmful consequences of the leakage could have been prevented entirely or for a (considerably) important part. In other words: the omission to take these measures caused damages.

* 1. The Reaction claims can – as the District Court considered in legal ground 4.53 of the ruling and Shell argued (section 71 of the SoD/1) – not be based on Section 11(5) (c) of the OPA. Also according to MD et al. (sections 286, 289 and 370 of the SoA/2) the tort of negligence (violation of a duty of care) – particularly, also see legal ground 6.29 below – and the statutory negligence of Section 11(5) (b) of the OPA qualify for application. The Court of Appeal shall assess the Positions I up to and including IV from the point of view of the tort of negligence, which is more extensive than the statutory negligence of Section 11 (5)(b) of the OPA and which shall not lead to other results in the overlapping area. It follows from the considerations in legal grounds 3.14 and 3.18 that the onus of evidence in this respect – and hence the obligation to furnish facts – is vested in MD et al.
  2. In sections 316-318 of the SoA/2 MD et al. provided a summary of sections 219-315 of the said statement in which various (alleged) obligations of SPDC of a partly procedural nature are discussed, including the obligation to prepare an *Oil Spill Contingency Plan*. These obligations are related to measures that Shell should, according to MD et al., in general have taken in advance in order to ensure that it can react fast and adequately in case of a leakage. Barring to the extent that they also fall under the measures as intended in legal ground 6.3, it can, however, not be appreciated that the argued non-imposition of the said measures resulted in adverse effects in case of this specific leakage event. Already because condition (c) as intended in legal ground 3.18 is not met, a tort of negligence cannot be assumed on the said ground.

The access issues

* 1. As follows from legal ground 6.2, upon the assessment of the Positions I up to and including IV the access issues play an important role. Shell is relying on the fact that it has been unable to take certain measures to mitigate the damages because it was refused access. In connection with this, MD et al. brought a number of positions to the fore (in particular sections 292-311 of the OS, sections 128-134 of the MOA-MD and sections 350-357 of the SoA/2) that boil down to the following. The Niger Delta is a rich source of oil for Shell, however also an extremely poor living area for Nigerians who are also, time and time again, confronted with the adverse consequences of Shell’s activities. They are the ones who live and work in the contaminated area. This decides their life. This includes persons who no longer feel like cooperating with Shell, and also person who think that they can capitalise on the situation. It results in tensions with Shell, and also within the communities. Shell and the communities have an exceedingly difficult relationship, and it can be blamed on Shell that it did not invest in a proper rapport. If it had done this then many access issues could have been prevented, still according to MD et al. It is a poignant account that was unfolded by MD et al., however, in the opinion of the Court of Appeal, this cannot imply that the omission of an act, which Shell was unable to perform because it was refused access, is nonetheless blamed on the same as a violation of a duty of care. The reasons for the refusal of access are too vague and cannot be traced back directly to Shell enough; it always includes a moment of choice of the party (parties) refusing the access (cf. section 628 of the SoD/SoA-CA/2). The fact that Shell cannot be blamed for not being able to perform the activities prevented by the refusal of access does, for that matter, not imply that under circumstances it can be blamed for not, or insufficiently, preluding to and/or (subsequently) did not do enough to circumvent the said refusal of access or to have it cancelled.
  2. The positions of Shell entail that it was confronted with an actual, and not merely formal, refusal of access. The position of MD et al. as included in legal ground 6.2.a that consent to enter the location of the leakage on 26 June 2005 was a formality, which would be granted after presentation of a more or less symbolic gift, cannot be squared with the position of MD et al. in section 310 of the OS that, briefly put, Shell made the promise to construct a road in Oruma – apparently the road as intended in legal ground 6.2.b – and by not living up to this promise it personally created an obstacle for obtaining access. Hence, the first-mentioned position required a further explanation, which is absent. Apart from this, MD et al. did not argue in sufficient concrete terms that it was known (had been communicated) to SPDC that a symbolic gift would have been enough. With this state of affairs it must be assumed that on 26 June 2005 there was question of actual refusal of access, at least that SPDC could and would think that.

Position I: knowledge of moment of occurrence of the leakage

* 1. MD et al. did not argue (in a sufficiently specific and substantiated manner) that the leakage had already occurred before 26 June 2005 (the day of the notification) and neither that there had been more than a short period of time between the occurrence of the leakage and the relevant notification. It must therefore be assumed that following the notification SPDC was informed of the leakage almost immediately. Position I fails on this point.

Position II: LDS

* 1. It is an established fact that in Nigeria false notifications of oil leakages are made regularly. That is why it is, in itself, justified – apparently also in the eyes of MD et al. (section 125 of the MOA-MD) – to only halt the oil supply after a notification of a leakage has been verified. If it were the case that verification is only possible in case of physical access to the location of the leakage then it would, perhaps, also be justified to wait with the discontinuation of the oil supply until access has been obtained. That is what SPDC did in the case at hand.
  2. Position II implies that the verification is also possible without physical access to the location of the leakage, namely by making use of an LDS, and that SPDC should have applied this measure before the leakage occurred – hence in the period before 26 June 2005 – (also see the legal grounds 3.5 *in fine*, 6.1 and 6.6 *in fine*).
  3. In section 312 of the SoA/2 MD et al. referred to sections 10.1 and 10.3 of standard 1160 of the *American Petroleum Institute* (API) of November 2001, reaffirmed in 2008 – hereinafter referred to as: the API 1160 (exhibit Q.16) – in which various options were described to realise an LDS that enables the operator to quickly signal and remedy a leakage. Chapter 10 (*'Mitigation Options'*) of the API 1160 includes the following:

An operator’s integrity management program will include applicable mitigation activities to prevent, detect and minimize the consequences of unintended releases. (...). Mitigation activities can be identified during normal pipeline operation (...).

The mitigation activities presented in this section include information on:

\* Preventing TPD.

\*(…)

\* Detecting unintended releases.

\* Minimizing the consequences of unintended releases.

\* Operating pressure reduction.

(...).

Section 10.1 is about *Third-Party Damage* (TPD). In sub-section 10.1.3 (*'Optical of Ground Intrusion Electronic Detection*') the following can be read:

These systems include a fiber optic or metallic cable, usually installed twenty to twenty-four in. above the pipeline that are continuously monitored by optical or metallic instruments. Should the cable become damaged or severed, the monitoring device(s), which are integrated in the pipeline programmable logic controllers (PLCs) and supervisory control and data acquisition (SCA DA) system, issue an alarm and identify the location of the cable damage.

Optical or electronic ground intrusion detection systems, may reduce the consequences of third-party intrusion in three ways:

(...)

3. Spill minimization - In the event third-party intrusion results in an immediate rupture, the intrusion alarm, coupled with a release alarm, will allow response to occur more quickly, and potentially reducing the volume released significantly.

Section 10.3 has the caption: *'Detecting and Minimizing Unintended Pipeline Releases'*. In sub-section 10.3.2 *'Types of Release Detection Systems'* the following can, inter alia, be read:

(…)

Pressure point analysis release detection software. Software for this system incorporates two independent methods of release detection: pressure point analysis and mass balance. Pattern recognition algorithms that distinguish normal operating events from leaks are used. When used with a communications system, pressure point analysis can provide the calculated location of a release.

* 1. MD et al. describe an LDS that they deem to be appropriate as follows: a pressure measuring system where sensors are placed at various locations on the pipeline and where, through a data system, the pressure is measures and the measuring results are sent to a control centre where they are monitored at least every hour (section 335 of the SoA/1). The said LDS corresponds essentially / in broad outline with the systems of the API 1160 described above.
  2. The *Design and Engineering Practice* (DEP) 31.40.60.11 of September 2002 (exhibit N.6) issued by Shell Global Solutions International B.V. *'specifies the requirements and gives recommendations for the application of Leak Detection Systems'* (page 4). On page 6, under the header *'Requirement (...)'*, it is noted that *'[a]n LDS reduces the consequences of failure by enabling fast emergency response'*. On page 9, under the header *'Selection Of A Leak Detection System'*, the following text can be found:

*4.1 Primary Functionality*

*The primary functionality is to detect the occurrence and/or presence of a leak. Unless there are substantial reasons for doing otherwise, the selected LSD shall be a real-time, corrected mass or volume balance system (...).*

*(...)*

*4.2 Secondary Functionality*

*(...)*

*Leak location identification is particularly useful where the location of a leak would be difficult or expensive to determine by normal procedures.*

In the *summary* of Appendix 1 (shown in section 90 of the SPE) various LDS are mentioned that have a response time of "*minutes to hours*’.

* 1. It follows from the API 1160 of 2001 and the DEP 31.40.60.11 of 2002 that – as argued by MD et al. in section 78 of the OA/2-MD – well before the leakage of 2005 an LDS as intended by MD et al. had already been available, i.e. an LDS that, without access to the location being required, can quickly detect a leakage in real time, and can even identity the location of the leakage, as a result of which the oil supply cannot only be halted within a short period of time but also, where relevant, ‘specifically’. With this kind of LDS the damages could have been prevented for a (highly) considerable part because the leakage would have been verified (much) sooner, and the oil supply would therefore have been halted (much) sooner.
  2. The argument of Shell in section 278 of the SoD/1 submitted in 2014 that the LDS as intended by MD et al. is a highly sophisticated system that has only recently been placed on the market can, in consideration of the considerations just mentioned in legal ground 6.14, not be accepted. The same fate applies to the argument of Shell in section 279 of the SoD/1 that the LDS described in legal ground 6.12 cannot practically be applied in Nigeria because transmitters operating on solar cells are required to send the data from the sensors to a central point, and the said transmitters and solar cells are exceptionally susceptible to theft in Nigeria. Namely, having regard to the following, this argument lacks sufficient substantiation. The LDS in the API 1160 directed at *Third- Party Damage* (TPD) also uses data transmission. As a fact that is generally known, it is noted that in areas where TPD to pipelines occurs regularly, theft at pipelines is also a frequently occurring phenomenon. It can therefore be assumed that the TPD-LDS is resistant to theft; otherwise this would be a fairly useless facility. Without further elucidation, which is missing, it cannot be appreciated why, in general, LDS in which data transmission takes place, would not be, or cannot be made, resistant to theft.
  3. The system that SPDC used in 2004/2005 – as argued by Shell: as part / form of an LDS (also see, inter alia, sections 82, 530 and 620 of the SoD/SoA-CA/2) – operated by means of a low-pressure security of the pumps in the flow stations. The said pumps ensure that the oil is pumped into the pipe from the flow station to the terminal. If a leakage occurs in a pipe then this results in a loss of pressure. If the pressure drops below a configured value, the pump in the flow station automatically switches off and an alarm sounds after which an investigation into the cause of the leakage is started (section 277 of the SoD/1 and section 82 of the SoD/SoA-CA/2). MD et al. are of the opinion that this system cannot be qualified as an LDS because (a) in case of kilometre-long pipelines it takes too much time before the drop in pressure as a result of a leakage is signalled by this system, and (b) no information is provided about the location of the leakage (sections 271 and 336 of the SoA/2). These arguments are, as can be appreciated immediately, actually correct. MD et al. are consequently the party in the right, which is also underlined in the insight provided by Shell into the HSE case, following the order pursuant to Section 843a of the Dutch Code of Civil Procedure, with document reference number SPDC 2001-188, Revision 2, March 2004 (see sections 270 and 337 of the SoA/2 and section 69 of the OA/2-MD), in which the following can be read:

4.3.4 Leak detection system

There is no installed leak detection system in the pipeline for gas/oil/spill/fire. We rely on feedback from area teams on pressure drops (the aforementioned loss of pressure, Court of Appeal) and the physical sighting of leaks by the communities, Bristol pilots and other third parties (...).

The fact that with the Oruma leakage the loss of pressure in the three days between 26 and 29 June 2005 did not result in the switching off of the pump in the flow station – according to Shell the oil supply was halted on 29 June 2005 – makes it all the more apparent that the low-pressure security of SPDC cannot be qualified as a fully-fledged alternative to an LDS. Shell’s low-pressure security is not an LDS and, in any case, not an adequate LDS. The tighter configuration or setting of the said low-pressure security offers, unlike Shell appears to assume, insufficient remedy. After all, the arguments of MD et al. indicated above under (a) and (b) essentially remain unaffected.

* 1. Now that it has been established that the pipeline at Oruma was not equipped with an LDS, the question must be answered whether – as MD et al. argue, but Shell disputes – SPDC is subject to a duty of care to install an LDS on the same. To assume a duty of care, the *Caparo* test must be met, i.e. the damages must be foreseeable, there must be question of proximity, and a duty of care must, in this case, be fair, just and reasonable (see legal ground 3.18).
  2. First and foremost, it is noted that SPDC carries out the activity of oil extraction in Nigeria, which is (highly) profitable to SPDC, and that the residents are, in their day-to-day life and work, dealing with the adverse consequences of the same, in particular the consequences of the frequent occurrence of leakages in pipes of SPDC (between 1998 and 2007: on average 272 per annum, of which according to Shell 45% could be blamed on defective maintenance and 55% on sabotage). This fact alone implies that SPDC was and is held, in respect of the said residents, to prevent leakages as much as possible and to limit damages resulting from leakages that do occur as much as possible. This general obligation is not disputed by Shell. However, this does not render clear yet what specific obligations (duties of care) are (were) vested in SPDC, and in particular it is not clear yet whether the specific obligation is (was) vested in SPDC to apply a (fully-fledged and adequate) LDS in the Oruma pipeline.
  3. A leakage has already occurred in the Oruma pipeline in 2000, near the location of the 2005 leakage (see, inter alia, page 8, seventh asterisk, page 18, third paragraph, and page 19, second bullet point, of the expert opinion). On page 18, second paragraph, of the expert opinion it was noted about this leakage from 2000 – in an undisputed manner – that it ‘*was also classed as caused by outside interference'*. As follows from page 8, eighth asterisk, of the expert opinion, the ILI Report from 2004 refers to no less than 129,678 spots of corrosion in the Oruma pipeline, of which 37 with a depth of 40-59%. Also if the correction that should be made in connection with the ILI Report of 2016 (page 11, paragraphs 4 up to and including 6 of the expert opinion) is taken into account then – with the experts on page 18, section 5, of their opinion – it must be concluded that internal corrosion is a serious problem in the Oruma pipeline, and had already been a problem in 2004. Having regard to all this, it had already been foreseeable for SPDC prior to the 2005 leakage that in this specific pipeline a leakage would occur (again), as a result of either insufficient maintenance / corrosion or sabotage. Confirmation for this can also be found in a report of SPDC from 2004 (exhibit M.3) about the Kolo Creek-Rumuekpe pipeline (that is the Oruma pipeline, see legal ground 1.d), in which it is noted that it came to the fore from an in-house investigation of SPDC that this pipeline was ‘*likely to leak before the year 2003/2004'* (pages 2-17 of exhibit M.3) and in which, moreover, the following is mentioned (exhibit M.3, pages 2-24):

(...) SPDC shall:

(...)

\* Ensure that immediate repairs are done for corroded/sabotaged sections (...).

* 1. However, what this is about is whether prior to mid-2005 it was foreseeable for SPDC that not applying an LDS at the Oruma pipeline would lead to damages. The Court of Appeal brings to mind that in this case an LDS was only appropriate because it would have offered a solution for the problem that SPDC could not verify the leakage notification due to the refusal of access. If there had not been a refusal of access then an LDS would not have been required. Hence, it specifically boils down to the fact whether it was foreseeable for SPDC – which knew that there was a realistic, increased chance that a leakage would occur in the Oruma pipeline – that if this kind of leakage would occur, it would not be granted access to the location of the leakage.
  2. In the report of WAC Global Services, prepared under the authority of SPDC, of December 2003 (*Peace and Security in the Niger Delta'*, exhibit C.7, see section 298 of the OS) the following can be read (page 13):

(...) SC IN staff and contractors have problems accessing sites for investigation or clean up,

where SCIN stands for: ‘*Shell Companies in Nigeria'* (see page 4). In section 32 of the SoD/SoA-CA/2 Shell indicated that the access is rejected ‘regularly’ by the local population. MD et al. argued in section 300 of the OS that it could also be expected of Oruma that SPDC would not unreservedly receive consent to access the leakage. This position was not rebutted by Shell (in a sufficiently clear manner). On the basis of all of this, it must be concluded that it had been foreseeable by SPDC prior to mid-2005 that it would not obtain access, or delayed access, in case of a leakage in the Oruma pipeline.

* 1. Now that SPDC knew prior to mid-2005 that a leakage could occur in the Oruma pipeline and it was foreseeable for SPDC that it would, in that case, be refused access to the location of the leakage, it was – in consideration that, as established in legal ground 6.14 and SPDC must have known, under these circumstances the damages would have been prevented for a (highly) considerable part with an LDS – foreseeable for SPDC that the failure to install an LDS would result in (considerable) damages for residents.
  2. In 2004 SPDC was, apparently, also of the opinion that, in general, application of a suitable LDS is appropriate, evidencing the comment, following the passage in the HSE case quoted in legal ground 6.16, that:

investigation of suitable pipeline leak detection system for the Niger Delta environment has been identified as a remedial action plan item (...).

* 1. Under the circumstances outlined here, the Court of Appeal considers it ‘*fair, just and reasonable'* to require of SPDC that it would have installed an LDS on the Oruma pipeline prior to the 2005 leakage. The proximity requirement is also met as Oguru, Efanga and the residents for whom MD acts lived and/or worked in the vicinity of the pipeline of SPDC.
  2. The considerations in legal grounds 6.18 up to and including 6.24 imply that SDPC was subject to a duty of care prior to the 2005 leakage to equip the Oruma pipeline with an LDS. It follows from the considerations in legal ground 6.16 that it violated the said duty of care. The failure to install an LDS unmistakably resulted in considerable damages. Namely, when applying this kind of system the oil supply would have been halted considerably sooner and the impact of the leakage would have been correspondingly smaller. An area of at most one or two instead of ten football pitches would have been contaminated (see legal ground 3.34). It must be concluded that SPDC committed tort of negligence by, at the time, not installing an LDS on the Oruma pipeline. Hence, Position II hits home.
  3. The positions of Shell, that at the time it had an operational LDS, that the LDS argued by MD et al. was not available, at least was not practically manageable, and that it was not subject to a duty of care in this respect, lack – as follows from the above – sufficient substantiation and are therefore set aside. There is consequently no room for evidence to the contrary as offered by Shell in section 936 of the SoD/SoA-CA/2.

Position III: closing of oil supply too late

* 1. Shell disputed the position of MD et al. that the oil supply was not halted sooner than on 7 July 2005 in a substantiated manner, see legal ground 6.2.f. MD et al. did not offer witness evidence for this position; their comment in section 352 of the SoA/2, that clarity can exclusively be obtained about the course of affairs by hearing witnesses, cannot be qualified as this kind of offer. Should this have been the case then the offer would have been dismissed due to being insufficiently specific; after all, it is not directed (sufficiently) specific at the position that SPDC did not halt the oil supply prior to 7 July 2005. This position was neither evidenced by the actual arguments i) and ii) of MD et al. discussed in legal ground 6.2.f, which were, after all, also disputed by Shell in a motivated manner, where it is also noted that the said rebuttal appears to be convincing. Nor did MD et al. make a specific offer for witness evidence in respect of these actual arguments. In consideration of the above it must be agreed with Shell that on 29 June 2005 the oil supply was halted by decommissioning the flow stations and closing the *manifold*. Whether there were remotely controllable valves is irrelevant in this light. Remotely controllable valves would, in any case, not have implied that the pipes would have been stopped prior to 29 June 2005 because the leakage was verified only then and, if an LDS had not been installed, could reasonably also only have been verified then (see legal ground 6.9). However, with an LDS the halting could have taken place considerably sooner. Position III is, as must be observed, actually entirely absorbed by Position II, and therefore lacks independent meaning.

Position IV: containing of spilled oil too late

* 1. It is an established fact that the oil spillage was only contained on 9 July 2005. The position of MD et al. that SDPC could (and therefore should) have already started containing sooner was disputed by Shell in a substantiated manner, see legal ground 6.2.c. In this respect it is noted that MD et al. did not make an adequate offer of evidence, in the course of which reference is made to the consideration about this above in legal ground 6.27. Hence, it must be assumed with SPDC that the Oruma community did not grant SPDC access on 29 June 2005 to carry out containment activities, and neither prior to that. MD et al. did not argue that SPDC yet had the opportunity to do this in the period between 30 June and 9 July 2005. A violation of a duty of care in connection with the containment cannot be assumed in these circumstances. Position VI also fails.
  2. MD et al. also based their containment positions on the torts of nuisance and trespass to chattel and on the *Rylands vs. Fletcher* rule. Following on from this it is, first of all, noted that in legal ground 5.30 it was ruled that in connection with the occurrence of the leakage MD et al. no longer have an interest in these legal concepts, and that in the context discussed here (that of the Reaction) the point of departure of the assessment should therefore be that the oil (after having spilled from the hole in the pipeline) was present on the right of way of SPDC. Against this background it is then noted that:
* the torts of nuisance and trespass to chattel cannot assist MD et al. further on account of the fact that the failure of SPDC to contain prior to 9 July 2005 cannot be qualified as unreasonable respectively negligent;
* the strict liability of *Rylands vs. Fletcher* can neither benefit MD et al. as (i) it could, perhaps, be said that the oil that ended up on the right of way of SPDC as a result of the leakage subsequently – due to the non-immediate containment – spilled from that right of way to the adjacent premises, however it cannot be said that SPDC introduced the said spilled oil on the right of way ‘*for his own purposes’* (see legal ground 3.21), so that the condition for application of this rule is not met.

Conclusion in respect of the ‘Reaction’ claims I and III.a-a against SPDC

* 1. Claims I and III.a-a directed against SPDC on account of the Reaction only qualify for adjudication, as follows from the above, to the extent that they are related to the failure to install an LDS. The necessity of applying an LDS as a measure to mitigate damages can also be traced back to the fact that on 26 June 2005 SPDC was refused access by Oguru as deputy chief of the Oruma community. Although something can be said for the standpoint of Shell, that this should be taken into account when assessing the claims filed by Oguru and for the benefit of the Oruma community (the residents), their involvement in the refusal of access can, according to the Court of Appeal, not justify the conclusion that the failure to install and LDS does not result in a violation of a duty of care in respect of Oguru and the residents. To this end there is still insufficient clarity about the (merits of the) reason(s) for the refusal of access, whilst, in terms of the residents, it was not argued, and nor did it become apparent, that all of them lent cooperation in the refusal of access. Moreover, it regards, as indicated in legal ground 6.6, a complex issue, where highly divergent views all fight for prevalence. It follows from the online publication of Cambridge University Press of 28 July 2009 from *'The Tort of Negligence in Nigeria’’* by Jill Cottrell:

‘The most important legislative change, relating to apportionment of damages in contributory negligence cases, has been adopted in all parts of Nigeria' (underlining, Court of Appeal),

that Nigerian law applicable to the assessment of the damages includes the possibility of apportionment of the damages on account of own fault. Perhaps this doctrine can play a role in refusal of access, however whether that is the case, and if so, to what degree, must be discussed in follow-up proceedings for the determination of damages, as argued by MD et al. In respect of Efanga the matter of the refusal of access is, for that matter, not relevant at all because he was, specifically, only connected to a delay of access in the period after 29 June 2005 when the oil supply had already been halted and for which period an LDS was therefore no longer important. This all implies that claims I and III-a.a on the basis of the LDS issue shall be sustained without restrictions.

* 1. In this respect it should also be noted that there is a difference between the adjudication of these claims I and claim III.a-a on account of the Reaction described just now and the adjudication of these claim on account of the Occurrence described in legal ground 5.28. The last-mentioned claims were sustained on the basis of the OPA so that the assessment of the damages should also take place on the basis of the said Act – more in particular Section 20(2) of it. The first-mentioned claims were sustained on the basis of common law, so that the damages must be assessed on the basis thereof.

Claim VII: the order on account of the Reaction

* 1. Claim VII consists of two components. The first component extends to the implementation of an adequate reaction to oil leakages. This component is in line with the description that MD et al. provided in sections 104 ff. of the OS of the *Oil Spill Contingency Plan* already discussed in legal ground 6.5, and is exclusively directed against SPDC as the operator that should implement this kind of plan. According to Shell this obligation was met (inter alia sections 30 and 134 of the MOA-S) and MD et al. did not evidence that this is not the case. The second component is directed against SPDC and the Shell parent companies and entails that they must ensure that any and all conditions for a ‘timely and adequate reaction’ must be met in the event that an oil leakage would again occur near Oruma.
  2. The Court of Appeal shall now assess whether claim VII for an order / injunctive measure can, in terms of the second component with regard to the LDS, be sustained against SPDC.
  3. Following the defence of Shell, that the claimed injunction does not comply with the requirement under Nigerian law that it must have been formulated in a sufficiently precise manner, it is considered that MD et al. brought the LDS up for discussion in these proceedings from the very beginning (see, for instance, section 103 of the OS) as a (timely and adequate) ‘reaction’ in view of limitation of the damages in the context of the Reaction theme, that injunctive claim VII is also related to this theme and the second component of it regards a ‘timely and adequate reaction’ that is unmistakably meant to limit the damages in case of a future leakage at Oruma (also see section 221 of the MOA-MD). It is in any case to that degree sufficiently clear, and should also have been sufficiently clear to Shell, what claim VII entails.
  4. The injunctive claim VII must be assessed on the basis of the present situation (see legal ground 3.7) and in consideration of the criteria mentioned in legal ground 3.13. Guiding principle with this assessment is, moreover, that in a situation where verification of a leakage notification cannot take place, or only with a serious delay, and some other requirements are met (see legal ground 6.22), SPDC is subject to a duty of care to apply an LDS, and that in 2005 SPDC was guilty of a violation of the said duty of care and, therefore, at the time committed a tort of negligence.
  5. The positions of MD et al. in section 64 of the OA/1-MD, read in the light of sections 6 and 7 of it, cannot be interpreted differently than that the pipeline at Goi (the cases c and d) have meanwhile, but that at Oruma still has not, been equipped with an LDS. Shell did not argue that the latter is the case. It should, therefore, be considered to be an established fact that the Oruma pipeline is presently neither equipped with an LDS. Nor is there any indication that Shell intends to yet do this. The violation of the duty of care that was established in connection with the leakage in 2005 – consisting of a failure to install an LDS – has therefore continued to date as a result of which there has meanwhile been question of a prolonged unlawful situation.
  6. In section 83 of the SoD-CA/2 Shell brought to the fore – as it has also done in 2016 (see legal ground 5.14) – that at the time of the submission of the said procedural document (mid-2019) the situation in Oruma was too unsafe to carry out a physical examination. As exhibit 70 Shell submitted a Travel Advice of the Dutch Ministry of Foreign Affairs valid for 2 July 2019 in which Bayelsa State, in which Oruma is located, received code orange (‘only necessary travelling’). It is obvious that under these circumstances the access issues in Oruma further deteriorated compared to 2005 – Shell also drew attention to this (section 917 of the SoD/SoA-CA/2).
  7. In the final report of the experts of 17 December 2018 it is mentioned that in the pipes in the area of Nigeria where Oruma is located ‘*internal corrosion seems to be a major problem'* (page 18, section 5). The chance that a leakage shall occur in the Oruma pipeline in the future as a result of corrosion can therefore not be neglected. The percentage of leakages that can be blamed on sabotage increased, according to Shell (section 29 of the SoD/SoA-CA/2), in the period between 2006 and 2010 to 75% (it had previously been 55%, see legal ground 6.18). In the present unsafe situation, the chance that sabotage takes place should, all the more so, be deemed to be considerable. In the past decade leakages specifically occurred in the Oruma pipeline cause by sabotage (see legal ground 5.34). In short, it is fairly probable that a new leakage shall occur in the Oruma pipeline.
  8. Due to the strongly increased access issues, the chance exists that a new leakage cannot be verified, or only with a (serious) delay, and the chance that the oil supply cannot be halted, or only with a (serious) delay, is therefore. If after a new leakage, which if fairly probably, the oil supply shall not be halted within a short period of time, then Oguru, Efanga and the residents can fear such considerable and far-reaching consequences – a prolonger and serious impairment of their living environment and their possibility of earning an income – that damages cannot offer sufficient compensation. The occurrence of the said adverse consequences can only be prevented by applying an LDS, also taking into account that:
* the procedural documents do not contain a single indication that SPDC would want to consider halting the oil supply merely on the basis of a notification, without relevant verification (in which instance the said damages could also arise without an LDS);
* the additional measures that Shell took, according to the position of MD et al. in section 120 of the OA/2-MD, offer no or barely any remedy as it only regards measures ‘*to prevent illegal tapping’* (see the last sentence of question 4 on page 2 of exhibit Q.75) with which, as an added bonus, a sabotage attempt can be nipped in the bud at most highly incidentally and with which leakages caused by corrosion cannot be detected at all.
  1. It follows from the above that an injunction imposed on SPDC to install an LDS is appropriate to end the existing – and considering legal grounds 6.37 and 6.38 meanwhile even direr – unlawful situation and to accomplish that justice can be adequately done.
  2. By way of defence against the injunctive claims Shell relied on the unsafe situation described in legal ground 6.37 and the associated access issues (sections 30, 133, 914-920 of the SoD/SoA-CA/2). In this respect it emphasised the kidnapping of two Shell employees in April 2019, in the course of which two police officers who accompanied them for their protection were killed. After a week the employees had been liberated by a special commando team. However, this incident took place in Rivers State, and not in the neighbouring Baysela State, in which Oruma is located.
  3. In an internal *Update on Security Operating Levels (SOL) and Security Single Point Approval (SSPA)* *- Niger Delta* of SPDC of 8 May 2019 (exhibit 69) the following message appeared (in which Baysela State and Oruma are not mentioned):

The security situation across the Niger Delta has deteriorated in recent months. We have recorded a number of incidents specially in Rivers State which highlight the security risks associated with operating in the region. The deteriorating security environment is as a result of a combination of violent crime, cult related clashes, political related violence and oil theft bolstered by arms proliferation in the region.

In response, SOLs have been elevated to **BLACK** along the following routes:

(...)

All activities requiring travel through/along these routes must meet the business critical threshold, be preceded by elevated level of approvals (...) and executed with **enhanced** security mitigation.

(...) the rest of the Niger Delta remain SOL **RED** (...)

For the avoidance of doubt, all movements within the Niger Delta are still subject to Security Singe Point Approval (SSPA). All SSPA requests must be processed and submitted for approval by the Manager - Security Operations Centre (SOC) PH at least 24 hours before the actual journey. (...).

It can be deduced from this message a) that security issued particularly occurred in Rivers State, b) that even with the highest security level, SOL **BLACK**, activities that require travelling can still be undertaken, albeit on the basis of certain conditions, and c) that with the lower security level applicable to the remainder of the Rivers Delta (including Baysela State), SOL **RED**, travelling is permitted, provided that an SSPA was obtained. It is – as argued by MD et al. in section 12 of the DE-MD/2 – despite the deteriorated security situation for the SPDC employees therefore possible to continue carrying out activities. This is in line with code orange, which was issued for Baysela State, as a result of which essential travelling is still permitted, and also with the fact that there has already been question of an unsafe situation in Ogoniland in Rivers State since 1993, whilst activities are nonetheless carried out by SPDC in connection with the main pipelines that run through this area (sections 130 and 381 of the SoD/SoA-CA/2, also see sections 157 and 158 of the SoA/2). According to Shell this was even still taking place at the village of Goi in Ogoniland at the start of 2018 (section 106 of the SoD/SoA-CA/2), although the security situation there was (had become) also really bad there in order to have experts carry out a physical examination (section 133 of the SoD/SoA-CA/2). The installation of an LDS falls under, or can be put on part with, ‘important maintenance related activities’ – which Shell understands at the ILI run from 2015 but not the local expert examination – that in the vision of Shell should also be carried out in an extremely threatening situation (section 381 of the SoD/SoA-CA/2). In so far as the defence of Shell as intended in legal ground 6.41 extends to argue that the performance of LDS activities on the Oruma pipeline would be irresponsible or even impossible, this defence is set aside for lack of sufficient substantiation, as a result of which the offer of evidence to the contrary included in, inter alia, section 936 of the SoD/SoA/CA/2 does not get around to.

* 1. SPDC shall be ordered to provide the Oruma pipeline as described in legal ground 1.2 with an LDS that complies with the present state of the art and that quickly, within minutes to hours, without physical access being required, detects a leakage (see legal ground 6.14). This injunction regards both the Oruma II pipeline, which apparently presently serves as the main pipeline, and the Oruma I pipeline, which should be able to take over the function of main pipeline at any time.
  2. On account of the difficulties to be expected – however not insurmountable (see legal ground 6.42) – during the performance of the installation activities in connection with the code orange / SOL **RED** situation in Baysela State, SPDC shall be granted the extensive time limit of one year for this. As SPDC did not alternatively argue moderation or maximisation of the claimed judicially imposed penalties, it must be assumed that there is no reason for this.
  3. The fact that during the leakage in 2005, meanwhile fifteen years ago, Oguru and, potentially, a number of residents personally created, in a certain sense, the necessity of an LDS by not allowing SPDC access to the location of the leakage does, for that matter, not oppose the injunction presently to be issued. Nothing has been argued about any (shared) responsibility of Oguru, Efanga and/or the residents for the present access issues in the area. Already on that ground the *clean hands* condition (see legal ground 3.13) cannot be relied on against MD et al.
  4. With the adjudication of the injunction related to the LDS, in terms of the Reaction theme, the chill must, for the most part, be deemed to be taken out of the air for MD et al. After all, not applying an LDS was the only sore point that such importance could be attached to that it was qualified as a tort of negligence. Assessing on the basis of the criteria mentioned in legal ground 3.13, there is, therefore, no room for a different injunction to be based on one or more of the other measures mentioned by MD et al. in the context of the Reaction theme.

1. The claims against the Shell parent companies on account of the ‘Reaction’

Introductory considerations

* 1. Prior to the assessment of claims I, IIIa-a and VII, second component, on account of the Reaction against the Shell parent companies, a number of introductory comments are made.

1. As elaborated in legal ground 3.33, condition for liability of the parent is, briefly put, that the subsidiary violated a duty of care. On account of the fact that above a violation of a duty of care by the subsidiary (SPDC) has only been established in connection with the failure to install an (adequate) LDS at Oruma, the argued liability of the parent(s) can also only be based on this.
2. Nigeria is of considerable financial importance to the Shell group. In the period between 2005 and 2010 Nigeria made up, for instance, no less than 15% of the worldwide gas and oil production of the Shell group. In 2001 Walter van de Vijver, one of the former managing directors of Shell, described this as follows: *[o]ver the longer term Nigeria will continue to be an extremely important part of our portfolio (...)*' (section 641 of the SoA/2). On the other hand, Nigeria is also a constant source of concern for Shell. In legal ground 6.18 reference has already been made to the large number of annual Shell leakages in Nigeria. It was argued by MD et al. in an undisputed manner that in the period between 2002 and 2007 the Nigerian Shell company (SPDC) was responsible for 33% of the total amount of oil spilled by the Shell group. In the 2005 *Business Assurance Letter* from Malcolm Brinded, at the time one of Shell’s managing directors, to the former CEO of the group, Jeroen van der Veer, the following can be read: *'The Nigerian Delta security and reputation issues continue to be very challenging'* (note 615 with section 652 of the SoA/2, also see section 889 of the SoD/SoA-CA/2), where *'challenging'* was, apparently, used as the known management euphemism for ‘problematic’ or ‘annoying’. Having regard to the observations as intended in legal grounds 6.37, 6.38 and 6.42, the present situation in Nigeria is not particularly less worrisome for Shell. Under these circumstances it can satisfactorily be assumed that the top management of Shell was and still is – either directly or indirectly – involved fairly intensively in SPDC. It follows from the quote from the *Vedanta vs. Lungowa* ruling of the UK Supreme Court mentioned in legal 3.29 and deemed to be normative by the Court of Appeal that *‘[everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (...) of the subsidiary ’* (underlining by the Court of Appeal) that in respect of the question whether the parent is liable it is not so much about whether the parent is, in general, involved in the subsidiary but – as argued by Shell (in, inter alia, sections 91(c), 104 and 116 OA/2-S) – that it boils down to the fact whether the said involvement extends to the actions of the subsidiary on which the liability of the parent is based. In the case at hand this regards the failure of SPDC to apply an (adequate) LDS. The requirement that the parent was or should have been informed of the said actions of the subsidiary moreover applies to the liability of the parent; the knowledge requirement as intended in legal ground 3.30.
3. In connection with claims I and III.a-a on account of the Reaction – which must be assessed on the basis of the state of the art up to and including 9 July 2005, when the Reaction was completed – it is therefore important i) whether at the time there was question of involvement of the parent in the subsidiary that extended to actions / decisions of the subsidiary in the period up to and including 9 July 2005 with regard to the application (or not) of an LDS at the Oruma pipeline, and ii) whether at the time the parent was or should have been informed of the said actions / decisions of the subsidiary. In this respect it regards Shell NV and Shell T&T as the Shell parents in the indicated period (the old parents, hereinafter for the sake of brevity also referred to as: the O Parents), reference is also made to legal ground 3.10.
4. In connection with claim VII, second component, – which must be assessed on the basis of the present state of the art – it must be examined i) whether there is presently question of involvement of the parent in the subsidiary that extends to the actions / decisions of the subsidiary with regard to the application (or not) of an LDS at the Oruma pipeline, and ii) whether the parent is or should presently be informed of the said actions / decisions of the subsidiary. This assessment focuses on RDS as the sole Shell parent.

The knowledge requirement

* 1. Shell disputed (see, inter alia, section 228 of the SoD-Jur) that the O Parents knew prior to July 2005 that the Oruma pipeline had not been provided with an LDS and Shell’s positions also incorporate that they should not have known that. On the other hand, MD et al. did not evidence and did not specify an offer to evidence that the O Parents were or should have been informed of it. Hence, this has remained uncorroborated, as a result of which the knowledge requirement was not met. Claims I and III.a-a against the O Parents consequently already fail to hold water on this ground. Hence, with regard to these claims the ‘involvement’ question no longer needs to be addressed.
  2. The position of MD et al. in section 705 (c) of the SoA/2, that RDS was informed of the fact that SPDC was not able to react adequately in case of leakages, has, on the other hand, in any case been an established fact to the extent that RDS, on the basis of what was brought to the fore in case b, has known, at least should have known, for quite some time that SPDC did not install an (adequate) LDS on the Oruma pipeline. Hence, the knowledge requirement is meet in respect of claim VII, second component.
  3. This implies that, in terms of this claim, the ‘involvement’ matter is relevant and must be assessed. In this respect, the structure of the Shell group should first be addressed as well as the question whether in the said group operating companies like SPDC are managed by RDS / the top management of Shell, and if so, how and to what degree.

The structure of the Shell group and the management within the said group

* 1. In general, the following can be said about the structure of the Shell group, where a distinction is made between the period prior to the restructuring (unification) on 20 July 2005, when the O Parents headed the group, and the period thereafter when RDS became the sole parent (see, inter alia, sections 26-32 and 37-38 of the SoRJ; sections 538 ff. and 565 of the SoA/2 and sections 846-851 of the SoD/SoA-CA/2). The O Parents were the shareholders of the two holding companies of the group (*Group Holding Companies*) - the holdings – that held the shares in the operating companies, including SPDC. Hence, the O Parents were the indirect shareholders of SPDC. The managing directors of the O Parents also acted as the managing directors of the holdings and the boards of directors of the holdings consisted almost entirely of directors of the O Parents. In case of decisions that the holdings reached on account of their share ownership about the operating companies, they were assisted by the *Committee of Managing Directors* (CMD), which exclusively consisted of the managing directors of the O Parents. In addition, there was the *Conference*, an informal consultation body that consisted of the plenary boards of directors of the O Parents. The Shell group had functionally been divided into four so-called businesses – including *Exploration and Production* (E&P or EP), which included SPDC – that were managed by group directors, who were also members of the CMD. In addition, there was a regional division within the Shell group headed by Regional Managing Directors (RMD). Up to and including March 2004, the previously mentioned Walter van de Vijver was the group director of EP and also the RMD for the region that included Nigeria. After that, Malcolm Brinded took over these positions.

The restructuring took place, briefly put, because RDS was placed above the O Parents, where the shareholders exchanged their shares in the O Parents for shares in RDS. Otherwise, the restructuring did not lead to changes that bear relevance to this case, with the understanding that the CMD was replaced by the *Executive Committee*, the *Conference* by the *Board of Directors* and EP by *Upstream*.

* 1. The following comes to the fore in respect of the management within the Shell group from the positions of Shell in sections 42-46 of the SoRJ-a / sections 44-48 of the SoRJ-b, section 190 of the SoD-Jur and sections 859 and 860 of the SoD/SoA-CA/2. The top of the said group – the parent(s) and/or the holdings – adopts policy in areas that bear relevance to the group as a whole, including *Health, Safety & Environment* (HSE) / *Health, Safety, Security & Environment* (HSSE). This policy is ‘elaborated further in guidelines (*standards and manuals)*’ (section 42 of the SoD-a / section 44 of the SoD-b; section 860 of the SoD/2). The *standards and manuals* – which also include the Design and Engineering Practice publications (DEPs) already mentioned in legal ground 6.13 - ‘(*are*) *implemented* by the various *Shell companies*. Compliance with the group policy is monitored at group level (by RDS) by means of, inter alia, the performance of audits.
  2. The *standards and manuals* are prepared and issued by the service companies specifically incorporated for that purpose, including Shell Global Solutions International B.V. (section 190 of the SoD-Jur and section 861 of the SoD/SoA-CA/2). It therefore follows from the position of Shell, that the policy of the top management of Shell ‘(is) elaborated further in (...) (*standards and manuals*)’, that these service companies elaborate the policy adopted by the top management of Shell for implementation by the group companies.
  3. The elaboration that MD et al. provided about the management within the Shell group does, in essence, not differ much from what was outlined above in legal grounds 7.6 and 7.7 (see, inter alia, sections 534, 573 and 634 of the SoA/2 and, in particular, sections 192-195 of the OA/2-MD), albeit that MD et al. made a number of additions / specifications. For instance, according to MD et al., via the EP business information from the operating companies went ‘up’ to the CMD and the management of the CMD on the basis of the said information went ‘down’ again (section 554 of the SoA/2), specific duties in the area of, for instance, maintenance and HSE were provided in the annual business plans with associated budgets that had to be approved by the parent(s), and the operating companies also had to indicate in *Assurance Letters* how they complied with the safety and HSE policy (sections 578- 585 of the SoA/2 and sections 75 and 139 of the SPE).
  4. The intended *standards and manuals* are, according to Shell, more specific than general guidelines and ambitions, however not so detailed that it is prescribed exactly how the operating companies need to act (section 42 of the SoRJ and section 194 of the SoD-Jur). The Shell parents are, according to Shell, not involved in detail in the operations of SPDC (section 203 of the SoD-Jur). MD et al. endorsed this in so far as that in their opinion the *standards and manuals* leave the operating companies with a certain degree of discretion – albeit that they deem it to be framed highly restrictedly by the said central guidelines (section 75 of the SPE) – and the involvement of the parent is limited to matters of a certain importance or consequence (Section 79 of the SPE). On the basis of these mutual positions it must be established that the involvement of the Shell parents does, in any case, not extend to the said free, unregulated degree of discretion and that, in any case, unimportant matters fall under the said degree of discretion.

Involvement in the LDS?

* 1. It now needs to be assessed whether the involvement of RDS extends to the application or not of an LDS on the Oruma pipeline. With, inter alia, their position in section 194 of the OA/2-MD, that the technical standards in the area of LDS are covered by the group standards, MD et al. expressed that LDS are subject to central involvement. In this respect they relied on a number of sources that contain information related to the same. It regards:

1. DEP 31.40.60;
2. the bonus policy of RDS;
3. the witness statement of Rebecca Sedgwick.

The Court of Appeal shall now further address these sources.

Re. a) DEP 31.40.60

* 1. In legal ground 6.13 it was elucidated that DEP 31.40.60 from 2002 contains the recommendation to apply an LDS. In section 89 of the SPE and section 624 of the SoA/2, MD et al. pointed to the following passage, already partly quoted in legal ground 6.13, on page 6 of the said DEP:

An LDS reduces the consequences of failure by enabling fast emergency response. These consequences comprise economic consequences, safety consequences, environmental consequences and the more intangible socio-political consequences. Pipeline leaks can result in bad publicity and penalties, both of which can be reduced by having a proper pipeline integrity management and emergency response system in place including an LDS.

It follows from this observation, that an LDS can reduce the commercial, environmental and publicity consequence of a leakage, that in the opinion of the authors of this DEP the group interest is affected by the application or not of an LDS.

* 1. Shell argued (in section 198 of the SoD-Jur) that the (Nigerian) problem of refusal of access does not occur, or only highly incidentally, in the rest of the world and that the DEPs and HSE manuals (consequently) do not contain specific recommendations or guidelines about it. To the extent that Shell intends to argue that DEP 31.40.60 permits a degree of discretion, as intended in legal ground 7.9, on this point, this line of reasoning cannot be accepted. On account of the fact that there is actually question of a need for an LDS in a situation where, like in Nigeria, the access is refused with great regularity, it is, after all, obvious to assume that this situation is not covered by the recommendation of the said DEP to apply an LDS, even less so now that, according to legal ground 7.11, this certainly does not regard an unimportant matter.
  2. The reliance of Shell in, inter alia, sections 861 and 866 of the SoD/SoA-CA/2 on the fact that the DEP was issued by Shell Global Solutions International B.V., and not by the O Parents / RDS, cannot work to its advantage. After all, it follows from legal ground 7.7 – which is based on the statements of Shell – that Shell Global Solutions International B.V. is, in this respect, a vehicle / extension of the top management of Shell, as argued by MD et al. (sections 622 and 623 of the SoA/2 and section 188 of the OA/2-MD).
  3. Considering all of the above, DEP 31.40.60 can be qualified as an expression of the involvement of all Shell parents in the LDS issues, in particular in Nigeria, (also) considering the considerations yet to be made below in legal grounds 7.16 and 7.17.

Re. b) the bonus policy of RDS

* 1. In section 171 of the MOA-MD and sections 610-613 of the SoA/2, MD et al. relied on the argument that the level of bonuses for the members of the *Executive Committee* of RDS, including Malcolm Brinded, is also determined by the number and the volume of the operational spills. According to MD et al. this shows that RDS exercises influence on it. With Shell, that does not dispute the existence of the bonus policy, the Court of Appeal assumes that the number and the volume of the operational spills have only been taken into account when determining the level of the bonus since 2010.
  2. Shell moreover pointed out (section 876 of the SoD/2) that this regards the aggregated number / volume of operational spills per annum over the entire Shell group. This does – other than it appears to suggest – not alter the fact that the attention shall mostly (also) focus on Nigeria considering the fact that the Nigerian Shell operating company SPDC is ‘responsible’ for a very considerable part of the total amount of oil spilled by the Shell group, in the period between 2002 and 2007 no less than 37% (see legal ground 7.1.b).
  3. The volume of the operational spills in case of leakages of which the verification is not possible or is delayed by access impediments is also, and to a considerable degree, determined by the presence, or not, of an LDS. In this kind of situation, the leakage can be verified within a few hours with an LDS, and the oil supply can subsequently be halted, whilst this can, without an LDS, for instance take three days, as was the case with the leakage at Oruma in 2005. In Nigeria refusal of access is a problem that occurs very frequently (see legal ground 6.6), which must be known at the Shell group, note merely because of the fact just mentioned in legal ground 7.16, but also because, inter alia:
* it is incorporated in the positions of MD et al. in section 160 of the MOA-MD and section 700 of the SoA/2 that RDS was familiar with the WAC Report as intended in legal ground 6.21 and a negative reaction to this from Shell failed to materialise;
* the access issues in Nigeria, and also specifically in Oruma, had already been discussed extensively in the OS submitted in 2009 in the proceedings against RDS (case b) and subsequently also after that.
  1. Having regard to the considerations in legal grounds 7.16 and 7.17 it can be assumed satisfactorily (*res ipsa loquitur*) that the members of the *Executive Committee* responsible for Nigeria – if only because of the not to be neglected influence that it can have on the level of their bonuses – shall, during their (functional or regional) management of SPDC also need to deal with the fact whether the pipelines in Nigeria (including the Oruma pipeline) should be provided with an LDS or not, in the course of which they shall have the ultimate answer also depend on other factors and a cost-benefit analysis. Since 2010, the bonus policy of RDS has therefore implied that the members of its *Executive Committee* shall, in an unreserved manner, have started involving themselves in the way that SPDC handles the LDS matter. This is, for that matter, in line with the framework of DEP 31.40.60, as intended in legal ground 7.11, and can also be qualified as a specific elaboration of it and also as a confirmation of the observation in the same that the LDS matter affects the group interest.

Re. c) the statement of Rebecca Sedgwick

* 1. As exhibit Q.77 MD et al. submitted an extensive written witness statement, dated 18 October 2017, of Rebecca Sedgwick, employed at SPDC between 2006 and 2021, which statement was submitted in the proceedings before the UK Court of Appeal in the case Okpabi vs. RDS, mentioned in legal ground 3.28. The said statement contains, inter alia, the following passage (also see section 70 of the OA/2-MD), where (**I**), (**II**) and (**III**) were included by the Court of Appeal in order to make a distinction between three elements in it:

28. (I) SPDC held numerous meetings, workshops and discussion groups to consider different measures (...). During these events, we discussed various initiatives including:

i. (...)

ii. (...)

iii. Introducing leak detection systems (...)

iv. (...)

V. (...).

29. Senior Shell management from Corporate Security at The Hague, including James Hall (...), regularly attended these workshops and discussion groups in Nigeria. (**II**) However, despite numerous meetings and discussions very little action was actually taken in response to these proposals. The implementation of most of these measures would have involved significant expenditure, which would have required the approval of the Head of Upstream International, an RDS Executive Committee member. (**III**) I can only infer that the implementation of the majority of these measures was blocked by RDS on the basis that they were too expensive.

* 1. On the other hand, on this point – in the form of exhibit 79 – Shell submitted a written statement, dated 9 November 2017, of Dean Emanuel, former manager of Sedgwick at SPDC, which statement was also submitted in the aforementioned English ‘proceedings’. In the statement of Emanuel the statement of Sedgwick is first disputed on the basis of a number of ‘ad hominem’ arguments (‘*Ms Sedgwick was an unreliable employee and a bad leaver'*, sections 12 up to and including 19). In general and considering individually, these kinds of arguments have little power of persuasion. Then, in section 21, Emanuel provides an elaboration about the general position of Sedgwick:

'Ms Sedgwick was a relatively junior employee of SPDC, and removed from decision making processes at SPDC. While (...) she was not herself involved or a participant in the taking of any significant decisions at SPDC. Because of her junior position, and because of her ever more frequent absences from work, she was never in a position to observe first hand what she alleges'.

In section 24 of Emanuel’s statement it can be read that "*Ms Sedgwick seems to suggest (...) that there is a (...) security function that sits outside of SPDC (...) which exercises complete control over security matters at SPDC. This is not my experience at all'*. Section 26 of Emanuel’s statement reads as follows:

‘It is of course correct that we keep relevant colleagues within Business and Functional lines abreast of pertinent information, where it is appropriate to do so. For example, we will copy James Hall on email reporting serious security incidents. However, this does not mean, for example, that James Hall or anyone else can seize complete control of security operations at SPDC. That suggestion is simply false'.

* 1. The *meetings, workshops and discussion groups* referred to by Sedgwick in part (I) of her statement were, apparently, not fora where decision-making took place; Sedgwick indicated that *'during these events' 'various initiatives'* were discussed, and Emanuel did not argue that decisions were (also) reached. The comment of Emanuel that Sedgwick was *'removed from decision making processes at SPDC’* and his comments in section 21 of his statement following on from that can, therefore, not be qualified as a rebuttal of part (**I**) of Sedgwick’s statement. For the remainder, nothing in Emanuel’s statement indicates that the statement of Sedgwick – hence: based on personal observation – about the m*eetings, workshops and discussions* and everything that took place during the same, would not be correct. On the basis of part (**I**) of the statement of Sedgwick, the Court of Appeal deems it to be established that the introduction of an LDS was discussed between SPDC and representatives of *'The Hague'* (apparently RDS, see legal ground 1.b). This shall not have regarded a mere exchange of information on the basis of equality. The statements of Sedgwick in part (**II**) – i.e. that the fairly costly initiatives were not followed up and that the reason for it must have been that RDS did not give approval for it – can also be traced back to personal observation. As a participant in the meetings she must be assumed to be familiar with the overall price tag associated with the measures discussed and the knowledge that most costly projects require approval ‘from the top’ is not reserved for persons with a special (more than *'junior'*) position, which did, according to Emanuel, not apply to Sedgwick. An approval system for larger expenses is not the same as the *'complete control'* that Emanuel refers to. Part (**II**) of Sedgwick’s statement was, consequently, not rebutted by Emanuel in a convincing manner. All in all, there is neither reason to doubt the correctness of this part of the statement, which brings to the fore, in addition to part (I) of Sedgwick’s statement, that RDS was involved in the question whether an LDS should be applied in Nigeria. The strong emphasis that Emanuel places on the absence of specific *'complete control'* does, for that matter, suggest that there was, or could be, question of a less far-reaching variant of involvement, e.g. influence or interference. To this extent, a confirmation of Sedgwick’s statement can even be read in his statement. In the light of the words used in it by Sedgwick *'I (...) infer'*, part (**III**) of her statement can, for that matter, not unreservedly be assumed to be correct in these proceedings.
  2. The arguments brought to the fore by Shell in section 113 of the OA/2-MD, irrespective of Emanual, against Sedgwick’s statement, cannot alter parts (**I**) and (**II**) of it. After all, Shell does not – either directly or indirectly – address these specific parts.
  3. The written statement of Sedgwick forms, recapitulating the above, evidence for the position of MD et al. represented in legal ground 7.10 that LDS are subject to central involvement.

Conclusion in respect of the involvement question and the further assessment

* 1. Having regard to the considerations in legal grounds 7.11 up to and including 7.23, it follows from the three indicated sources – all individually but certainly also when they are (partly) considered collectively – that RDS is, in any case from 2010, specifically (and fairly intensively) involved in the question whether the pipelines in Nigeria should be provided with an LDS, and therefore also in the question whether an LDS should be applied on the Oruma pipeline. The general defence of Shell, not directed at the LDS, that RDS is not involved in the operational activities of SPDC at a detailed level is so little specific in this respect that it cannot be qualified as a convincing and/or sufficiently substantiated rebuttal of the position of MD et al. as intended in legal ground 7.10. The said defence is therefore, also on account of the lack for sufficient substantiation, set aside, as a result of which there is no room for the offer of evidence to the contrary on this point made by Shell in section 93 of the SoD/SoA-CA/2. Nor did Shell indicate what Emanual could declare more or differently compared to his written statement submitted to this Court. With regard to claim VII, second component, the ‘involvement’ requirement is therefore met.
  2. Upon the further assessment of claim VII, second component, against RDS reference is, first of all, made to the considerations in legal grounds 6.32 up to and including 6.46, which is (where possible) equally applicable here. Repeating and, where required, supplementing some key points, the following is considered on account of the said further assessment.
  3. With regard to the Oruma pipeline there is still question of an unlawful situation caused by the subsidiary SPDC, which consists of the fact that to date it did not provide the said pipe with an LDS. RDS has been informed of this for quite some time (see legal ground 7.3). Nonetheless, it did not rely on its authorities pursuant to the (indirect) share ownership of SPDC and already specifically given substance to with its involvement in the area of LDS, although it – already on the basis of the documents exchanged in these proceedings – has known or should have known for quite some time that the lack of an LDS in the fairly probable event that a leakage shall (again) occur in the Oruma pipeline shall (can) have highly considerable adverse effects for Oguru, (the heirs of) Efanga and the other residents. There is question of proximity between RDS and these people from Oruma, which the Court of Appeal deduces from the consideration in the ‘*Vedanta vs. Lungowe'* ruling that *'the result would surely have been the same if the dust had escaped to neighbouring land where third parties, worked, lived or enjoyed recreation'*. After all, this extended the decision in the case *Chandler vs. Cape*, that the parent is liable vis-à-vis the employees of the subsidiary who were exposed to asbestos by the subsidiary, to third parties, with whom the people of Oruma can be compared. Under the circumstances outlined here, it is fair, just and reasonable to assume a duty of care of RDS to ensure that an LDS is installed on the Oruma pipeline. It did not comply with this duty of care, so that there is also question of an unlawful situation on its part. On account of the fact that SPDC has been unwilling for an exceptionally long period of time, even despite the increasing need for it, to install an LDS on the Oruma pipeline it is, in order that *justice can be adequately done*, necessary to also impose an injunction on RDS with which it can, as much as possible, be ensured that the Oruma pipeline is finally equipped with an LDS.
  4. RDS shall be ordered to ensure that an LDS as intended in legal ground 6.43 shall be installed on the Oruma pipeline, i.e. the Oruma I pipeline and the Oruma II pipeline, within one year, (also) see legal ground 6.43.
  5. It is also mentioned that RDS is a company under English law and that, as a rule of English company law, it is indicated in the *Vedanta vs. Lungowe* case that *[d]irect or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business (...) ’*, see legal ground 3.29.
  6. Now that RDS did not alternatively argue moderation or maximisation of the claimed judicially imposed penalties, it must be assumed that there is no reason for it.

1. 1. The claims on account of the ‘Decontamination’

Introductory considerations

* 1. Claims I, III.a, IV and V on account of the Decontamination are based on the positions that SPDC is (was), as the operator of the pipeline – irrespective of the cause of the leakage (section 113 of the OS; section 495 of the SoA/2, section 125 of the OA/2-MD), and therefore also if Shell was unable to do something about it – subject to a duty of care to adequately decontaminate the soil and water sources contaminated by the oil leakage of 26 June 2005, that it did not carry out the decontamination properly (section 413 of the SoA/2), as a result of which it violated the said duty of care and that it consequently committed a tort of negligence (see, inter alia, sections 316-372 and 424-428 of the SoR and sections 382 and 498 of the SoA/2). Claims I and III.a-a extend to establishment of this in court, as a start of respectively prelude to compensation on account of the improper decontamination. Claims IV and V intend to have the soil and the water sources yet properly decontaminated / purified; also the contamination still remaining after the decontamination must be cleared.
  2. To begin with, the following should be addressed. Claims I and III.a-a on account of the Occurrence were sustained against SPDC. Having regard to the adjudication of this claim I, SPDC is held to compensate Oguru and Efanga for the damages that they incurred as a result of the leakage, albeit that the level of the said damages still needs to be determined in follow-up proceedings for the determination of the damages. The adjudication of claim III.a-a has a comparable effect for the other residents. The damages that were caused by the leakage primarily consist of the contamination of the soil and water sources, and the obligation of SPDC to pay compensation also has the objective of addressing these damages. The level and the form of the compensation are determined on the basis of Nigerian law. If it would be the case, as argued by MD et al. in section 383 of the SoR, that under Nigerian law in case of compensation the *restitutio in integrum* principle applies as the main rule, then the thought arises that potentially already on account of the compensation that is payable on basis of the adjudication of claim I, and perhaps also claim III.a-a, on account of the Occurrence, complete decontamination of the contamination caused by the leakage must take place, at least an amount must be paid with which the said complete decontamination can be accomplished. The same thought could arise as a result of the adjudication of claims I and III.a-a on account of the Reaction/LDS. Then at the same time the question would arise – as also raised by them in section 114 of the MOA-MD – what interest MD et al. still have in the assessment of the claims on account of the Decontamination based on violation of a duty of care as intended in section 8.1. Whether Nigerian compensation law actually departs from *restitutio in integrum*, what the consequences of this could be for this case and whether the thoughts formulated above are correct, should, however, be decided in the follow-up proceedings for the determination of damages, so that it cannot be said yet that the interest of MD et al. in the assessment of the claims on account of the Decontamination due to the adjudication of claim I and III.a-a on account of the Occurrence and the Reaction is absent. In this respect it can also still be relevant that claims I and III.a-a on account of the Decontamination are based on common law, whilst claims I and III.a-a on account of the Occurrence were sustained on the basis of the OPA (cf. also legal ground 6.31). The latter-mentioned claims against the Shell parent(s) were, moreover, deemed to be non-sustainable, so that the claims on account of the Decontamination against the parent(s) are not (directly) affected by the matters discussed here.
  3. Shell argued against the claims on account of the Decontamination (hereinafter for the sake of brevity referred to as: the Decontamination Claims) that it decontaminated in a timely and adequate manner (sections 721 and 722 of the SoD/SoA-CA/2). In this respect it pointed to, inter alia, the Clean-up Report of May 2006 and the Clean-up Certificate of August 2006, as intended in legal ground 1.l.h and i.
  4. The line of reasoning followed by MD et al. in the context of the Decontamination Claims are, for an important part, based on the standpoint that it is up to SPDC ‘as the responsible operator’ to evidence that it decontaminated properly (sections 447 and 496 SoA/2, also see sections 406, 410 and 413 of the SoA/2), which according to MD et al. follows neither from the Clean-up Certificate nor from the Clean-up Report (sections 421 and 444-469 of the SoA/2 and sections 135 ff. of the OA/2- MD). This standpoint is, however, incorrect as the party, like MD et al. in this case, relying on the fact that a tort of negligence was committed, bears the onus of evidence and the obligation to furnish facts (see legal grounds 3.14 and 3.18). With the position also raised by MD et al. in this respect that SPDC is the only party that disposes of the information regarding the soundness of the decontamination, they fail to appreciate that they could have carried out the proper measurements on location themselves; in connection with this case employees of MD visited Nigeria on several occasions (see exhibit M.12). To the extent that with this position MD et al. meant that SPDC solely disposes of information about the manner that the decontamination activities were performed, relevance is absent, having regard to the considerations in legal ground 8.22. Hence, the said position cannot – as MD et al. appear to argue – justify a reversal of the onus of evidence. Nor can the said position imply, for the reasons enumerated above, that Shell is subject to a heavier obligation to provide grounds.

The EGASPIN recommendations

* 1. For the substantiation of the Decontamination Claims, MD et al. rely on a number of recommendations from EGASPIN from 2002 (see legal ground 3.19), of which the main recommendations are provided below.
  2. In Part VIII B of EGASPIN – which is dedicated to the *Oil Spill Contingency Plan*, see under section 2.0 on page 145 – the following is, inter alia, mentioned (pages 148, 150 and 152):

***2.6 Containment Procedures and Clean- Up of spills***

*2.6.3 (...)*

*(i) For inland waters/wetland the lone option for cleaning spills shall be complete containment and mechanical/manual removal. It shall be required that these clean-up methods be adopted until there shall be no more visible sheen of oil on the water.*

*(...)*

**2*.11 Remediation/Rehabilitation of Affected Area***

*2.11.1 It shall be the responsibility of a spiller to restore to as much as possible the original state of any impacted environment. The process of restoration shall vary from one environment to another. (See Part VIII F).*

*(...)*

*2.11.3 (...). The restorative process shall attempt to achieve acceptable minimum oil content and other target values (...) in the impacted environment, (also see Part VIII F).*

*(i) For all waters, there shall be no visible oil sheen* ***after*** *the first 30 days of the occurrence of the spill (...).*

*(ii) For swamp areas, there shall not be any sign of oil stain within the first 60 days of occurrence of the incident.*

*(iii)* ***For land/sediment, Ute quality levels ultimately aimed for (target value) is SO mg/kg, of oil content, (see Part VIIIF).***

*(...)*

***4.0 Mystery Spills (Spills Of Unknown Origin)***

*4.1 An operator shall be responsible for the containment and recovery of any spill discovered within his operational area, whether or not its source is known. The operator shall take prompt and adequate steps to contain, remove and dispose of the spill.*

* 1. Part VIII F of EGASPIN has the caption *'management and remediation of contaminated land'*. Under section 8.0 of it, on page 278, it is mentioned: *'Intervention and Target Values'*. This includes, inter alia, the following (on pages 278 and 279):

*8.1.1 The intervention values indicate the quality for which the functionality of soil for human, animal and plant life are, or threatened with being seriously impaired. Concentrations in excess of the intervention values correspond to serious contamination.*

*(...)*

*8.1.2.2 Target values indicate the soil quality required for sustainability or expressed in terms of remedial policy, the soil quality required for the full restoration of the soil’s functionality for human, animal and plant life. The target values therefore indicate the soil quality levels ultimately aimed for.*

In table VIII-F on page 280 the intervention value for contamination for ‘*soil / sediment'* by *'mineral oil'* (in short: oil) was set at 5,000 mg/kg and the target value at 50 mg/kg. For ‘*groundwater'* these values were set at, respectively, 600 and 50 μg/1.

* 1. The Court of Appeal brings to mind (see legal ground 3.19) that the non-binding standards of the EGASPIN can serve to specify or colour a duty of care, depending on the nature and content of the same; some recommendations are suitable for specification of a duty of care, and others are not. For instance, the recommendation in Part VIII B 4.1, that the operator, also if the operator is not responsible for the occurrence of the leakage, ‘*shall take prompt (...) steps to contain, remove and dispose of the spill'* in such specific manner that it can serve to colour a duty of care, however the recommendation mentioned in the same sentence that the operator ‘*shall take adequate steps (...)*' is too vague for that. After all, what is *adequate*, is not clear in itself, other than the word ‘*prompt'*, which indicates that (the first) steps must be taken directly, without tarrying, in order to contain and remove the spilled oil. Article 2.11.3 of Part VIII B that in its header refers to an ‘*attempt to achieve'* is, due to its nature, not suitable as a foundation for an enforceable obligation under civil law.

The further assessment of the Decontamination Claims

* 1. Upon the further assessment of the Decontamination Claims a distinction shall be made between the temporal aspects of the decontamination, the decontamination of the soil, and the water decontamination.

The temporal aspects of the decontamination

* 1. In section 377 of the SoA/2 MD et al. pointed to the obligation to start the decontamination as soon as possible where they, apparently, envision the recommendation just discussed in Part VIII B 4.1 of EGASPIN, that steps must be taken ‘*promptly'* ‘*to remove and dispose of the spill'*. For the relevant explanation they pointed, in section 380 of the SoA/2, inter alia, to their positions on the Reaction theme. In this context, the actions of Shell in the period up to and including 9 July 2005, when the oil was contained, have already been assessed. In respect of the period between 9 July 2005 and the date of the start of the decontamination, 18 August 2005, Shell has already taken a standpoint in the first instance, which boils down to the fact that the access was refused up to 18 August 2005 (section 87 of the SoD-a and section 57 of the SoD-b, also see section 97 of the SoD/SoA-CA/2). This was not disputed by MD et al. In section 487 of the SoA/2 MD et al. argued that between the leakage on 26 June 2005 and the decontamination approximately a year has lapsed, however in this respect they did not specify that, let alone why the decontamination – started in August 2005 and concluded in June 2006 – could and should have been carried out faster. Considering all of this, in terms of the temporal aspects of the decontamination, a violation of a duty of care by SPDC cannot be assumed.

The decontamination of the soil

* 1. In connection with the decontamination of the soil two values are mentioned in EGASPIN; the intervention value and the target value. According to Shell, a decontamination up to below the intervention value (section 702 of the SoD/SoA-CA/2) must be assumed. However, MD et al. are of the opinion that it is not sufficient that the hazardous substances – i.e. *mineral oils (Total Petroleum Hydrocarbon,* abbreviated as TPH) and *metals* – remain under the intervention values. The objective of returning the soil to the old state and the established target values brings about, in their opinion, a best efforts obligation on the part of the operator to set up the decontamination in such manner that the said target values are reached as much as possible (sections 387-389 of the SoA/2). MD et al. emphasise that the intervention values are not the decontamination objective and that the criterion of the EGASPIN implies that the soil is returned, as much as possible, to the old state and that in case of sensitive areas, e.g. *mangrove areas*, the contamination is removed in its entirety (sections 391 and 433 of the SoA/2).
  2. The expert hired by MD et al., Ir Th. Edelman, wrote the following on page 9 of his report dated 5 September 2020 submitted as exhibit Q.72:

*1. In the EGASPIN the objective of a soil decontamination is discussed at various locations.*

*(...)*

*5. The decontamination objective can be deduced from the conditions for the conclusion of a decontamination:*

*1 the intervention values cannot be exceeded after conclusion, and*

*2 the absence of the need for monitoring must be apparent.*

The Court of Appeal understands from the text at the top of page 9 with *’monitoring'* and from the final three paragraphs on page 13 that the condition under section 5.2 refers to the situation that there is, potentially, still a residual contamination exceeding the intervention value: if the said possibility is not excluded then the absence of the need for monitoring has not been demonstrated. In this light the quoted passages from the Edelman Report can hardly be understood other than that the decontamination objective is realised when the intervention values are not exceeded. In sections 50-52 of the OA/2 Shell rightly pointed to this.

* 1. As exhibit Q.32 MD et al. submitted a report of the *United Nations Environment Programme* (UNEP) from July 2011. On page 4 a bar graph with soil samples is shown in which it can be seen that only sample 23 exceeds the *'EGASPIN intervention value'* of 5,000 TPH, and that a number of other samples have a value between 50 and 5,000 TPH. Below this, on the same page, a graph is shown regarding the ‘*soil samples depth'*, where it is only noted with sample 23: ‘*Exceeding EGASPIN*, and with all other samples: *'Not exceeding EGASPIN*’. This therefore indicates that the UNEP (also) assumes that only in case of a transgression of the intervention values the EGASPIN standard is exceeded.
  2. That it is noted in the report of the International Union for Conservation of Nature (IUCN) from July 2013, submitted by MD et al. as exhibit O.6, that *'the current intervention levels (...) are inadequate'* (page 41) can – contrary to the opinion of MD et al. (section 439 of the SoA/2) – not carry any meaningful weight. This comment is part of *'recommendations'* for the future (see the caption with section 4.2 on page 41 and section 441 of the SoA/2) and essentially confirms the validity of the *'current intervention levels'*. The recommendation of IUCN was neither followed by Edelman in his report from 2020.
  3. On the basis of the considerations in legal grounds 8.12 and 8.13 it must be concluded that in the relevant circles EGASPIN, more in particular Part VIII F of it, is interpreted in the manner advocated by Shell, namely comprising that it is sufficient for a decontamination that it arrives under the intervention value. The different standpoint of MD et al. is dismissed.
  4. The specific recommendation of EGASPIN to have the intervention value be normative is suitable for specification of the duty of care of the operator. The same cannot be said about the general obligation of the operator set forth in article 2.11.1 of Part VIII B of EGASPIN *'to restore as much as possible the original state of any impacted environment'*. This description is too vague for this – what does *'as much as possible'* mean exactly? – which is also underlined by the fact that in this article reference is made to *'part VIII F’* for the elaboration of the said general obligation. And the said elaboration in Part VIII F implies, as just established, that the intervention values must be examined.
  5. Having regard to legal ground 8.15 and the first sentence of legal ground 8.16 a duty of care of SPDC must be assumed to decontaminate under the intervention values. Having regard to the considerations in legal grounds 8.12 up to and including 8.15 and 8.16, second and third sentence, it can, however, not be assumed that it is subject to a decontamination duty of care that entails more than the realisation of the said result.
  6. In February 2008 Bryjark Environmental Services Limited (hereinafter referred to as: Bryjark) issued a research report under the authority of a Nigerian sister organisation of MD in which it addresses the question whether the oil contamination by the oil leakage at Oruma was decontaminated sufficiently. In this report – submitted by MD et al. as exhibit B.2 – the following is, inter alia, mentioned (in table 3.4 on page 36):

Total Petroleum Hydrocarbon Concentration in Soil Samples

|  |  |  |
| --- | --- | --- |
| *S/No.* | *Study Station* | *TPH (mg/kg)* |
| *1.* | *Oruma 1* | *24.3* |
| *2.* | *Oruma 2* | *4,348.0* |
| *3.* | *Oruma 3* | *25.3* |
| *4.* | *Oruma 4* | *27.6* |
| *5.* | *Oruma 5* | *6,991.0* |
| *6.* | *Oruma 6* | *12.0* |

Hence, with the *Study Station 'Oruma 5'* a sample with a concentration of TPH ('*mineral oil’*) exceeding the intervention value was observed, and with the *Study Station ‘Oruma 2'* a sample with a high value. In legal ground 4.58 of the ruling the District Court considered that it was argued insufficiently, or it had become insufficiently clear, that these two high measuring results can be attributed to the present oil leakage in June 2005. In legal ground 4.60 the District Court also ruled, on the basis of this consideration, that the alleged insufficient decontamination had not become an established fact. MD et al. did not submit grounds for appeal against the consideration in legal ground 4.58, so that on appeal it must be assumed that the two high values are not the result of the leakage from 2005. Nor did MD et al. argue on appeal that the consideration of the District Court, that the high values cannot be attributed to the 2005 leakage, could not / cannot also support its opinion that the decontamination was not sufficient, so that on appeal it must, moreover, be assumed that a transgression of the intervention values not attributable to the 2005 leakage cannot result in adjudication of a claim of MD et al. This does, for that matter, also follow from legal ground 3.4 of this ruling. On the basis of the Bryjark Report it can, in short, not be determined that a relevant transgression of the intervention values took place. MD et al. did not argue on grounds other than the report (in a sufficiently substantiated manner) that the intervention value for *mineral oil* was exceeded.

* 1. In section 431 of the SoA/2 MD et al. argued that heavy metals were detected in exceedingly high concentrations, without, however, specifying that they refer to the decontamination area at Oruma (also see sections 456-462 of the SoA/2). It can be deduced from sections 462 and 494 of the SoA/2 and section 163 of the OA72-MD that this position is related to a different decontamination area, Ikot Ada Udo, in respect of which other proceedings between MD and Shell are pending to which the SoA/2 is also related (the cases e and f). The confirmation for this can be found in chapter 4 of the Q.72-Edelman Report where only Ikot Ada Udo is mentioned as a location where heavy metals were reported and in the comment on page 6 with section 10 of the said report, that *'it follows from the report [17]*' that there is still a high concentration of lead and mercury, where it is noted that report [17] regards, according to chapter 8 of an earlier report of Edelman, submitted as exhibit Q.30, Ikot Ada Udo. That there were still heavy metals in the soil after the Oruma decontamination, cannot be assumed with this state of affairs.
  2. The duty of care described in legal ground 8.17 to decontaminate up to under the intervention values was, as follows from the above, not violated. On account of the fact that the said duty of care does not require that in case of a decontamination all spilled oil is removed, but that the oil is only cleaned up to under the intervention value, oil residuals can still be present after a decontamination that was carried out in accordance with the said duty of care. This implies that MD et al. cannot derive any argument from the fact that not all spilled oil was cleaned. According to a specification of Shell, 350 of the 500 spilled barrels were decontaminated and even if, as argued by MD et al. in section 488 of the SoA/2, the decontaminated concentration would be lower then this can, therefore, not benefit MD et al., also in consideration of the fact that it was not substantiated, let alone demonstrated, that the decontaminated volume was so low that there must be question of a transgression of the intervention values that can be traced back to the 2005 leakage.
  3. According to MD et al. the contamination also resulted in ‘ecological stress’ and this is still the question (section 435 of the SoA/2 and section 162 of the OA/2-MD). In section 435 of the SoA/2 and section 5.6 of the report of Edelman submitted as exhibit Q.30 it is mentioned that ecological stress can also occur in case of low concentrations of oil. This means that ‘ecological stress’ can also occur in case of a decontamination that is in accordance with the duty of care vested in SPDC. The reliance on ‘ecological stress’ can, therefore, neither hold water.
  4. In terms of the soil decontamination the duty of care of SPDC consists of a result obligation (with regard to the intervention values), which it complied with. As the required result of the decontamination was accomplished, it no longer bears relevance how the decontamination was realised and whether it should, perhaps, have been set up and carried out in a different, and in general a ‘better’ manner. The positions of MD et al. (inter alia in sections 377 and 496 of the SoA/2) that, also having regard to the relevant recommendations from EGASPIN, SPDC:
* should have conducted a prior investigation into the appropriate decontamination method, as a result of which, inter alia, the use of the RENA method would have been abandoned (sections 393 and 423-425 of the SoA/2);
* should have diligently analysed the manner and effects of the decontamination;
* should have monitored the surroundings during and after the decontamination (sections 411, 412 and 474 of the SoA/2),

fail on this. It cannot be assumed that the failure of an operator to act in accordance with these recommendations results in a violation of a duty of care when the final result complies with the duty of care vested in the operator. The Court of Appeal also points out that MD et al. also departed from the primacy of final result in section 346 of the SoR, however applied in a reversed situation: *‘[b]ut also if RENA would be an internationally accepted method then Shell could not have released itself from its duty of care upon application of the said method, if the results are nonetheless dissatisfactory'*. Needlessly, it is also added that the criticism of MD et al. in respect of the application of the RENA method in this case is, mostly, based on the – disputed (section 724 of the SoD/2) – position that, now that it took some time before the said method was applied, it is ‘plausible’ / ‘probable’ (sections 421 and 429 of the SoA/2), that the oil had penetrated up to under the excavated 30 centimetres, however that, considering the use by MD et al. of the words ‘plausible’ and ‘probable’, it was not argued, let alone evidenced, specifically that this also actually happened. It was, in any case, not demonstrated that in this respect the normative intervention values were exceeded.

* 1. However, with the considerations in legal ground 8.22, the note can still be made that a manner of decontamination that resulted in additional damages, in addition to the damages that had already been caused by the leakage, can, however, potentially be qualified as a violation of a duty of care. The only additional damages that MD et al. presented in this context are the result of the burning of oil at, in their opinion, unsuitable locations (open dumpsites and waste pits) as a result of which trees and crops would have burnt (sections 34 and 118 of the OS; section 489 of the SoA/2). Shell disputed this, arguing that it regarded a controlled burning in pits (SoD/SoA-CA/2 under section 98 (iii), with note 138). As MD et al. neither furnished nor offered evidence of the improper manner of burning argued by them, their relevant position is set aside as unevidenced. That there was question of additional damages is, therefore, not an established fact.
  2. Having regard to the above, it cannot be assumed that SPDC violated a duty of care / committed a tort of negligence during the decontamination of the soil.

The water decontamination

* 1. In the first instance MD et al. argued with regard to the fish ponds and (other) surface water that after the decontamination action of SPDC oil sheen was still visible on the ponds of Oguru and Efanga (section 342 of the OS; section 344 of the SoR), in this respect relying on articles 2.6.3(i) and 2.11 -3(i) of Part VIIIB of EGASPIN, in which it is noted that decontamination must take place in such manner that an oil sheen is no longer visible (section 327 of the SoR). In its ruling the District Court did not expressly address the decontamination of the surface water, however it did dismiss the claims based on it, with which it implicitly dismissed this position of MD et al. MD et al. did not, in so many words, submit grounds for appeal against this and they neither repeated in the SoA/2 or their previous appeal documents that after the decontamination an oil sheen was still present, so that no implicit ground for appeal can be read in these documents. With this state of affairs, it must be assumed on appeal that after the decontamination an oil sheen would no longer be visible on the surface water. On account of the two-statement rule there is, basically, no more room for a new ground of appeal after the SoA/2. Moreover, in the procedural documents submitted after the SoA/2 – the SoA-CA/2 (see section 107) and the OA /2-MD – it was not argued (sufficiently clearly) that there was still an oil sheen on the water after the decontamination.

If a ground for appeal of the said scope would have been submitted (in a timely fashion) then this would, for that matter, not have benefitted MD et al. Other than they suggest in note 209 with section 344 of the SoR it cannot be found in the Bryjark Report that there was a sheen on the water. With exhibit Q.64, submitted with the SoD-CA/2, MD et al. submitted (black and white) photos of the ponds to the court that, according to the captions, were taken in 2008, hence after the decontamination, however they neither show an oil sheen in a sufficiently clear manner As MD et al. did not offer (further) witness evidence on this point, it has therefore remained unevidenced that there was still question of an oil sheen after the decontamination.

* 1. If follows from the Bryjark Report that after the decontamination oil (TPH) had still been present in the surface water at Oruma, in a concentration of 0.17-1.35 mg/1 (page 37). In this respect (on page 5) it is, indeed, mentioned that this concentration ‘*can exert negative impact*', however not how considerable this potential impact is. The report contains (further) indications in the following passages that the meaning of the said impact on specific surface water and fish must be put into perspective:
* *(...) there has been a significant decrease in the hydrocarbon concentration especially in the surface water based on the relatively dynamic nature of the water system in the area (p. 5);*
* *Previous studies have shown that oil trapped in soils and sediments persists much longer and is likely to cause more environmental problems than oil in water (p. 37);*
* *Adult fish are able to avoid oil-tainted water masses, because they can perceive the presence of oil in very low concentrations. In the event of an oil spill, fish may be exposed to concentrations of oil in water that may be too low to cause death (...) (p. 37).*

In section 162 of the OA/2-MD MD et al. noted that Bryjark establishes that there is *reduced life in (...) the ponds'*. In the light of all of this, and having regard to the considerations in legal ground 8.25, the position of MD et al. (in sections 413, 416 and 495 of the SoA/2), that the ponds were still so seriously contaminated after the present decontamination that fish could no longer live or be cultivated in them, lacks sufficient substantiation. No specific offer for witness examinations were made in respect of the said disputed position – for which the Bryjark Report does, for the aforementioned reasons, already not provide evidence and for which no specific evidence can neither be found elsewhere in the dossier – so that it did, in any case, remain unevidenced. The mere fact that a concentration of TPH was still present in the surface water that can have a negative impact on the environment after the decontamination, but of which the size is unknown – and that can therefore be absent or modest –, cannot justify the conclusion that SPDC violated a duty of care during the decontamination of the surface water.

* 1. In sections 421 and 471 of the SoA/2 MD et al. also brought to the fore that it is ‘plausible’ that the contamination has reached the groundwater / that this is ‘almost always’ the case. However, this does not argue that this was also actually so in the case at hand, and in any case not that this took place in a manner that the (decisive) groundwater intervention values (see legal ground 8.7 *in fine*) were exceeded. Although it had been obvious for them to do so, considering the substantiated defence of Shell in section 724 of the SoD/SoA-CA/2, that it was highly implausible that the contamination had penetrated deeper than the upper 30 centimetres of the soil, MD et al. did, moreover, not offer to evidence that this had indeed happened. In terms of the groundwater a violation of a duty of care by SPDC can, therefore, neither be established.

Conclusion in respect of the Decontamination Claims based on negligence

* 1. Now that a violation of a duty of care in respect of the decontamination carried out by SPDC has not become an established fact, the Decontamination Claims cannot be sustained, neither if they are directed against the Shell parent(s) and neither to the extent that they are related to the future. The decontamination duty of care of SPDC, which is not related to the question whether the leakage can be blamed on SPDC, does, after all, not extend so far that it must clean the entire contamination. The residual contamination that is still present does in this case, therefore, not constitute an unlawful situation. The Court of Appeal also notes in this respect, with reference to legal ground 8.2 that an obligation of SPDC to decontaminate in full can, potentially, derive from the obligation of SPDC to pay compensation on account of the occurrence of the leakage (legal ground 5.28), and perhaps also (partly) from the obligation vested in the same to pay compensation for the damages that are the result of not applying an LDS (legal ground 6.30).

The Rylands vs. Fletcher rule

* 1. MD et al. also partly supported their Decontamination Claims on the rule of *Rylands vs. Fletcher* (section 807 of the SoA/2). This rule is, in their opinion, applicable as a) the contaminated soil excavated during the decontamination was placed on clean land that was, due to the oil spilled from the contaminated soil, also contaminated, and b) SPDC dug waste pits in which it dumped oil waste from which the said oil leaked, because the waste pits do not protect against this, into the underlying soil. It can, however, not be appreciated that – as expressed by Shell in section 745 of the SoD/SoA-CA/2 – a contamination was consequently caused that would not have been present without the excavation and dumping in the waste pits. If the contaminated soil would not have been excavated and the oil waste would not have been dumped in a waste pit then the oil would still have spilled to the undersoil or adjacent soil. The reliance on strict liability of *Rylands vs. Fletcher* is therefore denied on account of the absence of damages. As the situation as intended here must be deemed to have meanwhile come to an end, an injunction based on the same is neither relevant.

1. 1. The claims II and III.b: the fundamental right to a clean living environment
   1. Shell is of the opinion that a violation of the fundamental right to a clean living environment can, at most, result in liability under civil law in case of ‘serious’ environmental contamination (section 765 of the SoD/SoA-CA/2). This implies that, in the vision of Shell, this also applies to the fundamental rights relied on by MD et al. of the same content pursuant to the Nigerian Constitution and the *African Charter on Human and Peoples’ Rights*. MD et al. founded their reliance on this on the fact that their living environment is ‘seriously’ contaminated (section 737 of the SoA/2). The Court of Appeal shall join this common guiding principle, which is in line with the general opinion regarding the threshold that must be reached to be able to refer to a violation of fundamental rights to protect the environment, see, for instance, the ECHR 9 December 1994, A303-C, NJ 1996, 506 (*López Ostra / Spain*), in which the requirement of *severe environmental pollution* is imposed.
   2. The Court of Appeal shall now assess the fundamental right claims II and III.b of MD et al. on the basis of the three themes Occurrence, Reaction and Decontamination mentioned in legal ground 3.5 (also see legal ground 3.9). It follows from legal ground 3.14 that the onus of evidence – and hence also the obligation to furnish facts – in respect of the facts on which the alleged violation of fundamental rights is based, is vested in MD et al.
   3. The contamination caused by the leakage can, undoubtedly, be qualified as serious, however in connection with the Occurrence a violation by Shell of the right to a clean living environment (see claim II.b) or liability for impairment of the same (see claim II) can, nonetheless, not be assumed because, having regard to the considerations in legal grounds 5.29 and 5.30, it cannot be established that the leakage was caused by actions or omissions of SPDC / Shell.
   4. The only component of the theme Reaction that resulted in the opinion that there is question of imputable actions / omissions on the part of SPDC / Shell is related to the LDS. MD et al. did, however, not argue in a (sufficiently) specific manner that the failure of SPDC / Shell to install an LDS / to ensure that this is done results in a violation of the fundamental right to a clean living environment. Considering this state of affairs, it cannot be concluded that this fundamental right was violated in connection with the Reaction.
   5. It follows from the considerations in legal grounds 8.20 up to and including 8.29 that it has not been possible to establish that after the decontamination there was still question of the serious residual contamination required in this context according to legal ground 9.1, in particular because the contamination as a result of the 2005 leakage was decontaminated up to below the intervention value. In this respect reference can furthermore be made to the fact that in article 8.1.1, second sentence, of Part VIIIF of EGASPIN (*'Concentrations in excess of the intervention values correspond to serious contamination*’) it is confirmed that (only) in case of a transgression of the intervention value the contamination is qualified as serious. In connection with the Decontamination a violation of the fundamental right to a clean living environment can neither be assumed.
   6. Claims II and III.b based on a violation of the fundamental right to a clean living environment cannot be sustained, as follows from the above. It can now remain undiscussed whether according to Nigerian law a violation of a fundamental right can form an independent basis for liability under civil law, as argued by MD et al. but disputed by Shell.
2. The claims III.a-b and IX
   1. Claim III.a-b was filed by MD for the benefit of the Oruma residents and this also applies to the injunctive claims IV up to and including VII (which were also filed by Oguru and Efanga), already assessed above. As considered in legal ground 3.7, the declaration of law claimed pursuant to claim III.a-b also covers the area that is covered by these injunctive claims. Claim III.a-b extends to nothing more or other than the said injunctive claims and shares, in all aspects, its fate. In case of an individual assessment of claim III.a-b, MD therefore has no interest. This claim shall be dismissed.
   2. The extrajudicial costs that were allegedly incurred in connection with the sustainable components of claims I and III.a-a can, also considering the defence of Shell (not abandoned on appeal), that Nigerian law does not foresee in the same (sections 136-138 of the MOA-S), not immediately be estimated. This loss item can be discussed further in the follow-up proceedings for the determination of the damages (claim I) respectively the potential follow-up proceedings for the determination of the damages for which claim III.a-a serves as a prelude. To this degree claim IX for compensation for the extrajudicial costs is (at the moment) not sustainable. The procedural documents do not contain an indication that in connection with the LDS matter extrajudicial actions were performed. To the extent that claim IX is related to this, it is consequently dismissed.
3. Concluding considerations
   1. In the above the JIT Report, the Clean-up Report and the Clean-up Certificate were not included in the assessment to the detriment of MD et al. Hence, their positions about the scope of the contamination do consequently – see legal ground 3.34 – not require further assessment.
   2. In addition to the comments about the offers of evidence of the parties above, the following is also considered about this. The offers of evidence of MD eta. (see, inter alia, sections 851 and 852 of the SoA/2) were either specified insufficiently or not relevant for positions that lack sufficient substantiation, and are therefore set aside. The same applies to the offers of evidence that Shell made in section 179 of the SoA-CA/1, section 296 of the SoD/1 and section 936 of the SoD/SoA-CA/2 for the positions in respect of which it bears the onus of evidence. The offers of Shell to furnish evidence to the contrary in the same sections are not relevant (inter alia the offer of evidence in section 532 of the SoD/SoA-CA/2) and/or are related to insufficiently substantiated positions. These offers are set aside for this reason (these reasons). It can moreover be added that it was not mentioned with the offer to furnish evidence to the contrary that – other than in case of the ‘normal’ offer of evidence – evidence can be furnished by means of witnesses. This means that, in terms of the evidence to the contrary, entitlement to furnishing evidence is out of the question (Section 166 Subsection 1 of the Dutch Code of Civil Procedure).
   3. Recapitulating everything, also considering the 2015 ruling, the Dutch court is competent to take full cognisance of the cases a and b and claims I and III.a-a against SPDC on account of the Occurrence and on account of the Reaction are, to the extent that they are related to the LDS, sustainable, as well as the injunctive claims against SPDC and RDS based on the LDS. To this degree the grounds for appeal in the principal action of MD et al. are successful. For the remainder the claims of MD et al. are non-sustainable, and their grounds for appeal in the principal action fail. The grounds for appeal of Shell in the cross-appeal, with which the jurisdiction of the Dutch court and the cause of action of MD et al. were disputed, do not hold water. The disputed ruling shall be quashed, and the ruling shall yet be as indicated above.
   4. In any case in view of the award of the costs of the proceedings, the cases a and b can be qualified as one case. In this one case the parties were both partly put in the wrong. The costs incurred in both instances shall therefore be paid by each party in the manner outlined in the operative part.
   5. The expenses of the experts (€ 44,840.18 and £ 17,000.00) can for half be allocated to case b, and for the other case to case c. The part to be allocated to case b therefore arrives at € 22,420.09 and £ 8,500.00. On account of the fact that SPDC was put in the wrong on the point to which the expert opinion was related, it shall need to bear these expenses.

DECISION

The Court of Appeal:

in the cases a and b

* quashes the ruling pronounced between the parties of the District Court in The Hague of 30 January 2013, and ruling again:
* rules that in respect of Oguru, Efanga and the other residents whose interests MD looks after SPDC i) bears strict liability for the damages that are the result of the leakage at Oruma on 26 June 2005, and ii) acted unlawfully by not installing an (adequate) *Leak Detection System* (LDS) in / on the Oruma pipeline prior to that date, and orders SPDC to compensate Oguru and Efanga for the damages deriving from i) and ii), to be assessed later during separate follow-up proceedings and settled according to the law;
* orders SPDC to provide the Oruma I pipeline and the Oruma II pipeline with a *Leak Detection System* (LDS) as intended in legal ground 6.43 (and to keep it provided with the same as long as these pipelines are being used as main or spare pipelines) within one year after service of this ruling and orders SPDC to pay MD et al. collectively a judicially imposed penalty for every day (a part of a day qualified as a day) that it does not comply with this order, of € 100,000.00;
* orders RDC to provide the Oruma I pipeline and the Oruma II pipeline with a Leak Detection System (LDS) as intended in legal ground 6.43 (and to keep it provided with the same as long as these pipelines are being used as main or spare pipelines) within one year after service of this ruling and orders RDC to pay MD et al. collectively a judicially imposed penalty for every day (a part of a day qualified as a day) that it does not comply with this order, of € 100,000.00;
* dismisses all other applications;
* compensates the costs of the proceedings in the first instance, in such manner that each party bears their own expenses;
* dismisses (for the first time on appeal) all other applications;
* compensates the costs of the proceedings on appeal, in such manner that each party bears their own expenses;
* determines that SPDC awards the expenses of the experts for an amount of € 22,420.09 and £ 8,500.00 in respect of case b to SPDC;
* declares this ruling, as much as possible, provisionally enforceable.

This ruling was issued by *Meester* J.M. van der Klooster, *Meester* M.Y. Bonneur and *Meester* S.J. Schaafsma and pronounced at the public hearing of 29 January 2021 in the presence of the Court Registrar *Meester* M.J. Boon.

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