ruling

THE HAGUE COURT OF APPEAL
Civil law division

Date of ruling : 29 January 2021
Case numbers : 200.126.843 (case c) + 200.126.848 (case d)
Case/ cause list number of court : C/09/337058 / HA ZA 09-1581 (case c) + C/09/365482 / HA ZA 10-1665 (case d)

Ruling

in the cases of:

1. **Eric Barizaa DOOH**,
   of Goi, Rivers State, Federal Republic of Nigeria,
2. the association with legal personality **VERENIGING MILIEUDEFENSIE**,
   established in Amsterdam,

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

versus (case c)

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,

and versus (case d)

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.

Contents

The contents of this ruling has been divided as follows:

Course of the proceedings

General

In this ruling, the Court of Appeal assesses cases c and d, which form part of six cases brought against Shell by MD and the Nigerian claimants/farmers. Cases a and b concern a leak which occurred at the Nigerian village of Oruma in 2005. The current 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 2006 and 2007.

The course of the proceedings in cases c and d

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 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 c, 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. Ogoniland is an area of about 1,000 square kilometre situated in Rivers State in the Niger Delta. The village of Goi is located in this area. The SPDC ceased operations in 1993 because it deemed the situation in that area too unsafe for its employees. After this date, underground main oil pipelines of the SPDC ran through Ogoniland, which are still used to this day, for the

transportation of crude oil from oil fields situated outside Ogoniland to one of the port terminals operated by the SPDC. Main and supply pipelines are connected to each other in a manifold.

d. B.M.T. Dooh (hereinafter: Barizaa Dooh) – who died on 14 January 2012 and was the father of Eric Dooh – used to be a Nigerian farmer and fisherman who lived near Goi. In 2004, Barizaa Dooh made a living by developing farmland and operating fish ponds near Goi. MD is a Dutch organization whose objective is to protect the environment worldwide and which assists the heirs of Barizaa Dooh in these proceedings.

e. On 10 October 2004, a leak (hereinafter also: the leak) occurred in one of the aforementioned underground pipelines in the territory of the Mogho community near Goi. The leak occurred in a 24 inch pipeline, more specifically in the part that had been built in 1964 and which runs from the manifold at Bomu to the Bonny terminal, this pipeline's end station (hereinafter also simply: the Goi pipeline). The oil gushed from a 46 centimetre long small opening at the top of the pipeline, between the 10 and 2 o' clock position. The top of the pipeline was at a depth of about 1 to 1.5 metres. A photograph of the opening is provided below:

f. 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.

g. On 12 and 13 October 2004, the so-called Joint Investigation Team (JIT) visited the site of the leak. The team was composed of representatives from

the ministries involved, of the SPDC as the operator of the Goi pipeline, and of the Mogho community. On 12 October 2004, the leak was closed provisionally with wood chips to stop the leak from flowing from the leak. On 13 October 2004, the leak was definitively repaired by fitting a round clamp, a so-called 24" x 14" PLIDCO split sleeve clamp, around the pipeline at the location of the leak.

h. The JIT drew up a report, which was not signed by the representatives of the Mogho community, but which was signed by the representatives from the Nigerian ministries and of the SPDC. Part A of the report states the following: '*Estimated quantity of oil spilled: 150 bbls*' (150 barrels of 159 litres each). Part B of the report includes the following, inter alia:

> *In getting to the leak point the following was observed.*
> *There was clear evidence of previous excavation as shown by an exposed pipeline and trench already dug by unknown persons.*
> *There was loose (soft) soil backfill and fresh grasses all around the leak point.*
> *On proper excavation to expose point, it was discovered that a transverse saw cut of 18"(45.72 cm) was made in the pipeline between 10-2 o'clock position by unknown persons.*
> *The coating on the pipeline was damaged at the point of the leak.*
> *Ultrasonic wall thickness test shows no evidence of corrosion at the point of leak as there was no significant wall loss.*
> *The leak was clamped.*
> *UT along saw cut: a 9.2.b 9.1.c 9.4.d 9.5.e 9.5 f 9.2 g. 9.3 h 9.(...) j 9.3 k 9.2 l 9.1 m 9.3 n 9.2 o 9.5 p 9.3 q 9.4*

i. In a letter dated 8 December 2004, Rivers State notified the SPDC that the SPDC was not allowed to carry out any of the scheduled decontamination activities in connection with oil leaks in Ogoniland. Over two years later, in January/February 2007, decontamination commenced. 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 May 2007. In June 2007, decontamination of the part of the affected area where fish ponds are located commenced. This decontamination was carried out according to the same method as the earlier decontamination processes, with the proviso that the fish ponds had to be drained first before excavating the contaminated soil (see for more information also 45-50 DoA).

j. On 4 April 2008, the Joint Federal and States Environmental Regulatory Agencies drew up *Clean-Up and Remediation Certification Formats* (hereinafter: the Clean-Up certificates), which were signed by two Nigerian government institutions, for the decontamination of the contaminated soil

according to the RENA method and about the decontamination of the contaminated fish ponds.
The following, inter alia, is stated in the certificate for the soil:

D. Area (...) of Impact: 311.000M2
(...)
Completion date: Aug 2007
STATUS: Site Certified

The following, inter alia, is stated in the certificate for the fish ponds:

D. Area (...) of Impact: 23.500M2
(...)
Completion date: Aug 2007
STATUS: Site Certified

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 Barizaa Dooh based on the assertions in the court documents of MD et al., and that Shell is jointly and severally liable towards Barizaa Dooh for the damage he 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 Barizaa Dooh 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 Goi, 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 Goi, 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/oil leaks 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 Goi 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 their replacement, to keep the oil pipelines at Goi 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 Goi; 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 4.21 and 4.25 of the judgment), that in October 2004 the SPDC effectively stopped and remedied the leak as quickly as reasonably possible within three days, so that it cannot be stated that Shell's response was factually inadequate (legal ground 4.51 of the judgment) and that it was not established that insufficient decontamination had been carried out (legal ground 4.58 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 leak that occurred 'in Goi'/'(in and) near Goi' on 10 October 2004. This is stated in so many words in claims III and V through to VII. Due to the connection between these claims, as described below under 3.9 and 3.10, and claims I and II, that date and location must also be understood to apply to claims I and II. For claim II, this is underlined in point 474 R.

3.5 MD et al. have also reported one or two other leaks in 2003 allegedly affecting Goi and Barizaa Dooh. According to the assertion of MD et al., this leak/these leaks occurred at the village of Kegbara Dere (points 16 and 24 SoA/2), and therefore not 'near' the village of Goi/'in Goi', even though they assert that the oil leaked in the spill/spills reached the village of Goi. Since all claims lodged by MD et al. must be understood to be based on a leak '(in and) near'/'in' Goi (cf. point 272 DoA/SoA-cross/2), as has been explained above,

MD et al.'s reliance on the 2003 leak/leaks at Kegbara Dere can remain undiscussed. Allowing this reliance would, after all, not lead to an award of any part of what is claimed.

3.6 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 (see also legal ground 2.1, first sentence). 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.

3.7 Claim I – which was only lodged by Barizaa Dooh, 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 2004-2008, when the alleged unlawful acts were committed.

3.8 Claims IV through to VII were lodged by Barizaa Dooh 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 476 R). Claim for injunction VI is for the effect that the pipeline near Goi is kept in a good state of repair (point 469 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 Goi.

3.9 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 Dooh – 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 Dooh) 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 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 122 SoA-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 Dooh – 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 Dooh – 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 474 R), but by the document of 11 September 2012, page six, MD et al. dropped this part of their claim, see also point 215 WS-MD.

3.11 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. Therefore, the claims relating to compensation in respect of 'Origin' and 'Response' covering the period up to and including 13 October 2004 only extend to Shell NV and Shell T&T.

Nigerian law; general

3.12 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.

3.13 The sources of Nigerian federal civil law include the following: English law and Nigerian legislation and jurisprudence. 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.

3.14 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*).

3.15 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.

3.16 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 (…).*

3.17 The SPDC – the operator of the Goi 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 points 284 and 355 DoA/SoA-cross/2).

3.18 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.

3.19 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 3.15 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.*

3.20 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.

3.21 MD et al. describe the tort of nuisance as: nuisance (point 120 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 129 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).

3.22 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

3.23 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*'.

3.24 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*'.

3.25 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 3.23 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.

3.26 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

3.27 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 3.30, 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.

3.28 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.

3.29 From point 80 of UK Court of Appeal 25 April 2012, [2012] EWCA Civ 525 (*Chandler v Cape*) (Exhibit 25) and points 44-54 of UK Supreme Court 10 April 2019, [2019] UKSC 20 (*Vedanta v Lungowe*) the following rule can be deduced: 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.

3.30 Especially in view of 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 3.27) but to English law.

3.31 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

3.32 The JIT report states that the equivalent of about 150 barrels of oil leaked in the 2004 spill, which comes down to about 24,000 litres. The Clean-Up certificate states that this caused contamination in area of about 311,000 and 23,500 m2, the equivalent of more than 50 football pitches. MD et al. have cast doubt on the accuracy of these figures (see, inter alia, points 86-88 WS-MD, 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 ground 3.15), 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 Barizaa Dooh and his son Eric Dooh (see legal grounds 5.1 through to 5.7 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. 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 Barizaa Dooh (the father)

4.2 MD et al. have asserted as follows. Barizaa Dooh had a farm and fish farm along the creek at Goi. He used and occupied the land on which he grew his crops and economic trees (jointly: the plans) and on which he had installed the fish ponds. Due to the leak of 10 October 2004 – which occurred at about one kilometre from the land and the fish ponds of Dooh – the oil flowed into a creek which discharged into Goi Creek, as a result of which the oil flowed onto Dooh's land and into his fish ponds. Because of this, the land and the plants were damaged and destroyed, the fish in the ponds died and the ponds became unusable for fish farming and fishing. In the fire that followed the leak the plants in the area affected by the leak were also destroyed.

4.3 To contest the right of action of Barizaa Dooh, Shell has put forward three arguments, namely a) that he should have submitted documents showing how he acquired the ownership/right of use of the land the fish ponds, b) that he failed to make clear the exact location of the land and fish ponds, and c) that it does not appear that the oil had leaked up to the land the fish ponds and caused damage there (inter alia, points 119-121 WS-S; points 115, 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 Dooh 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 Dooh needs no consideration, in view of the considerations in 5.28, 6.15, 7.31 and 8.6.

4.5 In the first instance, MD et al. have submitted as Exhibit M.4 a signed statement of the Goi community from 2012, in which the community declares that the four fish ponds that can be seen on the attached Google Earth maps '*belong to*' Barizaa Dooh. On appeal, in DoA-cross/2, MD et al. have submitted a survey plan with a map of 29 September 2019 as Exhibit Q.59 (C), depicting the land and ponds in a red circle. It is stated on the map that this concerns the '*property area*' of Dooh. The positioning of the land and the fish ponds on this map are in line with their positioning on the map stated in point 28 IS: Dooh's area is situated in the bend of Goi Creek at least one kilometre from the leak point. 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. This is not contested by Shell, which has also not contested the accuracy of the survey plan in Exhibit Q.59 (C). From the survey plan, as viewed in context with the map contained in point 28 IS, it is sufficiently clear where the lands and fish ponds of Barizaa Dooh are situated, and that at least he was the user of the lands and fish ponds ('*property area*'). Incidentally, at the 2020 hearing, outside of the WS/2-S, after years of contesting the location, Shell informed that the location of Barizaa Dooh's fish farm was not in dispute (RH-2020, p.12). Therefore, Shell's argument b) also does not hold.

4.6 As Exhibit Q.54, MD et al. have submitted a map, issued by Shell to the experts, made in 2009 by Shell's Geomatics Department, '*based on JIV acquired data*', showing the '*areas affected*' by the leak at Goi of 11 October 2004 (see point 138 SoA/2). It shows that the impact of the leak, regardless of its precise location, spilled over to (the *'pond'* in) the bend of Goi Creek, where Dooh's *area* is situated. Based on this map[1], it must be concluded that the oil flow from the leak reached the area used by Dooh and covered it at least a part of it and probably a large part of it. No substantiated defence/sufficiently substantiated defence against this has been provided in point 563 DoA/SoA-cross/2. To specify, and superfluously, it is noted that a comparison of the coordinates with the *pond* on Shell's own map with the coordinates of Dooh's *area* on the *survey plan*, and not contested by Shell, shows that this *area* is situated at the site of the contaminated pond, which

[1] As a side note, the Court observes that Shell's argument that it indicated the Dooh *area* on that map based on the map to the M.4 statement, which Shell contests, can be considered remarkable, because that statement and the map were drawn up three years later. The question also arises why Shell did not publish this map (Q.54), dating from 2009, until 2018.

confirms that the oil reached Dooh's *area*. It can therefore be considered certain that Dooh incurred at least some damage as a result of the leak. Shell's argument c) also does not hold, insofar it relates to the 2004 leak.

4.7 It must be concluded that Barizaa Dooh had a right of action in respect of this leak 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 currently unknown persons living in the vicinity of the spillpoint, within the area measuring about 50 football pitches, and the environment affected by the leak.

4.8 It has not been made clear where the leaks MD et al. claimed to have occurred in 2003 took place exactly. This means that Shell's argument c) in relation to these alleged leaks (see, inter alia, points 110, 235 and 273 DoA/SoA-cross/2) cannot be deemed as having been contested. If, despite of the considerations in 3.5, MD et al.'s reliance on these leaks were relevant, it could not be awarded for this reason.

Right of action of Eric Dooh (the son)

4.9 In legal ground 5.5 of the 2015 ruling, the Court ruled that Eric Dooh was entitled to institute the appeal in his own name, since Shell failed to contest (with sufficient substantiation) his assertions that under Nigerian law he, in brief, is the heir of Barizaa Dooh, who died in 2012. After the 2015 ruling, Shell did not address this issue anymore (see points 236-241 DoA/SoA-cross/2), so that that ruling must currently be considered as final.

4.10 What remains is the question discussed but not yet answered in legal ground 5.3 and 5.4 of the 2015 ruling whether or not the rights of action invoked by Barizaa Dooh in this case extinguished following his death, considering the ruling in another case between Barizaa Dooh and the SPDC about damage (caused by oil pollution) to Barizaa Dooh's property in the period 1994-1996 (Federal High Court 6 December 2013 (*Dooh v SPDC*)). In that case it was ruled (p. 5) that the action was *in personam* and '*an action in personam (...) will abate immediately on the Plaintiff's demise*'. Shell has further substantiated its viewpoint, that the above-mentioned question must be answered affirmatively, with the Exhibit 61 opinion of Oditah (see points 165-170 of this Exhibit) as stated in legal ground 3.25, submitted into the proceedings with DoA/SoA-cross/2. MD et al. have responded to this with an opinion of Chianu and Duruigbo, submitted as Exhibit Q.63 with WS/2-MD (hereinafter: the Q.63 opinion).

4.11 Shell's Exhibit 61 opinion starts from the following general rules in Nigerian law (point 165):

> *Under Nigerian Law, only claims* in rem *can be inherited. Actions* in rem *do not abate on the death of the plaintiff, unlike* actions in

personam*, which abate, in accordance with the latin maxim* personalis moritur cum persona *(meaning: a personal right of action dies with the person)*.

4.12 In point 18 of the Exhibit Q.63 opinion, MD et al. cite a passage from a historical overview given by the Lord Chancellor about the above-referred maxim (1943 SC (HL) 19 at 26 (*Stewart v London, Midland and Scottish Railway Co.*). From this passage, it becomes clear that this common law maxim was subject to important limitations and '*[was] in effect swept away by the Law Reform (Miscellaneous Provisions) Act, 1934*'. Section 1(1) of that act reads as follows:

> *Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate. Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other (...).*

The following can be read in the article '*Death and Tort*' by Steve Hedley in *Death Rites and Rights* (Belinda Brooks-Gordon et al, eds 2007) 241, at 242 (point 30 of the Q.63 opinion):

> *The modern position, established since 1934, is that tort actions have a life of their own, and do not die with either of the people involved in them (...). This reversed the early common law rule that* actio personalis moritur cum persona *(...). The modern rule – that rights of action usually don't die with either of the people involved, even if they are 'personal rights' – is therefore the opposite of the medieaval rule.*

The *1934 Act* does not apply in Nigeria, but for Rivers State, where Goi is situated, a provision is included in *Administration of Estates Law, Cap. 1, The Laws of Rivers State of Nigeria*, namely in section 13(1) (point 32 of Exhibit Q.63), which is almost identical to section 1(1) of said act. The *Administration of Estates Laws* of the then Bendel State contained a provision that was identical to this section 13(1) '*provision*'. The Court of Appeal ((2007) 3 NWLR (Pt. 1020) 71 (*Okumo Oil Palm Ltd. v Okpame*)) ruled based on this that the maxim '*actio personalis moritur cum persona*' does not apply to an action for overdue salary payments, regarding which the following was considered (see points 29, 35 and 39 of Exhibit Q.63):

> *'From the above provision, it is my view that the Maxim is applicable in a personal action founded on the tort of defamation or seduction of a wife, etc, it does not avail where interest accrues to the estate of the deceased'.*

Considering this state of affairs, Shell's starting point on which its Exhibit 61 opinion is based (see legal ground 4.11) cannot be accepted as accurate and – also considering that which has been put forward in the otherwise not contested Q.63 opinion – it must be assumed that under Nigerian law the maxim *actio personalis moritur cum persona* only applies to certain highly

personal actions of deceased persons in which the heirs have no further interest.

4.13 The case that led to *Dooh v SPDC* did not revolve around a highly personal action of Barizaa Dooh. His heirs also had an interest in the action. Therefore, *Dooh v SPDC* can be deemed to be in conflict with Nigerian law, noting that the reference in *Dooh v SPDC* to the ruling in the case *Oyeyemi v Commissioner for Local Government* (Supreme Court (1992) 2 NWLR (Pt.226) 661) is regarded as not effective, because that case concerned a claim relating to a *chieftaincy position*, which is an issue of a highly personal nature. Concurring with the Q.63 opinion (point 55) it must be concluded that *Dooh v SPDC* '*was given in error and not guided by relevant precedent*', so that it cannot have a precedent effect. Even if *Dooh v SPDC* should be acknowledged in the Netherlands – which can be left undiscussed here – it does not benefit Shell, unlike it believes (point 30 WS/1-S), since *Dooh v SPDC* pertained to a different factual situation than that of this case and therefore does not constitute a *res judicata* for this case.

4.14 The rights of action of the father may also be invoked by Eric Dooh, as follows from the foregoing.

Right of action of MD et al. under the OPA

4.15 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 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 – if the OPA even contains such a *condition precedent* – which they contest (points 14 and 21-24 DoA-cross/2) it cannot be alleged against them since the amount of compensation is not yet at issue (points 14 and 27-32 DoA-cross/2).

4.16 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 4.3 of the 2015 ruling (c+d).

4.17 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.

4.18 Superfluously, the Court notes the following. MD et al. sent notices of liability to the SPDC and RDS before the summons in case c, 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 Goi 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 of Origin. These claims – also as regards claim III.a, see legal ground 4.16 – 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 Barizaa Dooh 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 3.17 *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 (points 359 and 365 DoA/2)?

5.4 The Nigerian Evidence Act 2011, already discussed in legal ground 3.15, 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 3.24, 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 Goi of 10 October 2004 was caused by sabotage.

Evaluation of the evidence

5.13 In the first instance, Shell presented the following as proof that the sabotage it alleged was caused by a saw cut to contest the argument of MD et al. that the leak at Goi was caused by failed weld:

- the JIT report, which concludes that the ground at the leak site showed signs of previous excavation and that the soil was more loose than the ground around it and contained fresh grass, and also that there was a 46 centimetre long saw cut, made by unknown persons;
- videos made during the JIT visit, which allegedly confirm the conclusions from the JIT report;

The district court found this evidence sufficient to deem sabotage by means of a saw cut as certain, regarding which the district court also considered that MD et al. failed to substantiate that there was a weld at the damaged location.

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 6.3 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. The experts made the following remark at the end of their final report:

> '*We are surprised that (...) in 2015, the line was depressurized and filled with water (...), When a pipeline is in this condition we would*

have thought it would be prudent of Shell to remove the repair clamp and finally confirm that the point of leak was external interference'.

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 Among other documents, the experts asked Shell for reports of so-called *In-Line Inspections* (ILI) of the pipeline (see B-D 1). With an ILI run, a type of robot (an *intelligent pig*) moves through the pipe and inspects it from the inside. In B-D 2 from 2017 (in the expert opinion, referred to as W) Shell answered that no ILI reports were available for Goi, because Shell had not had access to that area since 1993, and '*until last year*' had not been able to carry out an ILI. According to the experts, this answer suggest that an ILI run had been carried out after all (namely '*last year*'), which made them wonder why that ILI report had not been issued (p. 15, first and second paragraph of the final report; p. 12, second paragraph of the draft report). Shell then submitted on 16 October 2018 – after the parties had received the draft report – several pages of the report on an ILI run carried out in 2016 by a company called Rosen (B-D 14, Exhibit C(1), in the expert opinion referred to as AN, see also B-D 13, p. 23). In their final report, the experts noted (on p. 19, point 4) that they had not received all '*available information (e.g. full ILI reports)*'. In points 6 and 136 SoA/2, MD et al. also noted that Shell had not submitted the full report of the ILI run carried out at Goi in 2015. In general, 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. On the one hand, the final report states that it is not possible to come to a definitive conclusion on the cause of the leak, and that most information only '*tends towards*' sabotage (p. 19, points 1 and 2), while not all available information was provided, which is in line with the interpretation of MD et al. But on the other hand, the final report states that there are 'no *realistic other alternatives*' (p. 19, point 3), 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: based on the videos, the experts plainly established that the leak was not caused by external corrosion (p. 14, first paragraph).

5.19 About the JIT report, the expert opinion notes that it is of such '*poor quality*' – particularly due to the lack of photographs and also due to the absence of measurements made at the site of the leak – that it severely hinders the verification of the sabotage assumed by the JIT (p. 20, second paragraph and p. 19, point 1 and 4), that after viewing the videos there are doubts about the strong statement as laid down in the JIT report that there is proof of previous excavation (p. 14, fourth paragraph) and that based on the videos the information is too limited and too lacking in detail to confirm the conclusion of the JIT, namely that there is a saw cut (p. 14, first paragraph). The experts have stated that based on the '*poor videos coverage*' they believed that there could be a '*failed weld*' (p. 20, second paragraph). However, the experts believe that the clamp used is less suitable for repairing a defect or leak in a weld, although they do not deem it impossible to use that clamp for that purpose (p.14, last paragraph).

5.20 The observations presented in legal ground 5.19 were already stated in the draft report, at least their essence. Based on the observations, questions 1 through to 3 of the Court were answered by the draft report:

1. *From the available material and information, it is not possible to make a decisive conclusion about the cause of the leak. Required additional information would be:*
   * *(...)*
   * *The result of the suggested (assumed) ILI-run (...) which would prove conclusively that it isn't a weld.*
2. *Information is lacking to undoubtedly select the most probable cause. Most information tends towards external interference, possibly with a hack saw, as is said to be concluded in the JIT report, but the information is insufficient or too vague to prove that it is not a defective weld, possibly in combination with some internal corrosion (...).*
3. *See answer on (ii), no realistic other alternatives.*

5.21 So, the draft report expresses the view that the information from the JIT report and the associated videos may tend towards sabotage/a saw cut, but that it is insufficient to designate sabotage/a saw cut as the most likely cause.

5.22 The experts' final report (p. 21) the answers to questions 1 and 2 contains information that '*from additional information supplied by Shell on 16 October 2018, (...) AN, including the 2015 ILI report, we can make more conclusive observations concerning the leak*'. Subsequently:

- question 2 was answered with that the most available information points at external interference, based on the information from the JIT report and the pages issued on the ILI run;
- question 3 was answered as follows: '*see answer (ii), no realistic other alternatives, based on the received information as mentioned under 2*';
- question 4 was answered with that based on the information received, the experts had a '*fair confidence level*' that the leak was caused by a saw cut, but if the JIT report would have had good photographs and measurements, and if all information had been provided (for instance, the full ILI report), that '*confidence level*' would have been much higher.

5.23 The Court understands that, considering legal ground 5.19, the idea as referred to in 5.21 continued to underlie the final report, and that the differences between the answers in draft report and the final report were caused by the pages from the ILI report submitted after the draft report. The second and third paragraphs on p. 15 of the final report show that several of the initial concerns of the experts regarding the exact location of the leak point were taken away by the information from those pages, and that that information showed the most likely position of the defect. The second bullet point of the fourth paragraph on p. 15 states that according to Shell, that position was at 48002 metres from the start of the pipeline. The fourth paragraph on p. 15 also shows that the submitted pages – pertaining to the section of pipeline (of about 1.84 kilometre) between 47361.62 and 49206.43 metres from the start (see Exhibit C(1) of B-D 14) – only reveal 16 cases of metal loss, which were repaired with a sleeve clamp, and that none of the defects underneath the repair clamps were associated with a weld. If there were no doubt that the leak around which this case revolves was located in that section of pipeline, the conclusion that the leak was not due to a failed weld would be inevitable, seeing as it has been established that that leak was repaired with a sleeve clamp, see also the phrase '*which would prove conclusively that it isn't a weld*' to question 1 of the draft report[2]. It is noteworthy that the experts do not state: 'the leak is at the 48002 metre position, as indicated by Shell, and there is no weld underneath the sleeve clamp, according to Rosen (see p. 276 of Exhibit C(1) of B-D 14), therefore the leak could not have been caused by a failed weld, and must have therefore been caused by sabotage'. The fact that the experts did not go so far, but stopped at a '*fair confidence level*' that the leak was caused (not by a weld but) by a saw cut, can only be explained, it seems, that they were insufficiently certain that the leak occurred in the section of pipeline covered by the submitted pages from the ILI report. The experts also did not positively identify the location of the leak and did not address the 48002 metre position mentioned by Shell; they only discussed the most likely position of the leak,

[2] The Court also assumes that the ILI run was carried out in the right pipe, and not in the parallel pipe that also exists/existed, as is apparent from B-D 13, p. 23. This is not in dispute.

while the exact location of the leak is, of course, of vital importance. In light of all this and considering the fact that the experts themselves deem a higher confidence level possible, the fair confidence level adopted by the experts cannot be construed to mean that they consider it beyond reasonable doubt that the leak was caused by sabotage/a saw cut. Theirs is a substantially lower level of confidence, to which it is inherent that one more alternative options are possible. Considering this state of affairs, no independent significance may be attached to the answer to question 3 in the final report. The answer was formulated based on '*the received information as mentioned under 2*', that is: the information from the JIT report and the submitted pages of the ILI run, and therefore in disregard of the uncertainty about the location of the leak. What is more, by copying the Roman numeral (ii), while regular numbers were used for the questions, it would appear that the answer to question 3 in the final report was copy-pasted from the answer to question 3 in the draft expert opinion, which, with the reference to question 2 ('(*ii*)'), only expressed that alternatives other than *external interference* and a *defective weld* were excluded, and therefore not that a *defective weld* was excluded.

5.24 Insofar as any specific objections against the expert opinion can be read in the assertions of Shell (such as in point 139 DoA/2), they cannot succeed on the ground of the aforesaid considerations.

5.25 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 information sabotage is the most likely hypothesis for the origin of the leak, but that it has not been established/proven beyond reasonable doubt that sabotage was indeed the cause of the leak.

5.26 The following must also be considered. The experts expressly asked Shell for the full ILI report of the Goi pipe, already in their e-mail of 2 August 2017 (*'Necessary information (...): A. (...) 3. Detailed full reports of In-Line Inspections of the pipelines including specifications of ILI devices used. 4. Exact location of leak, also referenced on ILI report. (...)',* B-D 1). Shell responded that (i) no ILI reports were available for Goi and (ii) that the leak was located in the 1990 Nkpoku and Bomu pipeline; the information Shell provided then pertained to that section of the pipeline (B-D 2 and 3). Both points have been proven to be wrong. As regards (ii) it has been established that the leak was situated in another section of the pipeline, namely between Bomu and Bonny Terminal, constructed in 1964; this point was noted by MD in a letter dated 22 November 2017 (B-D 4), thereby rectifying the point. Nevertheless, it appears that Shell did not provide the information as requested by the experts to pinpoint the right section of pipeline, as explained by MD et al. (points 90-91 WS/2-MD). As regards (i), Shell did have an ILI report after all, namely the above-discussed 2015 ILI report by Rosen. Only after the experts had established in their draft report of 18 September 2018

(B-D 12) that they could not draw a clear conclusion on the basis of the material made available to them, which made it clear that sabotage had not been established, Shell produced this ILI report. But Shell only provided a small part of the report, namely several pages it found relevant (a few pages of the 35-page report; 7 pages of the 382-page test result report; B-D 13 and 14). Shell did not explain why it did not comply with the request of the court-appointed experts to submit the full ILI report, nor did Shell put forward that it had a serious reason for doing so. Shell has stated that it sent 'all relevant required information'. In the final report, the experts clarify that the full ILI report should have been provided: p. 19: *'if we had received all available information (e.g. full ILI reports)…'*), and also emphasize that they have based the report on limited information ('*some pages of the 2015 ILI report from Rosen were supplied'* (p. 15), '*the selected pages of the report*' (p. 20); underlining added by the Court. This means that Shell withheld documents which the experts deemed necessary for their investigation without justification. This is contrary to Section 198 subsection 3 Dutch Code of Civil Procedure and also to the interlocutory ruling of 27 March 2018 (*'rules that the parties will issue the information required by the experts, if available'*). It should also be noted that it is up to the experts, and not to Shell, to determine which information is relevant to the investigation. In the opinion of the Court, Shell has failed to comply with the duty to tell the truth/duty to assist (Section 21 Dutch Code of Civil Procedure; Section 198 subsection 3 Dutch Code of Civil Procedure). For the Court, this is reason to lay the uncertainty about the cause of the leak – (also) separate from the considerations in 5.23 and regardless of the threshold of proof to be used – at the feet of Shell. Also on this ground, the Court arrives at the opinion that Shell's defence of sabotage fails.

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

5.27 Pursuant to Section 11(5)(c) OPA, the SPDC therefore has strict liability – to Dooh 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 Dooh 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 decision. This also means that the referral to follow-up proceedings for the determination of damages sought by Dooh with his claim I is also 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.

5.28 Above point 293 of the IS in case c (against the SPDC and a parent company) and in case d (against two parent companies) 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.

5.29 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 5.27 and 5.28. 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 5.25, 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

5.30 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 3.28). But it has not been proven, as explained in legal ground 5.29. This means that claims I and III.a-a in respect of Origin are not allowable against the parent company/companies.

5.31 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 pipes in a good state of repair

5.32 Claim VI is for the issuance of an order to the Shell parent company/companies and subsidiary – as of today (see legal ground 3.8) – to keep the Goi pipeline in a good state of repair, in view of the leak that occurred there in 2004.

5.33 It is also relevant in assessing this claim that it has not been established that the 2004 leak at Goi was the result of negligence or unreasonable acts of the

SPDC. Its liability for compensation in this context rests on strict liability. Therefore, an unlawful state in respect of Origin cannot be deemed to exist as regards the Goi 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 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 10 October 2004 – which occurred in the territory of the Mogho community, whose territory borders on that of the Goi community – and the definitive plugging of the leak on 13 October 2004.

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

a. Following the leak report received by the SPDC on 10 October 2004, the SPDC did not immediately shut down the oil supply. The reason for this established practice of the SPDC is because of the regular occurrence of false and incorrect reports. The SPDC delayed shutting down the oil supply until verifying and confirming the report. The Court understands that due to the unsafe situation, which had existed in Ogoniland since 1993, where the location of leak is situated, the SPDC – at least outside of JIT context, see below under b and d – was unable to verify the leak by visiting that location 'over land'.

b. On 11 October 2004, the report was confirmed by a helicopter flying over the site of the leak (point 38 DoA). When JIT members wanted to go to that location, they were refused access by young members of the Mogho community (point 38 DoA, not really contested, see inter alia point 299 R). While the negotiations about the access were underway, on 11 October 2004 a fire started in the territory of the Goi community, where the oil had meanwhile spread to. MD et al. refer to it as a 'huge and devastating fire' (point 54 WS/1-MD).

c. The parties agree that at least on 11 October 2004 the oil was still gushing out through the hole under great pressure (point 284 R, point 18 Rej and point 359 SoA/2). MD et al. have asserted that on 13 October 2004, the pipe was still under considerable pressure (point 361 SoA/2).

d. On 12 October 2004, the JIT gained permission from the Mogho community to enter the site of the leak (point 40 DoA), after which the pipe was exposed and provisionally repaired that same day. After that,

still on 12 October 2004, the remainder of the leaked oil was removed from the excavated hole.

e. Not until 13 October 2004 did the Goi community grant access to the source of the fire. At 14:40 hours on that day, the fire was extinguished. At 16:30 hours, the leak was definitively repaired by applying a sleeve clamp. During the visit of the JIT, the oil present at the site of the leak was cleaned up (point 47 DoA).

f. According to MD et al., the oil supply was not halted until the leak was 'clamped' on 13 October 2004 (point 284 R), pointing out that due to the fact that the oil continued to spout from the leak in huge quantities, the pipe had not been *depressured* (point 126 WS-MD). According to Shell, the oil supply was immediately shut down after verifying the leak report on 11 October 2004 (point 18 Rej), pointing out that the oil supply does not stop immediately when a pipe is closed off, but that it takes a long time for pressure in a pipeline to drop down (point 625 DoA/SoA-cross/2).

g. According to the argument of MD et al., deep ditches should have been dug to contain the leaked oil; this was not carried out, or at least not in time and not adequately (point 127 WS-MD). Shell has disputed this by saying that '– *when it was enabled by the communities – it sealed the holes in the pipelines (...) and contained the oil*' (point 576 DoA/SoA-cross/2, see also point 138 Rej).

6.3 All in all, it took three days for the leak to be plugged. MD et al. believe this is a 'disproportionate amount of time' (point 319 SoA/2). During those three days, at least 24,000 litres of crude oil leaked out of the pipe (see legal ground 3.29). 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 also, in general, point 370 SoA/2):

I. The SPDC should have shut down the oil supply sooner and should have used a better flow restriction system (see also points 358 and 366 SoA/2 and points 77 and 78 WS/2-MD);

III. 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 and point 76 WS/2-MD);

III. The SPDC had no system to detect the fire sooner, and should have ensured, by depressurizing the pipeline, that the fire did not rage for so long (points 339 and 340 SoA/2);

IV. The SPDC should have contained the oil earlier and more adequately (see point 127 WS-MD, already stated in legal ground 6.2.g).

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 also legal ground 6.15 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 3.15 and 3.19 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 3.19, 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 actually 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 In this case, there is the special circumstance that the SPDC has not had regular access to Ogoniland since 1993 (see legal ground 1.1.c), which is where the location of the leak at Goi is situated. Nevertheless, the SPDC continued to use the pipelines running through Ogoniland. The Court believes – as expressed by MD et al. in, inter alia, point 306 IS – that by doing so the SPDC accepted the risk that it would not always have easy access 'over land' to the site of a leak, reported or otherwise.

Argument i.: oil supply pipe shut off too late

6.8 The – contested – assertion of MD et al. that the oil supply was not shut off until 13 October 2004, meaning too late, has not been proven on the basis of their argument that on 13 October 2004 the pipe had yet not been *depressured* since Shell has successfully contested this argument with the rebuttal that it takes a while for the pressure to drop. The remark of MD et al. 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 to tender evidence by witnesses. Moreover, that remark is not focused on their aforementioned assertion and argument, so that at least it does not furnish a sufficiently specified offer of proof. With this state of affairs, the Court concurs with Shell that the oil supply had actually been shut down on 11 October 2004. Even insofar as Argument I of MD et al. means that the SPDC should have applied a better flow restriction system, because – despite shutting down the oil supply on 11 October 2004 – there was still oil coming from the leak (point 361 SoA/2) and the oil flow had apparently not been closed down effectively (see points 362-364 SoA/2), it fails. After all, MD et al. have not explained, let alone proven, how any remaining pressure could have been dropped quicker following the shut-off on 11 October 2004.

6.9 In point 284 R, MD et al. have however also argued that since the SPDC employed a helicopter, the leak could have been verified sooner than on 11 October 2004, namely immediately after the occurrence of the leak on 10 October 2004. On appeal, MD et al. have reiterated this (point 334 SoA/2).

6.10 The starting point for the assessment of this assertion of MD et al. is that it has been established that false reports of oil leaks occur frequently and that on this basis alone it is therefore justified – apparently also in the eyes of MD et al. (point 125 WS-MD) – to not shut down the oil supply until a leak report has been verified. The following is also considered in response to that assertion.

6.11 In point 617 DoA/2, Shell underlined that the SPDC monitors the situation with helicopter flights. Its defence (in point 619 DoA/2), that a leak cannot always be verified from a helicopter, does not apply in this case of oil spouting up from a leak (on 11 October, and therefore also immediately after the occurrence of the leak on 10 October 2004). The SPDC saw reason to send a helicopter to the site of the leak on 11 October 2004, apparently to verify the report it had received about a spouting oil leak. Without a further explanation by Shell – which is lacking – the Court fails to see how the SPDC could not have done so one day earlier. In point 291 SoA/2, MD et al. have pointed out the recommendation on p. 152 of the 2002 EGASPIN that the '*operator shall take prompt (...) steps to contain (...) the spill*'. This recommendation, reflecting the opinion of the relevant circles, is so concrete that it may serve to particularize a duty of care (see also legal ground 7.8 below). This also applies to Article 25 of the *Petroleum (Drilling and Production) Regulations*, which contains a similar obligation for the operator (see point 296 SoA/2). Also in view of the considerations in 6.7, under the stated circumstances – and assuming the justification of the SPDC's verification wish – the SPDC could reasonably be expected to send a helicopter to the reported location of the leak immediately after receiving a report in order to verify the report, thereby circumventing the restriction on verification caused by the access refusal. If it had done so, the leak, from which oil was spouting with great force, would have been confirmed shortly after the report. Considering this state of affairs, it is *fair, just and reasonable* to assume that the SPDC had a duty of care to shut down the oil supply shortly after the report, even on 10 October 2004, also considering that the *proximity* requirement has been met in respect of the persons living and working near the leaks (Barizaa Dooh and the other residents), and damage/considerable damage for these persons was absolutely foreseeable if the oil supply was not shut off within a short period of time. This means that the three factors of the *Caparo* test for the existence of a duty of care have been met. The SPDC breached this duty of care, as a result of which damage occurred. The conclusion must be that the SPDC committed a tort of negligence by not shutting off the oil supply on 10 October 2004, but later on 11 October 2004. To this extent alone, Argument I succeeds.

Argument II: LDS

6.12 A Leak Detection System (LDS) is a system with which a leak can be detected quickly, quickly/in real time – within '*minutes to hours*' – without access to the location of the leak being required. This could include 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/2). With an LDS the same could have been achieved as with the helicopter inspection the SPDC should have carried out, but did not carry out, on 10 October 2004, namely that shortly after the leak on 10 October 2004, the leak could have been confirmed, immediately followed by a shutdown of the oil supply. In this sense, Argument II merges with Argument I, thereby lacking independent significance.

Argument III: the fire

6.13 As asserted by Shell, and not contested by MD et al., it has been established that the Goi community did not allow the SPDC access to the site of the fire until 13 October 2004, after which the fire was extinguished. Considering this access refusal, the SPDC could not have extinguished the fire sooner if it had had a system that could have detected the fire earlier, and at any rate could have not extinguished the fire sooner. Argument III fails for this reasons, also considering that the access refusal cannot be alleged against the SPDC (see legal ground 6.6) and that the SPDC cannot be reproached for not lowering the pressure earlier (see legal ground 6.8).

Argument IV: the containment

6.14 The concise assertions of MD et al. about containment have been contested by Shell just as succinctly. Since on MD et al. rest the obligation to furnish facts and the burden of proof, this works to their disadvantage, meaning that Argument IV is disregarded on account of insufficient substantiation.

Conclusion on claims I and III.a-a in respect of Response

6.15 In connection with Arguments III and IV it is considered that the torts of nuisance and trespass to chattel cannot help MD et al., because the acts/omissions alleged against the SPDC in these arguments cannot be designated as unreasonable or negligent, respectively, in light of the considerations in 6.13 and 6.14. In connection with Argument IV, the strict liability rule of *Rylands v Fletcher* can also not help MD et al. since 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'* meaning that this application condition of the rule has not been met (see legal ground 3.22).

6.16. 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 shutting down the oil supply one day too late.

6.17 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 5.27. 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.

6.18 Shell has contested, stating reasons, that the then parent companies were aware/had been made aware of the leak of 10 October 2004. Against this, MD et al. failed to assert, stating reasons, and failed to tender evidence that those parent companies knew or should have known that the SPDC did not shut down the oil supply until 11 October 2004. Claims I and III.a-a against the parent companies are not allowable for not meeting the knowledge requirement set out in legal ground 3.29 alone.

Claim VII: order in respect of Response

6.19 Claim for injunction VII in respect of Response 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 so-called Oil Spill Contingency Plan 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 Goi.

6.20 The Court recalls that a claim for injunction must be assessed according to the current situation (see legal ground 3.6) and with due observance of the standards mentioned in legal ground 3.14.

6.21 In points 7 and 64 of their PA/1-MD WS/1-MD of 12 March 2015, MD et al. have put forward that Shell will replace the Goi pipeline and will install a fibre-optic sensing technology, with which leaks and sabotage attempts can be detected early and remotely. In point 159 SoA/2 of 12 March 2019, they noted that the pipeline has since been replaced, but not stating that the detection technology has not been applied. According to MD et al., a facility has been installed, sufficiently ensuring a 'timely and adequate response' in case of a new leak. Therefore, there is no room for an order in line with the

second part, not against the SPDC and not against the parent companies. Claim VII is rejected.

7. The claims in respect of Decontamination

Preliminary considerations

7.1 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 10 October 2004, 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 that 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.

7.2 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 Dooh, which he 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 413 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, as a result of which 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/shutting off the oil supply too late. 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. 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 6.17). 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.

7.3 Shell has put forward against the claims in respect of Decontamination (hereinafter, simply: the Decontamination claims) that it decontaminated timely and adequately (points 726 and 727 DoA/SoA-cross/2). It has pointed to the Clean-Up certificates of April 2008, presented in 1.1.j.

7.4 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 certificates (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 3.15 and 3.19). 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 7.25. 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

7.5 In substantiation of the Decontamination claims, MD et al. have invoked a number of recommendations from the EGASPIN from 2002 (see legal ground 3.20), the most important of which are given here.

7.6 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.

7.7 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.

7.8 The Court recalls (see legal ground 3.20) 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

7.9 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

7.10 In point 377 SoA/2, MD et al. have pointed out the obligation laid down in the above-discussed Part VIII B 4.1 of the EGASPIN, for decontamination to commence as quickly as possible. In point 477 SoA/2, they argued that 27 months had passed after the leak on 10 October 2004 before decontamination began.

7.11 The conduct of Shell in the period up until 13 October 2004 was already discussed in the assessment of the claims in respect of Response, as also stated by MD et al. in point 380 SoA/2. In the vision of MD et al., the SPDC could have commenced the decontamination process following the repair of the leak on 13 October 2004 (point 478 SoA/2). In points 47 DoA and 14 Rej, Shell argued that during the JIT visit, clean-up work had commenced but that after it had removed the oil which was present at the site of the leak permission was no longer forthcoming for commencing more comprehensive work. MD et al. have argued in rebuttal that it is incorrect that the SPDC did not get permission from the local population to decontaminate the affected area, but MD et al. did not tender a specified offer for evidence (by witnesses) that access issues were no longer a problem after 13 October 2004. Therefore, the Court must assume that in the period between 13 October 2004 and the

beginning of December 2004, the SPDC was unable to decontaminate due to access refusal.

7.12 It is an established fact that on 8 December 2004, Rivers State notified the SPDC that for the time being it was not allowed to carry out decontamination work. Therefore, the SPDC cannot be reproached for not decontaminating in the period between 8 December 2004 and January 2007, when this ban was apparently lifted. MD et al. have failed to assert concretely that, let alone why, the decontamination process, which started in January/February 2007 and was terminated in May/August 2007 could have been carried out quicker.

7.13 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

7.14 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 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, according to MD et al. in points 391 and 433 SoA/2.

7.15 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-S.

7.16 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.

7.17 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.

7.18. Based on the considerations in 7.15 and 7.16, 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.

7.19 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.

7.20 In light of legal ground 7.18 and the first sentence of legal ground 7.19, a duty of care of the SPDC must be assumed for decontaminating below the intervention values. In light of the considerations in 7.15 through to 7.18 and 7.19, second and third sentence, it cannot, however, be assumed that the SPDC has a decontamination duty of care that entails more than this result.

7.21 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 Goi in 2004 was sufficiently decontaminated. This report – submitted by MD et al. as Exhibit B.2 – does not mention that a soil sample with a content of TPH ('*mineral oil*') of over 5000 mg/kg was found.

7.22 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 Goi (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 Goi decontamination.

7.23. The duty of care described in legal ground 7.20 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.

7.24 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.

7.25 As regards the soil decontamination, the duty of care of the SDPDC 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 354 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 729 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.

7.26 The considerations in 7.25 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 MD et al. have put forward is related to the agent 'Oclansorb' which was used during the decontamination. It is a powdery material that is scattered over a layer of oil and absorbs the oil, after which it has to be swept up. According to MD et al., this sweeping part was not executed, thereby causing damage to the environment (point 480 SoA/2). Against the defence of Shell, that this part was carried out (point 730 DoA/2), MD et al. did not tender evidence (by witnesses), so that their version remains unproven and does not detract from the opinion in legal ground 7.25.

7.27 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

7.28 From the Bryjark report, it is apparent that following the decontamination, oil (TPH) was present in the surface water at Goi, at levels of 0.48 – 1.29 mg/l (p. 35). Although the report states (on p. 35) that this level '*has a negative*

impact', it fails to state how big this 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 are indications there has been a significant decrease in the hydrocarbon concentration since the spill occurred. This decrease may have been fastened by the relatively dynamic nature of the water system in the area* (p. 35);
- *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. 35);
- *(...) there is evidence of recruitment of juvenile mudskippers (*an amphibious fish, the Court*) in the impacted area.* (p. 35).
- *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. 36).

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, 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 has a negative impact on the environment, but the extent of which is unknown – and which therefore could also be (very) minor – does not justify the conclusion that the SPDC breached a duty of care when purifying the surface water.

7.29 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 groundwater intervention values (see legal ground 7.7 *in fine*). No evidence to this effect has been tendered or offered. Although MD et al. have argued that the UNEP report mentioned in legal ground 7.16 indicated that the intervention value for the groundwater in the Mogho area at Goi was exceeded (point 483 SoA/2), but against Shell's defence in point 732 DoA/2 that this is the result of an investigation into a leak which took place at another location near Goi in 2010 MD et al. have not proven or tendered evidence that the UNEP finding was recorded for the area that became contaminated as a result of the 2004 leak and that it concerns the consequence of this leak. Therefore, a breach of a duty of care on the part of the SPDC in

connection with the decontamination of the 2004 leak can also not be established as regards the groundwater.

Conclusion on the negligence-based Decontamination claims

7.30 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 insofar as 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 7.2, 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 5.27), and possibly also (partially) from the obligation it has to pay damages ensuing from shutting down the oil supply too late (see legal ground 6.16).

7.31 The exceeded groundwater intervention value near Goi, reported by the UNEP in 2011, cannot be considered to form part of the residual contamination of the decontamination of the 2004 leak. Incidentally, it has not been argued that the exceeded value continues to this day, while this isolated case of exceeding the intervention value carries insufficient weight to warrant an order under Nigerian law.

The Rylands v Fletcher rule

7.32 MD et al. have also partially based their Decontamination claims on the *Rylands v Fletcher* rule (point 807 SoA/2). They believe that that rule applies because the contaminated soil was excavated and placed on clean soil, which in turn became contaminated by the oil leaking from the contaminated soil. However, the Court fails to see that – as expressed by Shell in point 745 DoA – this caused a contamination which would not have occurred without the excavation of the soil. If the contaminated soil had not been excavated, 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.

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

8.1 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/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.

8.2 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 3.6, namely Origin, Response and Decontamination (see also legal ground 3.10). From legal ground 3.15 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.

8.3 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.a) or liability for its impairment (see claim II) nevertheless cannot be assumed because, in view of the considerations in 5.29, 5.30 and 5.33, it cannot be established that the leak was caused by a (culpable) act or negligence on the part of the SPDC/Shell.

8.4 The only element of the theme Response which has led to the opinion that the SPDC/Shell has committed culpable acts/negligence, and which may qualify as a 'fundamental right violation/interference' is that the oil supply was not shut down immediately on 10 October 2004. However, MD et al. have failed to assert (sufficiently) concretely that this omission on the part of the SPDC/Shell – or not applying an LDS (see legal ground 6.12) – 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.

8.5 From the considerations in 7.14 through to 7.32 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 8.1, mainly because the contamination due to the 2004 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.

8.6 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.

9. Claims III.a-b and IX

9.1 Claim III.a-b was instituted by MD for the Goi community, and this also applies to claims for injunction IV through to VII, assessed above, and which were also instituted by Dooh. As has been considered in legal ground 3.8, 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.

9.2 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 late shutting down of the oil supply. Insofar as claim IX is for this effect, it is denied for this reason.

10. Concluding considerations

10.1 In the foregoing, the JIT report, the Clean- Up certificates 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 3.32.

10.2 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/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).

10.3 To sum up, also considering the 2015 ruling, the Dutch court is competent to take full cognizance of cases c and d, and claims I and III.a- in respect of Origin and in respect of Response, insofar as they concern the late shutting down the oil supply, are allowable against the SPDC. To this extent, the 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.

10.4 At any rate with a view to the payment of the costs of the proceedings, cases c and d 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.

10.5 The costs of the experts (€ 44,840.18 and £ 17,000) are for one part allocated to case a, and for the other part to case c. The amounts allocated to case c 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 c and d

- 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 Dooh and the other local residents whose interests MD seeks to protect i) has strict liability for the damage resulting from the leak at Goi on 10 October 2004 and ii) acted unlawfully by not shutting down the oil supply in the Goi pipeline on 10 October 2004, and orders the SPDC to compensate Dooh for the damage ensuing from i) and ii), to be assessed later during separate follow-up proceedings and settled according to the law;

  * 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 c 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.