ruling

THE HAGUE COURT OF APPEAL
Civil law division

Date of ruling : 29 January 2021
Case numbers : 200.126.804 (case a) + 200.126.834 (case b)
Case/ cause list number of 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**,
   of Oruma, Bayelsa State, Federal Republic of Nigeria,
2. the late **Alali EFANGA**,
   former resident of Oruma, Bayelsa State, Federal Republic of Nigeria,
3. the association with legal personality **VERENIGING MILIEUDEFENSIE**,
   established in Amsterdam,

appellants, also respondents in the cross-appeal,
hereinafter referred to as: Oguru, Efanga and MD, and jointly as: MD et al. (plural),
attorney-at-law: *mr.* Ch. Samkalden of Amsterdam,

versus (case a)

1. **SHELL PETROLEUM N.V.**,
   established in The Hague,
2. the legal person incorporated under foreign law **THE "SHELL" TRANSPORT AND TRADING COMPANY LIMITED**,
   established in London, United Kingdom,

respondents, also appellants in the cross-appeal,
hereinafter referred to as: Shell NV and Shell T&T, and jointly as: Shell (singular),
attorney-at-law: *mr.* J. de Bie Leuveling Tjeenk of Amsterdam,

and versus (case b)

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

established in London, United Kingdom, with its registered office in The Hague,

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

established in Port Harcourt, Rivers State, Federal Republic of Nigeria,

respondents, also appellants in the cross-appeal,

hereinafter referred to as: RDS and the SPDC, and jointly as: Shell (singular),

attorney-at-law: *mr.* J. de Bie Leuveling Tjeenk of Amsterdam.

Contents

The contents of this ruling has been divided as follows:

Decision

Course of the proceedings

General

In this ruling, the Court of Appeal assesses cases a and b, which form part of six cases brought against Shell by MD and the Nigerian claimants/farmers. The current cases a and b concern a leak which occurred at the Nigerian village of Oruma in 2005. Cases c and d concern a leak which occurred at the Nigerian village of Goi in 2004. Cases e and f concern a leak which occurred at the Nigerian village of Ikot Ada Udo in 2007.

The appellant under 2, Alali Efanga, died in 2016. The lawsuit was continued under his name (see also point 47 of Shell's defence on appeal, also statement of appeal in the cross-appeal stage 2).

The course of the proceedings in cases a and b

Please refer to the most recent interlocutory judgment of 31 July 2018 and the three preceding interlocutory judgments of 27 March 2018, 11 October 2016 and 18 December 2015 for a detailed overview of the course of the proceedings up to that date. A summary of the entire course of proceedings is presented below.

MD et al. have brought their appeal against the 30 January 2013 judgment of The Hague District Court (hereinafter: the district court) in time. This judgment is based on the following documents, inter alia:

- the initiating summons of MD et al. (IS);
- Shell's statement of defence (SoD);
- the reply of MD et al. (R);
- Shell's rejoinder (Rej);
- the written summaries of the oral arguments of MD et al. (WS-MD) and of Shell (WS-S) of 11 October 2012.

On appeal, the following court documents were submitted/the following procedural acts took place:

- the motion for the production of exhibits of MD et al. (M-Exh);

- Shell's defence on appeal in the procedural issue pursuant to Section 843a Code of Civil Procedure including a motion for the court to decline jurisdiction in the procedural issue (DoA-Exh);
- the defence on appeal regarding the motion for the court to decline jurisdiction in the procedural issue pursuant to Section 843a Code of Civil Procedure of MD et al. (DoA-J/Exh);
- the record of appearance of the parties of 30 June 2014 (RA-2014), showing that the procedural agreement was made to split up the appeal proceedings into two phases, in which (phase 1) firstly an opinion would be given on the competence of the Dutch court, concurrently with a decision on the claim/claims in the procedural issue pursuant to Section 843a Code of Civil Procedure, followed by (phase 2) a decision on the merits;
- Shell's statement of appeal in the cross-appeal stage 1 (SoA-cross/1);
- the statement of appeal on the dismissal of the Section 843a Code of Civil Procedure claim in phase 1 of MD et al. (SoA/1);
- Shell's defence on appeal stage 1 (DoA/1);
- the defence on appeal against Shell's statement of appeal (phase 1) of MD et al. (DoA-cross/1);
- the written summary of the oral arguments of MD et al. (WS/1-MD) and of Shell (WS/1-S);
- the interlocutory ruling of this Court of Appeal of 18 December 2015 (the 2015 ruling), in which it was decided (i) that the Dutch court had international jurisdiction to take cognizance of all claims and (ii) that MD had *locus standi* in the class action and in which (iii) the 843a Code of Civil Procedure claims of MD et al. were partially allowed;
- the interlocutory ruling of 27 March 2018 (the 2018/1 ruling) in which an expert examination into the cause of the leaks in Oruma and Goi was ordered – following a personal appearance of the parties and a documents exchange;
- the interlocutory ruling of 31 July 2018 (the 2018/2 ruling), in which a further application of MD et al. in the 843a Code of Civil Procedure procedural issue was dismissed;
- the expert opinion of 17 December 2018 (the expert opinion);
- the order of this Court of Appeal of 25 January 2019, in which the costs of the experts were estimated at € 44,840.18 for D. Koster and W. Sloterdijk and at £ 17,000.00 for T. Sowerby;
- the 260-page statement of appeal stage 2 of MD et al. (SoA/2);
- Shell's 375-page defence on appeal/statement of appeal in the cross-appeal stage 2 (DoA/SoA-cross/2);
- the defence on appeal in the cross-appeal stage 2 of MD et al. (DoA-cross/2);

- the document commenting on exhibits in the principal appeal stage of MD et al. (DC-MD/2) in which they comment on Exhibits 56-57 to the DoA/SoA-cross/2;
- the document containing Exhibits Q.72-Q.80 of MD et al.;
- Shell's additional Exhibits 77 and 78;
- Exhibits Q.81 and Q.82 of MD et al.;
- Shell's Exhibits 79 and 80;
- Exhibits Q.83 and Q.84 of MD et al.

On 8 and 9 October 2020, the attorneys-at-law of the parties pleaded the cases (the 2020 hearing). They used written summaries of the oral arguments (WS/2-MD and WS/2-S), which they submitted. A record of the hearing was drawn up (RH-2020). The objections raised at the hearing against the submission of exhibits and against the arguments brought forward at the hearing were withdrawn.

The parties also submitted a folder (digital and in hard copy) containing the correspondence conducted, numbered 1 - 113. That folder also contains the report of findings of 18 July 2017 of *mr.* B.E. ter Haar concerning the confidential documents filed by Shell. Shell also submitted those documents on a USB flash drive.

The exhibits of MD et al. are identified with a letter and a number (for instance, M.1 and Q.83), Shell's exhibits with only a number (for instance, 66).

Where reference is made hereinafter to the court documents, this is taken to mean the court documents in case b, unless expressly stated otherwise.

The further assessment

1. The facts

1.1. The Court considers the following facts as established:

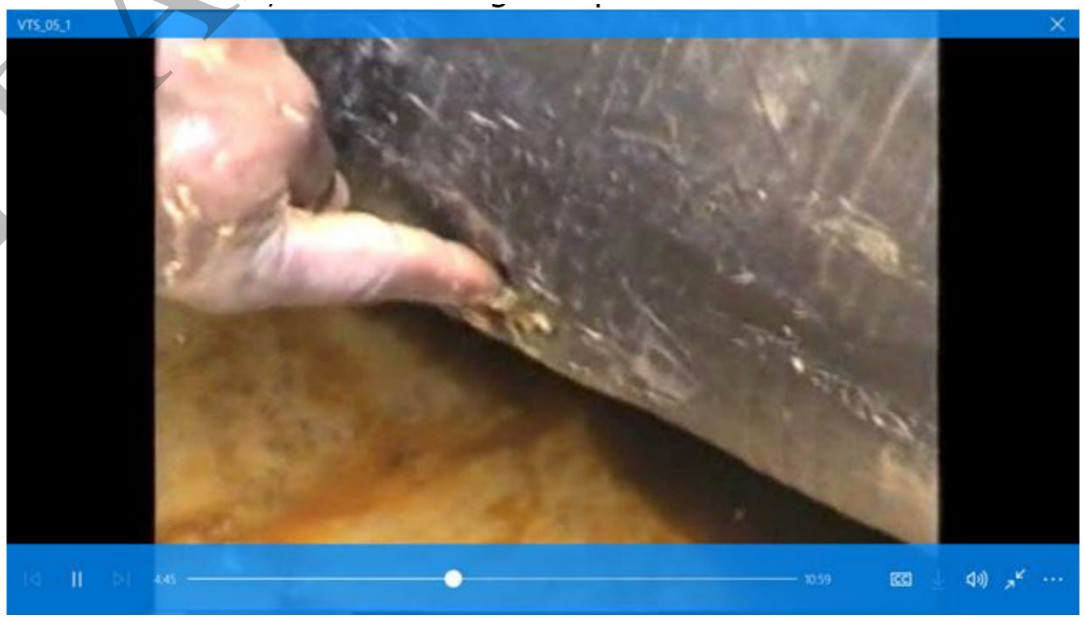
a. Nigeria has been burdened for a long time by serious problems for people and nature due to the oil extraction activities of oil companies, including the Shell group. The Shell group, a multinational which is headquartered in The Hague, has been carrying out oil extraction activities in Nigeria since 1958. Nigeria experiences many oil leaks from oil pipelines and oil installations each year. Oil leaks may arise due to defective and/or obsolete material of the oil companies or due to sabotage, which could effectively involve insufficient security measures. Sabotage is often committed to steal oil or to receive compensation from oil companies for the oil contamination in the form of

money or paid orders for decontamination work to be carried out after the leak.

b. Up until 20 July 2005, Shell NV in The Hague and Shell T&T in London jointly headed the Shell group as parent companies. Via subsidiaries they held shares in the SPDC, the Nigerian legal person in the Shell group involved in the oil extraction activities in Nigeria. RDS – established in London but headquartered in The Hague – has been at the head of the group since the restructuring of the Shell group of 20 July 2005. Since then, RDS has held the shares in the SPDC via subsidiaries.

c. Oguru is, and Efanga who died in 2016 was, a Nigerian farmer from the village of Oruma in Nigeria's Bayelsa State. MD is a Dutch organization whose objective is to protect the environment worldwide and which assists Oguru and the late Efanga in these proceedings.

d. On 26 June 2005, the SPDC received a report of an oil leak in the underground oil pipeline operated by the SPDC near Oruma (hereinafter also simply referred to as: the leak). This pipeline runs between Kolo Creek and Rumuekpe and is 37.10 kilometres long. At these sites there is a manifold, an installation where the supply lines and main pipelines are connected to each other. The leak, which was verified by the SPDC on 29 June 2005, occurred at 7.7 km from the Kolo Creek manifold and had been caused by a more or less round hole. The top side of the pipeline was at a depth of a little over a metre at the location of the leak. The oil came bubbling up out of the ground as a result of the leak. A photograph of the leak is provided below:



e. The leaked oil spilled beyond the strip of land where the SPDC has right of way. Right of way is the exclusive right to use land by having pipelines in the ground and whereby the owner of the land is no longer allowed to use the land.

f. On 7 July 2005, the so-called Joint Investigation Team (JIT) visited the site of the leak, at which time, inter alia, the thickness of the pipe wall was measured with an ultrasonic measuring device, the so-called ultrasonic thickness (UT) measurements. The JIT was composed of representatives of the ministries concerned, of the Oruma community and of the SPDC as operator of the pipeline. Thereafter, still on 7 July 2005, the leak was closed: first provisionally with a wooden plug to prevent any residual oil from leaking from the pipeline, and then definitively by fitting a round clamp, a so-called PLIDCO split sleeve clamp, around the pipeline at the location of the leak.

g. The JIT drew up a report that in any case was signed by representatives of the Nigerian ministries and of the SPDC. Part A of the report states the following, inter alia: '*Estimated quantity of oil spilled: 400 BBLS*' (400 barrels of 159 litres each). Part B of the report includes the following, inter alia.

> *Evidence of previous excavation noticed at leak site.*
>
> *During excavation to expose pipe, the soil texture 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.*
>
> *U.T. Around leak hole: a – 9.7 b – 9.6 c – 9.6 d – 9.6 e – 9.5 f – 9.6*

h. On 9 July 2005, the SPDC contained the leaked oil. On 18 August 2005, the decontamination mobilization effort was initiated. In the period of August to October 2005, the oil was collected and removed, and in the October-November 2005 period, clean-up efforts were made. In the period of November 2005 to April 2006, remediation activities were carried out according to the Remediation by Enhanced Natural Attenuation (RENA) method through land and farming process, entailing that contaminated soil is mixed with clean material, following which nature restores itself over time.

This involved excavating the contaminated soil to a depth of 30 centimetres. The decontamination process was finalized in April/June 2006. On 2 May 2006, Normal Nigeria Enterprise drew up the *Report on Recovery, Clean Up and Remediation Project at 20" Kolocreek-Rumuekpe Trunkline at Oruma* (hereinafter: the Clean-Up report) for the SPDC.

i. In August 2006, the Joint Federal and States Environmental Regulatory Agencies drew up the *Clean-Up and Remediation Certification Format* (hereinafter: the Clean-Up certificate), which was signed by three Nigerian government institutions, for the decontamination of the pollution at Oruma. The following, inter alia, is stated in this certificate:

> *B. Cause & Date of Spill: SABOTAGE 2005*
>
> *C. Area (...) of Impact: 60.000 M2*
>
> *(...)*
>
> *Completion date: June 2006*
>
> *(...)*
>
> *STATUS: Site Certified*

j. The pipeline referred to under d. (hereinafter also: the Oruma I pipeline or pipe) had been in use since 1994, and at the time of the leak was the only functioning oil transport pipeline in the area. A spare pipeline lay next to this pipeline and was replaced with a new main pipeline (hereinafter also: the Oruma II pipeline or pipe), which was put into use in July 2009. The Oruma I pipeline has been the spare pipeline for the Oruma II pipeline since then.

1.2 MD et al. have submitted survey plans with maps of the area around the leak in Exhibits Q.59 A and B, which are dealt with in more detail in legal grounds 4.5 and 4.6. Two adjacent SPDC pipes, marked S1 and S2, are drawn in the survey plans (see also point 7 of the legend). Especially in light of this, the Oruma I and Oruma II pipelines can be considered a unit of one length (37.10 kilometres between Kolo Creek and Rumuekpe), while these pipes' purpose changed in 2009. The parties also view them as one pipeline, or at least in their analyses have not attached consequences to the fact that, strictly speaking, there are two adjacent pipelines. Therefore, the Court will refer to said unit as, simply, the 'Oruma pipe/pipeline' and will only use the terms Oruma I pipeline and Oruma II pipeline if this is required for reasons of clarity.

2. The claims of MD et al. and the judgments of the district court

2.1 MD et al. assert that Shell is liable for the origin of the leak, failed to respond adequately to the leak, and failed to clean up properly after the leak. MD et al. claim, following an amendment of claim III on appeal, in a somewhat abridged form (whereby 'Shell' is understood to mean the four summoned Shell legal persons), in a decision that is provisionally enforceable:

I to rule that Shell acted unlawfully towards Oguru and/or Efanga based on the assertions in the court documents of MD et al., and that Shell is jointly and severally liable towards Oguru and/or Efanga for the damage they incurred and will incur as a result of Shell's unlawful conduct, which damage is to be assessed later during separate follow-up proceedings and settled according to the law, plus statutory interest from the date of the summonses until the date on which payment is made in full;

II to rule that Shell is liable for the violation of the physical integrity of Oguru and Efanga caused by living in a contaminated living environment;

III.a to rule that Shell acted unlawfully by allowing the contested leak to occur, and/or failing to respond properly to the contested leak, and/or failing to properly decontaminate the soil/farmland and fish ponds which were contaminated as a result of the contested leak, for the benefit of the local population and in order to counter any and/or further environmental and health damage, current and future, in the persons living in the vicinity of the contested leak in Oruma, whose interests – which are similar to those of the individual claimants – MD also seeks to protect in these proceedings, in accordance with its objectives as set out in its articles of association; and/or

III.b to rule that Shell infringed on the right to a clean living environment, as enshrined in Articles 20, 33 and 34 of the Nigerian Constitution and in Article 24 of the African Charter on Human and Peoples' Rights, by allowing the contested leak to occur, and/or failing to respond properly to the contested leak, and/or failing to properly decontaminate the soil/farmland and fish ponds which were contaminated as a result of the contested leak, for the benefit of the local population and in order to counter any and/or further environmental and health damage, current and future, in the persons living in the vicinity of the contested leak in Oruma, whose interests – which are similar to those of the individual claimants – MD also seeks to protect in these proceedings, in accordance with its objectives as set out in its articles of association;

IV to instruct Shell to commence decontaminating the soil around the oil leak within two weeks from the service of the ruling so that it will meet the international and local environmental standards in force, and to complete the decontamination process within one month from the start;

V to instruct Shell to commence purifying the water sources in and around Oruma within two weeks from the service of the ruling, and to complete the purification process within one month from the start;

VI to order Shell, after its replacement to keep the oil pipeline at Oruma in a good state of repair;

VII to order Shell to implement in Nigeria an adequate response plan to tackle oil spills and to ensure that all conditions are met for a timely and adequate response in case a new oil leak occurs at Oruma; for MD et al. this includes at least making available sufficient materials and means – as proof of which Shell will send MD et al. overviews – in order to limit any damage of a potential oil leak as much as possible;

VIII to order Shell to pay to MD et al. a penalty of € 100,000 (or another amount as determined in the proper administration of justice in the ruling) every time Shell, separately and jointly, acts in violation of the orders referred to under IV, V, VI and/or VII (as the Court understands it);

IX to hold Shell jointly and severally liable for compensation of the extrajudicial costs;

X to order Shell to pay the costs of these proceedings in both instances, including the costs of the experts, or at least to compensate the costs of the parties.

2.2 The district court dismissed all claims of MD et al. To that end, the district court considered, inter alia, that MD et al. failed to contest with sufficient substantiation Shell's defence that the leak was caused by sabotage (legal grounds 4.20 and 4.27 of the judgment), that the SPDC effectively stopped and remedied the leak as quickly as possible on 29 June and on 7 July 2005, so that it cannot be stated that Shell's response was factually inadequate (legal ground 4.53 of the judgment) and that it was not established that insufficient decontamination had been carried out (legal ground 4.60 of the judgment).

3. The appeal; preliminary considerations

Applicable law

3.1 As is stated under 1.3 of the 2015 ruling, the claims of MD et al. must be assessed substantively according to Nigerian law, and Dutch law/procedural law – as laid down, inter alia, in the Dutch Code of Civil Procedure – applies to the manner of litigation, cf. Book 10 Section 3 Dutch Civil Code. It has to be noted here, though, that substantive aspects of procedural law, including the question which penalties may be imposed, are governed by the *lex causae* (in this case: Nigerian law), as well as the substantive law of evidence, as

currently expressed in Book 10 Section 13 Dutch Civil Code, including special rules on the division of the burden of proof relating to a certain legal relationship and which seek to specify the subjective rights ensuing from that legal relationship. In all other respects, the division of the burden of proof, as well as the obligation to furnish facts, is governed by the *lex fori*, in this case Dutch law, more specifically Dutch procedural law.

3.2 In Dutch procedural law, an appeal is considered a continuation of the proceedings in the first instance, whereby on appeal A) new factual and/or legal positions may be taken, also if they could have been brought forward earlier (the repeat function) and B) (partly for that reason) the judgment rendered in the first instance is not necessarily reviewed, but rather the claims are re-assessed, in principle based on the situation existing at the time when the ruling on appeal was rendered (*ex nunc*). Feature B) is specifically pertinent in the situation that the claim was dismissed in the first instance, such as is the case here.

Renewed assessment of the claims

3.3 With the grounds of appeal in the principal appeal of MD et al. and Shell's grounds of appeal in the cross-appeal, the dispute has been submitted to the Court virtually to its fullest extent. The Court will therefore not discuss the grounds of appeal separately, but re-assess the claims of MD et al.

3.4 The factual basis underlying the claims is the 'contested leak'/'the oil leak' (see the text of claim III and IV). In view of the procedural documents, that is the leak that occurred 'in Oruma'/'(in and) near Oruma' on 26 June 2005. This location is also stated in so many words in claims III and V through to VII. Due to the connection between these claims, as described below under 3.8 and 3.9, and claims I and II, that date and location must also be understood to apply to claims I and II.

3.5 The claims of MD et al. are based on three (groups of) acts/unlawful acts, namely acts/unlawful acts that are related to i) the origin of a leak, ii) Shell's response to a leak that has arisen and iii) the decontamination of the leak. This is expressly stated in claims III.a and b, as well as in claims IV and V (on decontamination), VI (on origin) and VII (on response). In light of this, the acts referred to in claim I and underlying claim II must therefore be interpreted in the same manner. The Court will hereinafter assess the claims of MD et al. based on these three themes ('Origin', 'Response' and 'Decontamination'). In this respect, it is noted – and this is also the interpretation of Shell (point 620 DoA/SoA-cross/2) – that 'Response' also covers measures that should have been taken before the leak occurred, which

would have enabled Shell to respond to an occurrence of a leak in a timely and adequate manner.

3.6 Claim I – which was only lodged by Oguru and Efanga, and not also by MD – extends, strictly speaking, to the issuance of a declaratory decision that Shell is liable for the damages due to unlawful acts by Shell on the three aforementioned themes. However, the Court understands, inter alia from point 201 WS-MD, that MD et al. seek a referral to follow-up proceedings for the determination of damages pursuant to Section 612 et seq. Dutch Code of Civil Procedure, which is applicable here as part of Dutch procedural law. This is also Shell's interpretation (points 12 and 264 DoA/SoA-cross/2). This claim revolves around the situation in the years 2005-2006, when the alleged unlawful acts were committed.

3.7 Claims IV through to VII were lodged by Oguru and Efanga and by MD, and are intended for injunctions/orders. These orders – which the district court did not issue – must be assessed based on the state of affairs at the moment this ruling is handed down (see legal ground 3.2). Claims for injunction IV and V are for the effect that the residual damage is sanitized after the decontamination (point 444 R). Claim for injunction VI is for the effect that the pipeline near Oruma is kept in a good state of repair (point 437 R). Claim VII seeks, inter alia, to ensure that Shell is able to respond in a timely and adequate manner should another leak occur again near Oruma.

3.8 The Court deduces from points 768, 780, 784 and 789 SoA/2 that claim III.a – which was only lodged by MD, and not also by Oguru and Efanga – has two intentions. That claim for a declaratory decision serves:

a) as a prelude to the compensation to be obtained by the local residents (not being Oguru and Efanga) for damages past and future;

b) to represent the public and/or environmental interest/the interest of these local residents that the oil contamination is cleaned up after all/further, and new oil contamination is prevented.

Aspect a) regards the area also covered by claim I and effectuates that that claim is also lodged for the benefit of the local residents (see point 854 SoA/2). To this extent, claim III.a is in line with claim I. Aspect b) regards the area also covered by claims for injunction IV through to VII. To this extent, claim III.a is in line with claims IV through to VII. A difference between claim I and aspect a) of claim III.a is that claim III.a does not concern a referral to follow-up proceedings for the determination of damages, but encompasses future claims for compensation of the local residents. Shell's defence, namely that the claims for compensation of the individual local residents have already expired (legal ground 4.8 of the 2015 ruling; point 123 SoA-cross/1 and point 907 DoA/SoA-cross/2), does not alter the fact – unlike Shell appears to believe – that MD still has an interest in claim III.a on

account of the future damage of the local residents, whose interests MD also seeks to protect, and on account of aspect b). It may well be the case, as Shell notes in point 122SoA-cross/1, that the Dutch court will be found to have no international jurisdiction as regards the claims for compensation to be lodged against the SPDC by said local residents. However, this does not mean that the argument Shell has attached to this, namely that the declaratory decision under claim III.a cannot form a basis for such claims for compensation, is correct. Foreign decisions of 'superior courts' (courts with general jurisdiction, such as this Court) may be recognized in Nigeria based on the 1961 Nigeria Foreign Judgments (Reciprocal Enforcement) Act, currently Chapter C35 in the 2004 Laws of the Federation of Nigeria. There are no reasons, nor have any reasons been put forward, to assume that this is not the case for the decision to be taken in this case on claim III.a. It should also be considered here that foreign decisions are generally speaking recognized in the Netherlands (Supreme Court 26 September 2014, ECLI:NL:HR:2014:2838 (*Gazprombank*)), so that the reciprocity requirement from the aforementioned Nigerian act cannot be viewed as a hindrance to recognition of this ruling's decision on claim III.a in Nigeria.

Whenever the difference between both aspects of claim III.a is relevant, this claim will be designated as 'III.a-a' when referring to aspect a), and as 'III.a-b' when referring to aspect b).

3.9 Claim III.b – which was only lodged by MD, and not also by Oguru and Efanga – seeks a declaratory decision that with its acts on the three themes, Shell infringed on the local resident's fundamental right to a clean living environment. Claim II – which was only lodged by Oguru and Efanga – seeks such a declaratory decision to their benefit, as the Court understands from point 854 SoA/2. This claim initially also pertained to future health damage (point 442 R), but by the document of 11 September 2012, page four, MD et al. dropped this part of their claim, see also point 215 WS-MD.

3.10 All claims have been lodged against Nigerian operating company SPDC and against the Shell parent companies. In the period up to 20 July 2005, this concerned Shell NV and Shell T&T jointly, after which RDS became the only remaining parent company. RDS was not formed by a merger of Shell NV and/or Shell T&T (point 17 SoD). Therefore, the claims relating to compensation in respect of 'Origin' and 'Response' covering the period up to and including 9 July 2005 only extend to Shell NV and Shell T&T.

Nigerian law; general

3.11 The Federal Republic of Nigeria consists of states. The Nigerian judicial system has federal courts and state courts. From high to low, the federal courts are the following: 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 below to these courts, without any addition, this is taken to mean the Nigerian courts. When referring to English courts (of the same name), this is indicated with the addition: UK.

3.12 The sources of Nigerian federal civil law include the following: English law and Nigerian legislation and case law. The English law that applies 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 proviso that judgments of English courts dating from after Nigeria's independence in 1960 formally have no binding authority in Nigerian courts, but do have persuasive authority and are often followed in Nigerian court decisions.

3.13 Common law has the legal remedy of damages (including the purely compensatory option of compensation). The mandatory injunction, which is based on equity (equitable remedy), only comes into play if compensation is not sufficient. The equity principles, including the principle of 'he who comes to equity must have clean hands' may further limit the equitable remedies. In a ruling of 10 February 2012, C 112/2002, LOR (10/2/2012) (*Military Governor of Lagos State v Adebayo Adeyiga*), the Supreme Court considered as follows (p. 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 former condition is the only method whereby justice can be adequately done.*

In point 846 SoA/2, MD et al. rightfully pointed out that according to Nigerian law awarding or dismissing a claim for injunction falls under the discretionary power of the court. From the above-cited consideration of the Supreme Court it can also be deduced that a Nigerian injunction is intended to end an unlawful state ('*restoration of things*'), which also covers a continuing unlawful omission. Nigerian law also has a declaratory decision, known as declaratory relief, as equitable remedy, see Supreme Court 13 April 2007, S.C. 243/2001 (*Ibator v. Barakuro*).

3.14 The Nigerian Evidence Act 1945, replaced with the Evidence Act 2011, forms part of Nigerian federal legislation. Section 135(1) of the 1945 version and Section 131(1) of the 2011 version convey the main rule of the division of the burden of proof:

> *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 is considered in 3.1 *in fine*, the 'normal' division of the burden of proof must be determined based on Dutch law as the *lex fori*, meaning in accordance with Section 150 Dutch Code of Civil Procedure, which states as the main rule that the party invoking the legal effects of the facts or rights alleged by said party carries the burden of proof as regards the respective facts or rights.

3.15 The Oil Pipelines Act 1956 (OPA) also forms part of Nigerian federal legislation. Section 11(5) OPA – which MD et al. have invoked – stipulates as follows:

> *The holder of a licence shall pay compensation –*
>
> *(a) to any person whose land or interest in land (whether or not it is land 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.*

Section 19 OPA, which forms part of Part IV ('*Compensation*'), stipulates the following, inter alia:

> *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) OPA, which also forms part of Part IV, determines as follows:

> *If a claim is made under subsection (5) of section 11 of this Act, the court shall award such compensation as it considers just having regard to (...).*

3.16 The SPDC – the operator of the Oruma pipeline – is the licence holder of that pipeline in the sense of Section 11(5) OPA. It is stated under (a) of this section that the owner, holder or user of land is entitled to compensation if he

experiences nuisance as a result of activities of the licence holder (statutory nuisance). It is stated under (b) that the licence holder has a statutory duty of care to protect, maintain and repair his pipelines, and that he is obligated to pay compensation for any damage in case he fails to do so (statutory negligence). It is stated under (c) that the licence holder has strict liability for damages resulting from a leak from his pipeline (statutory strict liability), from which he is only relieved if he successfully proves that the damage is the result of the injured party's own acts or of a malicious act of a third party, such as sabotage. This concerns an affirmative defence ('yes, but' defence) with respect to which the licence holder bears the burden of proof (like Shell in point 355 DoA/SoA-cross/2).

3.17 MD et al. have also invoked several torts (unlawful acts under common law), namely: the tort of negligence, the tort of nuisance and the tort of trespass to chattel.

3.18 Tort of negligence, which is comparable to a breach of the standard of care under Dutch law, requires that:

a) there is a duty of care;

b) said duty of care has been breached;

c) damages have occurred as a result.

Whether or not a duty of care exists must be determined on the basis of the so-named Caparo test:

i) is the damage foreseeable?

ii) is there proximity?

iii) is it fair, just and reasonable to assume a duty of care?

Under Nigerian law, a claimant also carries the burden of proof with respect to a), b) and c), see legal ground 3.14 and also Supreme Court 6 June 2008, [2008] 13 NWRL (*Abubakar v Joseph*) (Appendix 1 to Exhibit 19), legal ground 14 on p. 317, legal ground 20 on p. 318 and p. 341 – except in the case of *res ipsa loquitur*, a common law principle explaining that the mere occurrence of an event implies negligence, without direct or further evidence being required. In the aforementioned ruling, the following was further stated on the meaning of negligence (legal ground 12 on p. 316/p. 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 view expressed by Shell in point 320 DoA/SoA-cross/2 that Nigerian law has no liability for 'pure omissions' is therefore incorrect.

The proximity requirement will generally be met in case of physical proximity, but in absence thereof, there may still be proximity; the concept covers a range of relationships. A ruling of the predecessor of the UK

Supreme Court (House of Lords 8 February 1990, [1990] ALL ER 568, [1990] 2 AC 605 (*Caparo Industries plc v Dickman*) – from which the name of the Caparo test is derived – states the following about the proximity requirement (p.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.*

3.19 MD et al. have partly based their standpoints in this case on soft law, including the Environmental Guidelines and Standards for Petroleum Industry in Nigeria (EGASPIN), issued by the Department of Petroleum Resources (DPR), revised edition of 2002 (Exhibit G.2 and Exhibit 13), which their expert E. Duruigbo describes as '*recommendations*' reflecting the '*industry custom*' (Exhibit M.1, no. 60). It is obvious to assume, also according to the common law such as it is applied in Nigeria, that such non-binding standards – depending on their nature and contents – may aid to specify or illuminate a duty of care. This is confirmed in point 50 of the opinion M.T. Ladan and R.T. Ako of 13 December 2011, submitted by MD et al. as Exhibit L.1.

3.20 MD et al. describe the tort of nuisance as: nuisance (point 125 R), the tort of trespass to chattel as: breach of property or goods not being land (such as trees, crops and fish), whereby breach is taken to mean: inflicting damage or disrupting use (point 134 R, point 827 SoA/2). The tort of trespass to chattel requires intent or negligence, while the tort of nuisance requires unreasonable acts on the part of the party causing the nuisance (points 825 and 817 SoA/2).

3.21 Another part of common law is the rule of the English case of *Ryland v Fletcher* (House of Lords 17 July 1868, (LR 3 HL 330)). The court of appeal in that case described that rule 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 then House of Lords affirmed this rule, with the addition that the rule only pertains to '*non natural use*' of the land. The *Rylands v Fletcher* rule imposes strict liability – which incidentally is not unlimited – on the occupier of the land for the damage that occurs if the conditions of this rule are met. The strict liability of Section 11(5)(c) OPA can be viewed as the implementation of this rule in case of pipe damage.

Exclusivity of the OPA

3.22 Shell has argued that Section 11(5)(c) OPA provides an exclusive arrangement for the liability of a licence holder for damage caused by a leak from a pipeline, and that there therefore is no place for liability for such damage on a common law ground such as negligence, nuisance or trespass. In this context, Shell refers to the following rulings:

- UK High Court 20 June 2014, (2014) EWHC 719 (TCC) (*Bodo v SPDC*) in which (in legal ground 64) that exclusivity of the OPA is assumed;
- Court of Appeal 25 July 2017 (*Nigerian Agip Oil Co v Ogbu*) (Exhibit 61, Appendix 2) in which on p. 29 in an *obiter dictum*, referencing inter alia *Bodo v SPDC*, it is noted that Section 11(5) OPA has set aside the common law;
- High Court 15 January 2019 (*Johnson v SPDC*) (Exhibit 61, Appendix 4) in four consolidated cases in which it was determined that the OPA '*has provided a comprehensive compensation regime*'.

3.23 Before *Bodo v SPDC,* the Nigerian courts did not view the OPA, or Section 11(5) OPA, as exclusive. This is apparent from, for example, the ruling in the case *SPDC v Otoko* (Court of Appeal 25 May 1990, [1990]6 NWLR 693) (Exhibit J.5). This case concerned leaks from pipelines, so that that case (also according to Shell; point 291 DoA/SoA-cross/2) fell within the OPA's scope of application. Nevertheless, the Court of Appeal did not apply the OPA but rather common law (tort of negligence) (see, inter alia, points 19 et seq. of the dictum). In the ruling in the case of *SPDC v Edamkue* (Supreme Court 10 July 2009, 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74) (Appendix 1.12 to Exhibit M.1)) the common law rule of *Rylands v Fletcher* was used in a case regarding a pipeline leak. In a ruling (Supreme Court 5 June 2015, LOR (5/6/2015/SC) (*SPDC v Anaro)* delivered after *Bodo v SPDC*, the Supreme Court determined in a case which (also according to Shell; point 291 DoA/SoA-cross/2) fell under the scope of application of the OPA, that the *Rylands v Fletcher* rule was rightfully applied (Exhibit Q.24, see mainly p. 13 of said ruling). From this it can be deduced that the Supreme Court did not view the OPA as exclusive, both before and after *Bodo v SPDC*. A Federal High Court (14 December 2016 (*Ajanaku v Mobil*) (Exhibit Q.23) considered as follows: '*It is settled law that victims of oil operations spillage/damage can maintain an action for compensation under the rule in Rylands vs. Fletcher*'.

3.24 The OPA dates from 1956. From the above considerations the argument follows that this act is exclusive, was first put forward, or at least was first embraced, in a UK High Court procedure which in 2014 led to *Bodo v SPDC*, and was later sporadically used by lower Nigerian courts, but not by the Supreme Court, which continued to assume its non-exclusivity. In view of the system of precedent, this court must follow the Supreme Court. All the more

so now the only higher Nigerian court has assumed the exclusivity, the Court of Appeal in *NAOC v Ogbu*, namely in an *obiter dictum* (see, inter alia, point 37 of the opinion of Shell's expert F. Oditah in Exhibit 61), which has no binding effect (see Uniken Venema/Zwalve, *Common Law & Civil Law*, 2008, p. 80). Therefore, Shell's argument as stated under 3.22 does not succeed. The OPA is not exclusive, so that common law legal actions are also an option, with the associated legal and equitable remedies.

3.25 The standpoint taken by Shell – following on from the aforementioned opinion in Exhibit 61 – that there is no room in the OPA for a declaratory decision, but only for compensation (point 74 WS/2-S and point 262 DoA/SoA-cross/2) is also rejected. The rulings discussed in points 44 through to 47 of the Exhibit 61-opinion only reveal that the OPA does not allow any/other damages, because it mentions 'compensation'. From this it does not follow that a declaratory decision (whether or not as a prelude to compensation) is in conflict with the wording, system or purpose of the OPA. A declaratory decision may well be an appropriate means to settle or streamline a dispute as referred to in Section 19 OPA, which may or may not involve a declaratory decision in a dispute about the question whether or not a compensation obligation exists under the OPA, after which the amount of compensation may either be agreed between the parties, within the meaning of the last sentence of Section 11(5) OPA or may be determined by the court on the basis of Section 20(2) of said act.

Liability of a parent company under Nigerian law

3.26 The claims of MD et al. against the parent companies of Shell are governed by Nigerian law. This is agreed between the parties (see also 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 Rome II Regulation). These claims are not based on a direct piercing of the corporate veil (where the separation of legal personalities between the parent company and subsidiary is disregarded), but on what is also known as an indirect piercing of the corporate veil, namely the liability of the parent company for its own acts or omissions with respect to third parties that were/are affected by the acts or omissions of its subsidiary (inter alia, points 126 and 127 SoA/1) – based on the negligence/breach of a duty of care.

3.27 Shell has noted that there is no Nigerian precedent for this liability of a parent company. A question that was posed by the Court at the 2020 hearing in response to this remark was answered on behalf of Shell that, to its knowledge, no case had ever occurred in which a parent company was called to account/included in a summons (RH-2020, p. 13) in a context such as the one in this case. Therefore, it must be established that in Nigeria no

comparable case of parent company liability has been settled in legal proceedings. Considering this state of affairs, English case law – which after all has persuasive authority in Nigeria – must be consulted.

3.28 The relevant recent English rulings in this area are:

- UK Court of Appeal 25 April 2012, [2012] EWCA Civ 525 (*Chandler v Cape*) (Exhibit 25), in which in substantive proceedings the liability of the parent company with respect to employees of the subsidiary was assumed;
- UK Court of Appeal 14 February 2018, [2018] EWCA Civ 191 (*Okpabi v RDS*) (Exhibit Q.34), in which in the context of the competence issue it was determined that the claimants had no arguable case against the parent company (appeal before the Supreme Court pending, case id: UKSC 2018/0068));
- UK Supreme Court 10 April 2019, [2019] UKSC 20 (*Vedanta v Lungowe*), in which the opinion in the context of the competence issue, that claimants had an arguable case against the parent company, was upheld.

3.29 The most importance must be attached to the ruling (delivered in unanimity) of the UK Supreme Court. In this ruling, the following was considered, inter alia:

> *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-à-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 v Cape*' case referred to under 3.28, added by the Court)*, 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. (...).

3.30 The legal rule given by the UK Supreme Court in *Vedanta v Lungowe* (hereinafter: the *Vedanta* rule) means that it must be assessed according to the usual standards – the *Caparo* test, see legal ground 3.18 – whether or not a parent company has a duty of care with respect to third parties that have a relationship with its subsidiary, that a further classification in *Fallgruppen* is not applicable, and that involvement in the subsidiary is a basic condition (cf. point 8 WS/2-S). Point 80 of *Chandler v Cape* states as an extra condition for a duty of care of the parent company that the parent company knew or should have known about the unsafety of the system used by the subsidiary. This

knowledge requirement must be deemed to form part of the *Vedanta* rule. If the parent company is not aware or should be aware of the injurious acts of the parent company, it is difficult to recognize that, as far as the parent company is concerned, the foreseeability requirement – step a) of the *Caparo* test – has been met nor that it would be fair, just and reasonable – step c) of the *Caparo* test – to impose a duty of care on the parent company.

3.31 Including the knowledge requirement, the *Vedanta* rule may be represented as follows: if the parent company knows or should know that its subsidiary unlawfully inflicts damage on third parties in an area where the parent company involves itself in the subsidiary, the starting point is that the parent company has a duty of care in respect of the third parties to intervene.

3.32 Especially considering the above-cited consideration 54 of the *Vedanta v Lugowe* ruling, there is no reason to assume that the Nigerian court would not adopt the *Vedanta* rule, as shown above. Therefore, this rule must be deemed to form part of Nigerian law. Since Nigerian law is identical to English law in this respect, it would make no difference whatsoever if the parent company liability were to be assessed not according to Nigerian law (see legal ground 3.26) but to English law.

3.33 In this context, the following can also be noted:

- The Shell parent companies are not licence holders in the sense of the OPA; this act therefore does not apply to them;
- In light of the view under 3.24 that the OPA does not have an exclusive nature, this act does not preclude – unlike Shell believes (point 770 DoA/SoA-cross/2) – an assumption of parent company liability on the basis of common law;
- Along with Shell (point 770 DoA/SoA-cross/2), it must be assumed that, looking at specifically this case, if there is no tort of negligence/nuisance/trespass to chattel of the subsidiary – perhaps with the exception of special circumstances, of which there is no evidence here – a breach of a duty of care on the part of the parent company cannot be assumed.

The extent of the contamination

3.34 The JIT report states that the equivalent of about 400 barrels of oil leaked in the spill of 26 June 2005, which comes down to about 64,000 litres. The Clean-Up certificate states that this caused contamination in area of about 60,000 m^2, the equivalent of about ten football pitches. MD et al. have cast doubt on the accuracy of these figures (see, inter alia, point 10 SoA/2 and

points 139 et seq. WS/2-MD), while failing to provide the figures (approximations) which should be assumed, even though logically speaking they should have done so (legal grounds 3.14 and 3.18), especially when it comes to the size of the contaminated area they could have determined on the basis of their own investigation. However, the Court understands from points 79-88 WS-MD, point 10 SoA/2 and points 146 and 157 WS/2-MD, that the argument of MD et al. regarding the inaccuracy of the figures is only in support of their standpoint that the JIT report and Clean-Up certificate are unreliable (cf. point 53 WS/2-S).

4. Preliminary defences of Shell

Introduction

4.1 Shell has put forward several preliminary defences, which were largely processed in the 2015 ruling. That ruling discussed Shell's reliance on the lack of a right of action of Oguru and Efanga (see legal grounds 4.1 through to 4.3 of said ruling), but no final decision on that has been taken. In the 2015 ruling, Shell's reliance on the general dismissal of MD's right of action was definitively rejected (legal grounds 3.1 through to 3.4 of said ruling). Shell subsequently and specifically put forward in points 223-230 and 932 and 933 DoA/SoA-cross/2 that MD et al. have no case based on the OPA due to non-fulfilment of a *condition precedent*. The Court will now assess/further assess, in the aforementioned order, the preliminary defences on which no definitive decision has yet been taken.

Right of action of Oguru and Efanga

4.2 MD et al. have asserted as follows. Oguru and Efanga use and occupy the land on which they grew their crops and economic trees (jointly: the plants). This land was situated near the right of way of the SPDC. Oil spilled over this land due to the leak of 26 June 2005, so that the land and the plants (of which they were owners) were affected and destroyed. Oguru and Efanga also had a number of fish ponds, which they had installed in the bush on both sides of the Olumogbogbo-Gbara Creek. The oil that spilled into this creek was spread by the current and tidal movement, so that some of the oil also ended up in the fish ponds of Oguru and Efanga. The fish in the ponds died as a result and the ponds became unusable for fish farming and fishing.

4.3 To contest the right of action of Oguru and Efanga, Shell has put forward three arguments, namely a) that they should have submitted documents showing how they acquired the ownership/right of use of the land and the fish ponds, b) that they failed to make clear the exact location of the land and the

fish ponds, and c) that it does not appear that the oil had leaked up to this land and these fish ponds and caused damage there (inter alia, points 243, 244, 253, 254, 562 and 564 DoA/SoA-cross/2).

4.4 Section 11(5)(b) and (c) OPA confers right of action on '*any person suffering damage*'. The words '*any person*' show that the group of persons with a right of action is very broad and that no specific requirements are set as to the capacity of the injured party. This does not tally with expecting an injured party that is able to prove that they have the capacity of owner or (lawful) user – which is not required – to also demonstrate how they acquired the ownership or right of use. The same applies to a claim on the basis of negligence. This also does not require specific requirements as to the capacity of the injured party. Insofar as the claims of Oguru and Efanga are based on Section 11(5)(b) and (c) OPA and the tort of negligence, Shell's argument a) does not succeed for these reasons alone. Whether or not this argument is applicable to the other bases of the claims of Oguru and Efanga needs no consideration, in view of the considerations in 5.30, 6.29, 8.29 and 9.6.

4.5 In the first instance, MD et al. submitted signed statements of the Oruma community from 2012, in which the community states that the land and the fish ponds circled on the attached Google Earth maps '*are owned and used by*' Oguru and Efanga with '*the right to do so*' (hereinafter: the M.4 statements). On appeal, in DoA-cross/2, MD et al. have submitted survey plans with maps of 4 October 2019 as Exhibit Q.59 (A and B), on which is stated: '*shewing property area*' of Oguru and the deceased Efanga. The land and the fish ponds are depicted in red lines on the maps. According to the assertions of MD et al. in point 31 WS/2-MD, following on from points 92 and 106 DoA-cross/2, a survey plan is an official, certified document on which the location and demarcation of a piece of land is depicted, comparable to a cadastral map in the Netherlands. Shell has not contested this. From the last sentence of point 61 WS/2-S, it can be deduced that Shell deems the M4 statements to be incorrect, because the map associated with the statements show the lands and fish ponds at different locations than on the map of the survey plan, which Shell apparently does deem to be correct. In point 92 (with note 102) DoA-cross/2 and point 17 WS/2-MD, MD et al. have given a credible explanation for this, namely that the person who drew the circles on the map of the M.4 statements had mistaken a path between the lands of Oguru and Efanga for the right of way, and that if the map of the M.4 statements is turned 45º to the right, it is clear that it corresponds with the maps in the survey plans, as is made clear with the photograph on p.8 WS/2-MD. Regardless, it is at any rate sufficiently clear from the not-contested survey plans where the lands and fish ponds of Oguru and the late Efanga are situated, and that they in any case were the users of the lands and the fish ponds (*'property area'*). Therefore, argument b) also does not hold.

4.6 The maps to the survey plans show the location of the leak (*spillpoint*). It appears from the scale of the map that Oguru's land starts at about 100m from the spillpoint and that Efanga's land borders it. The land and fish ponds of Oguru and Efanga are situated so close to the location of the leak that, also in light of the considerations in 3.34, the oil flow inevitably reached those lands and fish ponds and at least covered parts of the lands and fish ponds, also considering that Shell has not asserted that the oil almost exclusively flowed in the opposite direction. It can therefore be considered certain that Oguru and Efanga incurred at least some damage as a result of the leak. Shell's argument c) also does not hold.

4.7 It must be concluded that Oguru and Efanga are entitled to claim pursuant to Section 11(5)(b) and (c) OPA and pursuant to the tort of negligence. This also applies to MD where it seeks to protect the interests of other, currently unknown, persons living in the vicinity of the spillpoint, within the area measuring about ten football pitches, and the environment affected by the leak.

Right of action of MD et al. under the OPA

4.8 Shell argues that MD et al. have no right of action under the OPA, because they do not meet the condition (*condition precedent*) set out in the last sentence of Section 11(5) OPA, in conjunction with Sections 11(6) and 20(2) OPA, to be able to claim compensation at law based on that condition, namely that the parties must have first consulted each other in an attempt to reach agreement on the amount of compensation. MD et al. counter this with the statement that the OPA does not contain such a *condition precedent* and, in the alternative, that it cannot be alleged against them since the amount of compensation is not yet at issue (points 14 and 21-32 DoA-cross/2).

4.9 In assessing this point of contention, the Court states first and foremost that Shell has failed to argue that as an interest group MD cannot invoke Section 11(5) OPA. The fact that Shell believes that MD has no right of action (see the heading above point 223 DoA/SoA-cross/2) due to not meeting the alleged 'consultation' condition in that section, and not in the alternative sense, indicates that it – rightly – assumes that there is no further hindrance to deem MD entitled to bring an action based on that section. In this context, reference is made to legal ground 3.3 of the 2015 ruling (a+b).

4.10 Section 19 OPA distinguishes 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) OPA, containing the alleged *condition precedent*, only pertains to disputes on '*the*

amount of such compensation'. Claims I and III.a-a, which are partially based on the OPA, are for declaratory decisions with a referral to follow-up proceedings for the determination of damages, and declaratory decisions as a prelude/basis for future claims for compensation, respectively. Those claims therefore pertain to disputes about the question '*as to whether any compensation is payable*' and not, or not yet, about the question of '*the amount of such compensation*'. The alleged '*condition precedent*' does not come into play here. Therefore, MD et al. have rightfully put forward that this cannot be alleged against them.

4.11 Superfluously, the Court notes the following. MD et al. sent notices of liability to the SPDC and RDS before the summons in case b, to which the SPDC responded with the remark that it '*under no obligation is to compensate your clients for the damage claimed (…)*'. During the appeal proceedings, the Court repeatedly requested/urged the parties to examine whether or not they could reach a mutual agreement (see, inter alia, p. 6 of the record of appearance of the parties of 24 November 2016 and p. 18 of the RH-2020). At the 2020 hearing, Shell noted that a settlement is not an option – as the Court understands it: for Shell – because MD also seeks to protect the interests of three communities, including the Oruma community, and not just those of several individual claimants. Taking all this into account, Shell effectively halted ahead of time the consultations it now emphasizes so much. Considering this state of affairs, the condition precedent must be deemed as fulfilled, in view of the underlying principle, as regards Dutch law, of Book 6 Section 23 subsection 1 Dutch Civil Code.

5. The claims in respect of 'Origin' (of the leak)

Claims I and III.a-a against the SPDC in respect of 'Origin'

5.1 The Court will now assess claims I and III.a-a of MD et al. against the subsidiary SPDC insofar as they pertain to the theme 'Origin'. These claims – also as regards claim III.a, see legal ground 4.9 – are firstly based on Section 11(5)(c) OPA, which imposes strict liability on the SPDC for damages ensuing from a leak in a pipeline. However, this strict liability does not apply without limitation; it does not apply, inter alia, if the damage is the result of a malicious act of a third person, such as is the case with third-party sabotage.

Sabotage defence: burden of proof and threshold of proof

5.2 The SPDC asserts that the leak was caused by sabotage. MD et al. have contested this. According to them, the leak was the result of overdue maintenance. Shell has not argued that the sabotage it has presumed was

caused by Oguru and/or Efanga or the local residents whose interests MD seeks to protect. Shell bases its defence on third-party sabotage.

5.3 It is – rightfully – not in dispute that Shell has the burden of proof as regards the third-party sabotage it alleges (see also legal ground 3.16 *in fine*). However, it is in dispute which evidence evaluation standard (threshold of proof) applies here: is that the special standard for civil cases, beyond reasonable doubt, such as MD et al. believe, or the regular standard of preponderance of weight of evidence, such as Shell believes?

5.4 The Nigerian Evidence Act 2011, already discussed in legal ground 3.14, states the following, inter alia:

> ***134 Standard of proof in civil cases***
>
> *The burden of proof shall discharged 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 subsection 1 of the 1945 version of the act stipulated the same as Section 135(a) of the 2011 version.

These legislative texts at first glance seem to suggest, as Shell notes in point 15 WS/2-S, inter alia, that in cases of criminal offences committed by a non-party, such as with third-party sabotage, the special standard of beyond reasonable doubt does not apply. However, according to MD et al. Nigerian courts do apply this special standard in third-party sabotage cases.

5.5 The Court first of all points out that in the Supreme Court ruling in the *SPDC v Edamkue* case of 2009, referred to in legal ground 3.23, the beyond reasonable doubt standard was used in a civil oil leak case in which third-party sabotage was invoked, as the Court understands. This is not out of the ordinary considering Section 138 subsection 1 of the Evidence Act 1945.

5.6 From the ruling of a Court of Appeal (7 December 2011, (2011)LPELR-9783(CA) (*SPDC v. Firibeb*) (Appendix 1 to Exhibit 60)) regarding Section 11(5)(b) and (c) OPA it becomes clear that in the first instance, the Federal High Court ruled (p. 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 that case, the SPDC did not submit grounds for appeal against this judgment.

5.7 The ruling of a Court of Appeal of 17 December 2018 (2018)17NWLR (Pt. 1649) 420 (*SPDC v Okeh*) (Exhibit Q.60, Appendix A) also concerned third-party sabotage. In an explanation of the law on p. 436/437, reference is made to the beyond reasonable doubt standard from *SPDC v Edamkue* and to Section 138(1) of the Evidence Act. From this it can deduced that this Court of Appeal effectively applied the beyond reasonable doubt standard. The fact that on p. 439, second paragraph, mention is made of reliable proof does not take away from this, especially not since that paragraph emphasizes that in that case there was actually no proof at all for sabotage ('*little or no iota of proof* ').

5.8 Another case between the SPDC and Okeh, in which a Federal High Court gave a decision on 20 February 2018 (Exhibit Q.60, Appendix B) also involved third-party sabotage. This court considered the following as regards the proof to be submitted: '*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 determined that this threshold had been met.

5.9 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, p. 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.*

5.10 Shell and its experts Oditah and Ayoola could not identify a single legal decision in which the regular standard pursuant to Section 134 Evidence Act 2011 rather than the beyond reasonable doubt standard was used in third-party sabotage cases to counter the legal sources discussed in 5.6 through to 5.9, which strongly suggest that in legal practice the beyond reasonable doubt standard is applied in cases involving third-party sabotage. In his opinion in Exhibit 77 (under 224) Ayoola acknowledged that there is a '*temptation for civil courts*' to interpret Section 138(1)/135(1) Evidence Act in a way that requires beyond reasonable doubt, also in cases of non-party sabotage. The Court finds that under applicable Nigerian law, as it is applied by the Nigerian

courts, this high threshold of proof must be applied in third-party sabotage cases. The fact that Oditah and Ayoola deem this incorrect, does not alter this. The opinions of these party experts carry insufficient weight in relation to the legal practice, as is evident from 5.6 through to 5.9.

5.11 As is evident from the foregoing, there is a specific threshold of proof in Nigeria to prove sabotage. Such a specific rule can be considered as belonging to the substantive law of evidence, which is subject to the *lex causae* (see legal ground 3.1), because it is closely related to substantive law. Unlike argued by Shell, inter alia, in points 11-14 WS/2-S, it is not the case that in a situation like this, whether special or not, the threshold of proof to be applied is determined by Dutch law as the *lex fori*.

5.12 The Court will now assess if Shell has proven beyond reasonable doubt that the leak at Oruma of 26 June 2005 was caused by sabotage.

Evaluation of the evidence

5.13 Against the assertion of MD et al. that the leak at Oruma was caused by overdue maintenance, more specifically by corrosion, Shell presented the following evidence in the first instance as proof of the alleged sabotage:

- the JIT report, which concludes that there were fresh traces of digging and a round hole (inconsistent with corrosion) with smooth edges (drill hole), thereby proving sabotage;
- videos made during the JIT visit, which allegedly confirm the conclusions from the JIT report;
- the UT measurements carried out during the JIT visit, which would prove that the thickness of the wall around the leak had not or had hardly decreased compared to the original wall thickness, so that internal corrosion could allegedly be excluded;
- the results of 6 April 2005 of a measurement carried out by the company Rosen in December 2004 – using the *Magnetic Flux Leakage* (MFL) technique – with a type of robot (a so-called intelligent pig) which moves through the pipeline and inspects it from the inside (a pig run, also known as an inline inspection (ILI) run), which results apparently proved that at the time (six months before the leak) the pipe showed no thinning at the location of the leak, so that it would not seem logical that the damage to the pipeline was due to corrosion.

The district court found this evidence sufficient to deem sabotage certain.

5.14 In the 2018 ruling, the Court ordered an expert opinion with the following areas that require investigation:

1) To what extent does the available material enable you to obtain a complete picture of the possible cause of the leak? If the material is insufficient, which extra information do you need?

2) If the current material enables you to render an opinion: in your expert opinion, what caused the leak? On what grounds do you base your opinion?

3) In your expert opinion, are there other possible causes of the leak? If so, which are they and on what grounds do you base this opinion?

4) Is it possible on the basis of the available material to draw a definitive conclusion about the cause of the leak?

5) Are there other facts and circumstances you deem relevant for answering the questions?

It was originally planned for the experts to physically examine the hole in the pipeline (legal ground 5.3 of the 2015 ruling), but due to the unsafe situation on site this plan was abandoned (see, inter alia, point 2.2 of Shell's 'Memo for the appearance of the parties of 24 November 2016 (in cases a through to e))'. So the experts carried out a desk research.

5.15 Before the 2020 hearing, MD et al. submitted at the request of the Court the relevant documents, some digitally, as Appendices 1 through to 18, about the creation of the experts' report (hereinafter referred to as B-D 1 through to 18). One of these documents is the experts' draft report of 18 September 2018, designated as B-D 12, to which Shell responded (B-D 13) on 16 October 2018 and also MD et al. (B-D 15). Thereafter, MD et al. sent an e-mail with questions and remarks in response to Shell's B-D 13 input (B-D 16). B-D 17 contains an e-mail exchange between the parties and the experts. B-D 18 is an e-mail from expert Sowerby to the Court.

5.16 Shell provided the experts with new or further information on 3 November 2017 (B-D 2) about the ILI runs carried out in 2000, 2004, 2011 and 2016, which in the expert opinion are designated as: B (2000), E/F/G/AG/AH (2004), M/AG/AH (2011) and U/AG/AH (2016). When asked, on 23 August 2018 Shell provided further information (B-D 10 and 11) to the experts about the ILI runs of, inter alia, 2005, designated in the experts' report as: Z. On 16 October 2018 (B-D 14 Exhibit A) – so after the draft report – Shell provided additional information from Rosen about the ILI runs it had carried out, which in the expert opinion is designated as: AJ). MD et al. complained that Shell provided the information requested by the experts either not at all or too late (point 88 WS/2-MD).

5.17 On 17 December 2018, the experts issued their final report. The parties gave their respective interpretations of the report. According to MD et al., there is too much doubt among the experts to assume sabotage, while according to Shell, the experts arrive at the conclusion that the leak was caused by sabotage, even according to the beyond reasonable doubt standard. The final report leaves room for both interpretations at first reading. The report states, inter alia, that on the one hand the experts could not come to a definitive conclusion about the cause of the leak and that it is only their 'impression' that the sabotage was the cause (p. 18, point 4), which is in line with the interpretation of MD et al., but on the other hand that their doubt about that '*is now very low*' (p. 16, second paragraph), which is more in line with Shell's interpretation. A further analysis of the experts' report shows the following (references pertain to the final report, unless stated otherwise).

5.18 First of all, the experts established that the ILI reports '*clearly*' state where the 2005 leak is located (p. 11, final paragraph), namely at 7749.68-7750.04 meters downstream from the Kolo Creek manifold (p. 8, seventh asterisk in conjunction with p. 7, second asterisk). They also specified the position of the leak at 07:55 hours while the JIT report stated 08:30 hours, see p. 8 seventh asterisk. The experts also plainly established that external corrosion could not have caused the leak, which leaves only internal corrosion or external interference as potential causes, with the proviso that external interference '*by plant machinery and tractors etc*' (probably) is also excluded, so that, in the end, only internal corrosion and sabotage remain as the possible causes, or so the Court understands (p. 12, seventh paragraph; p. 18 point 3).

5.19 The experts also described the JIT report as being '*of very poor quality*' (p. 12, third paragraph): it is not detailed enough, does not have good photographs and generally does not meet the standards set to such a report (p. 16, third paragraph). The experts also find the JIT's UT measurements '*questionable as to their accuracy*' (p. 12, fifth and sixth paragraph; p. 16, third paragraph) because due to the corrosion found in the pipeline (see under 5.21 below) the measurements should have revealed a greater variation in wall thickness. Therefore, the Court understands that the experts answered question 2 about the cause of the 2005 leak based solely on the information they obtained from the ILI runs of 2005, 2011 and 2016.

5.20 The experts focused on the 2016 ILI measurements because these had revealed a lower number of corrosion sites than the earlier ILI measurements and Rosen had given a convincing explaining for this in B-D 14 Exhibit A (= AJ) (p. 11, paragraphs 2 through to 6; p. 8, seventh asterisk).

5.21 The experts established that internal corrosion was visible on the bottom part of the pipeline across the entire length/ '*the 6 o'clock position*', but that for

the first 15 km, where the Oruma leak occurred (see legal ground 5.18, first sentence) the depth of it was in '*general*' less than 40% (p. 10, last paragraph; p. 12, sixth paragraph). Based on 'Z', the experts also came to the conclusion that it is clear that the area around the position of the leak was '*clean*', '*with no corrosion evident around the leak*' (p. 16, fifth paragraph). This concerns the situation in the direct and wider vicinity of the leak.

5.22 The experts also examined the situation at the site of the leak, underneath the clamp (the PLIDCO split sleeve clamp). The experts initially wondered if *'at'* the place of the leak there could be three *'defects'*; this was, according to the experts in their draft report, implied by the ILI reports, which at the same time indicated no '*significant areas of internal corrosion*' '*at the position of*' the leak, and which, still according to the experts in their draft report, in this respect provided conflicting information (see p. 13, third and fourth paragraph of the draft report B-D 12). Shell then noted that these concerned two '*minor indications*' which were the result of corrosion and one '*larger indication*', which is the leak this case revolves around (B-D 13, p. 27 under 2). On p. 8, seventh asterisk of the final report, this remark by Shell was apparently accepted as correct on the basis of the statement of Rosen B-D 14 Exhibit A (= AJ), which '*suggests that the additional corrosion features under the repair clamps are very low level ≤ 10%*'. This solves the problem of the conflicting information.

5.23 The findings stated under 5.20 through to 5.22 caused the experts to conclude in their final report that '*the most likely cause of the leak is external interference rather than corrosion*' (p. 16, sixth paragraph). On p. 18, point 4 of the final report, the same was stated in slightly different wording: '*it is our impression that everything we have seen points to external interference as being the likely cause of the leak*'. This conclusion/impression was already present in the draft report B-D 12, in identical wording (p. 14, second paragraph; p. 16, point 4). The Court understands that the experts' thought process behind this conclusion/impression is that, since underneath the clamp (not the place of the leak) a very small amount of corrosion was found, in the direct vicinity of the leak no corrosion was found and in the wider area of the leak at best less deep corrosion was found, it is not likely that (underneath the clamp) at the location of the leak corrosion had developed so deep that it caused a hole.

5.24 However, the experts have also stated that the material made available by Shell does not enable them to obtain a complete picture of the possible cause of the leak, mainly due to the lack of photographs and high-quality measurements (p. 15, final paragraph/p. 16, first paragraph of the final report; p. 13, second paragraph of the draft report), and that the only way '*to absolutely confirm*' that the leak was caused by sabotage is to remove the

clamp from the leak, re-examine the leakage area, and drawing up a high-quality report, containing good photographs and research information (p. 19, third bullet point of the final report; p. 16 at 5, 5th bullet point of the draft report B-D 12). The Court understands that the experts' intention was to convey that although the information about the corrosion situation in the immediate and wider vicinity of the place of the leak could reveal something about the probability of the existence of deep corrosion at that location (indirect information), but that a definitive answer can only be obtained with information about the leak itself and the place of the leak, such as photographs and measurements (direct information), which Shell has not provided.

5.25 On p. 16, second paragraph, of the final report the experts noted – further to their above-mentioned complaint that due to the lack of good photographs and measurements, they could not obtain a complete picture – the following comment:

> *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 added by the Court).

In assessing the meaning of this passage, two things must be stated first and foremost: i) this passage does not appear in the draft report and ii) the '*latest ILI data supplied by Shell on 16 October 2018*' refers to the statement of Rosen B-D 14 Exhibit A, designated as AJ in the expert opinion. B-D 14 Exhibit A/AJ was only raised in the expert opinion as a solution to the 'conflicting information' issue flagged in the draft report (see legal ground 5.22) – except to justify the focus on the 2016 ILI run (see legal ground 5.20), which is not relevant in this context. Against this background, the passage cited above must be understood as follows: even though a complete picture cannot be obtained due to the lack of good photographs and measurements, '*the latest ILI data supplied by Shell on 16 October 2018*' '*however*' provide sufficient data to resolve the problem of the conflicting information to such an extent that the doubt, raised by the problem, is ('*now*') very low. In view of this and considering the solving the 'conflicting information' problem has not lead to an adjustment of the conclusion/impression mentioned in legal ground 5.23 – which, after all, was already stated in the draft report using the same terms – the remark that '*doubt is now very low*' cannot be considered as a refinement of the conclusion/impression.

5.26 Insofar as any specific objections against the expert opinion can be read in the assertions of Shell (such as in point 90 DoA/SoA-cross/2), they cannot succeed on the ground of the aforesaid considerations.

5.27 The Court accepts and adopts the expert opinion, as reflected and interpreted in the foregoing. This brings the Court to the opinion that based on the available indirect information sabotage is the most likely hypothesis for the origin of the leak, but that due to the lack of direct information it has not been established/proven beyond reasonable doubt that sabotage was indeed the cause of the leak.

Conclusion on claims I and III.a-a against the SPDC in respect of 'Origin'

5.28 Pursuant to Section 11(5)(c) OPA, the SPDC therefore has strict liability – to Oguru, Efanga and MD as the representative of the other residents – in respect of the origin of the leak. The Court issues a declaratory decision on this, allowing claims I and III.a-a to this extent, whereby it has been taken into account that it is likely that Oguru and Efanga and the other residents incurred damage as a result of this leak (some damage has even been established, see legal grounds 4.6 and 4.7), which underlines once more their interest in the declaratory decisions. This also means that the referral to follow-up proceedings for the determination of damages sought by Oguru and Efanga with claim I is allowable. Those proceedings will deal in greater depth with the questions of which damage and loss items are eligible for compensation under Nigerian law applicable to these questions, and how the damage should be estimated.

5.29 Above point 284 of the IS in case a (against two parent companies) and in case b (against the SPDC and RDS) is the heading '*In the alternative: insufficient security of the pipeline*'. In point 214 SoA/2, MD et al. have stated that when it is established beyond reasonable doubt – as the Court understands: only when – sabotage was involved, a further investigation is needed to establish whether or not 'Shell' was negligent in the prevention of the sabotage. From this the Court deduces that the assertions of MD et al. regarding negligence of the SPDC and the Shell parent companies to sufficiently secure, or have secured, the pipeline against sabotage, were brought to bear in case/under the condition that sabotage has not been proven beyond reasonable doubt. Since this condition has not been met, the assertions of MD et al. can remain undiscussed.

5.30 MD et al. no longer have an interest in an assessment of claims I and III.a-a against the SPDC based on a tort/the *Rylands v Fletcher* rule in light of the considerations in 5.28 and 5.29. Incidentally, the claims would not have been allowable based on the torts of negligence, nuisance or trespass to chattel, because as is apparent from legal ground 5.27, sabotage – although not proven beyond reasonable doubt – rather than overdue maintenance is the most likely hypothesis for the origin of the leak, so that it cannot be

determined that the leak was due to negligence or unreasonable acts of the SPDC.

Claims I and III.a-a against the parent companies in respect of 'Origin'

5.31 To be able to assume a duty of care of the parent company/companies, MD et al. – which have the burden of proof in this respect – must at least prove that the subsidiary SPDC acted negligently or unreasonably (see legal ground 3.33 *in fine*). But it has not been proven, as explained in legal ground 5.30. This means that claims I and III.a-a in respect of Origin are not allowable against the parent company/companies.

5.32 It should be noted here that in this context Shell's defence that the leak was due to sabotage rather than insufficient maintenance needs not be proven beyond reasonable doubt. This threshold of proof must be deemed to apply only to the party on which the burden of proof rests, such as the licence holder/occupier (the SPDC) pursuant to Section 11(5)(c) OPA/*Rylands v Fletcher* rule. In the context of parent company liability, the burden of proof rests on MD et al. rather than on Shell.

Claim VI: keeping the pipe/pipes in a good state of repair

5.33 Claim VI is for the issuance of an order to the Shell parent company/companies and subsidiary – as of today (see legal ground 3.7) – to keep the Oruma pipeline in a good state of repair, in view of the leak that occurred there in 2005.

5.34 It is also relevant in assessing this claim that it has not been established that that leak was the result of negligence or unreasonable acts of the SPDC. Its liability for compensation in this context rests on strict liability. Although MD et al. have argued that in the direct vicinity of Oruma, also in the period from 2010 to 2020, many leaks occurred (point 226 SoA/2, points 19, 20 and 110 WS/2-MD) – in, as far as the Court understands it, the Oruma I pipeline and/or (mainly) the Oruma II pipeline – they have also noted that 'according to Shell' these were 'all cases of sabotage' without contesting this standpoint of Shell. Considering legal ground 5.29, these leaks can also not be traced back to negligence/unreasonable acts of the SPDC. In short, an unlawful state in respect of Origin cannot be deemed to exist as regards the Oruma pipeline. Awarding the claims for injunction, instituted on account of Origin, against the parent company/companies and the subsidiary is therefore not applicable. Claim VI is rejected.

6. The claims against the SPDC in respect of 'Response'

Background and bases

6.1 The claims in respect of Response are based on the course of events during and before the period between the report of the leak on 26 June 2005 and the definitive plugging of the leak on 7 July 2005/containment of the leaked oil on 9 July 2005 (point 282 R).

The following can be said about the events in that period.

a. After receiving the report on 26 June 2005, the SPDC did not immediately close off the oil supply, but instead sent employees to Oruma to verify the leak. The reason for this established practice of the SPDC is because of the regular occurrence of false and incorrect reports. Therefore, the oil supply is closed off after the leak is confirmed. However, the SPDC employees were denied access by deputy chief Oguru so that they could not verify the leak. MD et al. argue that Oguru did this because the SPDC employees did not bring a traditional access gift (IS under 295; point 32 SoD). It is tradition for outsiders to ask the village chief (paramount ruler) for permission to enter the land the village of the local residents, according to MD et al., adding that asking for permission is a formality; permission is always granted if a small gift is presented, such as a small amount of alcoholic beverage or a sum of money of about 1 dollar (point 294 IS).

b. Shell argues that two days later, on 28 June 2005, Oguru again denied the SPDC access, this time raising that following a previous leak in 2000, the SPDC had failed to keep its promise of paving the road to Oruma with asphalt (point 55 DoA/SoA-cross/2). MD et al. – stating that the SPDC 'first returned three days later (...)' (point 295 IS) and had not made serious attempts to gain access between 26 and 29 June 2005 (point 308 IS) – also highlighted this promise in point 310 IS, which Shell denies was made (point 63 SoD; point 55 DoA/SoA-cross/2).

c. The parties agree that on 29 June 2005 the SPDC was granted access to the site of the leak and that the leak was established then. What transpired thereafter is the subject of debate. Shell claims that access was only granted for verifying the leak and under the strict condition that the SPDC would not carry out any repair or containment activities (point 54 SoD; point 57 DoA/SoA-cross/2). MD et al. claim that the

SPDC had not brought any material to stop the leak or limit the damage of the leak, and then left (point 296 IS).

d. According to Shell, the SPDC continued to try to gain access to the site of the leak after 29 June 2005. However, these attempts were thwarted by the resistance and even aggression of the Oruma community. A discussion/discussions ensued, still according to Shell, between the SPDC and the Oruma community, which resulted in an agreement entailing that the SPDC would gain access, in exchange for which the SPDC would rebuild a particular road – apparently a different one from the road referred to under b. – in the dry season. Article 6 of this agreement, which MD et al. have submitted as Exhibit A.8, reads as follows (point 308 IS; point 62 DoA/SoA-cross/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 6th of July 2005*.

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

e. According to the assertion of MD et al., the SPDC then 'chose' to appear in Oruma in the later afternoon of 6 July 2005 only to establish that by that time it was too late to commence work on that day, as a result of which repairs were not carried out until 7 July 2005 (point 309 IS). About these events too, Shell has presented a different version: when in the morning of 6 July 2005 the SPDC arrived in Oruma, the Oruma community set new conditions on access. The negotiations about the access lasted until 15:00 hours, after which it was not practical to start working that same day, meaning that the repairs were postponed until the following day (point 63 DoA/SoA-cross/2).

f. Shell has emphasized (point 36 SoD; point 59 DoA/SoA-cross/2), that after verifying the leak on 29 June 2005, it shut down the oil supply through the affected pipe that same day by shutting down four upstream flow stations (installations where the first separation of oil, water and gas takes place) and closing off the relevant manifold (point 31 in conjunction with 21 SoD; point 59 DoA/SoA-cross/2). MD et al. have argued (points 30 and 107 IS; point 282 R) that the SPDC did not shut down the oil flow until 7 July 2005, and not sooner. They put forward two arguments in support of this argument:

i) oil was still flowing from the hole in the pipe when it was closed on 7 July 2005;

ii) Oguru and Efanga noted that between 26 June and 7 July 2005 gas was burned off without interruption from the nearby manifold, which shows that the oil flow through this manifold to the Kolo Creek-Rumuekpe pipeline had continued.

In Shell's view these arguments do not hold, in substantiation of which it argues as follows. Argument i) ignores the fact that after the oil supply was shut down on 29 June 2005, a large amount of oil remained in the pipeline, which explains the residual oil bubbling up from the leak when it was closed on 7 July 2005. Argument ii) starts from the incorrect assumption that burning off gas takes place at the manifolds; but such facilities are only found at flow stations, while the fact that gas is flared at a flow station does not mean that the oil flow through the pipe has not been shut down (points 37-38 SoD).

6.3 All in all, it took eleven days for the leak to be plugged. MD et al. believe this is a 'disproportionate amount of time' (point 319 SoA/2). During those eleven days, at least 64,000 litres of crude oil leaked out, see legal ground 3.34. According to MD et al., the SPDC had the obligation to do what was necessary to limit the damage ensuing from leaks in its pipes – even if the origin of the leak cannot be attributed to the SPDC (see, inter alia, point 125 WS/2-MD) – as much as possible (points 284 and 369 SoA/2), an obligation which it failed to meet. MD et al. have substantiated their claims in respect of Response with the following concrete, factual statements – hereinafter: Arguments I through to IV (see in general point 370 SoA/2):

I. SPDC should have taken measures to be informed of the leak quick/quicker (see also point 335 SoA/2);

II. The SPDC should have installed a Leak Detection System (LDS), obviating the need for verification of the report (inter alia, point 290 R, point 63 (WS/1-MD, points 312, 335 and 336 SoA/2 and points 68, 74-76 and 121 WS/2-MD);

III. The SPDC should have shut down the oil supply sooner and to that end should have used a flow restriction system with a reliable pressure measurement system and remote-controlled valves (see also points 314 and 357-366 SoA/2 and points 77 and 78 WS/2-MD);

IV. The SPDC should have contained the oil earlier (see also point 127 WS-MD).

If one or more of these measures had been taken, the harmful effects of the leak could have been prevented, either entirely or to a very large extent, as can be deduced from the statements of MD et al. In other words: the failure to take these measures caused the damage.

6.4 The Response claims – as considered by the district court under 4.53 of the judgment and as put forward by Shell (point 71 DoA/1) – cannot be based on

Section 11(5) (c) OPA. The tort of negligence (breach of duty of care) and the statutory negligence pursuant to Section 11(5) (b) OPA are – mainly, see legal ground 6.29 below – eligible for application, also according to MD et al. (points 286, 289 and 370 SoA/2). The Court will assess Arguments I through to IV from the perspective of the tort of negligence, which is more comprehensive than the statutory negligence pursuant to Section 11(5)(b) OPA and which will not lead to other results in the overlapping area. From the considerations of 3.14 and 3.18 it follows that the burden of proof – and thereby the obligation to furnish facts – rests on MD et al.

6.5 In points 316-318 SoA/2, MD et al. have provided a summary of points 219-315 of that statement of appeal, containing a discussion of various alleged obligations of the SPDC of a partly procedural nature, including the obligation to draw up an Oil Spill Contingency Plan. Those obligations relate to the measures Shell in general must take in advance according to MD et al. to ensure that it can respond swiftly and adequately to a leak. Except insofar as they also fall under the measures mentioned in legal ground 6.3, the Court fails to see that the alleged failure to take these measures had negative consequences in this specific leak event. Since for this reason alone condition (c), as stated in legal ground 3.18, has not been met a tort of negligence cannot be assumed on that ground.

The access issue

6.6 As is apparent from legal ground 6.2, the access issue plays a major role in assessing Arguments I through to IV. Shell invokes the inability to take certain damage-mitigating measures, because it was denied access. In response, MD et al. put forward several statements (mainly points 292-311 IS, points 128-134 WS-MD and points 350-357 SoA/2), which come down to the following. The Niger Delta is a rich source of oil for Shell, but also an extremely poor living area for Nigerians, who are also time and again confronted with the harmful effects of Shell's activities. They have to live and work in the contaminated area. It determines their life. Among them are people who have grown averse to working with Shell and also people who think they can gain from the situation. This causes tensions with Shell and also within the communities. The relationship between Shell and the communities is very troubled and Shell is to blame for not investing in a good rapport. If it had done so, many access issues could have been prevented, according still to MD et al. It is a harrowing tale MD et al. have presented here, but the Court believes that omitting an act, which Shell was unable to carry out due to being denied access, cannot lead to Shell being attributed with breaching a duty of care. The reasons for the access refusal are too vague and not easily directly attributable to Shell; the people denying access always have a moment of choice (cf. point 628 DoA/SoA-cross/2). However,

the fact that Shell cannot be reproached for not being able to carry out the actions hindered by the refusal of access does not alter the fact that under certain circumstances it can be reproached for not anticipating, or not anticipating sufficiently, the refusal of access and/or (then) taking insufficient action to circumvent the refusal of access or having it lifted.

6.7 Shell's assertions imply that it was confronted with an actual and not just a formal refusal of access. The assertion of MD et al., given under 6.2.a, that permission to access the site of the leak on 26 June 2005 was a mere formality, which could have been secured by giving a more or less symbolic gift, cannot be reconciled with the assertion of MD et al. in point 310 IS which, in brief, states that Shell had promised to construct a road in Oruma – apparently the road referred to in legal ground 6.2b – and by reneging on its commitment had in fact created the obstacle for gaining access. The first-named assertion therefore needed a more detailed explanation, which is however lacking. Apart from this, MD et al. have failed to assert sufficiently concretely that the SPDC had been informed and knew that a symbolic gift would have sufficed. Considering this state of affairs, it must be held as correct that on 26 June 2005 there was an actual refusal of access, or at least that the SPDC could and was right to assume that.

Argument I: knowledge of moment of origin of the leak

6.8 MD et al. have failed to assert sufficiently concrete and with substantiation that the leak had arisen before 26 June 2005 (the day of the report) and also that between the onset of the leak and related report more than a short while had passed. Therefore, it must be held as correct that because of the report the SPDC was virtually immediately informed of the leak. Therefore, Argument I fails.

Argument II: LDS

6.9 It is an established fact that false reports of oil leaks occur in Nigeria on a regular basis. Therefore it is justifiable of itself – apparently also in the eyes of MD et al. (point 125 WS-MD) – to shut down the oil supply after a leak report has been verified. If it were the case that verification is only possible with a physical visit of the site of the leak, it would perhaps also be justifiable to hold the shut-down of the oil supply until access has been obtained. This is what the SPDC has done in this case.

6.10 Argument II entails that verification is also possible without physical access to the site of the leak, namely by using an LDS, and that the SPDC should have implemented this measure before the leak occurred – meaning in the

period before 26 June 2005 – (see also legal grounds 3.5 *in fine*, 6.1 and 6.6 *in fine*).

6.11 In point 312 SoA/2, MD et al. have pointed out sections 10.1 and 10.3 of Standard 1160 of the American Petroleum Institute (API) of November 2001, reaffirmed in 2008 – hereinafter: API 1160 (Exhibit Q.16) – which describes a number of options to set up an LDS that enables the operator to quickly detect and solve a leak. Chapter 10 ('Mitigation Options') API 1160 contains 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). Subsection 10.1.3 ('Optical of Ground Intrusion Electronic Detection') reads as follows:

> *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 (SCADA) 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 is captioned as follows: '*Detecting and Minimizing Unintended Pipeline Releases*'. Subsection 10.3.2 'Types of Release Detection Systems' states the following, inter alia:

> *(…)*

> 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.*

6.12 MD et al. have described an LDS they deem suitable as follows: a pressure measuring system which involves installing sensors at different places on the pipeline and in which a data system measures the pressure, sending the readings to a control centre where they are monitored at least every hour (point 335 SoA/1). This LDS is essentially/largely corresponds with the above-described systems of API 1160.

6.13 *Design and Engineering Practice* (DEP) 31.40.60.11 of September 2002 (Exhibit N.6), published by Shell Global Solutions International B.V., '*specifies the requirements and gives recommendations for the application of Leak Detection Systems*' (p. 4). On p. 6, under the heading '*Requirement (...)*', it is stated that '*[a]n LDS reduces the consequences of failure by enabling fast emergency response*'. The following text can be found on p. 9, under the heading '*Selection Of A Leak Detection System*':

> *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.*

The summary of Appendix 1 (given in point 90 M-Exh) mentions several LDS systems that have a response time of 'minutes to hours'.

6.14 From the 2001 API 1160 and the 2002 DEP 31.40.60.11 it becomes apparent – as argued by MD et al. in point 78 WS/2-MD – that an LDS as referred to by MD et al. was available well before the 2005 leak, meaning an LDS that detects a leak quickly/in real time without access to the location being required, and that can even identify the location of the leak, so that not only the oil supply can be shut down in a short time, but also in a 'targeted' manner, insofar as relevant. With such an LDS the damage could have

prevented to a great extent, because the leak would have been verified (much) sooner and the oil supply would also have been shut down (much) sooner.

6.15 Shell's argument in point 278 of the 2014 DoA/1, that the LDS brought up by MD et al. is a highly sophisticated system that only fairly recently came on the market, cannot be accepted considering the consideration in 6.14. The same goes for Shell's argument under 279 DoA/1 that the LDS, as described in legal ground 6.12, is not practical in Nigeria, because it requires solar-operated transmitters to transmit the data from the sensors to a central point, and that these transmitters and solar cells are incredibly prone to theft in Nigeria. This argument lacks a sufficient substantiation, in view of the following. The Third-Party Damage (TPD) LDS from API 1160 also makes use of data transmission. It is a generally accepted fact that areas where TPD to pipelines occurs regularly, theft at pipelines is also a frequent occurrence. It can therefore be assumed that the TPD-LDS is theft-proof; otherwise it would be a fairly useless installation. Without further explanation, which is lacking, the Court fails to see why generally speaking LDS systems that have data transmission are not theft-proof or can be made theft-proof.

6.16 The system used by the SPDC in 2004/2005 – according to Shell: as part/type of LDS (see also, inter alia, points 82, 530 and 620 DoA/SoA-cross/2) – worked with a low pressure security installation for the pumps in the flow stations. The pumps ensured that the oil was pumped from the flow station into the pipeline. A leak causes loss of pressure. When the pressure falls below a set value, the pump in the flow station automatically shuts down and an alarm sounds, after which an investigation into the cause of the leak is initiated (point 277 DoA/1 and point 82 DoA/SoA-cross/2). MD et al. believe that this system cannot be regarded as an LDS, because (a) in pipelines that are kilometres long it takes too much time before the system detects a pressure drop, and (b) no information is provided about the location of the leak (points 271 and 336 SoA/2). It is immediately clear that these arguments are factually correct. MD et al. are therefore right, which is underlined by the HSE case, with doc. Ref. no. SPDC 2001-188, Revision 2, March 2004 (see points 270 and 337 SoA/2 and point 69 WS/2-MD), which Shell provided for inspection in response to the court order given pursuant to Section 843a Dutch Code of Civil Procedure order:

> 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 loss of pressure referred to above, the Court) *and the physical sighting of leaks by the communities, Bristol pilots and other third parties (...).*

The fact that the loss of pressure in the Oruma leak did not cause the pump in the flow station to switch off in the three days between 26 and 29 June 2005 –

according to Shell, the oil supply was not shut down until 29 June 2005 – makes it clearer that the SPDC's low pressure security installation cannot be viewed as a fully viable alternative to an LDS. Shell's low pressure security installation is not an LDS, and in any case not an adequate LDS. Optimally configuring or fine-tuning said low pressure security installation does not provide a sufficient solution, unlike Shell appears to argue. After all, this leaves the arguments of MD et al., designated above as (a) and (b), unaffected.

6.17 Since it has been established that the pipeline at Oruma was not equipped with an LDS, the question is whether or not the SPDC had a duty of care to have an LDS installed on the pipeline – as MD et al. argue and Shell contests. To be able to assume a duty of care, the *Caparo* test must be met, that is to say that the damage must be foreseeable, there must be proximity, and the duty of care in this case must be fair, just and reasonable (see legal ground 3.18).

6.18 Stating first and foremost that the SPDC in Nigeria is involved in, for the company very profitable, oil extraction activities, and that the local residents are affected by the associated harmful effects, mainly the consequences of the highly frequently occurring leaks in SPDC pipelines (between 1998 and 2007: 272 leak events per year on average, of which Shell claims 45% are due to overdue maintenance and 55% to sabotage). This fact alone entails that the SPDC had, and has, the obligation with respect to the local residents to prevent leaks as much as possible, and once the damage has occurred, to limit the effects of the leaks as much as possible. This general obligation is not contested by Shell. However, this does not say which concrete obligations (duties of care) rested and rest on the SPDC, and particularly not whether the SPDC had and had the concrete obligation to equip the Oruma pipeline with a fully-fledged and adequate LDS.

6.19 A leak had previously occurred in the Oruma pipeline in 2000, close to the location of the 2005 leak (see, inter alia, p. 8, seventh asterisk, p. 18, third paragraph, and p. 19, second bullet point, of the experts' report). On p. 18, second paragraph of the experts' report, it was noted about this 2000 leak – which was uncontested – that it '*was also classed as caused by outside interference*'. As is apparent from p. 8, eighth asterisk, of the experts' report, the 2004 ILI report mentioned no less than 129,678 corrosion spots in the Oruma pipeline, 37 of which had a depth of 40-59%. Even when allowing for a correction that can be made in connection with the 2016 ILI report (p. 11, paragraphs 4 through to 6 of the experts' report), it must be concluded – concurring with the experts on p. 18, point 5 of the report – that internal corrosion was a serious problem in the Oruma pipeline, and was already present in 2004. In view of this, it was foreseeable for the SPDC before the

2005 leak that this specific pipeline would be affected – again – by a leak due to either insufficient maintenance/corrosion or sabotage. This is confirmed in a 2004 SPDC report (Exhibit M.3) about the Kolo Creek-Rumuekpe pipeline (this is the Oruma pipeline, see legal ground 1.d), in which it is noted that from SPDC investigations it had become clear that this pipe was '*likely to leak before the year 2003/2004*' (p. 2-17 of Exhibit M.3) and which also states the following (Exhibit M.3, p. 2-24):

> (…) *SPDC shall:*
>
> *(...)*
>
> ** Ensure that immediate repairs are done for corroded/sabotaged sections (...).*

6.20 What is at issue here is whether or not it was foreseeable for the SPDC before mid-2005 that not equipping the Oruma pipeline with an LDS would result in damage. The Court recalls that in this case an LDS would have only been appropriate, because it would have solved the problem of the SPDC not being able to verify the leak report due to the refusal of access. In the absence of a refusal of access an LDS would not have been required. It is a specific matter of whether or not it was foreseeable for the SPDC – which knew that there was a real, increased risk that a leak would occur in the Oruma pipeline – that if a leak were to occur, it would not be granted access to the location of the leak.

6.21 The report of WAC Global Services, commissioned by the SPDC, of December 2003 (*Peace and Security in the Niger Delta*; Exhibit C.7, see point 298 IS) contains the following passage (p. 13):

> *(...) SCIN staff and contractors have problems accessing sites for investigation or clean up*,

where SCIN stands for: '*Shell Companies in Nigeria*' (see p. 4). In point 32 DoA/SoA-cross/2, Shell states that access was 'regularly' refused by the local population. In point 300 IS, MD et al. state that also in the case of Oruma it was to be expected that the SPDC would not immediately be given permission to access the leak. Shell has failed to contest this assertion sufficiently clear. Based on this, the conclusion must be that it was foreseeable for the SPDC before mid-2005 that it would not be allowed access, or with a delay, to a leak in the Oruma pipeline.

.

6.22 Since the SPDC knew before mid-2005 that a leak could occur in the Oruma pipeline, and that it was foreseeable for the SPDC that in such a case it would be refused access to the leak, it was foreseeable for the SPDC – considering that, as has been established in 6.14 and the SPDC should have been aware of, under those circumstances an LDS would have prevented the damage to a

great extent – that omitting to install an LDS would inflict significant damage on the local residents.

6.23 Apparently, in 2004 the SPDC was also of the opinion that generally speaking installing a suitable LDS was called for, in light of the remark, further to the passage in the HSE case cited 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 (...).*

6.24 Under the circumstances as outlined above, the Court deems it '*fair, just and reasonable*' to require the SPDC to have installed an LDS on the Oruma pipeline before the 2005 leak. The proximity requirement has also been met now that Oguru, Efanga and the local residents whose interests MD seeks to protect lived and/or worked in the vicinity of the SPDC pipeline.

6.25 The considerations in 6.18 through to 6.24 entail that the SPDC had a duty of care before the 2005 leak to install an LDS on the Oruma pipeline. The considerations in 6.16 reveal that it breached this duty of care. Omitting to install an LDS unmistakably caused significant damage. If such a system had been applied, the oil supply would have stopped much earlier, and the impact of the leak would have consequently been smaller. An area the size of at most one or football pitches instead of ten would have been contaminated (see legal ground 3.34). It must be concluded that the SPDC committed the tort of negligence by not installing an LDS on the Oruma pipeline at the time. Argument II therefore succeeds.

6.26. Shell's assertions that it operated an LDS at the time, that the LDS as supported by MD et al. was not available, or at least not practical, and that it had no duty of care in that respect lack sufficient substantiation and are therefore disregarded. Therefore, there is no room for rebutting evidence, as provided by Shell under 936 DoA/SoA-cross/2.

Argument III: oil supply pipe shut off too late

6.27 Shell has contested the argument of MD et al. with substantiation that the oil supply was not shut down before 7 July 2005, see legal ground 6.2.f. MD et al. have failed to tender evidence by witnesses for this argument; their remark in 352 SoA/2 that the course of events following the leak can only be clarified by hearing witnesses cannot be designated as such an offer. If that were the case, that offer would have been rejected as being insufficiently specified; after all, it is not (sufficiently) specifically geared towards the argument that the SPDC did not shut down the oil supply until 7 July 2005. This argument is also not proven by factual arguments i) and ii) of MD et al., discussed in legal

ground 6.2.f, which Shell has after all also contested with substantiation, noting that the contention appears to be convincing. In respect of those arguments, MD et al. have also not tendered concrete evidence by witnesses. Considering all this, the Court must concur with Shell and assume that the oil supply was shut down on 29 June 2005 by shutting down the flow stations and closing off the manifold. Whether or not remote-controlled valves were available is not relevant in this light. Remote-controlled valves would not have contributed to an earlier shut-down of the pipelines before 29 June 2005, because that was when the leak was verified and, if no LDS had existed, that was the day when the leak could have reasonably be verified (see legal ground 6.9). With LDS, the shut-down could have occurred significantly sooner. The Court must conclude that Argument III effectively merges with Argument II and has no independent significance.

Argument IV: spilled oil contained too late

6.28 It is an established fact that the spread of oil was not contained until 9 July 2005. The assertion of MD et al. that the SPDC could, and therefore should, have contained sooner has been contested by Shell with substantiation, see legal ground 6.2.c. Here too, MD et al. have failed to tender sufficient evidence, with a reference to the relevant considerations under 6.27. The Court must concur with the SPDC in assuming that on 29 June 2005 and before the Oruma community refused the SPDC access for carrying out containment activities. MD et al. have not argued that in the period between 30 June and 9 July 2005 the SPDC had another opportunity to do so. Under these circumstances, a breach of a duty of care in connection with containment cannot be assumed. Argument VI also fails.

6.29 MD et al. have also based their containment arguments on the *torts of nuisance* and the *trespass to chattel* and on the *Rylands v Fletcher* rule. In connection with this, it is firstly noted that it has been decided in 5.30 that in connection with the origin of the leak MD et al. no longer have an interest in these legal concepts, and that in the relevant connection here (of Response) the starting point for the assessment therefore must be that the oil is on the SPDC's right of way after seeping out of the hole in the pipeline. Against this background, it is subsequently noted that:

- the torts of nuisance and trespass to chattel cannot help MD et al., because the SPDC's omission to contain the oil before 9 July 2005 cannot be designated as unreasonable or negligent, respectively;
- the strict liability rule of *Rylands v Fletcher* can also not help MD et al. since (i) although it could be said that the oil that ended up on the SPDC's right of way due to the leak subsequently flowed onto the adjacent grounds from that right of way – because it was not immediately contained – it cannot be said that the SPDC placed that

leaked oil on the right of way '*for his own purposes'* (see legal ground 3.21), meaning that this application condition of the rule has not been met.

Conclusion on 'Response' claims I and III.a-a against the SPDC

6.30 It follows from the foregoing that claims I and III.a-a in respect of Response against the SPDC are only eligible for allowing insofar as they pertain to not installing an LDS. The need for applying an LDS as a damage-mitigating measure can also be traced back to the fact that on 26 June 2005 the SPDC was refused access by Oguru as the deputy chief of the Oruma community. Although there is something to be said for Shell's standpoint that this must be included in the assessment of the claims instituted by Oguru and for the benefit of the Oruma community (the local residents), the Court holds that their involvement in the refusal of access does not justify the conclusion that omitting to install an LDS does not constitute a breach of a duty of care with respect to Oguru and the local residents. Too little has been clarified about the reasons, and their validity, for the refusal of access, while, as far as the local residents is concerned, it has not been argued, and incidentally is also not plausible, that all of them were involved in the refusal of access. Furthermore, this is a complex issue, as has been noted in 6.6, in which very diverse viewpoints battle for priority. From the following passage from the online Cambridge University Press publication of 28 July 2009, '*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 by the Court),

it follows that the Nigerian law applicable to loss estimate has the option of apportioning the damage due to contributory negligence. Perhaps this principle plays a role in the refusal of access, but if it does, and if so, to what extent, must be dealt with in the follow-up proceedings for the determination of damages, as proposed by MD et al. The issue of the refusal of access is not relevant at all as regards Efanga, because he was only concretely linked with the access delay in the period after 29 June 2005 when the oil supply had been shut down, and for which period an LDS is consequently no longer relevant. This all leads the Court to allow claims I and III.a-a, without restrictions, based on the LDS issue.

6.31 It must be noted here that there is a difference between the above-described award of claims I and III.a-a in respect of Response and the award of these claims in respect of Origin as described in legal ground 5.28. In the latter case, the claims are allowed based on the OPA, so that the damage assessment must also be based on this act – more specifically, Section 20(2) OPA. The

first-named claims are allowed based on common law, so that the damage must be based on common law.

Claim VII: order in respect of 'Response'

6.32 Claim VII consists of two parts. Part one is for the implementation of an adequate plan for a response to oil leaks. This part links up with the description of MD et al. in point 104 et seq. IS on the Oil Spill Contingency Plan, discussed in legal ground 6.5, and is directed only against the SPDC as the operator that must implement such a plan. According to Shell, this obligation has been met (inter alia, in points 30 and 134 (WS-S), and MD et al. have failed to prove that this is not the case. Part two is directed against the SPDC and the Shell parent companies, and entails that they have to ensure that all conditions for a 'timely and adequate response' have been met in case another oil leak occurs at Oruma.

6.33 The Court will now examine whether claim for injunction VII is allowable against the SPDC, as regards the second part in relation to the LDS.

6.34 In response to Shell's defence that the claim for injunction does not meet the requirement, pursuant to Nigerian law, that it must be formulated sufficiently precisely, the Court considers that from the start of these proceedings MD et al. (see, for instance, point 103 IS) consistently raised the issue of the LDS as a timely and adequate 'response' in view damage limitation in the context of the theme 'Response', that claim for injunction VII also pertains to this theme and the second part of this claim is for a 'timely and adequate response' which is unmistakably meant for damage limitation in future leaks at Oruma (see also point 221 WS-MD). At any rate, the essence of claim VII is sufficiently clear, and it must have also been sufficiently clear for Shell.

6.35 Claim for injunction VII must be assessed according to the current situation (see legal ground 3.7) and with due observance of the standards mentioned in legal ground 3.13. The starting point for that assessment is also that the situation in which a leak report cannot be verified due to access problems or can only be verified with significant delay, and several other requirements have been met (see legal ground 6.22), the SPDC has a duty of care to apply an LDS, and that in 2005 the SPDC was guilty of breaching this duty of care and accordingly committed a tort of negligence.

6.36 The arguments of MD et al. in point 64 WS/1-MD, read in the context of points 6 and 7 WS/1-MD, can only be interpreted in one way, namely that the pipeline at Goi (cases c and d) has since been equipped with an LDS while the one at Oruma still has not. Shell has not argued that the latter pipe has been

fitted with an LDS. Therefore, it must be considered an established fact that the Oruma pipeline also currently does not have an LDS. There is also no indication that Shell intends to install one. The duty of care breach that has been established in connection with the 2005 leak – omitting to install an LDS – has thus continued to this day, culminating in a prolonged unlawful situation.

6.37 In point 83 DoA-cross/2 Shell put forward – like it also did in 2016 (see legal ground 5.14) – that when that document was submitted (mid-2019) the situation in Oruma was too unsafe to carry out a physical inspection. As Exhibit 70, Shell has submitted a Travel Advisory of the Dutch Ministry of Foreign Affairs applicable to 2 July 2019, in which the state of Bayelsa, where Oruma is situated, was labelled as code orange ('only necessary travels'). It is logical that under these circumstances, the access issue in Oruma deteriorated even further relative to 2005 – as Shell has also pointed out (point 917 DoA/SoA-cross/2).

6.38 The experts' final report of 17 December 2018 states that in the pipes in the area in Nigeria where Oruma is situated '*internal corrosion seems to be a major problem*' (p. 18, point 5). The risk of a future leak occurring in the Oruma pipeline as a result of corrosion in the pipe is therefore not negligible. According to Shell (point 29 DoA/SoA-cross/2), the percentage of leaks due to sabotage rose to 75% in the 2006-2010 period (compared to 55% before that period, see legal ground 6.18). In the current unsafe situation the risk of sabotage must all the more so be considered as significant. In the past decade, multiple leaks occurred specifically in the Oruma pipeline due to sabotage (see legal ground 5.34). In short, it is fairly likely for a new leak to occur in the Oruma pipeline.

6.39 Due to the strongly increased access problems, chances are considerable or highly considerable that following another leak, a report cannot be verified or with some or serious delay, and chances are also considerable or highly considerable that in that case, the oil supply cannot be shut down or only with some or serious delay. When after a new leak, which is fairly likely, the oil supply is not shut down within a short amount of time, Oguru, Efanga and the other residents will face consequences that will be so major and far-reaching – a long-term and serious disruption of their living environment and their chances of securing an income – that damages cannot provide sufficient compensation. The occurrence of those negative consequences can only be prevented by applying an LDS, also considering that:

- the procedural documents do not contain any clues that the SPDC would even consider shutting down the oil supply based only on a report without verification, in which case the damage referred to would also be prevented without an LDS;

- the additional measures Shell has taken in response to the argument of MD et al. in point 120 WS/2-MD offer scant or no relief since the measures are only '*to prevent illegal tapping*' (see the last phrase of question 4 on p. 2 of Exhibit Q.75) and with which sabotage attempts can only be stymied very occasionally, as a lucky break, and which are wholly unsuitable for discovering leaks caused by corrosion.

6.40 From the foregoing it follows that an order for the SPDC to install an LDS is required for terminating the existing unlawful situation – which according to legal grounds 6.37 and 6.38 has become even more dire – and for ensuring that *justice can be adequately done*.

6.41 In defence against the claims for injunction, Shell invoked the unsafe situation, as described in legal ground 6.37, and the associated access problems (points 30, 133, 914-920 DoA/SoA-cross/2). Shell has emphasized the abduction of two Shell employees in April 2019, in which two police officers who had escorted them for their safety were killed. A Special Forces team freed the employees after a week. However, this incident occurred in Rivers State, and not the adjacent Bayelsa State, where Oruma is situated.

6.42 In an internal *Update on Security Operating Levels (SOL) and Security Single Point Approval (SSPA) – Niger Delta* of the SPDC of 8 May 2019 (Exhibit 69) the following report was published, in which Bayelsa 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. (...).*

From this report, it can be deduced that a) security incidents occurred mainly in River State, b) even at the highest security operating level, SOL **BLACK**, activities that require travel can still be undertaken, under certain conditions and c) travel is permitted under the lower security operating level, SOL **RED**, for the rest of the Rivers Delta (including Bayelsa State) provided approval (SSPA) has been obtained. Despite the deteriorated security situation, it remained possible for SPDC employees to carry out work activities – like MD et al. have put forward in point 12 DC-MD/2. This is in line with the code orange that was issued for Bayelsa State, according to which necessary travel was still permitted, and it is also in line with the fact that there had been an unsafe situation in Ogoniland, Rivers State, since 1993, while the SPDC continued to carry out work activities related to the main pipelines running through that area (points 130 and 381 DoA/SoA-cross/2, see also points 157 and 158 SoA/2). According to Shell, this continued even until early 2018 at the village of Goi, Ogoniland (point 106 DoA/SoA-cross/2), although the security situation there had deteriorated too much for a physical inspection by the experts (point 133 DoA/SoA-cross/2). Installing an LDS falls under, or can be equated with, 'important maintenance' – of which Shell considers the 2015 ILI run but not the expert examination on site to form part – which in Shell's view should also be carried out in a highly threatening situation (point 381 DoA/SoA-cross/2). Insofar as Shell's defence, as stated in 6.41, is to argue that carrying out LDS work on the Oruma pipeline is irresponsible or even impossible, this defence is disregarded as being insufficiently substantiated, meaning that the Court is unable to assess the rebutting evidence as offered in, inter alia, point 936 DoA/SoA-cross/2.

6.43 The SPDC is ordered to install an LDS on the Oruma pipeline, as described in legal ground 1.2, which meets the current standards and therefore is state of the art, and one which is able to detect a leak swiftly, within *minutes to hours*, without physical access being required (see legal ground 6.14). This order pertains to both the Oruma II pipeline, which currently acts as the main pipeline, and the Oruma I pipeline, which as a spare pipeline should be able to take over the function of the main pipeline at any time.

6.44 Due to the expected difficulties in carrying out the installation – which are not insurmountable (see legal ground 6.42) – due to the code orange/SOL **RED** situation in Bayelsa State, the SPDC will be granted the generous term of one year to accomplish this. Since the SPDC has not argued in the alternative for mitigating or capping the penalties claimed, it must be assumed that there is no reason for doing so.

6.45 The fact that Oguru and possibly several local residents in a sense brought about the need for an LDS during the 2005 leak, now fifteen years ago, by refusing the SPDC access to the location of the leak, does not stand in the

way of the order to be currently issued. Nothing has been asserted about any level of responsibility of partial responsibility for the current access issues in the area of Oguru, Efanga and/or the location residents. For this reason alone, the clean hands condition cannot be alleged against MD et al. (see legal ground 3.13).

6.46 With the award of the order focused on the LDS, the issue with respect to the theme Response must be deemed to be solved for the most part for MD et al. After all, not installing an LDS was the only obstacle to which so much weight was attached that it was designated as a tort of negligence. When testing against the standards referred to in 3.13, there is no room for a further order based on one or more of the other measures identified by MD et al. in the context of the theme Response.

7. The claims against the Shell parent companies in respect of Response

Preliminary considerations

7.1 Prior to assessing claims I, III.a-a and VII, second part, in respect of Response against the Shell parent companies, the Court now formulates several introductory remarks.

a. As has been explained in 3.33, the condition for liability of the parent company, which – in brief – is that the subsidiary has breached a duty of care. Since in the foregoing only a breach of a duty of care by the subsidiary (the SPDC) has been established in connection with not installing an LDS, or an adequate LDS, the alleged liability of the parent company/companies can also only be based hereupon.

b. Nigeria is of great financial importance for the Shell group. In the period 2005-2010, Nigeria for instance accounted for no less than 15% of the Shell group's worldwide gas and oil production. In 2001, Walter van de Vijver, one of the then 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 (...)*' (point 641 SoA/2). On the other hand, Nigeria is also a source of constant concern for Shell. In legal ground 6.18, the large number of Shell leaks per annum in Nigeria was discussed. MD et al. have asserted without contest that in the period 2002-2007, the Nigerian Shell company (SPDC) was responsible for 33% of the total amount of the

oil leaked by the Shell group. In the 2005 *Business Assurance Letter*, Malcolm Brinded, one of Shell's Managing Directors at the time, wrote the following to the Shell group's then CEO, Jeroen van der Veer: '*The Nigerian Delta security and reputation issues continue to be very challenging*' (note 615 to point 652 SoA/2, see also point 889 DoA/SoA-cross/2), whereby '*challenging*' was apparently used as the well-known management euphemism for 'problematic' or 'unpleasant'. In view of the considerations in legal grounds 6.37, 6.38 and 6.48, the current situation in Nigeria has certainly not become less worrisome for Shell. Under these circumstances, there are sufficient reasons to believe that the Shell leadership was and still is fairly intensively involved – directly and indirectly – with the SPDC. From the passage in the ruling of the UK Supreme Court, deemed normative by this Court in legal ground 3.29 in the case of *Vedanta v Lungowe* that '*[e]verything 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 added by the Court), it is apparent that the question whether or not the parent is liable does not necessarily revolve around whether the parent is involved in the subsidiary in general, but – as Shell has argued (in, inter alia, points 91(c), 104 and 116 WS/2-S) – that it is important whether or not that involvement encompassed the actions of the subsidiary on which the parent liability is based. In this case, it is the SPDC's omission to apply an LDS or adequate LDS. Parent liability is also contingent on the requirement that the parent knows or should know about the subsidiary's actions; the so-called knowledge requirement in legal ground 3.30.

c. In connection with claims I and III.a-a in respect of Response – which must be assessed according to the state of affairs up to 9 July 2005, when the Response was completed – it is therefore important i) if at the time the parent company was involved in the subsidiary extending to actions/decisions of the subsidiary in the period up to 9 July 2005 in relation to the application, or not, of an LDS at the Oruma pipeline and ii) if the parent company at the time knew or should have known about those actions/decisions of the subsidiary. This concerns Shell NV and Shell T&T as the Shell parents in the aforementioned period (the old parent companies, hereinafter also abbreviated as: the O Parents), see also legal ground 3.10.

d. In connection with claim VII, second part – which must be assessed according to the current state of affairs – it must be assessed i) if the parent company is currently involved in the subsidiary extending to actions/decisions of the subsidiary in relation to the application, or not,

of an LDS at the Oruma pipeline and ii) if the parent company at this time knows or should know about those actions/decisions of the subsidiary. This assessment targets RDS as the current Shell parent company.

The knowledge requirement

7.2 Shell has contested (see, inter alia, point 228 DoA-Exh) that the O Parents knew before July 2005 that the Oruma pipeline was not equipped with an LDS, and Shell's assertions also imply that they should not have known that. In response, MD et al. failed to prove and did not offer to prove specifically that the O Parents did know or should have known about it. As this has remained unproven, the knowledge requirement has not been met. Claims I and III.a-a against the O Parents fail for this reason alone. The 'involvement' question therefore does not warrant a further assessment as regards these claims.

7.3 However, the argument of MD et al. in 705 (c) SoA/2, that RDS knew that the SPDC was not able to respond adequately in case of a leak, has been established to such an extent that based on the arguments in case b against RDS, it has known for quite some time, or at least should know, that the SPDC has not equipped the Oruma pipeline with an LDS or adequate LDS. As regards claim VII, second part, the knowledge requirement has been met.

7.4 This means that as far as this claim is concerned the 'involvement' issue is relevant and must be assessed. In view of that assessment, the Shell group structure must first be explored as well as the question if in the Shell group, operating companies such as the SPDC are managed by RDS/the Shell leadership, and if so, how and to what extent.

The structure and management of the Shell group

7.5 In general terms, the following can be said about the structure of the Shell group. A distinction is made between the period before the restructuring (unification) of 20 July 2005, when the O Parents headed the group, and the period thereafter, when RDS became the only parent company (see, inter alia, points 26-32 and 37-38 Rej; points 538 ff. and 565 SoA/2 and points 846-851 DoA/SoA-cross/2). The O Parents were the shareholders of the two group holding companies – de holdings – which held the shares of the operating companies, including the SPDC. So, the O Parents were the indirect shareholders of the SPDC. The Managing Directors of the O Parents also acted as the holdings' Managing Directors, while the boards of the holdings virtually entirely consisted of directors of the O Parents. In their decisions

about the operating companies taken by the holdings pursuant to their shareholdership, the holdings were assisted by the Committee of Managing Directors (CMD), which consisted exclusively of the Managing Directors of the O Parents. There was also the Conference, an informal consultative body comprised of the full boards of the O Parents. The Shell group used to be functionally divided into four so-named businesses – including Exploration and Production (E&P or EP), under which the SPDC fell – which were managed by group directors, who were also members of the CMD. The Shell group was also regionally divided, with Regional Managing Directors heading the departments. Up to and including March 2004, the previously mentioned Walter van de Vijver was the EP Group Director and also the RMD for the region under which Nigeria fell. Malcolm Brinded later took over this position.

The restructuring took place, because – in brief – RDS was placed above the O Parents, a move that involved the shareholders exchanging their shares in the O Parents for shares in RDS. The restructuring also led to other changes, which are not relevant for this case, with the proviso that the CMD was replaced with the Executive Committee, the Conference with the Board of Directors and EP with Upstream.

7.6 From the assertions of Shell in points 42-46 Rej-a/44-48 Rej-b, point 190 DoA-Exh and points 859 and 860 DoA/SoA-cross/2, the following becomes apparent about the management in the Shell group. The leadership of the group – the parent/parents and/or the holding – adopt the policy in the areas that are relevant for the group as a whole, including Health, Safety & Environment (HSE)/Health, Safety, Security & Environment (HSSE). This policy is 'detailed further in guidelines (standards and manuals)' (point 42 SoD-a/44 Rej-b; point 860 DoA/2). The standards and manuals, which include the Design and Engineering Practice publications (DEP) referred to in legal ground 6.13, *'(are) implemented by the various Shell companies (...)'*. Checks on compliance with the group policy takes place at the group level (by RDS) by means of carrying out audits, inter alia.

7.7 The standards and manuals are drawn up and published by specially set up service companies, including Shell Global Solutions International B.V. (point 190 DoA-Exh and point 861 DoA/SoA-cross/2). From the assertion of Shell, in which the policy of the Shell leadership 'is detailed further in (...) (standards and manuals)', it therefore follows that the service companies detail the policy determined by the Shell leadership for implementation by the group companies.

7.8 The explanation given by MD et al. about management within the Shell group does not differ fundamentally from that which has been stated in legal grounds 7.6 and 7.7 (see, inter alia, points 534, 573 and 634 SoA/2 and

mainly points 192-195 WS/2-MD), albeit that MD et al. have made some additions/specifications to it. For instance, MD et al. have asserted that information from the operating companies went 'up' to the CMD via the EP *business*, and the CMD's management came 'down' based on that information (point 554 SoA/2), while concrete tasks in the area of, for instance, maintenance and HSE, were relayed in the annual business plans with associated budgets, which the parent company/companies had to approve and the operating companies had to state in *Assurance Letters* how they complied with the group's security and HSE policy (points 578-585 SoA/2 and points 75 and 139 M-Exh).

7.9 The referred to standards and manuals were more specific than general goals and ambitions, according to Shell, but not that detailed that they prescribed exactly how the operating companies had to act (point 42 Rej and point 194 DoA-Exh). Shell has stated that the Shell parent companies are not involved in detail in the operations of the SPDC (point 203 DoA-Exh). MD et al. have confirmed this to such an extent that in their view, the standards and manuals left the operating companies some room for manoeuvre – albeit that they viewed this room as very closely regulated due to these central guidelines (point 75 M-Exh) – and the involvement of the parent was limited to matters of some importance or consequence (point 79 M-Exh). Based on these mutual assertions, it must be established that the involvement of the Shell parent companies at least did not extend to this free, unregulated space, and that at least unimportant issues fell under this free space.

Involvement in the LDS?

7.10 It must now be ascertained whether or not RDS' involvement extended to the application or not application of an LDS on the Oruma pipeline. With their assertion in point 194 WS/2-MD, inter alia, that the technical standards in the area of LDS are covered by the group standards, MD et al. have expressed that LDS systems were subject of central involvement. They relied on several sources containing relevant information. These are:

a) DEP 31.40.60;

b) RDS' bonus policy;

c) the witness statement of Rebecca Sedgwick.

The Court will no assess these sources in more detail.

Re a) DEP 31.40.60

7.11 In legal ground 6.13 it was explained that DEP 31.40.60 from 2002 contains the recommendation to install an LDS. In point 89 M-Exh and point 624

SoA/2, MD et al. have pointed out the following passage on p. 6 of this DEP, which was also cited in legal ground 6.13:

> *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.*

From the observation made here, that an LDS may reduce the economic, environmental and publicity consequences of a leak, it is apparent that the drafters of this DEP recognized that the group interest is affected by installing or not installing an LDS.

7.12 Shell has put forward (in point 198 DoA-Exh) that the Nigerian access refusal problem does not occur, or hardly ever, elsewhere in the world and that therefore the DEPs and HSE manuals do not contain concrete recommendations or guidelines in this area. Insofar as Shell seeks to argue that DEP 31.40.60 leaves room for manoeuvre in this area, as referred to in 7.9, that argument cannot be accepted. Since there is a need for an LDS specifically in the situation in which, like in Nigeria, access is refused on a regular basis, it is certainly not obvious to assume that that situation is not covered by the recommendation in that DEP to apply an LDS, especially considering that it is not an unimportant issue, as legal ground 7.11 shows.

7.13 Therefore, Shell's reliance, in points 861 and 866 DoA/SoA-cross/2 inter alia, on the fact that the DEP was issued by Shell Global Solutions International B.V., and not by the O Parents/RDS, is of no avail to Shell. After all, from legal ground 7.7 – which is based on Shell's own assertions – it follows that in this context Shell Global Solutions International B.V. is a vehicle/extension of the Shell leadership, as MD et al. have argued (in points 622 and 623 SoA/2 and point 188 WS/2-MD).

7.14 Taking all this into account, DEP 31.40.60 can be viewed as an expression of the involvement of Shell parent companies in the LDS issue, in particular in Nigeria, also considering that which is considered in 7.16 and 7.17 hereinafter.

Re b) RDS' bonus policy

7.15 In point 171 WS-MD and points 610-613 SoA/2, MD et al. have used the argument that the amount of the bonuses for the members of the RDS *Executive Committee*, including Malcolm Brinded, is also determined by the

number and volume of *operational spills*. According to MD et al., this shows that RDS exerts influence over it. The Court assumes, with Shell, which does not contest the existence of this bonus policy, that the number and volume of *operational spills* has only been included in determining the bonus amounts since 2010.

7.16 Shell has also pointed out (point 876 DoA/2) that this concerns the aggregated number/volume of *operational spills* on an annual basis across the entire Shell group. However, this does not alter the fact – unlike Shell seems to want to imply – that the focus would have been on specifically Nigeria considering the fact the Nigerian Shell operating company SPDC is 'responsible' for a very large share of the total volume of oil leaked by the Shell group, in the 2002-2007 period no less than 33% (see legal ground 7.1.b).

7.17 The volume of *operational spills* is determined, in part and to a considerable extent, by the presence or absence of an LDS in leaks that cannot be verified or whose verification is delayed by access issues. In these situations, an LDS is able to verify the leak within hours, after which the oil supply can be shut down, while without an LDS, this process can take up to three days, such as was the case with the 2005 leak at Oruma. In Nigeria, access refusal is a common problem (see legal ground 6.6), which the Shell leadership is sure to know, not only because of the fact mentioned in legal ground 7.16, but also because:

- the assertions of MD et al. in point 160 WS-MD and point 700 SoA/2 imply that RDS was aware of the WAC report mentioned in legal ground 6.21 and Shell did not deny this;
- the access issues in Nigeria, and also specifically in Oruma, were extensively discussed back in 2009 when the IS was issued in the proceedings against RDS (case b), and also thereafter.

7.18 In view of the considerations in 7.16 and 7.17, there are sufficient reasons to assume (*res ipsa loquitur*) that the members of the *Executive Committee* responsible for Nigeria will also acknowledge in their functional or regional management of the SPDC – due to the not so insignificant influence it may have on their bonus amounts – whether or not the pipelines in Nigeria (including the Oruma pipeline), should be fitted with an LDS, for which they will also base their final answer on other factors and a cost-benefit analysis. RDS' bonus policy since 2010 will therefore have inspired the members of the *Executive Committee* to fervently involve themselves in the way the SPDC handles the LDS issue. This is also in line with the framework of DEP 31.40.60, presented in legal ground 7.11, and can also be viewed as a concrete specification of the framework, and also as confirmation of the observation therein that the LDS issue affects the group interest.

Re c) the statement of Rebecca Sedgwick

7.19 As Exhibit Q.77, MD et al. have submitted a comprehensive written witness statement, dated 18 October 2017, of Rebecca Sedgwick, who worked for the SPDC between 2006 and 2012, and which statement was submitted to the proceedings before the UK Court of Appeal in the case *Okpabi v RDS*, referred to in legal ground 3.28. This statement contains the following passage (see also point 70 WS/2-MD), in which (**I**), (**II**) and (**III**) have been added by the Court to distinguish three separate parts:

> *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.*

7.20 In response, Shell submitted – in the form of Exhibit 79 – a written statement, dated 9 November 2017, of Dean Emanuel, the former manager of Sedgwick at the SPDC, which statement was also submitted to the English proceedings. Emanuel's statement starts with 'ad hominem' arguments to contest the statement of Sedgwick ('*Ms Sedgwick was an unreliable employee and a bad leaver*', points 12 through to 19). In general, such arguments are of themselves not very persuasive. Emanuel then explained in point 21 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 point 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*'. Point 26 of Emanuel's statements is 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*'.

7.21 The *meetings, workshops and discussion groups* referred to by Sedgwick in part **(I)** of her statements were, apparently, no bodies where decision-making took place; Sedgwick stated that '*during these events*' '*various initiatives*' were discussed, and Emanuel did not argue that this (also) involved decision-making. Emanuel's remark that Sedgwick was '*removed from decision making processes at SPDC'* and his remarks in point 21, which are elaborations of this point, can therefore not be viewed as a contention of part **(I)** of Sedgwick's statement. Nothing else in Emanuel's statements proves that the statement of Sedgwick – note: based on personal observation – about the *meetings, workhops and discussions* and all that transpired there, was incorrect. Based on part **(I)** of Sedgwick's statement, the Court deems it proven that between the SPDC and the representatives of '*The Hague*' (apparently RDS, see legal ground 1.b) discussions took place about the introduction of an LDS. This would not have concerned just an exchange of information on an equal basis. That which Sedgwick has stated in part **(II)** – namely, that the fairly expensive initiatives were not implemented and that the reason must have been that RDS did not approve them – is also based on personal observation. As a participant to the *meetings* it must be assumed that she knows the overall price of the measures that were discussed, and knowing that the more expensive projects require approval from 'upstairs' is not restricted to persons with a special (more than '*junior*') position, to which group Sedgwick, according to Emanuel, does not belong. An approval system for significant expenditure is not the same as the '*complete control*' of which Emanuel speaks. Part **(II)** of Sedgwick's statement has also not been refuted convincingly by Emanuel. All in all, there is no reason to doubt the accuracy of this part of the statement, from which also becomes apparent, in addition to part **(I)** of Sedgwick's statement, that RDS was involved in the question of installing or not installing an LDS in Nigeria. Emanuel places great emphasis on the lack of specifically '*complete control*', which suggests that there was or could have been a less far-reaching type of involvement, such as influence or concern. To that extent, his statement can be interpreted as confirmation of Sedgwick's statement. Incidentally, in light of the words used by Sedgwick '*I*

(...) infer' part **(III)** of her statement cannot be assumed to be true in these proceedings.

7.22 That which Shell has put forward in point 113 WS/2-MD, independently of Emanuel, against Sedgwick's statement does not alter detract from part (**I**) and (**II**). After all, Shell does not address these specific parts of the statement, either directly or indirectly.

7.23 Summarizing the foregoing, Sedgwick's written statement proves the assertion of MD et al., represented in legal ground 7.10, that LDS systems were the subject of central involvement.

Conclusion on the involvement issue and the further assessment

7.24 In light of the considerations in 7.11 through to 7.23, it follows from the three sources mentioned – each separately, but especially when viewing them (partially) in context – that RDS, at any rate from 2010, became involved, concretely and fairly intensively, in the question if pipelines in Nigeria should have an LDS installed, and consequently also in the question if the Oruma pipeline should be equipped with an LDS. The general defence of Shell, which does not focus on the LDS, that RDS is not involved in detail in the SPDC's operational activities, is so vague that it cannot be considered as a convincing and/or sufficiently substantiated contestation of the assertion of MD et al., referred to in legal ground 7.10. This defence is therefore disregarded for being insufficiently substantiated, so that there is no room in this area for the rebutting evidence of Shell submitted in point 936 DoA/SoA-cross/2. Shell has also not indicated what else Emanuel could have stated compared to his written statement submitted to these proceedings. As regards claim VII, second part, the 'involvement' requirement has been met.

7.25 In the further assessment of claim VII, second part, against RDS reference is firstly made to the considerations in 6.32 through to 6.46, which applies equally here, insofar as possible. The following is considered for that further assessment, reiterating several key points and making additions where needed.

7.26 As regards the Oruma pipeline, there is still the matter at hand of an unlawful situation, caused by the subsidiary SPDC, consisting of hitherto not equipping the Oruma pipeline with an LDS. RDS has known about this for a long time (see legal ground 7.3). Nevertheless, RDS has not exercised its authority – ensuing from its indirect or direct shareholdership in the SPDC, and concretely specified with its involvement in the LDS issue – to move the SPDC to install an LDS in/on the Oruma pipeline, although RDS has also

known for some time – through the documents exchanged in these proceedings alone – that the lack of an LDS in the fairly likely scenario that another leak will occur in the Oruma pipeline in the future will and could have very serious consequences for Oguru, (the heirs of) Efanga and the other local residents. There is *proximity* between RDS and the 'Oruma inhabitants', which the Court deduces from the consideration in the '*Vedanta v 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*'. In this ruling, the decision in the *Chandler v Cape* case, that the parent was liable to the subsidiary's employees, who had been exposed to asbestos by the subsidiary, was applied to *third parties*, with which the 'Oruma inhabitants' 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. Seeing as RDS has not fulfilled this *duty of care*, this also constitutes an unlawful situation on her part. Since the SPDC has remained unwilling for a very long time to proceed to install an LDS on the Oruma pipeline, even in spite of the increased need for it, it is necessary, so that *justice can be adequately done*, to also impose an order on RDS, with which it can be ensured as far as possible that an LDS will be installed on the Oruma pipeline at long last.

7.27 RDS will be ordered to ensure that an LDS, referred to in legal ground 6.43, is installed on the Oruma pipeline, meaning: the Oruma I pipeline and the Oruma II pipeline (see also legal ground 6.43) within one year.

7.28 It must also be noted that RDS is a company under English law and that in the *Vedanta v Lungowe* ruling of the UK Supreme Court a rule of English company rule was given, namely 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.

7.29 Since RDS has also not argued in the alternative for mitigating or capping the penalties claimed, it must be assumed that there is no reason for doing so.

8. The claims in respect of Decontamination

Preliminary considerations

8.1 Claims I, III.a, IV and V in respect of Decontamination are based on the arguments that as the operator of the pipeline – regardless of the cause of the leak (point 113 IS; point 495 SoA/2, point 125 WS/2-MD), and therefore also

if Shell was unable to do anything about it – the SPDC has and had a duty of care to adequately decontaminate the soil and water sources contaminated by the oil spill of 26 June 2005, and that it has failed to properly decontaminate (point 413 SoA/2), thereby breaching that duty of care and thereby committing a tort of negligence (see, inter alia, points 316-372 and 424-428 R and points 382 and 498 SoA/2). Claims I and III.a-a are for a declaratory decision regarding this matter, as a base/prelude to compensation on account of improper decontamination. Claims IV and V are for the effect that the soil and water sources are decontaminated/purified; any residual decontamination remaining after the decontamination must be cleaned up.

8.2 At first, the following must be considered. Claims I and III.a-a in respect of Origin have been allowed against the SPDC. In view of the award of claim I, the SPDC is obliged to pay damages to Oguru and Efanga, which they incurred as a result of the leak, although the amount of compensation must be determined in follow-up proceedings for the determination of damages. The award of claim III.a-a has a similar effect for the other local residents. The damage caused by the leak primarily consists of contamination of the soil and the water sources, and the compensation obligation of the SPDC also seeks to remedy this damage. The amount and type of damages will be determined based on Nigerian law. If it is the case that under Nigerian law the principle of *restitutio in integrum* applies as the main rule of damages, as MD et al. have asserted in point 383 R, what comes to mind is that pursuant to the damages that are payable due to the award of claim I alone, and possibly also claim III.a-a, in respect of Origin, a full decontamination of the pollution caused by the leak must be carried out, or at least that an amount must be paid to cover this full decontamination. The same thought could arise in response to the award of claims I and III.a-a in respect of Response/LDS. This also brings up the question which interest MD et al. would still have in an assessment of the claims in respect of Decontamination based on a breach of the duty of care, as referred to in 8.1, an issue which was also raised by MD et al. in point 114 WS-MD. Whether or not Nigerian compensation law indeed assumes *restitutio in integrum*, what the consequences of this are and whether or not the above-formulated thoughts are correct, must all be determined in the follow-up proceedings for the determination of damages, so that the Court cannot state at this time that the interest of MD et al. in an assessment of the claims in respect of Decontamination is lost due to the award of claims I and III.a-a. In this context, it may also be relevant that claims I and III.a-a in respect of Decontamination are based on common law, while claims I and III.a-a in respect of Origin were awarded based on the OPA (cf. also legal ground 6.31). The latter claims have furthermore been deemed not-allowable against the Shell parent/parents, so that the claims in respect of Decontamination against the parent/parents are not directly or indirectly affected by the issues discussed here.

8.3 Shell has put forward against the claims in respect of Decontamination (hereinafter, simply: the Decontamination claims) that it decontaminated timely and adequately (points 721 and 722 DoA/SoA-cross/2). It has pointed to the Clean-Up report of May 2006, presented in 1.1.h and i, and the Clean-Up certificate of August 2006, inter alia.

8.4 The arguments applied by MD et al. in the context of the Decontamination claims are based to a large extent on the notion that 'as a responsible operator', it is up to the SPDC to prove that it decontaminated properly (points 447 and 496 SoA/2, see also points 406, 410 and 413 SoA/2), which according to MD et al. cannot be deduced from the Clean-Up certificate or the Clean-Up report (points 421 and 444-469 SoA/2 and point 135 ff. WS/2-MD). However, this idea is incorrect because on the party invoking a tort of negligence, in this case MD et al., rests the obligation to furnish facts and the burden of proof (see legal grounds 3.14 and 3.18). The assertion raised by MD et al. that the SPDC is the only party that has information about the soundness of the decontamination disregards the fact that they could have carried out measurements on site; employees of MD have visited Nigeria multiple times in connection with this case (see Exhibit M.12). Insofar as MD et al. mean that the SPDC is the only party with information about the decontamination methods applied, this lacks relevance, in light of the considerations in 8.22. This argument can therefore not justify a reversal of the burden of proof, like MD et al. appear to want to argue for. Nor can this argument mean that Shell has a greater obligation to state reasons for the same reasons mentioned above.

The EGASPIN recommendations

8.5 In substantiation of the Decontamination claims, MD et al. have invoked a number of recommendations from the EGASPIN from 2002 (see legal ground 3.19), the most important of which are given here.

8.6 In Part VIII B of the EGASPIN – focusing on the *Oil Spill Contingency Plan*, see under 2.0 on p. 145 – the following is stated (p. 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, the quality levels ultimately aimed for (target value) is 50 mg/kg, of oil content. (see Part VIII F).

(...)

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.

8.7 Part VIII F of the EGASPIN is captioned as '*management and remediation of contaminated land*'. Under 8.0, p. 278, it says: '*Intervention and Target Values*'. The following is stated there, inter alia (on p. 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.

Table VIII-F on p. 280 determines the intervention value for contamination by '*mineral oil*' (in short: oil) of '*soil/sediment*' at 5,000 mg/kg and the target

value at 50 mg/kg. For '*groundwater*' these values are established at 600 and 50 µg/l, respectively.

8.8 The Court recalls (see legal ground 3.19) that the non-binding standards of the EGASPIN may serve to specify or illuminate a duty of care, depending on their nature and contents; some recommendations are suitable for specifying a duty of care, while others are not. For instance, the recommendation in Part VIII B 4.1, that the operator, even if not responsible for the origin of the leak, '*shall take prompt (...) steps to contain, remove and dispose of the spill*' is so specific that it may serve to clarify a duty of care, but the recommendation in the same sentence that he '*shall take adequate steps (...)*' is too vague. After all, it is not clear in and of itself what *adequate* means, unlike the word '*prompt*', which indicates that (first) steps must be taken to contain and remove the leaked oil directly, without delay. Article 2.11.3 of Part VIII B, which in the preamble mentions '*attempt to achieve*', is by its nature not suitable as a basis for a civil law obligation which can be enforced.

The further assessment of the Decontamination claims

8.9 In the further assessment of the Decontamination claims, the Court will distinguish between the temporal aspects of the decontamination, the decontamination of the soil and the water purification.

The temporal aspects of the decontamination

8.10 In point 377 SoA/2, MD et al. have pointed out the obligation for decontamination to commence as quickly as possible, in which context they have apparently looked at the above-discussed recommendation in Part VIII B 4.1 of the EGASPIN, that '*prompt*' steps must be taken '*to remove and dispose of the spill*'. For an explanation of this, they have referred to their arguments on the theme Response in point 380 SoA/2, inter alia. In that context, the actions of Shell in the period up to 9 July 2005, when the oil was being contained, have already been assessed. Regarding the period between 9 July 2005 and the date on which the decontamination commenced, 18 August 2005, Shell took the standpoint in the first instance, namely that up until 18 August 2005 access was being refused (point 87 SoD-a and point 57 SoD-b, see also point 97 DoA/SoA-cross/2). MD et al. have not contested this. In point 487 SoA/2, MD et al. have put forward that about one year elapsed between the leak on 26 June 2005 and the decontamination, but they have failed to specify that, let alone why the decontamination – started in August 2005 and concluded in June 2006 – could and should have been carried out quicker. Taking all this into account, no breach of a duty of care on the part of the SPDC can be assumed in respect of the temporal aspects.

Soil decontamination

8.11 The EGASPIN mentions two values in connection with soil decontamination: the intervention value and the target value. According to Shell, decontamination to under the intervention value must be strived for (point 702 DoA/SoA-cross/2). However, MD et al. believe that it is not sufficient for hazardous substances – *mineral oils* (*Total Petroleum Hydrocarbon*, abbreviated as TPH) and *metals* – to remain below intervention values. The goal is to restore the soil to its original state, and in their view the set target values entail a best-efforts obligation for the operator to organize the decontamination process in a way that those target values are met as far as possible (points 387-389 SoA/2). MD et al. emphasize that the intervention values are not the goal of decontamination and that the EGASPIN standard entails that the soil is restored to its original state as far as possible, and that in sensitive areas, such as mangrove areas, the contamination is removed completely (points 391 and 433 SoA/2).

8.12 The expert hired by MD et al., *ir.* Th. Edelman, wrote the following on p. 9 of his report of 5 September 2020, submitted as Exhibit Q.72:

> *1. The soil decontamination goal is addressed on several locations in the EGASPIN .*
>
> *(...)*
>
> *5. The decontamination goal can be deduced from the conditions for the concluding decontamination efforts:*
>
> *1 The intervention values may not be exceeded afterwards, and*
>
> *2 absence of the need for monitoring must be apparent.*

The Court understands from the text at the top of p. 9 under '*monitoring*' and from the last three paragraphs on p. 13 that the condition in 5.2 refers to the situation of the possible presence of residual contamination over the intervention value; if this possibility is not excluded, absence of the need for monitoring is not apparent. In this light, the passages from the Edelman report cited cannot be interpreted other than that the decontamination goal is achieved when the intervention values are not exceeded. Shell rightfully pointed this out in points 50-52 WS/2.

8.13 MD et al. have submitted a report of the *United Nations Environment Programme* (UNEP) from July 2011 as Exhibit Q.32. On p. 4 there is a bar chart with '*soil samples*', which shows that only sample 23 exceeds the '*EGASPIN intervention value*' of 5000 TPH, and that several other samples have a value of between 50 and 5000 TPH. Below the bar chart, on the same

page, there is a diagram of '*soil samples depth*', where only at sample 23 it states: '*Exceeding EGASPIN*', and at all other samples: '*Not exceeding EGASPIN*'. This also clearly shows that the UNEP assumes that the EGASPIN standard is only exceeded when the intervention values are exceeded.

8.14 That in the report of the International Union for Conservation of Nature (IUCN) of July 2013, submitted by MD et al. as Exhibit O.6, it is noted that '*the current intervention levels (...) are inadequate*' (p. 41) does not carry significant weight – unlike MD et al. believe (point 439 SoA/2). This remark forms part of '*recommendations*' for the future (see the caption of 4.2 on p. 41 and point 441 SoA/2) and essentially confirms the application of the '*current intervention levels*'. The IUCN's recommendation was also not followed by Edelman in his 2020 report.

8.15 Based on the considerations in 8.12 and 8.13, it must be concluded that in the relevant circles, the EGASPIN, more specifically its Part VIII F, must be viewed as argued for by Shell, namely that for decontamination purposes, achieving targets below intervention values is sufficient. The different standpoint of MD et al. is rejected.

8.16 The specific recommendation of the EGASPIN to take the intervention value as a guideline is suitable for specifying the operator's duty of care. The same cannot be said for the operator's general obligation as laid down in Article 2.11.1 of Part VIII B of the EGASPIN '*to restore as much as possible the original state of any impacted environment*'. This description is too vague for this purpose – what does '*as much as possible*' mean exactly? – which is underlined by the reference made in that article to '*part VIII F*' for the elaboration of this general obligation. The elaboration in Part VIII F entails, as has been established above, that the intervention value must be taken into account.

8.17 In light of legal ground 8.15 and the first sentence of legal ground 8.16, a duty of care of the SPDC must be assumed for decontaminating below the intervention values. In light of the considerations in 8.12 through to 8.15 and 8.16, second and third sentence, it cannot, however, be assumed that the SPDC has a decontamination duty of care that entails more than this result.

8.18 In February 2008, Bryjark Environmental Services Limited (hereinafter: Bryjark) was ordered by a Nigerian sister organisation of MD to issue an investigative report, in which it deals with the question of whether or not the contamination due to oil spill at Oruma in 2005 was sufficiently decontaminated. This report – submitted by MD et al. as Exhibit B.2 – states the following (in table 3.4 on p. 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*

A sample containing a TPH value ('*mineral oil*') exceeding the intervention value was found at *Study Station 'Oruma 5'*, while a sample with a high value was found at *Study Station 'Oruma 2'*. The district court considered in 4.58 of the judgment that it was insufficiently argued and made evident that these two high measuring results were attributable to the oil leak of June 2005. In legal ground 4.60, the district court ruled, in part based on this consideration, that the alleged insufficient decontamination was not established. MD et al. did not submit grounds for appeal against the considerations in 4.58, so that on appeal it must be assumed that the two high values were not caused by the 2005 leak. Nor have MD et al. argued on appeal that the district court's consideration that the high values were not due to the 2005 leak could not/cannot support its opinion that the decontamination was not insufficient, so that on appeal it must therefore also be assumed that a result exceeding the intervention value, not attributable to the 2005 leak, cannot lead to an award of any claim of MD et al. Incidentally, this also follows from legal ground 3.4 of this ruling. In short, based on the Bryjark report, it cannot be established that a relevant excess over the intervention value occurred. MD et al. have argued, sufficiently substantiated, on other grounds than the report that the intervention value for mineral oil has been exceeded.

8.19 In point 431 SoA/2, MD et al. have argued that very high levels of heavy metals were found, without however specifying that they looked at the decontamination area at Oruma (see also points 456-462 SoA/2). From points 462 and 494 SoA/2 and point 163 WS/2-MD, it can be deduced that this assertion pertains to another decontamination area, namely Ikot Ada Udo, regarding which proceedings between MD and Shell are pending, to which the SoA/2 also pertains (cases e and f). This is confirmed in Chapter 4 of the Edelman report of Exhibit Q.72, where only Ikot Ada Udo is mentioned as the location where heavy metals were reported, and in the remark on p. 6 under 10 of said report, that '*from report [17]*' it becomes apparent that there still are high levels of lead and mercury, and where it is also noted that report [17] pertains to Ikot Ada Udo, as is apparent from Chapter 8 of a previous report by Edelman, submitted as Exhibit Q.30. Considering this state of affairs, it cannot be assumed that heavy metals remained present in the soil after the Oruma decontamination.

8.20 The duty of care described in legal ground 8.17 for decontaminating below intervention values, as follows from the foregoing, has not been breached. Since this duty of care does not require the removal of all leaked oil in the decontamination process, but only decontamination below the intervention value, oil may remain after a decontamination that is in line with that duty of care. This means that MD et al. cannot derive arguments from the fact that not all of the leaked oil has been cleaned up. According to information provided by Shell, 350 of the 500 leaked barrels were decontaminated and even if the quantity decontaminated was lower, as put forward by MD et al. in point 488 SoA/2, it does not support their argument, also considering that they failed to assert stating reasons, let alone proved, that the quantity that was decontaminated is so low that there is no other explanation as to why the intervention values are exceeded than the 2005 leak.

8.21 MD et al. assert that the contamination also caused 'ecological stress', which continues to this day (point 435 SoA/2 and point 162 WS/2-MD). Point 435 SoA/2 and point 5.6 of the Edelman report submitted as Exhibit Q.30 state that ecological stress can also occur at low levels of oil. This means that 'ecological stress' can also occur with a decontamination that is in line with the duty of care of the SPDC. Therefore, the reliance on 'ecological stress' also fails.

8.22 As regards the soil decontamination, the duty of care of the SPDC was an obligation of results (with respect to the intervention values), which it has met. Seeing as the required result of the decontamination has been achieved, it is no longer relevant how the decontamination was effectuated and whether or not it should have been organized and executed in a different and in general 'better' way. The arguments of MD et al. (inter alia, in points 377 and 496 SoA/2) that the SPDC, also considering the relevant recommendations from the EGASPIN:

- should have investigated beforehand the appropriate decontamination method, so that, inter alia, the RENA method would not have been applied (points 393 and 423-425 SoA/2);
- should have outlined in detail the method and effects of the decontamination process;
- should have monitored the vicinity during and after the decontamination process (points 411, 412 and 474 SoA/2),

fail for this reason. It cannot be assumed that an operator's omission to act in accordance with these recommendations constitutes a breach of a duty of care if the end result is in line with the operator's duty of care. The Court would also like to point out that in point 346 R, MD et al. also assume the primacy of the end result, but applied in a reverse situation: '*[b]ut even if the RENA method were internationally accepted, Shell could not have fulfilled its duty of*

care by using this method, if the results are unsatisfactory after all'. Superfluously, the Court adds here that the criticism of MD et al. of the application of the RENA method in this case is in particular based on the – contested (point 724 DoA/2) – argument that, since it took a while before this method was applied, it is 'likely'/'probable' (points 421 and 429 SoA/2) that the oil had dropped down to below the 30 centimetres of excavated soil, but that, considering the words 'likely' and 'probable' as used by MD et al., it has not been specifically argued, let alone proven, that this actually happened. At any rate, it is has not been proven that the normative intervention values were exceeded.

8.23 The considerations in 8.22 warrant a caveat, that a decontamination method that would have caused extra damage, on top of the damage caused by the leak, possibly can be designated as a breach of a duty of care. The only additional damage put forward by MD et al. in this context is the consequence of burning oil at locations they deem unfit for that purpose (open-air landfills and refuse pits), allegedly scorching trees and crops (points 34 and 118 IS; point 489 SoA/2). Shell has contested this, alleging that these were controlled burnings in pits (DoA/SoA-cross/2 under 98 (iii), with note 138). Since MD et al. have failed to furnish or submit evidence of the improper burning as alleged by them their argument to that effect is disregarded as unproven. It has therefore not been proven that extra damage has occurred.

8.24. Considering the foregoing, it cannot be assumed that the SPDC breached a duty of care/committed a tort of negligence in decontaminating the soil.

The water purification

8.25 In the first instance, MD et al. asserted with respect to the fish ponds and other surface waters that following the clean-up of the SPDC, an oil sheen was visible on the ponds of Oguru and Efanga (point 342 IS; point 344 R), invoking Articles 2.6.3(i) and 2.11.3(i) of Part VIII B of the EGASPIN, which state that the decontamination must be carried out so that an oil sheen is no longer visible (point 327 R). In its judgment, the district court did not explicitly go into the decontamination of the surface waters, but did reject the claims based on it, thereby implicitly rejecting that argument of MD et al. MD et al. did not explicitly submit grounds for appeal against this nor did they repeat, either in the SoA/2 or in the preceding appeal documents, that an oil sheen remained visible after the decontamination, so that no implicit ground for appeal can be read in these documents. Considering this state of affairs, it must be assumed on appeal that following the decontamination process no oil sheen was visible on the surface waters. Due to the two-statement rule, there is no room for a new ground for appeal following the SoA/2. Furthermore, the court documents submitted after SoA/2 – the DoA-cross/2 (see point 107) and

the WS/2-MD – it was also not sufficiently argued that an oil sheen was on the water after the decontamination.

Even if a ground for appeal to that effect would have been submitted in time, it would not have benefited MD et al. Unlike they imply in note 209 under point 344 R, there are no indications in the Bryjark report that an oil sheen was visible on the water. Exhibit Q.64, submitted with DoA-cross/2, MD et al. submitted black-and-white photographs of ponds into the proceedings which, according to the captions, had been made in 2008, so after the decontamination, but they also do not sufficiently clearly show an oil sheen. Seeing as MD et al. have not tendered (more) evidence by witnesses, it therefore remains unproven that an oil sheen remained following the decontamination.

8.26 From the Bryjark report, it is apparent that following the decontamination, oil (TPH) was present in the surface water at Oruma, at levels of 0.17 – 1.35 mg/l (p. 37). Although the report states (on p. 5) that this level '*can exert negative impact*', it fails to state how big this potential impact is. In the following passages of the report there are further clues that the significance of that impact must be regarded in relation to, specifically, surface water and fish:

- *(...) 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).

MD et al. have noted in point 162 WS/2-MD that Bryjark has established that there is '*reduced life in (...) the ponds*'. In light of all this and of the considerations in 8.25, the assertion of MD et al. (in points 413, 416, 495 SoA/2) that the ponds were still so severely contaminated after the decontamination at issue here that no fish could live or be farmed in the ponds, lacks sufficient substantiation. For this contested assertion – in support of which the Bryjark report does not provide evidence on account of the reasons stated above and for which no concrete evidence can be found elsewhere in the file – no specified evidence by witnesses was tendered, so that it has at least remains unproven. The mere fact that after the decontamination process, a level of TPH was found in the surface water which could have a negative impact on the environment, but the extent of which is unknown – and which therefore could also be absent or minor – does not justify the conclusion that the SPDC breached a duty of care when purifying the surface water.

8.27 In points 421 and 471 SoA/2, MD et al. have put forward that it is 'likely' that the contamination has reached the groundwater/that that is 'nearly always' the case. With this it has not been argued that this actually happened here, and in any case it does not argue that this happened in a manner that exceeded the (determining) groundwater intervention values (see legal ground 8.7 *in fine*). Although it would have been logical for MD et al. to do so, in light of the substantiated defence of Shell in point 724 DoA/SoA-cross/2 that it is highly unlikely that the contamination penetrated beyond the uppermost 30 centimetres of soil, they failed to tender evidence for this course of events. A breach of a duty of care on the part of the SPDC can also not be established as regards the groundwater.

Conclusion on the negligence-based Decontamination claims

8.28 Now that a breach of a duty of care in connection with the decontamination effort expended by the SPDC has not been established, the Decontamination claims are not allowable, also not where they are directed against the Shell parent company/companies nor insofar as they pertain to the future. The decontamination duty of care of the SPDC, which is a separate issue from the question whether the leak can be attributed to her, does not extend so far that the SPDC has to clean up all contamination. The residual contamination that currently remains therefore does not constitute an unlawful situation in this context. The Court notes here, referencing legal ground 8.2, that the SPDC may still have an obligation to carry out a full decontamination, which may ensue from the liability for compensation pursuant to the origin of the leak (legal ground 5.28), and possibly also (partially) from the obligation it has to pay damages ensuing from not installing an LDS (see legal ground 6.30).

The Rylands v Fletcher rule

8.29 MD et al. have also partially based their Decontamination claims on the *Rylands v Fletcher* rule (point 807 SoA/2). They believe that rule applies since a) the soil excavated during the decontamination process was placed on clean soil, which in turn became contaminated by the oil leaking from the excavated, contaminated soil and b) the SPDC dug waste pits in which it dumped oil waste, from which location the oil, seeing as the waste pits were not protected against this, leaked into the underlying soil. However, the Court fails to see that – as expressed by Shell in point 745 DoA/SoA-cross/2 – this caused a contamination which would not have occurred without the excavation of the soil and the dumping of it in the waste pits. If the contaminated soil had not been excavated and the oil waste had not been deposited in a waste pit, the oil would have leaked into the underlying or adjacent soils anyhow. Invoking the strict liability of *Rylands v Fletcher* is

denied due to the lack of damage. Since the situation referred to here must be deemed to have been terminated, an order to that effect is not relevant.

9. Claims II and III.b: the fundamental right to a clean living environment

9.1 Shell believes that a violation of the fundamental right to a clean living environment at most could lead to civil liability in the case of 'severe environmental pollution' (point 765 DoA/SoA-cross/2). It implies that in Shell's view this also applies to the fundamental rights invoked by MD et al. of that content in the Nigerian Constitution and the *African Charter on Human and Peoples' Rights*. MD et al. have based their reliance on the assertion that their living environment is 'severely' contaminated (point 737 SoA/2). The Court will start from the common starting point, which is in line with the general opinion about the threshold that must be set in order to be able to designate a violation of fundamental rights for the protection of the environment, see for instance ECtHR, 9 December 1994, A303-C, NJ 1996, 506 (*López Ostra/Spain*), in which the requirement of severe environmental pollution was set.

9.2 The Court will now assess the fundamental rights claims II and III.b of MD et al. based on the three themes referred to in legal ground 3.5, namely Origin, Response and Decontamination (see also legal ground 3.9). From legal ground 3.14 it follows that MD et al. have the burden of proof – and consequently also the obligation to furnish facts – for the facts on which the fundamental rights violation they allege are based.

9.3 The contamination caused by the leak can undoubtedly be qualified as serious, but in connection with Origin, a violation by Shell of the right to a clean living environment (see claim III.b) or liability for its impairment (see claim II) nevertheless cannot be assumed because, in view of the considerations in 5.29 and 5.30, it cannot be established that the leak was caused by an act or omission on the part of the SPDC/Shell.

9.4 The only element of the theme Response which has led to the opinion that the SPDC/Shell has committed culpable acts/negligence relates to the LDS. However, MD et al. have failed to assert (sufficiently) concretely that the omission of the SPDC/Shell to install an LDS/to ensure that an LDS is installed, constitutes 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 Response.

9.5 From the considerations in 8.20 through to 8.29 it follows that it has not been established that following the decontamination process there was severe

residual pollution, required in this context as is apparent from legal ground 9.1, mainly because the contamination due to the 2005 leak was decontaminated below the intervention value. The Court also notes that in Article 8.1.1, second sentence of Part VIII F of the EGASPIN (*'Concentrations in excess of the intervention values correspond to serious contamination'*) it is confirmed that contamination is deemed severe only when the intervention value is exceeded. Therefore, a violation of the fundamental right to a clean living environment in connection with Decontamination can also not be assumed.

9.6 Claims II and III.b based on the violation of the fundamental right to a clean living environment are not allowable, as follows from the foregoing. It needs no consideration whether or not under Nigerian law a violation of a fundamental right may constitute an independent basis for civil liability, as argued by MD et al. but contested by Shell.

10. Claims III.a-b and IX

10.1 Claim III.a-b was instituted by MD for the Oruma community, and this also applies to claims for injunction IV through to VII, assessed above, and which were also instituted by Oguru and Efanga. As has been considered in legal ground 3.7, the declaratory decision claimed with III.a-b also covers the area of the claims for injunction. Claim III.a-b simply seeks those claims for injunction and shares in their fate, in all respects. MD therefore has no interest in a separate assessment of claim III.a-b. That claim is denied.

10.2 The extrajudicial costs that were allegedly incurred in connection with the elements of claims I and III.a-a, which are to be allowed, cannot be estimated right away, also considering the defence of Shell (not provided on appeal) that Nigerian law does not provide for that (points 136-138 WS-S). This loss item could be brought up for further assessment in the follow-up proceedings for the determination of damages (claim I) or in any compensation proceedings for which claim III.a-a serves as a prelude. To this extent, claim IX for the compensation of the extrajudicial costs is not allowable (at present). The procedural documents contain no indications that extrajudicial acts were committed in connection with the LDS issue. Insofar as claim IX is for this effect, it is denied for this reason.

11. Concluding considerations

11.1 In the foregoing, the JIT report, the Clean- Up report and the Clean-Up certificate were included in the assessment, not to the detriment of MD et al.

Their assertions about the extent of the contamination therefore need no further assessment – see legal ground 3.34.

11.2 In addition to that which has been stated above about the parties' offers of proof, the following is considered. The offers of proof of MD et al. (see, inter alia points 851 and 852 SoA/2) were either insufficiently specified, not relevant or were submitted for assertions lacking in sufficient substantiation, and are therefore disregarded. The same applies to the offers of proof Shell made in point 179 SoA-cross/1, point 296 DoA/1 and point 936 DoA/SoA-cross/2 for the assertions for which it has the burden of proof. The offers of Shell of rebutting evidence in the same points are not relevant (inter alia, the tender of evidence in point 532 DoA/SoA-cross/2) and/or pertain to insufficiently substantiated assertions. Therefore, these offers are disregarded. In addition to this, the offer of rebutting evidence – unlike with the 'regular' offer of proof – was not accompanied with the statement that evidence of witnesses could be provided. This means that as regards the rebutting evidence, there is no right to the provision of evidence (Section 166 subsection 1 Dutch Code of Civil Procedure).

11.3 To sum up, also considering the 2015 ruling, the Dutch court is competent to take full cognizance of cases a and b, and claims I and III.a-a against the SPDC in respect of Origin and in respect of Response, insofar as they concern the LDS, are allowable, as are the claims for injunction against the SPDC and RDS based on the LDS. To this extent, grounds of appeal in the principal appeal of MD et al. succeed. In all other respects, the claims of MD et al. are not allowable and their grounds of appeal in the principal appeal fail. Shell's grounds of appeal in the cross-appeal, with which it contested the competence of the Dutch court and the *locus standi* of MD et al. fail. The contested judgment is quashed and a decision will be made as stated above.

11.4 At any rate with a view to the payment of the costs of the proceedings, cases a and b can be considered as one case. In this particular case, both parties were partially unsuccessful. The costs incurred in both instances will therefore be compensated in such manner as described in the operative part.

11.5 The costs of the experts (€ 44,840.18 and £ 17,000) are for one part allocated to case b, and for the other part to case c. The amounts allocated to case b are therefore € 22,420.09 and £ 8,500.00. Since the SPDC failed on the issue to which the experts' report pertained, it shall bear these costs.

DECISION

The Court of Appeal:

in cases a and b

- overturns the judgment given between the parties by The Hague District Court on 30 January 2013, and in a new ruling:

  * rules that the SPDC with respect to Oguru, Efanga and the other local residents whose interests MD seeks to protect i) has strict liability for the damage resulting from the leak at Oruma on 26 June 2005 and ii) acted unlawfully by not installing in/on the Oruma pipeline a Leak Detection System (LDS), or at least an adequate one, before this date, and orders the SPDC to compensate Oguru and Efanga for the damage ensuing from i) and ii), to be assessed later during separate follow-up proceedings and settled according to the law;

  * instructs the SPDC to equip within one year from service of this ruling the Oruma I pipeline and Oruma II pipeline with a Leak Detection System (LDS), as referred to in legal ground 6.43, and to ensure the LDS continues to be installed for as long as these pipes are used as a main pipe or spare pipe, and orders the SPDC to pay to MD et al. jointly a penalty of € 100,000 for each day (a part of a day counts as a full day) it fails to comply with this order;

  * instructs RDS to equip within one year from service of this ruling the Oruma I pipeline and Oruma II pipeline with a Leak Detection System (LDS), as referred to in legal ground 6.43, and to ensure the LDS continues to be installed for as long as these pipes are used as a main pipe or spare pipe, and orders RDS to pay to MD et al. jointly a penalty of € 100,000 for each day (a part of a day counts as a full day) it fails to comply with this order;

  * dismisses all other applications;

  * compensates the costs of the proceedings in the first instance thusly that each of the parties bears their respective costs;

- dismisses all other applications (submitted for the first time on appeal);

- compensates the costs of the proceedings on appeal thusly that each of the parties bears their respective costs;

- determines that the SPDC bears the costs of the experts allocated to case b in the amounts of € 22,420.09 and £ 8,500.00;

- declares this ruling provisionally enforceable as far as possible.

This ruling was issued by judges *mrs.* J.M. van der Klooster, M.Y. Bonneur and S.J. Schaafsma and pronounced in open court at the hearing of 29 January 2021, in the presence of the court clerk, *mr.* M.J. Boon.