Court of Appeal of The
Hague
Case numbers: 200.126.843
and 200.126.848
Date: 7 January 2014

STATEMENT OF DEFENSE IN THE MOTION BY VIRTUE OF SECTION 843a DCCP, ALSO CONTAINING MOTION FOR THE COURT TO DECLINE JURISDICTION AND TRANSFER THE CASE

i n t h e m a t t e r o f:

in the case with number 200.126.843:

1. the legal entity organized under the laws of the United Kingdom **ROYAL DUTCH SHELL PLC** ("**RDS**"),
with "registered address" in London, United Kingdom,
with office in The Hague,
2. the legal entity organized under the laws of the Federal Republic of Nigeria **THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD.** ("**SPDC**"),
established in Port Harcourt, Rivers State, Federal Republic of Nigeria,
respondents in the main action,
defendants in the motion,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

in the case with number 200.126.848:

1. the public limited company **SHELL PETROLEUM N.V.** ("**SPNV**"), with registered office in The Hague,
2. the legal entity organized under the laws of the United Kingdom **THE 'SHELL' TRANSPORT AND TRADING COMPANY LTD.** ("**Shell Transport**"), with registered address in London, United Kingdom,
respondents in the main action,
defendants in the motion,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

v e r s u s:

in both cases:

1. **ERIC BARIZAA DOOH** ("**Eric Dooh**"), as legal successor by universal title of his father, Barizaa Manson Tete Dooh ("**Dooh**"),
residing in Goi, Rivers State, Federal Republic of Nigeria
2. the association with corporate personality
VERENIGING MILIEUDEFENSIE ("**Milieudefensie**"),
established in Amsterdam,
plaintiffs in the motion,
appellants,
attorney conducting the case: Ch. Samkalden, LL.M.
attorney of record: W.P. den Hertog, LL.M.

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1 INTRODUCTION

1. Before filing a statement of appeal, Milieudefensie et al. initiated a new motion by virtue of Section 843a DCCP. The Court of Appeal has given Shell the opportunity to file a defense in this motion.

2. Shell's initial defense against the claims in this new motion to produce documents is that these claims of Milieudefensie et al. are inadmissible (see Chapter 2 below). In the first instance, Milieudefensie et al. also initiated claims to produce documents. The District Court dismissed those claims to produce documents in the interlocutory judgment dated 14 September 2011. Until a decision regarding the grounds for appeal is handed down, the Court of Appeal is bound by the decisions of the District Court in the interlocutory judgment and initiating new claims to produce documents is pointless. Thus, this new motion to produce documents can only be taken to be a disguised appeal, in which Milieudefensie et al.'s claims are inadmissible. Instead of initiating new claims to produce documents, Milieudefensie et al. (if they wish to do so) must submit their claims to produce documents to the Court of Appeal by means of grounds for appeal directed against that interlocutory judgment.

3. Should the Court of Appeal dismiss this inadmissibility defense, Shell also conducts other defenses against the claims to produce documents in this motion. Shell will put forward a number of these other defenses in the main action, as well. This is without prejudice to the fact that the Court of Appeal must already assess these defenses in the scope of this motion, because the success of one or more of these defenses (wholly or partially) precludes awarding the claims to produce documents. This applies to the following defenses:

   (a) the appeal in the case against RDS and SPDC is not pending due to the absence of a notice of appeal (see Chapter 3)

   (b) Eric Dooh's claims are inadmissible (see Chapter 4)

   (c) the Dutch court does not have jurisdiction over SPDC in this motion (see Chapter 6)

   (d) Milieudefensie's claims by virtue of Section 3:305a DCC are inadmissible (see Chapter 7); and

   (e) Dooh's right of action has not been proven (see Chapter 7).

4. Chapter 5 briefly sets out the legal basis of Milieudefensie et al.'s claims in the main action. This is both relevant for assessing the question regarding whether

the Dutch court has jurisdiction over SPDC, and for answering the question regarding the legitimate interest in the production of documents.

5. Shell has also conducted the defenses referred to in paragraphs (c) through (e) above in the first instance. The District Court has dismissed these defenses. In the event that the Court of Appeal rules that Milieudefensie et al.'s claims in the motion to produce documents are admissible, it is pointed out that the Court of Appeal is not bound by the findings of the District Court. Were this otherwise, Milieudefensie et al. could not be successful, because the District Court dismissed the (largely identical) claims to produce documents in the first instance. In that case, Shell's defense against the claims to produce documents would also be limited in an unacceptable manner, because the Court of Appeal would be bound by the District Court's decisions that were to the detriment of Shell (such as the international jurisdiction over SPDC, the admissibility of Milieudefensie's claims by virtue of Section 3:305a DCC and Dooh's right of action). Moreover, with regard to the international jurisdiction, the Court of Appeal must also assess this issue *ex officio* in the scope of this motion.[1]

6. In addition to the "preliminary" defenses referred to above, in Chapters 8 through 10, Shell conducts a further substantive defense against the claims to produce documents.

7. In Chapter 11, Shell requests that the Court of Appeal allows an interim appeal in cassation in the event that any part of the claims to produce documents may be awarded and that the Court of Appeal not declare the awarding of any claim provisionally enforceable.

8. Shell requests that the Court of Appeal considers all Shell's arguments and defenses in the case documents in the first instance to be repeated and included here. Shell further contests everything that Milieudefensie et al. submitted in the statement in the motion, unless this statement on appeal demonstrates that Shell acknowledges the accuracy of any argument of Milieudefensie et al. Shell submits the complete case file of the first instance into the proceedings, both in the case against RDS and SPDC (case number 200.126.843), and in the case against Shell Transport and SPNV (case number 200.126.848). Overviews of the two case files are included on pages 116 - 117.

9. The following definitions are used in this statement on appeal:

   Motion to produce documents on the part of Milieudefensie et al. dated 13 September 2013 = 2013 Motion to produce documents

   Milieudefensie et al. = the appellants (Eric Dooh and Milieudefensie)

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1 See HR 18 February 2011, *NJ* 2012, 333.

Dooh = Barizaa Manson Tete Dooh (plaintiff in the first instance)

Milieudefensie = Vereniging Milieudefensie

Shell = the respondents (RDS, SPDC, SPNV and Shell Transport)

RDS = Royal Dutch Shell Plc.

SPDC = The Shell Petroleum Development Company of Nigeria Ltd.

Shell Transport = The 'Shell' Transport and Trading Company Ltd.

the Koninklijke = N.V. Koninklijke Nederlandsche Petroleum Maatschappij. The abbreviation "the Koninklijke" is used in this statement on appeal to refer to the substantive party to the proceedings (meaning the Koninklijke as the legal predecessor by universal title of SPNV).

SPNV = Shell Petroleum N.V. The abbreviation "SPNV" is used in this statement on appeal to refer to the formal party to the proceedings (meaning SPNV as the legal successor by universal title of the Koninklijke) on the one hand and, on the other, to refer to SPNV as *Group Holding Company* (see no. 218 below)

SPCo = Shell Petroleum Company Ltd.

2 CLAIMS IN THE MOTION TO PRODUCE DOCUMENTS ARE INADMISSIBLE

10. In the first instance, Milieudefensie et al. also initiated claims to produce documents. The District Court dismissed those claims to produce documents in the interlocutory judgment dated 14 September 2011. Instead of initiating new claims to produce documents, Milieudefensie et al. (if they wish to do so) must submit their claims to produce documents to the Court of Appeal by means of grounds for appeal seeking to challenge that interlocutory judgment. In this motion, Milieudefensie et al. largely claim access to the same documents to which they claimed access in the first instance (see nos. 245, 255, 263, 270, 279, 282 and 293). To the extent that on appeal, Milieudefensie et al. are claiming documents other than the ones they claimed in the first instance, they can modify their claim to this end in the Statement of Appeal. Once again initiating claims to produce documents constitutes a disguised appeal against the interlocutory judgment in the motion to produce documents. Consequently, Milieudefensie et al.'s subject claims to produce documents are inadmissible.

11. In its ruling of 29 October 2013, ECLI:NL:GHDHA:2013:3941, the Court of Appeal of The Hague ruled in respect of a similar defense by a respondent that this defense failed in this latter case, given that in principle, it is possible to initiate the same claim again, even if the claim was previously dismissed; the claim in the motion by virtue of Section 843a DCCP can be initiated at every stage of the proceedings. Moreover, the Court of Appeal found that the claim to produce documents on appeal deviated from the motion in the first instance, because the documents on appeal were claimed for a different purpose than in the first instance. On appeal, the issue was to substantiate the claimed copyright infringement; in the first instance, the issue was to identify other infringing parties.

12. Shell believes that this opinion of the Court of Appeal should not be followed in the case at issue. The fact that a motion by virtue of Section 843a DCCP can be initiated at every stage of the proceedings does not mean that this motion can be initiated *again* at every stage of the proceedings. In principle, there is no room to once again initiate a claim to produce documents that has already been dismissed. This might be different in special cases. Such a special case may occur if the reason for the initial dismissal is that for the present, there is no legitimate interest because the production of documents is claimed in view of furnishing evidence in respect of a point in dispute that is not yet at issue. In that case, the situation can change so much as the proceedings progress that at some point, a legitimate interest does occur in the production of documents. The same claim to produce documents may also be initiated for a different purpose, as was obviously the case in the ruling dated 29 October 2013 mentioned above. Neither situation occurs here. Nor is there any other reason in the case at issue to offer Milieudefensie et al. the opportunity to *again* initiate

their claims for the production of documents on appeal, outside the grounds for appeal

13. The Court of Appeal is bound by the decisions of the District Court in the interlocutory judgment in the motion to produce documents as long as Milieudefensie et al. have not directed any grounds for appeal against that judgment. This is also acknowledged by Milieudefensie et al. themselves: "In the final judgment dated 30 January 2013, the District Court did not come back to the criteria regarding the evidentiary interest stipulated in the interlocutory judgment. Until a decision regarding the grounds for appeal has been handed down, those judgments should be started from".[2] However, Milieudefensie et al. wrongfully conclude based on this correct observation that they "in fact, do not have any option other than to once again file a motion." Milieudefensie et al. fail to recognize that until a decision regarding the grounds for appeal is handed down, the binding force of the interlocutory judgment in the motion to produce documents cannot be circumvented by initiating a new motion.

14. What Milieudefensie et al. essentially argue is that prior to submitting the grounds for appeal, they must be able to initiate a new motion by virtue of Section 843a DCCP, because without the documents they are allegedly unable to formulate any grounds for appeal. In so doing, they fail to recognize that where the District Court did not see any reason to order the production of documents, there can be no reason for the Court of Appeal to do so, either, other than in the scope of a decision regarding the grounds for appeal still to be formulated. After all, compared to the situation in the first instance, on appeal, the requirements to be stipulated for the duty to contend facts and circumstances of Milieudefensie et al. will be more rather than less stringent. See the following passage from the Explanatory Memorandum to the legislative bill to amend Section 843a DCC:[3]

> "Dutch procedural law is characterized by what is referred to as a funnel-shaped model. As the proceedings progress, the funnel-shaped model demarcates the relevant factual basis that is (still) in dispute in increasingly greater detail and more and more accurately. Thus, it is obvious that as the proceedings progress, the substantive conditions attached to the ability to invoke the right to a copy of documents can and may be interpreted more and more stringently."

15. The "funnel-shaped model" mentioned in the passage cited above demands that on appeal, Milieudefensie et al. further work out their arguments before they are entitled to any production of documents. They must do so in a

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2 2013 Motion to produce documents, no. 26.

3 Dutch Lower House 2011–2012, 33 079, no. 3, p. 4.

statement of appeal, since that is the document to be used to explain in what respect the District Court applied incorrect legal frameworks to assess their claims. This is also the document to further work out factual arguments. In initiating the subject motion, Milieudefensie et al. have chosen a route that is inappropriate for appellate procedural law.

16. As stated before, in this case, no special circumstances are involved that justify Milieudefensie et al. initiating this new motion. In the 2013 Motion to produce documents, Milieudefensie et al. essentially do not advance anything new in relation to their arguments in the first instance. They submit the same – inadequate – basis for their claims and largely claim the same documents, for the same purpose as in the first instance. In contrast to what Milieudefensie et al. argue,[4] the fact that their claims were dismissed in the final judgment of 30 January 2013 does not mean that now they allegedly do have a legitimate interest in the claimed documents. The District Court found Milieudefensie et al.'s arguments wanting, both in the scope of the motion to produce documents and in the main action. With this state of affairs, outside the grounds for appeal still to be put forward, the Court of Appeal cannot arrive at a different opinion than the District Court, including not in respect of the right to the production of documents.

17. Milieudefensie et al. explicitly leave open the possibility to also claim the documents claimed in the first instance – most of which are claimed again in this motion – in the Statement of Appeal.[5] It is unacceptable that if Milieudefensie et al.'s subject claims for the production of documents are held to be admissible, they would, in fact, be able to appeal twice against the interlocutory judgment of 14 September 2011. It is either one or the other: either the objections formulated against the interlocutory judgment of 14 September 2011 in the 2013 Motion to produce documents are designated as grounds for appeal, but in that case Milieudefensie et al. are not free to put forward new grounds for appeal in any subsequent case document (including not against the final judgment), or the previously mentioned objections are not deemed to be grounds for appeal, but in that case the Court of Appeal must disregard those objections at the current stage of the proceedings. After all, in view of the "one statement" rule (Section 347 (1) DCCP), an appellant is not permitted to spread his grounds for appeal over two or more different case documents. This is only different to the extent that the other party unequivocally consents to this. Shell does not consent to Milieudefensie et al. spreading their grounds for appeal over two or more different case documents.

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4 See the 2013 Motion to produce documents, no. 24.

5 2013 Motion to produce documents, no. 5.

18. In the 2013 Motion to produce documents, Milieudefensie et al. themselves indicate that "they still want to be given the opportunity to set out their grounds for appeal against the final judgment".[6] They also want to leave open the possibility to direct grounds for appeal against the interlocutory judgment of the District Court of 14 September 2011 in a further case document.[7] In view of the "one statement" rule, this means that the 2013 Motion to produce documents does not yet put forward any grounds for appeal against the interlocutory judgment of 14 September 2011 and that for the time being, the decisions that the District Court handed down in that interlocutory judgment qualify as unchallenged.

19. Given that the Court of Appeal is bound by the decisions of the District Court until a decision has been rendered on the grounds for appeal – as also recognized by Milieudefensie et al. – Milieudefensie et al.'s claims in the motion are inadmissible. This applies in any event in as far as in this new motion, Milieudefensie et al. claim the production of the same documents they claimed in the first instance.

20. In the event that the Court of Appeal rules that Milieudefensie et al.'s claims in the motion to produce documents are admissible, it is pointed out that the Court of Appeal is not bound by the findings of the District Court. Were this otherwise, Milieudefensie et al. could not be successful, because the District Court dismissed the (largely identical) claims to produce documents in the first instance. In that case, Shell's defense against the claims to produce documents would also be limited in an unacceptable manner, because the Court of Appeal would be bound by the District Court's decisions that were to the detriment of Shell (such as the international jurisdiction over SPDC, the admissibility of Milieudefensie's claims by virtue of Section 3:305a DCC and Dooh's right of action). Moreover, with regard to the international jurisdiction, the Court of Appeal must also assess this issue *ex officio* in the scope of this motion.[8]

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6 2013 Motion to produce documents, no. 7.

7 2013 Motion to produce documents, no. 5.

8 See HR 18 February 2011, *NJ* 2012, 333.

3 APPEAL NOT PENDING DUE TO ABSENCE OF A NOTICE OF APPEAL

3.1 Introduction

21. The exceptional situation in which an appeal is shown to be pending even though no notice of appeal has been served occurs in the case with number 200.126.843. This is possible because – as has been demonstrated in the interim – the bailiff in question did issue an original notice of appeal to Milieudefensie et al., but failed to leave copies of this notice of appeal with RDS and SPDC.

22. On 1 May 2013, the term for initiating appeal expired while no writ had been served on RDS and SPDC in the case at issue. On 31 May 2013, a writ was served on RDS and SPDC, in which they were summoned to appear at the case list hearing of 2 July 2013 (**Exhibit 39**). A copy of the notice of appeal that the bailiff had obviously issued to Milieudefensie et al. was attached to this writ.

23. The Court of Appeal could not infer from the original notice of appeal that Milieudefensie et al. filed at the case list hearing of 21 May 2013 that it had not been actually served. Consequently, the Court of Appeal granted leave to proceed against RDS and SPDC, who were declared to be in default. For that reason, RDS and SPDC feel obliged to appear in these proceedings to explain that no notice of appeal was served in this case. As a consequence of the absence of a notice of appeal, the appeal instance has not been initiated with a valid case document; the Court of Appeal is requested to rule that the appeal instance has ended. Shell will explain all this in more detail below.

3.2 The factual conduct of events

24. The case with number 200.126.843 is related to four other cases dealing with oil spills in Nigeria, which Milieudefensie initiated in the first instance before the District Court of The Hague together with one or more individual Nigerian plaintiffs. This involves three cases in which RDS and SPDC are the defendants, and two cases in which SPNV and Shell Transport are the defendants. In all five cases, the District Court rendered a final judgment on 30 January 2013. Consequently, the last day of the term for initiating appeal was in all cases 1 May 2013.[9]

25. Late in the afternoon on 1 May 2013, a bailiff called at the office of J. de Bie Leuveling Tjeenk, LL.M. ("**attorney Tjeenk**"), the attorney of Shell; by virtue of Section 63 DCCP, this bailiff served ten copies of writs. These ten copies were

[9] Section 339 (1) DCCP in conjunction with Section 1 (1) of the General Extension of Time Limits Act in conjunction with Section 3 (1) of the General Extension of Time Limits Act.

left with Mr. W.D. van der Voorden ("**Van der Voorden**"), employed at the Litigation Service Desk of the law firm of De Brauw Blackstone Westbroek.

A color copy of the ten copies is submitted as **Exhibit 40**. In addition, the ten original copies are filed at the court registry.

26. Accordingly, notices of appeal were served in the following four cases:

(i) Milieudefensie as appellant and RDS and SPDC as respondents, pending before this Court of Appeal under case number 200.126.849;

(ii) Oguru, Efanga and Milieudefensie as appellants and SPNV and Shell Transport as respondents, pending before this Court of Appeal under case number 200.126.804;

(iii) Oguru, Efanga and Milieudefensie as appellants and RDS and SPDC as respondents, pending before this Court of Appeal under case number 200.126.834;

(iv) Dooh and Milieudefensie as appellants and SPNV and Shell Transport as respondents, pending before this Court of Appeal under case number 200.126.848.

27. In the cases referred to under (i), (ii) and (iv), the bailiff left two copies of the notice of appeal. In the case referred to under (iii), the bailiff left four copies of the notice of appeal (see Exhibit 40). Thus, a total of ten copies were left.

28. On the day the case was heard for the first time, 21 May 2013, in the four cases mentioned in no. 26, attorney Tjeenk presented himself as the attorney representing RDS, SPDC, SPNV and Shell Transport. In the afternoon of 21 May 2013, the court registry of the Court of Appeal called the Litigation Service Desk of attorney Tjeenk's office with the statement that on 21 May 2013, a fifth case was also heard for the first time; the court registry asked whether it was correct that attorney Tjeenk had not presented himself as the attorney in this fifth case. In response, the court registry was told that this was correct. The reason for this is that no notice of appeal has been issued in this fifth case – it has meanwhile become clear that this is the case with number 200.126.843.

29. Based on the fact that apparently, a fifth appeal procedure was heard before the Court of Appeal on 21 May 2013, Shell concluded that in this fifth case, the bailiff evidently must have issued an original notice of appeal to his principals, even though the bailiff did not serve this notice of appeal to RDS and SPDC on

1 May 2013. After all, without an original notice of appeal, the case cannot be placed on the case list.[10]

30. On behalf of Shell, in a fax letter dated 24 May 2013 (**Exhibit 41**), attorney Tjeenk requested that the bailiff offer a clarification and explain how it was possible that an appeal was heard before the Court of Appeal, even though no notice of appeal had been served.

31. In response, by means of a fax message dated 24 May 2013 (**Exhibit 42**), an employee of the bailiff's office sent a copy of a writ, stating that an appeal was brought on 1 May 2013 and that copies were left of the notice of appeal in the case between Dooh and Milieudefensie as appellants and RDS and SPDC as respondents. The fax message did not offer the requested explanation, but simply stated that the writ of summons was allegedly served on 1 May 2013 at attorney Tjeenk's office and left with Van der Voorden.

32. In a fax letter dated 28 May 2013 (**Exhibit 43**), attorney Tjeenk once again requested that the bailiff explain exactly what occurred on 1 May 2013, because no notice of appeal was served in the case with number 200.126.843. This letter encloses a statement by Van der Voorden (**Exhibit 44**), who received the copies of the notices of appeal from the bailiff on 1 May 2013. This statement specifically demonstrates the cases in which Van der Voorden received copies and how many copies were received. Thus, it can be inferred from the statement that in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other, on 1 May 2013 no copies of a notice of appeal were left at the office of attorney Tjeenk. This means that no notice of appeal was served in that case on 1 May 2013. After all, in practice, the service of a writ means leaving a copy. Thus, if no copy was left, no service was made.[11]

33. Subsequently, on 31 May 2013, the bailiff served the writ referred to in no. 22 above at attorney Tjeenk's office, by virtue of which RDS and SPDC were summoned to appear in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other, at the hearing of 2 July 2013 (see Exhibit 39). A copy of the writ referred to in no. 31 was served along with this writ. The writ of 31 May 2013 states on two occasions that on 1 May 2013, a notice of appeal was allegedly served in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other, even

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10 See Section 125 DCCP and Article 3.1 (a) of the National civil procedural rules for cases that are instituted by a writ of summons before the courts of appeal.

11 See for the concept of "service" M. Teekens, *De Gerechtsdeurwaarder* (The Bailiff), Kluwer 1973, p. 36, and also *Groene Serie Burgerlijke Rechtsvordering*, note 2 with Section 45 DCCP.

though the bailiff had meanwhile learned from the exchange of letters referred to above that this was not correct.

34. After the writ referred to above had been served on 31 May 2013, Shell received a letter from the bailiff on 3 June 2013, which had apparently been drawn up on 30 May 2013 (**Exhibit 45**). This letter is a response to the fax letter from attorney Tjeenk of 28 May 2013 (Exhibit 43). In the letter, the bailiff states that in the late afternoon of 1 May 2013, he served five notices of appeal, "in which a copy for each of the respondents was left at your office with Mr. W.D. van der Voorden." Thus, the bailiff confirms that on 1 May 2013, he left no more than a total of ten copies with Van der Voorden. The bailiff further states that "on that same day (…), he filled out and signed the original writs that corresponded to the copies" and that he made copies for his own records. In so doing, the bailiff confirms that he filled out and signed the original writs afterwards – and thus not at attorney Tjeenk's office. Subsequently, the bailiff concludes in his letter that he "can only presume that the copies left are identical to the copies in [his] possession and the originals sent to [his] client". In so doing, the bailiff acknowledges that he does not know if he left copies that are identical to the originals with attorney Tjeenk's office.

35. In a fax letter dated 6 June 2013 (**Exhibit 46**), attorney Tjeenk responded on behalf of Shell to the writ of 31 May 2013 (Exhibit 39) and the bailiff's letter of 30 May 2013 (Exhibit 45). In that letter, attorney Tjeenk repeated what had already been explained in the letters dated 24 and 28 May 2013 (Exhibits 41 and 43) and in the statement by Van der Voorden enclosed with the last mentioned letter (Exhibit 44), namely that no notice of appeal had been served on 1 May 2013 in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other. This leads to the conclusion that the writs of 1 May and 31 May 2013 in this latter case are in breach of the truth. Shell requested that the bailiff rectify this and issue an amended writ, correcting the statement in breach of the truth in the writs mentioned above is corrected.

36. The bailiff then turned the matter over to an attorney. This did not produce any meaningful result. The bailiff did not comply with the request to issue an amended writ. After being invited to do so, the bailiff refused to come to attorney Tjeenk's office to examine the ten copies that the bailiff did leave on 1 May 2013. If he had done this, he could have determined himself that on 1 May 2013, he did not leave any copies of a notice of appeal in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other.

3.3 The consequences for the proceedings at issue

37. The factual conduct of events outlined in section 3.2 demonstrates that although the case with number 200.126.843 was entered in the docket by means of a notice of appeal, this notice of appeal was not served on RDS and

SPDC. Because a notice of appeal had been entered, the Court of Appeal was unable to determine this; consequently, at the docket hearing of 21 May 2013, the Court of Appeal granted leave to proceed in default of appearance in respect of RDS and SPDC.

38. In view of the fact that to date, the bailiff refuses to rectify or revoke the writs that are in breach of the truth, Shell was forced to appear in the case with number 200.126.843 to explain the matter to the Court of Appeal.

39. Even though the writ that the bailiff issued to his principals, which was entered in the docket at the docket hearing of 21 May 2013, is an authentic document that constitutes conclusive evidence of the bailiff's statements regarding his observations and acts within the scope of his authority,[12] Shell is free to furnish evidence to the contrary.[13] Shell believes that this evidence to the contrary has been furnished, because the factual conduct of events outlined in section 3.2 demonstrates that on 1 May 2013, no notice of appeal was served at attorney Tjeenk's office in the case at issue. The following is especially relevant in this connection:

- that on 1 May 2013, the bailiff left a total of ten copies of a notice of appeal with attorney Tjeenk's office, which was certified by Van der Voorden, who took receipt of the copies from the bailiff on 1 May 2013 (Exhibit 44) and which the bailiff confirmed in his letter dated 30 May 2013 (Exhibit 45);

- that these ten copies did not include any copies of a notice of appeal in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other, which is demonstrated by the copies of the notices of appeal submitted as Exhibit 40; the original writs have been filed at the court registry.

40. In contrast to what the writ states, it must be concluded that on 1 May 2013, no copies of the writ in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other were left with attorney Tjeenk's office (or anywhere else for that matter); thus, that notice of appeal has not been served. The above means that the Court of Appeal should rule that the appeal proceedings in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other have ended. After all, appeals are initiated by the notice of appeal (Section 343 DCCP), which is absent in the case at issue.

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12 Section 156 (2) DCCP and Section 157 (1) DCCP.

13 Section 151 (2) DCCP.

3.4 Response to Milieudefensie et al.'s arguments

41. Milieudefensie et al. contend (2013 Motion to produce documents, no. 13) that evidence of the fact that no valid notice of appeal was issued "is in any event not furnished by the fact that the bailiff may have left more copies than required in one of the five related cases", because "this does not demonstrate the failure to leave a copy in another case". This argument fails in light of the bailiff's confirmation in his letter dated 30 May 2013 (Exhibit 45) that in the afternoon of 1 May 2013, he served five notices of appeal, "in which a copy for each of the respondents was left (…) with Mr. W.D. van der Voorden" (see no. 34 above). After all, in so doing the bailiff confirms that on 1 May 2013, he left a total of ten copies with Van der Voorden and did not mistakenly leave twelve copies (four in one case and two in the four other cases). Given that RDS and SPDC have ten copies, but no copies of a notice of appeal in the case at issue, this furnishes evidence to the contrary in respect of the contents of the writ that the bailiff issued to his principals, which was entered in the docket at the docket hearing of 21 May 2013 (see also no. 39 above).

42. Milieudefensie et al. further argue (2013 Motion to produce documents, no. 14) that it is not clear why Shell waited until 24 May 2013 to contact the bailiff, because Shell was already aware of the fact that no notice of appeal had been issued in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other. Milieudefensie et al. claim that in so doing "the only goal that Shell could have pursued in this was to ensure that the period for issuing an amended bailiff's notification of Section 120 (2) DCCP had expired". According to Milieudefensie et al., any defects in the writ of 1 May 2013 could have been remedied up to 21 May 2013 (the day on which the case would be heard for the first time). Milieudefensie et al. fail to recognize that this does not involve a writ with a defect that renders the writ void, but the complete absence of a notice of appeal. Thus, this was not a defect that could be remedied. This means that Milieudefensie et al. would not have been helped if before the day on which the case would be heard for the first time, they had become aware of the fact that no notice of appeal had been issued in the case at issue. Moreover, Milieudefensie et al. suggest that Shell was obliged to inform the bailiff or Milieudefensie et al. of the fact that no notice of appeal had been issued in the case between Dooh and Milieudefensie, on the one hand, and RDS and SPDC, on the other. Such an obligation does not exist. If the bailiff made a mistake, this comes at the expense of Milieudefensie et al. as the principal of the bailiff. Thus, it is incorrect that the consequences of the fact that "something had apparently gone wrong in issuing the notice of appeal" come for Shell's account (2013 Motion to produce documents, no. 16).

43. Milieudefensie et al.'s argument (2013 Motion to produce documents, no. 15) that the reaction of Mr. Sunmonu, managing director of SPDC, published on the

website www.shell.nl (and submitted as Exhibit N.1) allegedly demonstrates that Shell "most certainly knew that Dooh et al. had appealed against the judgment of 30 January 2013" does not hold. The passage that Milieudefensie et al. specifically rely on reads: "Reaction from Mutiu Sunmonu (Managing Director, SPDC) to the appeal lodged by three Nigerian farmers together with Milieudefensie in lawsuits against Shell that they lost in January." This sentence introduces Mr. Sunmonu's reaction and is not part of his reaction. It is merely a factual observation that is, moreover, correct. After all, Dooh et al. did appeal against the judgment of 30 January 2013, although only in the case against SPNV and Shell Transport. Thus, it cannot be concluded from this sentence that Shell allegedly believes that Dooh et al. also lodged an appeal in the case against SPDC and RDS.

44. Milieudefensie et al. also contend (2013 Motion to produce documents, no. 16) that Shell does not have any interest to be respected in law in the defense that the notice of appeal was allegedly not validly issued, given that "Shell did not suffer any procedural disadvantage whatsoever under the circumstances specified" and, moreover, in the interim Shell has appeared in court to prevent a judgment in default of appearance. This argument, as well, which is apparently based on the doctrine of covered invalidity, does not hold. Based on Section 122 DCCP, the judge does not declare that a writ of summons is invalid in the event that the defendant appeared in the proceedings and the defect in the summons did not harm his interests unreasonably. This doctrine does not apply here. As stated before, the case at issue does not involve a summons with a defect that renders the summons void, but the complete absence of a notice of appeal. In the absence of any writ that was served within the term for initiating appeal, the appeal instance has not been brought before the court. The rule that the appeal must be initiated by issuing a writ within the term for initiating appeal is a public order rule.

3.5 Offer to furnish evidence

45. Shell already furnished the evidence of its arguments with this statement on appeal. This specifically regards the copies of the notices of appeal submitted as Exhibit 40, the originals of which have also been filed at the court registry, and the statement by Van der Voorden submitted as Exhibit 44. In as far as necessary, Shell offers to furnish additional evidence by examining witnesses, in particular Van der Voorden. In addition, the bailiff could be examined as a witness.

3.6 Conclusion

46. In view of the above, Shell requests in the relief sought at the end of this statement on appeal that the Court of Appeal rules that in the case with number

200.126.843, the appeal instance has ended, or at least declares Milieudefensie et al.'s appeal inadmissible.

4 ERIC DOOH'S APPEAL IS INADMISSIBLE

47. Pursuant to a writ of summons dated 27 April 2009, Dooh (and Milieudefensie) initiated the proceedings in the first instance in the case at issue against SPDC and RDS and pursuant to a writ of summons dated 21 April 2010 in the case against SPNV and Shell Transport. That instance ended with the District Court's Final judgment dated 30 January 2013. On 14 January 2012, i.e. pending the proceedings in the first instance, Dooh died. Dooh's death did not constitute a reason to suspend the proceedings by virtue of Section 225 (1) a DCCP. After Dooh's death, the proceedings in the first instance were continued in his name. In no. 17 of the 2013 Motion to produce documents, Milieudefensie et al. submit that "Eric Dooh continued the proceedings of his father after he died." That is incorrect. The final judgment dated 30 January 2013 is in the name of Dooh's father.

48. The appellant is "Mr. Eric Barizaa Dooh […], as the legal successor by universal title of his father, Barizaa Manson Tete Dooh, the plaintiff in the first instance". However, it follows from p. 9 of the Funeral Service Barizaa Manson Tete Dooh program, which Shell submitted as Exhibit 35, that Eric Dooh is only one of seven (currently still living) children of Dooh, including four sons and three daughters. In view of the admissibility of the appeal initiated by Dooh, the question arises regarding whether Eric Dooh is Dooh's sole heir or only a partner in Dooh's (undivided right to an) estate.

49. Under Dutch procedural law, by virtue of Section 3:171 DCC, in principle, a (legal) claim of a community of property can be initiated by one of the owners in that community on behalf of the community. By virtue of Section 3:189 (2) in conjunction with Section 3:171 DCC, this same authority accrues to one of the heirs regarding a claim that is part of a community of (an undivided right to) an estate and therefore belongs to the joint heirs.[14] In that case, the writ of summons must demonstrate that the heir initiates the claim on behalf of the joint heirs rather than *pro se*. This follows from various passages from the parliamentary history of Section 3:171 DCC:

> "However, this does not alter the fact that in the event that a legal claim results in allocation of a claim regarding a performance that is owed to the community, by virtue of Section [3:170 DCC], the order can only be complied with by delivering the performance to the joint owners, unless any regulations dictate otherwise, of course. In the absence of such regulations, the owner who initiates the claim must also apply for an order

[14] See also Huijgen et al., *Compendium Erfrecht* (Law of Succession Compendium), 2005, nos. 275 and 288.

> against the joint owners; the amended draft expresses this with the words "to obtain a court order for the community".[15]

And:

> "First and foremost, the owner who exercises his authority from this section (...) for the purpose of initiating proceedings to obtain a court order for the community, acts as a formal party to the proceedings on behalf of the joint owners as a substantive party to the proceedings. Thus, he is only authorized to entice an order "for the community" means that in the writ of summons or application, he must indicate that he is acting in his capacity on behalf of the joint owners, who are named to the extent possible."[16]

50. Established case law also stipulates that the case document that commences the proceedings must demonstrate that the heir or owner is litigating on behalf of the community. See, for example, HR 5 March 1999, LJN ZC2868, NJ 1999, 383 and Court of Appeal of Leeuwarden 20 October 2009, LJN BK0853 (*De Koornbeurs/FGG*), grounds 11-12.

51. The requirement that if one of the heirs wishes to litigate on behalf of the joint heirs, this capacity must be clearly demonstrated by the case document commencing the proceedings also applies in the event of initiating a remedy at law, including appeal. By virtue of Section 332 DCCP, in principle, an appeal can only be initiated by those who were parties to the proceedings in the previous instance.[17] In the event that an original party to the proceedings died in the interim, the remedy at law can be initiated by his legal successors.[18] In the event that the claim initiated in the first instance by the party to the proceedings who died in the interim is part of (an undivided right to) an estate that is left to several heirs, the community of heirs – of which the independent heirs are the owners – is the legal successor to that party to the proceedings. Although it stands to reason that by virtue of Section 3:171 DCC, every heir is authorized to initiate an appeal on behalf of the joint heirs (in which the heir in question is the formal party to the proceedings, but the community of heirs is

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15 Parliamentary History of the New Civil Code, Book 3, Van Zeben/Du Pon/Olthof, 1981, p. 591.

16 Parliamentary History of the New Civil Code, Act implementing Book 3 (Books, 3, 5 and 6), Van Zeben/Du Pon/Reehuis/Slob, 1990, p. 1283.

17 See also HR 13 November 1987, *NJ* 1988, 941 and HR 21 February 1992, *NJ* 1992, 336.

18 HR 25 August 1931, *NJ* 1931, 1431, HR 30 June 1967, *NJ* 1968, 36 and HR 20 December 1996, LJN ZC2233, *NJ* 1997, 220, ground 6.2.

the substantive party to the proceedings), the notice of appeal must clearly demonstrate that the appeal is initiated on behalf of the joint heirs.[19]

52. In the case at issue, it is not demonstrated that Eric Dooh initiates an appeal on behalf of (the undivided right to) the estate of Dooh. On the contrary: Eric Dooh only initiated the appeal on his own behalf and for himself, "as legal successor by universal title of his father, Barizaa Manson Tete Dooh". Eric Dooh's appeal accordingly initiated *pro se* is only admissible if (i) Eric Dooh is Dooh's sole heir, or (ii) the claims that Dooh initiated in the first instance exclusively accrue to Eric Dooh in any other way and not (also) to other heirs of Dooh. It has not been demonstrated that one of these cases occurs here. Nor has Eric Dooh submitted – let alone demonstrated – this. However, it is up to Eric Dooh to demonstrate that he is the sole heir of Dooh or that he is the sole rightful claimant of the claims that Dooh initiated by virtue of the summons dated 27 April 2009 for any other reason. See in this connection, for example, HR 10 June 1983, LJN AG4605, *NJ* 1984, 294 (*Tridon/Island GEM*) and HR 2 April 2004, LJN AO1936, *NJ* 2006, 71.

53. For lack of knowledge, Shell contests that Eric Dooh is Dooh's sole heir or that he has become the sole rightful claimant to the claims that Dooh initiated in the first instance for any other reason. With this state of affairs, Shell contests that Eric Dooh's appeal is admissible. This means that Eric Dooh does not have a legitimate interest in his motion to produce documents. Eric Dooh will first have to demonstrate that he is indeed Dooh's sole heir or that he has otherwise become the sole rightful claimant to the claims that Dooh initiated in the first instance. Failing this, his appeal is inadmissible, nor is he entitled to the production of documents that he allegedly needs for his grounds for appeal to be put forward in this scope.

[19] See in this connection also the opinion of A-G Bakels for HR 5 March 1999, LJN ZC2868, *NJ* 1999, 383, par. 2.3-2.4 and Court of Appeal of Leeuwarden 5 June 2012, LJN BW8466.

5 LEGAL BASES OF THE CLAIMS IN THE MAIN ACTION

54. This chapter briefly sets out the legal bases of Milieudefensie et al.'s claims in the main action. This is relevant both for assessing the question regarding whether the Dutch court has jurisdiction over SPDC and the question regarding the legitimate interest in the production of documents.

55. Milieudefensie et al. gradually developed the legal bases of their claims in the course of the proceedings in the first instance. In the Initiatory writs of summons, they argued that the cases were allegedly governed by Dutch law.[20] After the District Court had ruled in the interlocutory judgment in the jurisdiction motion of 14 September 2011 that Milieudefensie et al.'s claims are governed by Nigerian law, in the Statement of Reply, Milieudefensie et al. tried to substantiate their claims according to Nigerian law. In that scope, they invoked four different common law torts: *negligence, nuisance*, *trespass to chattel* and the *Rule in Rylands v. Fletcher*. The legal opinions of Professor Duruigbo – submitted in the first instance on the occasion of the pleadings in the main action – also address Section 11(5)(a) to (c) of the Nigerian Oil Pipelines Act ("**OPA**"),[21] but, as Milieudefensie et al. rightfully note: "The *statutory duties* have largely been disregarded during the proceedings in the first instance."[22] On appeal, in the 2013 Motion to produce documents, Milieudefensie et al. for the first time explicitly invoke Section 11(5)(a) to (c) OPA,[23] as well as duties of care that allegedly follow from *common law*.[24] Milieudefensie et al. have apparently worked out the legal basis of their claims based on the District Court's final judgment, in which the District Court extensively discusses Section 11(5)(a) to (c) OPA.[25]

56. Of all these different bases, only Section 11(5)(c) OPA is specifically designed for the right to compensation due to an oil spill. This provision reads:

> "The holder of a license shall pay compensation (…) 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."

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20 Initiatory writs of summons, no. 19.

21 Exhibit M1 to the document of 11 September 2002, pp. 39-41.

22 2013 Motion to produce documents, no. 31.

23 2013 Motion to produce documents, nos. 37-43.

24 2013 Motion to produce documents, nos. 44-70.

25 Grounds 4.41-4.43.

57. Section 11(5)(c) OPA comprises "strict liability" on the part of the license holder of the pipeline where the leak occurred, in the case at issue SPDC. Thus, the license holder's liability is not based on breach of a duty of care. Also according to Milieudefensie et al: "to assume *strict liability* there is no need to determine whether or not a duty of care has been breached".[26] SPDC is liable by law, unless the oil spill is the result of the plaintiff's *own default*, or *a malicious act of a third party*. Thus, Milieudefensie et al.'s wish to use the claimed documents to demonstrate that SPDC had a duty of care and that SPDC breached its duty of care cannot constitute a legitimate interest in the production of documents.

58. One example of a liberating circumstance is sabotage. The burden of proof that the oil spill was caused by a liberating circumstance such as sabotage falls on the license holder. The District Court rightfully concluded that it had been proven that the oil spill at issue was caused by sabotage.[27] For the sole reason that the liability based on Section 11(5)(c) OPA involves strict liability, it is not obvious that if the invocation of Section 11(5)(c) OPA is unsuccessful, Milieudefensie et al. could be successful with one of the other bases. Milieudefensie et al. apparently believe that SPDC might be liable on another basis, even if it is established that the oil spill was caused by sabotage. In other words, Milieudefensie et al. advance these other bases to circumvent SPDC's sabotage defense. For example, Milieudefensie et al. also base their claims on the fact that SPDC allegedly has a duty of care to prevent sabotage and that SPDC allegedly breached that duty of care.

59. As Milieudefensie et al. rightfully acknowledge,[28] the decision of whether SPDC's statutory obligation to protect its pipelines (see section 11(5)(b) OPA), also comprises the obligation to take measures against sabotage will only be taken in the main action. This question can be left aside in this motion. It is pointed out that in this scope, Milieudefensie et al. wrongfully argue that it is up to "Shell" to prove that it took sufficient measures to protect the pipeline near Goi. It is not clear that in the scope of section 11(5)(b) OPA, the burden of proof falls on the defendant, even apart from the fact that this provision does not entail any duty of care to protect the pipeline from sabotage. Where section 11(5)(c) OPA provides explicit liability on the part of the license holder for oil spills in which sabotage is a liberating defense, this liberating defense cannot be undermined by reading a duty of care to prevent sabotage in section 11(5)(b) OPA.

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26 2013 Motion to produce documents, no. 125.

27 Final judgment, ground 4.25.

28 2013 Motion to produce documents, no. 42.

60. In the main action, Shell will argue that under Nigerian law, SPDC's liability to pay compensation on account of the oil spill from the pipeline near Goi must be exclusively assessed based on section 11(5)(c) OPA. These are exhaustive provisions regulating the liability regime for damage caused by oil spills and does not leave any room to find that SPDC is liable to pay compensation based on one of the common law torts, such as *negligence, nuisance*, *trespass to chattel* or the *rule in Rylands v. Fletcher*.

61. In addition, in the main action Shell will argue that the District Court rightly ruled that SPDC did not have any duty of care on account of *negligence* to prevent sabotage.[29] Sabotage is a "complete defense", irrespective of the basis that Milieudefensie et al. rely on.[30]

62. The claims against RDS, the Koninklijke and Shell Transport as "parent companies" of SPDC cannot be based on section 11(5)(c) OPA. These companies are not license holders and by virtue of section 11(5)(c) OPA they cannot be liable for damage caused by the oil spill near Goi. Milieudefensie et al. nevertheless believe that RDS, the Koninklijke and Shell Transport are liable for the damage that was allegedly caused by that oil spill based on an "independent tort",[31] i.e. the *common law tort of negligence*.

63. In the next chapter (nos. 84-100), the fact that the claims against RDS, the Koninklijke and Shell Transport are certain to fail in the absence of a statutory basis or precedent from Nigerian case law (and for the rest also in the absence of a precedent from any other common law jurisdiction) will be discussed at length.

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29 Final judgment, ground 4.50.

30 See the Third Supplementary Opinion of Professor Fidelis Oditah QC, SAN of 13 March 2012 (Exhibit 33 with the Rejoinder), no. 17: "sabotage is recognized under Nigerian law as a complete defense to the civil liability of an operator for pollution. Both at common law and under applicable legislation, the operator is exempted from liability if it can establish that the spillage was as a result of sabotage."

31 Written pleadings of Milieudefensie et al. dated 11 October 2012, no. 163.

6 NO INTERNATIONAL JURISDICTION IN RESPECT OF SPDC

6.1 Introduction

64. The claim of lack of jurisdiction of the Dutch court is only an issue in the case with number 200.126.843 against RDS and SPDC. Thus, the case against the Koninklijke and Shell Transport is not discussed in this chapter.

65. In the interlocutory judgment in the jurisdiction motion of 24 February 2010 and in the final judgment, the District Court found that international jurisdiction exists based on Section 7 (1) DCCP.

66. The Court of Appeal can only conduct a substantive assessment of the claims to produce documents against SPDC if the Dutch court has international jurisdiction over SPDC.[32] In this motion, to substantiate that the Dutch court allegedly has international jurisdiction over SPDC, Milieudefensie et al. only argue (2013 Motion to produce documents, no. 28) that Section 843a DCCP also applies to foreign legal relationships or proceedings. To this end, they refer to the ruling HR 8 June 2012, *NJ* 2013, 286.

67. This argument fails. As stated before, Section 843a DCCP only applies in respect of SPDC if the Dutch court has international jurisdiction over SPDC. Milieudefensie et al.'s reference to the ruling HR 8 June 2012, *NJ* 2013, 286, does not hold. This latter case involved a claim for the production of documents that had been initiated against a Dutch defendant. In that case, the jurisdiction of the Dutch court resulted from Article 2 of the Brussels Convention.

68. The Court of Appeal cannot take cognizance of the claims for the production of documents against SPDC, because the Dutch court does not have any jurisdiction over SPDC, including not based on Section 7 (1) DCCP. SPDC's ties with Dutch national jurisdiction are allegedly formed by the claims against RDS. However, those claims lack a sound basis under the applicable Nigerian law. Otherwise, there is no sufficient connection between the claims against RDS and those against SPDC to justify jurisdiction based on the *forum connexitatis*, either.

69. Like the other elements of the Dutch jurisdiction rules, Section 7 (1) DCCP is based on concrete "points of view" that regard "interests of the state, on the

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[32] See the opinion of Advocate General Vlas, footnote 13, for HR 8 June 2012, LJN BV8510, *NJ* 2013, 286: "In international cases, there must be jurisdiction, of course, in order to take cognizance of the claim by virtue of Section 843a DCCP. In the case at issue, the Court of Appeal has jurisdiction to take cognizance of the claim based on Article 2 of the Brussels Regulation, because the defendant is domiciled in the Netherlands."

one hand, and interests of the parties to the proceedings, on the other".[33] If these points of view are not taken into account, the jurisdiction rules of Section 7 (1) DCCP would become too broad. In this scope, Strikwerda notes the following:[34]

> "International jurisdiction rules that are too broad result in overlap and in turn plurality of competent forums. In general, this is felt to be undesirable, not only because this may give rise to positive international competence conflicts, but also because this may encourage 'forum shopping' or 'forum tourism': the plaintiff unilaterally chooses the forum that he expects will render the ruling that will be most favorable for him."

70. In this respect, the interest of the state has three aspects:[35]

(a) the Netherlands cannot close its doors to international disputes; on its own territory, the state must maintain order and peace by resolving disputes that have close ties with the forum country; for international disputes, the state must also contribute to the international administration of justice;
(b) the Netherlands cannot open its doors too wide; the limited capacity of the judicial system – which is financed by public funds – will become overloaded if the Netherlands becomes the forum for all private law disputes that do not have any relevant ties with the forum country;
(c) the Netherlands should not open its doors too wide; too extensive an assumption of jurisdiction will lead to legal political objections from countries that have closer ties with the dispute.

71. The interest of the parties to the proceedings has two aspects:[36]

(a) the right to access to the court; the parties must always be able to find a court that has international jurisdiction for their international dispute, and a jurisdiction vacuum (or 'negative international competence conflict') must be prevented; and

(b) the advantage of litigating before the most suitable forum; from the point of view of legal costs, judicial efficiency, or quality of the administration of justice, it is self-evident to litigate in the country where most of the evidence is, where the objects to be recovered are or whose legal system applies.

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33 L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht* (Introduction to Dutch international private law), 10th edition, Deventer 2012, p. 213.

34 Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 214.

35 Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 213.

36 Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, pp. 213-214.

72. Applied to the case at issue, this presents the following picture. The Dutch state does not have any interest in contributing to the administration of justice for an internal Nigerian dispute in which SPDC is a defendant. The state does have an interest in (a) limiting the use of the judicial system that is financed from public funds (and which is already overloaded) and (b) preventing possible legal political objections from – in this case – Nigeria to the Dutch court exercising jurisdiction in purely internal Nigerian disputes.

73. With regard to the parties to the proceedings, the following can be noted. The right to access to the court is not at issue here. After all, the Nigerian court has jurisdiction over the case against SPDC. This is not changed because Milieudefensie is unable to initiate a class action by virtue of Section 3:305a DCC before the Nigerian court, as that is the result of a difference between Dutch and Nigerian law regarding the class action right. This does not comprise any legally relevant limitation of the right to access to the court, given that Nigerian law does recognize a class action right. The interests of the parties that Milieudefensie claims to represent can be represented in law by one or more of those parties, also on behalf of all others, by means of a *representative action*.[37] This is just as well a form of a class action right, which in the case at issue even offers more effective legal protection than Milieudefensie's acting in law (see section 7.2 below).

74. The facts regarding the clean-up and remediation of the consequences of the oil spill at issue exclusively occurred in Nigeria. Having the Dutch court determine those facts and furnishing evidence in that scope is highly inefficient. In addition, Milieudefensie et al. base the claims against SPDC on legal arguments that have never been put forward against SPDC (or other oil companies) in legal proceedings in Nigeria; in any event, these arguments have never been accepted and resulted in liability on the part of an 'operator'. For example, this is true for the argument that SPDC allegedly has a duty of care to prevent sabotage. This also applies to the argument that SPDC could be liable for failing to clean up the consequences of an oil spill that was caused by sabotage and for which SPDC is thus not liable. Accordingly, SPDC's liability must be assessed by a court that is not familiar with the rules it has to apply and who cannot find any support in existing case law, either. As will be further explained in nos. 91-96 below, the Dutch court will have to adopt a reticent stance in this context. It is not up to the Dutch court to usher in new development of law under Nigerian law. This means that it is not efficient to

[37] See also the legal opinion of Professor F. Oditah QC, Supplementary Opinion dated 21 February 2011 (Exhibit 24 with the Defense in the Motion of RDS and SPDC in the case against Akpan and Milieudefensie dated 23 February 2011 (docket number 2009/1580, currently case number 200.126.849)), nos. 22-31.

have the Dutch court assess the case against SPDC, not even viewed from Milieudefensie et al.'s perspective.

75. The inefficiency also exists from SPDC's perspective. The rationale of the *forum rei* can be found in protection of the defendant: given that the plaintiff initiates the proceedings and it has not been established that his claim is valid, the defendant may not be forced to litigate before the court in the plaintiff's domicile.[38] In the subject proceedings, SPDC is faced with a foreign procedural language, foreign (procedural) law and a legal culture that is foreign to SPDC. Both in practical terms and as regards the costs, the briefing of the case will produce a multitude of problems compared to litigating before one's own court. See the parliamentary history:[39]

> "On the other hand, it is *inter alia* important for jurisdiction rules that it may sometimes be extremely burdensome if a party is forced to litigate abroad on account of the costs, distance, language problems, lack of familiarity with local substantive law and procedural law, etc."

76. In the case at issue, Nigerian law applies. This does not reduce the practical problems for SPDC; on the contrary. SPDC must defend itself before the Dutch court, which is not familiar with Nigerian law. Moreover, the possibility of submitting legal points in dispute to a highest court is absent, given that it is not possible to complain about any breach of Nigerian law in an appeal to the Netherlands Supreme Court, nor can the case be submitted to the Nigerian Supreme Court.

77. All this means that it is highly objectionable for SPDC to subject itself to these proceedings before the Dutch court, especially in the case at issue, in which the distance between Nigeria and the Netherlands is substantial, not only in geographical terms, but in a cultural respect, as well.

6.2 Section 7 (1) DCCP

78. In a recent decision regarding the jurisdiction ground of Section 7 (1) DCCP, the District Court of Amsterdam found as follows:[40]

> "By virtue of Section 7 (1) DCCP, in the event that there are several defendants and the Dutch court has jurisdiction in respect of one of them, the Dutch court also has jurisdiction in respect of the other defendants, provided that the claims against the individual defendants are so connected that reasons of procedural efficiency justify that the claims are

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38 Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 215.

39 Parliamentary History of the Code of Civil Procedure, Van Mierlo/Bart, p. 79.

40 District Court of Amsterdam 23 October 2013, ECLI:NL:RBAMS:2013:7936, ground 4.2.

> collectively tried. The District Court found first and foremost that Section 7 (1) DCCP must be restrictively applied as an exception to the main rule. This is related to the starting point that rules regarding national jurisdiction must be highly predictable. It is not in the interest of legal certainty if it is not possible in advance to reasonably estimate the jurisdictions in which one might be summoned in connection with a specific act. In answering the question regarding whether the claims are so connected that reasons of procedural efficiency justify that these claims are collectively tried, all circumstances of the case must be considered – not just the factual situation, but also the situation in law. Moreover, it is up to the party that invokes Section 7 (...) to contend and – if a sufficiently substantiated challenge is put forward – prove the circumstances justifying a collective hearing. Finally, it can be inferred from the parliamentary history (Dutch Lower House, session year 1999-2000, 26 855, no. 3, p. 37) that Section 7 (1) DCC (in part) seeks to avoid irreconcilable decisions on the same subject."

79. Shell believes that with this finding, the District Court of Amsterdam correctly set out the review framework of Section 7 (1) DCCP. Briefly summarized:

- Section 7 (1) DCCP must be applied restrictively, because it is an exception to the main rule of the *forum rei*;
- all circumstances of the case must be taken into account;
- it must have been reasonably foreseeable for the foreign co-defendant that he could be summoned to appear before the Dutch court;
- sufficient connection must be involved, both factually and legally;
- it is up to the plaintiff to contend – and if necessary prove – circumstances that justify a collective hearing.

80. All these points of view also occur in ECJ case law regarding Article 6 (1) of the Brussels Convention. That case law is relevant in the interpretation of Section 7 (1) DCCP. This follows from the parliamentary history:[41]

> "Proposed for the first sub-section of Section 7 (1.1.6) for the sake of judicial efficiency; compare the current Section 126, seventh sub-section, DCCP, as well as Article 6, part 1 of the Brussels/Lugano Conventions. However, the wording of Section 7 (1.1.6) is more limited (see the end), because jurisdiction based on the ground that other defendants are also included in the proceedings would be exorbitant in the event that there is no connection between the claims against the different defendants. In this respect, case law of the European Court of Justice has been incorporated

[41] Parliamentary History of the Code of Civil Procedure, Van Mierlo/Bart, p. 108.

> in the proposed text (ECJ 27 September 1988, *NJ* 1990, 425), so that no deviation from Article 6, part 1 of the Brussels Convention is involved."

ECJ case law that was rendered after the ruling ECJ 27 September 1988, *NJ* 1990, 425 (*Kalfelis*) is also relevant in the interpretation of Section 7 DCCP.[42]

81. In view of the reference in the parliamentary history to the ECJ case law, Section 7 (1) DCCP stipulates more stringent requirements for the required connection than Section 126 (7) DCCP (old). See Advocate General Langemeijer in his opinion for HR 30 November 2007, *NJ* 2008, 77:[43]

> "2.8 The new Section 7 DCCP contains a first sub-section that – even though it has been derived from Section 126 DCCP (old) – only allows legal entities/natural persons who are established or domiciled abroad to be co-summoned to a limited extent (…). According to the parliamentary history of this provision, the legislator felt that establishing jurisdiction solely on the ground that other defendants are also included in the proceedings is exorbitant if there is no connection between the claims against the different defendants. With the new Section 7, the legislator sought to tie in with the criterion of Article 6, part 1, of the Brussels/Lugano Conventions and with relevant ECJ case law."

82. Shell believes that in the scope of the interpretation of Section 7 (1) DCCP, the criteria developed in the ECJ case law regarding Article 6 (1) of the Brussels Convention are considered to be minimum requirements. In the interlocutory judgment of 24 February 2010 (ground 3.7), the District Court wrongfully held that the ECJ case law regarding Article 6 (1) of the Brussels Convention was not decisive and in the final judgment (ground 4.6) wrongfully left the

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42 T&C Burgerlijke Rechtsvordering, comments to Section 7 DCCP, Polak/Zilinsky, note 2; M.V. Polak, *Ars Aequi 56* (2007) 12, p. 994; P. Vlas, note, no. 3, to ECJ 13 July 2006, *NJ* 2008, 76 (*Roche/Primus*): "Section 7 DCCP includes a jurisdiction rule that has been derived from Article 6 (1) of the Brussels Convention in the event of plurality of defendants. Section 7 DCCP stipulates that 'the claims against the individual defendants must be so connected that reasons of procedural efficiency justify that the claims are collectively tried'. According to the Explanatory Memorandum, the *Kalfelis/Schröder* ruling of the ECJ was taken into account and Section 7 DCCP does not deviate from Article 6 (1) of the Brussels Convention (*Parliamentary History of the Code of Civil Procedure*, Van Mierlo/Bart, p. 108). For that reason, it can be defended that in interpreting Section 7 DCCP, the interpretation of Article 6 (1) of the Brussels Convention and currently of Article 6 (1) of the Brussels Regulation is followed to the extent possible."

43 See also the relevant finding of the Netherlands Supreme Court in the ruling 30 November 2007, *NJ* 2008, 77, ground 2.5.2: "The requirement of connection formulated by the European Court of Justice for Article 6 (1) of the Brussels Convention and Article 6 (1) of the Lugano Convention does not apply to Section 126 (7) DCCP (old) that still applies to this case."

applicability of that case law aside. These findings are incorrect, as well. To find that jurisdiction exists by virtue of Section 7 (1) DCCP, the requirements of Article 6 (1) of the Brussels Convention must have been satisfied *at a minimum*.

83. However, the observation that the requirements of Article 6 (1) of the Brussels Convention have been satisfied does not automatically mean that jurisdiction by virtue of Section 7 (1) DCCP can be assumed. For example, in one important respect, Section 7 (1) DCCP deviates from Article 6 (1) of the Brussels Convention. Section 7 (1) DCCP does not stipulate the requirement that one of the defendants must be domiciled in the Netherlands. Irrespective of the jurisdiction ground based on which the Dutch court assumes jurisdiction in respect of one of the defendants, it can assume jurisdiction in respect of the co-defendant(s), provided that the connection requirement has been satisfied, of course. Thus, Section 7 (1) DCCP potentially has a broader scope than Article 6 (1) of the Brussels Convention. Polak argued that for this reason, the need for an anti-abuse rule for Section 7 (1) DCCP is greater than if Article 6 (1) of the Brussels Convention is applied.[44]

6.3 Basis of the claims against RDS is obviously insufficient

84. At the time of the jurisdiction motion, the District Court should already have concluded that in light of the facts that Milieudefensie et al. contended in the initiatory writ of summons and the applicable Nigerian law, the claims against RDS do not have any basis in law (as the District Court ultimately also ruled in the final judgment). After all, Nigerian law does not have any examples of liability of a parent company under similar circumstances. English law does not have any relevant precedent, either. Milieudefensie et al. invoke *Chandler v. Cape* – it is pointed out that they did not already do so in the Initiatory writ of summons, because at that time, no ruling had yet been rendered in that case – but both the District Court and Robert Weir QC, engaged by Milieudefensie et al. themselves, are rightfully of the opinion that the circumstances in *Chandler v. Cape* are not similar to those in the case at issue. The further course of the proceedings in the first instance could no longer change this absence of a legal basis in Nigerian law, of course (nor did it do so).

85. In the substantive assessment of the claims against RDS, based on an assessment of the facts contended by Milieudefensie et al. in light of the decision in *Chandler v. Cape*, the District Court rightfully held that the special circumstances based on which the parent company was held liable in this latter case are not so similar to those in the case at issue that on this ground, a duty of care allegedly falls on RDS in respect of the people living in the vicinity of SPDC's oil pipelines and oil facilities (grounds 4.30-4.37 of the final judgment).

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[44] M.V. Polak, *Ars Aequi 56* (2007) 12, pp. 994-995.

Nor are there any other grounds to assume such a duty of care, according to the District Court's rightful opinion (ground 4.38). However, prior to these findings, the District Court ruled (ground 4.4) that the claims against RDS could not be deemed to be certain to fail beforehand. The decision in *Chandler v. Cape* allegedly demonstrates that beforehand it could be defended that under certain circumstances, based on Nigerian law, the parent company of a subsidiary may be liable based on the tort of negligence against people who suffered damage as a result of the activities of that (sub-) subsidiary.

86. The District Court handed down a completely correct opinion regarding RDS' liability, but wrongfully ruled that the claims against RDS were not certain to fail beforehand. This finding by the District Court is based on the fact that under certain circumstances, a parent company may be liable in respect of persons who suffered damage as a result of the activities of its (sub-) subsidiary. This general notion is without prejudice to the fact that Milieudefensie et al.'s claims are most certainly certain to fail. In answering the question regarding international jurisdiction of the Dutch court, the District Court wrongfully failed to assess whether it is likely that *in the case at issue*, circumstances occur that may lead to liability of the parent company under Nigerian law. If the District Court had done so, it should have concluded that the claims against RDS are most certainly certain to fail.

87. Nigerian law does not offer any basis for the claims against RDS. Nigerian corporate law is based on the '*separate entity doctrine*': upon incorporation, the company becomes a separate legal entity, which is separated from its shareholders.[45] Closely related to the '*separate entity doctrine*' is the limited liability doctrine: the shareholders are indemnified against any liability for the company's obligations in the event that they have fully paid up their shares.[46] This applies both when the shareholder is a natural person and when the shareholder is a legal entity.[47]

88. There are – rare – cases in which under Nigerian law there may be room '*to lift the corporate veil*'. RDS could be liable to the victims of the oil spill at issue if

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45 '*Companies and Allied Matters Act 1990*' ("CAMA"), Section 37; *FDB Financial Services* v. *Adesola* (2000) 8 NWLR (Pt 668) 170, p. 183H; *Vibelko (Nigeria) Ltd* v. *NDIC* (2006) 12 NWLR (Pt 994) 280, p. 295F-296B (see Exhibit 2.L with the Defense of RDS and SPDC and Exhibit 5.L with the Defense of SPNV and Shell Transport).

46 CAMA, Section 21(1)(a) (see Exhibit 2.N with the Defense of RDS and SPDC and Exhibit 5.N with the Defense of SPNV and Shell Transport).

47 *Union Beverages Ltd* v. *Pepsicola Int Ltd* (1993) 3 NWLR (Pt 330) 1, p. 16C-E (see Exhibit 2.B with the Defense of RDS and SPDC and Exhibit 5.B with the Defense of SPNV and Shell Transport).

one of those cases occurs. Under specific circumstances, piercing the corporate veil is deemed possible under Nigerian law in the following events:

- the legal personality of the company in question is used to masque '*fraud*' or '*illegality*';[48]
- the company in question is no more than a façade;[49]
- the company in question is an '*agent*' of the company against which the 'piercing the corporate veil' action is directed.[50]

89. None of the 'piercing the corporate veil' situations mentioned above occurs in the case at issue, nor do Milieudefensie et al. submit that one of those situations occurs. With this state of affairs, Milieudefensie et al.'s claims against RDS are certain to fail.

90. The argument that RDS allegedly has a duty of care to the victims of the oil spill at issue is not supported by any ruling from a Nigerian court.[51] In this connection, Milieudefensie et al. themselves only invoke court decisions from the United States and England. With this state of affairs, the current position of Nigerian law is that only the cases indicated above (*fraud, illegality, façade* or *agency*) – which has been established do not occur here – might allow room for liability of RDS for the oil spill at issue. In applying Nigerian law, the Dutch court must concur with the existing interpretations of the law in Nigeria.

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48 *FDB Financial Services* v. *Adesola* (2000) 8 NWLR (Pt 668) 170, p. 183H (see Exhibit 2.H with the Defense of RDS and SPDC and Exhibit 5.H with the Defense of SPNV and Shell Transport).

49 *Adeyemi v Lan & Baker (Nig) Ltd* (2000) 7 NWLR (Pt 663) 33, p. 51A-F; *Vibelko (Nigeria) Ltd* v. *NDIC* (2006) 12 NWLR (Pt 994) 280, p. 295G-H (see Exhibit 2.G with the Defense of RDS and SPDC and Exhibit 5.G with the Defense of SPNV and Shell Transport).

50 *Union Beverages Ltd* v. *Pepsicola Int Ltd* (1993) 3 NWLR (Pt 330) 1, p. 16D-E (see Exhibit 2.B with the Defense of RDS and SPDC and Exhibit 5.B with the Defense of SPNV and Shell Transport).

51 See the Corporate Law Opinion of Professor Oditah of 24 March 2011 (Exhibit 26 with the Document dated 19 May 2011 of RDS and SPDC and Exhibit 29 with the Rejoinder in the Motion to produce documents of SPNV and Shell Transport), no. 21: "I am not aware of any reported Nigerian case that could support the idea that a parent company such as RDS could possibly owe a duty of care to the creditors of its subsidiary outside the rare and limited circumstances where a Nigerian court would be prepared to lift the corporate veil, namely fraud, illegality, agency or façade." See also no. 28: "I am not aware of any reported Nigerian case that could possibly support the claim brought against RDS for the loss allegedly arising from the oil spill merely because it is alleged that it should have used its control and influence over SPDC to ensure that the policy was implemented and that SPDC traded in an environmentally responsible manner."

91. The Explanatory Memorandum to Section 10:2 DCC sets out that the foreign law must be applied in the same way as it is in the country in question, meaning including, for example, case law and literature, and including the opinions prevailing in that country regarding questions such as the manner of interpreting the law.[52] See also in this connection the National Committee for International Private Law:[53]

> "In addition, the National Committee notes that unwritten Dutch international private law assumes that the interpretation of the foreign law must be in accordance with the opinions and methods used in the country in question. If the foreign law recognizes several opinions regarding a specific point, the Dutch party applying the law will have to find a solution in the spirit of the relevant system – not one based on objectives of an interpretation of his own law. What applies in the country in question regarding, for example, the relationship between written and unwritten law or regarding the interpretation and supplementation of the law must be followed in the Netherlands. The limit in this is public order. The National Committee concurs with the usual opinion that the foreign law must be applied in the same way in the country in question to the extent possible. However, the National Committee is of the opinion that there is no need to draw up a statutory provision for this."

92. See also Kosters-Dubbink:[54]

> "The foreign law must be treated in accordance with the opinions and methods that are actually used in the foreign country's legal practice; the prevailing case law in that country is especially important here. What applies in the foreign country regarding the doctrine of legal sources, the relationship of written and unwritten law, the possibility that practice sets aside the law, the interpretation and supplementation of laws, the position taken by science, etc.; all this must be followed in our country, even if it is incompatible with the prevailing insights in one's own country and even if the latter is preferred."

93. If the further development of the foreign law is involved, the Dutch court should take a reticent stance. See Jessurun d'Oliveira:[55]

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52 Dutch Lower House 2009-2010, 32 137, no. 3, p. 9.

53 National Committee for International Private Law, Report to the Minister of Justice on the general provisions of the Dutch International Private Law Act, 1 June 2002, pp. 19-20.

54 J. Kosters and C.W. Dubbink, *Algemeen deel van het Nederlandse internationaal privaatrecht*, 1962, p. 738.

> "By necessity, the share of the Dutch court in the development of the foreign law is somewhat more restricted than in respect of its own law. The Dutch court will have to seek to concur with the status quo as closely as possible and is bound by the foreign opinions regarding the hierarchy of legal sources. If English law applies, the Dutch court is just as bound by the doctrine of precedents as the English court. Usually, this difference will not be felt very strongly; nevertheless, it is present. The foreign law is relatively less incomplete than Dutch law, as it were."

94. See also Van Hoek in her *Ars Aequi* annotation to the judgments of the District Court:[56]

> "Moreover, the role of the Dutch court in respect of foreign law is limited to applying the usual interpretation. Given that the Dutch court is not part of the Nigerian legal system, it cannot be expected to make an innovative contribution to Nigerian law. Thus, ideally, the Dutch court will correctly apply the foreign law; further developments of that law cannot be expected from the Dutch court. This Dutch annotator cannot determine whether the District Court of The Hague correctly applied Nigerian law in the case at issue."

95. See also Paul Scholten in his – still current – General Part:[57]

> "Finally, a few words regarding the question of *how* the court must enforce the foreign law after it has concluded that this law applies. The answer will be: as if it is the court's own law. However, that is not entirely correct. Certainly, the court that applies foreign law will have to examine the authoritative factors in that country and take its decision on that basis, exactly as it does in purely national cases; however, there is a difference. We said that every decision comprises knowledge, intellectual work and assessment. That assessment is pushed back here. The court takes a different view of the foreign law than it does of its own law, in which the court itself is a body and which the court in part develops. Acting independently, using a new analogy, stipulating a new rule by means of a new combination of rules, developing law based on efficiency considerations – there is little or no room for all this for the court that applies foreign law. Regardless of how strange a Dutch court that must apply French law may feel the interpretation of French law in French case law and doctrines is, it must nevertheless accept this interpretation – it is

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55 H.U. Jessurun d'Oliveira, *De antikiesregel. Een paar aspekten van de behandeling van buitenlands recht in het burgerlijk proces*, dissertation 1971, p. 123.

56 A.A.H. van Hoek, *Ars Aequi* June 2013, pp. 488-489.

57 Asser/Scholten, *Algemeen deel**, third edition 1974, pp. 167-168.

> not this court's task to improve this interpretation. The court is a stranger to that law. The result is that the court regards that law from a historical sociological point of view rather than from a legal point of view. What is, in fact, being followed is especially important here, the case law has a great deal of authority. Finally, if the court is again unable to accept any result it feels is obviously unfair, it is its own system based on the public order principle rather than its interpretation of the foreign law that causes the court to reject the conclusions it makes based on the foreign information for the case it is to try.
> It is not only its relationship to the foreign law that imposes this self-limitation. The court can hardly do anything else. The assessment can only be made by the party that is itself *in* the legal community on which it rules. An outsider never completely understands the foreign law. It is part of a spiritual life; in the end, this continues to be foreign to the foreign court. The application of foreign law is defective by its very nature. If this is compelled by the international relationship, the court is well advised to follow what the country's own court would have decided as closely as possible."

96. In the application of Nigerian law, the Dutch court will have to use existing case law as the basis in order to follow what the Nigerian court would have decided. The Dutch court may not allow itself to be tempted to let its own sense of justice take its course.

97. In the Initiatory summons, Milieudefensie et al. sought support in court decisions from the United States and England for the claims against RDS. In its defense, Shell explained that the decisions in question do not offer any support for the argument that RDS allegedly has a duty of care.[58] In the continuation of the proceedings in the first instance, Milieudefensie et al. exclusively started from the decisions that first the English High Court and then the Court of Appeal rendered in the case *Chandler v Cape*. In the 2013 Motion to produce documents, as well, Milieudefensie et al. base RDS' liability on that case. Based on an assessment of the facts contended by Milieudefensie et al. viewed in light of the decision in *Chandler v. Cape*, the District Court rightly held that the special circumstances by virtue of which the parent company in that case was held liable are not so similar to those in the case at issue that on this ground, a duty of care allegedly falls on RDS in respect of the people living in the vicinity of SPDC's oil pipelines and oil facilities. Weir also recognizes that *Chandler v. Cape* cannot be directly applied to the case at issue:

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[58] Motion for the court to decline jurisdiction and transfer the case, also including conditional statement of defense in the main action, nos. 150-155.

> "43. The decision in *Chandler v Cape plc* is not on all fours with the facts of this case. That much is clear. For instance, as the court in the January 2013 judgment points out at 4.34, in Chandler the claimant was an employee of the defendant parents' subsidiary company whereas here the Claimants are people living in the vicinity of a pipeline operated by the subsidiary."

98. Weir acknowledges that *Chandler v. Cape* is not a precedent for assuming a duty of care in the case at issue. *Chandler v. Cape* deals with liability of the parent company to an employee of the subsidiary; the case at issue does not involve this. Weir also believes that *Chandler v. Cape* cannot be directly applied in the case at issue:

> "The Claimant's case does not, therefore, involve the direct application of the principles set out by Arden LJ at para 80 *Chandler v Cape* and set out at 4.33 of the January 2013 judgment. The relevance of the *Chandler* decision is that it provides a good example, which is not that far removed from the facts of this case (and so relevant when adopting an incremental approach), of the imposition of a duty of care in a novel situation."

99. Weir writes in so many words that the case at issue involves the question regarding a duty of care on the part of RDS in a *novel situation*. In other words: Milieudefensie et al. ask the Dutch court to assume a duty of care in a case in which the Nigerian court and even the English court have never done so.

100. With this state of affairs, the conclusion must be that the factual and legal basis of the claims against RDS is obviously insufficient. In the absence of any precedent of a Nigerian court that can support the argument that RDS has a duty of care to the victims of the oil spill at issue, the Dutch court must find that the claims against RDS are certain to fail. After all, if those claims would be awarded, this means that a duty of care is assumed in a case in which this has never been assumed before. This would be in breach of the starting point that in applying foreign law – in the words of Jessurun d'Oliveira – the Dutch court must follow the "status quo".

101. In the final judgment (ground 4.7), the District Court found that according to the Dutch legislator's intention, the jurisdiction of the Dutch court in the case against SPDC based on Section 7 DCCP does not cease to exist if the claims against RDS are dismissed in the final judgment, not even if there is subsequently no connection or hardly any connection with Dutch jurisdiction. This finding is incorrect. If there is no connection between the claims against SPDC and Dutch jurisdiction, the Dutch court does not have jurisdiction over those claims. The fact that the District Court found that the claims against RDS are unfounded should have led the District Court to conclude that the Dutch

court cannot base its jurisdiction in the case against SPDC on Section 7 (1) DCCP. If at some point in the course of the proceedings, the judge concludes that there is no foundation for the claims against the Dutch defendant, he has no jurisdiction over the claims against the foreign defendant. After all, in that case there is no connection. Nor is it efficient in that case that the Dutch court renders a ruling regarding the merits of the case against the foreign defendant. If the claims against the Dutch defendant must be dismissed, the case does not have any connection with Dutch jurisdiction; in that case, reasons of efficiency demand that the foreign court conducts the substantive assessment.

102. In the motion at issue, the Court of Appeal can conclude what the District Court should have concluded, namely that there is no connection between the case against SPDC and Dutch jurisdiction. In this motion, Milieudefensie et al. claim the production of documents in order to further substantiate in the statement of appeal that RDS most certainly did have a duty of care. This is without prejudice to the fact that currently it must be established that the claims against RDS are certain to fail. If Nigerian law does not offer any basis for the claims against RDS and Milieudefensie et al. are also unable to designate that basis, the production of the documents claimed by Milieudefensie et al. and the Statement of Appeal still to be filed will not alter that situation.

103. Superfluously, in section 6.5 below, Shell will explain that for the rest, the requirement of sufficient connection has not been satisfied, either. This is preceded by a brief summary of what can be inferred from the current ECJ case law in respect of the connection requirement by virtue of Article 6 (1) of the Brussels Convention.

6.4 Article 6 (1) of the Brussels Convention

104. Subject to the starting point mentioned in nos. 82-83 above to the effect that the connection required in the scope of Article 6 (1) of the Brussels Convention is only a *minimum standard* in the application of Section 7 (1) DCCP, Shell notes the following regarding the ECJ's interpretation of Article 6 (1) of the Brussels Convention.

105. In a recent ruling, the District Court of Rotterdam summarized ECJ case law regarding Article 6 (1) of the Brussels Convention as follows:[59]

> "The general principle is jurisdiction of the courts of the Member State in whose territory the 'defendant' is domiciled and only by way of exception to this principle does the Brussels Regulation provide for special jurisdiction rules for cases that have been fully listed, in which the

[59] District Court of Rotterdam 17 July 2013, ECLI:NL:RBROT:2013:5504, NJF 2013, 414, ground 5.8.

'defendant' – depending on the case – can or must be sued in the courts of another Member State. The special jurisdiction rules must be given a restricted/strict/limited interpretation. The jurisdiction rules must be highly predictable.

With regard to its purpose, in accordance with recitals 12 and 15, the jurisdiction rule of Article 6, preamble and (1) of the Brussels Regulation first of all seeks to facilitate the sound administration of justice, minimize the possibility of concurrent proceedings and prevent decisions from being given that would be irreconcilable if the cases would be tried separately (ECJ 1 December 2011, *NJ* 2013, 66 (Painer)).

In addition, the same rule cannot be applied such that the plaintiff can initiate a claim against several 'defendants' for the sole purpose of ousting the jurisdiction of the courts of the State where this defendant is domiciled (see, most recently, ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*)). Compare ECJ 11 October 2007, *NJ* 2008, 80 (*Freeport*). One requisite condition for jurisdiction based on Article 6, preamble and (1) of the Brussels Regulation is that there is a risk of irreconcilable judgments in the event that the cases are tried separately. It is up to the national court to assess whether this is involved. In this context, all required elements from the file must be taken into account; as the occasion arises, even if this is not required for the assessment, including the legal basis of the claims initiated with this national court (ECJ 11 October 2007, *NJ* 2008, 80 (*Freeport*); ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*)). Decisions cannot already be regarded as irreconcilable based on a divergence in the outcome of the dispute. To regard decisions to be irreconcilable, that divergence must also arise in the context of the same situation of law and facts (ECJ 13 July 2006, *NJ* 2008, 76 (*Roche/Primus*); ECJ 11 October 2007, *NJ* 2008, 80 (*Freeport*); ECJ 12 July 2012, *NJ* 2013, 67 (*Solvay*)). The fact that claims directed against several 'defendants' have a different legal basis does not necessarily preclude the application of Article 6, preamble and (1) of the Brussels Regulation, provided that it was foreseeable for the defendants that they might be sued in the Member State where a co-defendant was domiciled. This is all the more convincing in cases in which the national provisions on which the claims filed against the various defendants are based are mainly identical. In assessing the risk of irreconcilable decisions if the cases are tried separately, it may be relevant whether the defendants acted independently of one another in the acts for which they are reproached. See, most recently, ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*)."

106. Thus, sufficient connection is only involved in the event of "the same situation of law and facts". There must be both a sufficient factual connection and a

sufficient legal connection between the claims against the different defendants. To satisfy the requirement of "the same situation of law and facts" the claims against the different defendants are not required to have an identical legal basis. It is required that it must have been foreseeable for the defendants that they might be sued in the Member State where one of them was domiciled.[60] In addition, in assessing the risk of irreconcilable decisions, it may be relevant whether the defendants acted independently of one another in the acts for which they are reproached.[61]

107. The plaintiff must contend and if necessary prove that the connection requirement is satisfied. See ECJ 13 July 2006, *NJ* 2008, 76 (*Roche/Primus*):

> "39. It must be observed that the determination as to whether the criteria concerned are satisfied, which is for the applicant to prove,…"

108. The same applies in the scope of Section 7 (1) DCCP. See the District Court of Amsterdam in its judgment cited in no. 78 above.

109. This entails that in assessing its international jurisdiction, the court cannot exclusively rely on the arguments in the summons. The latter is almost self-evident. Were this to be otherwise, a plaintiff could create jurisdiction by virtue of Section 7 (1) DCCP (or Article 6 (1) of the Brussels Convention) in respect of a foreign defendant at his own discretion, merely by contending facts from which connection could arise, without worrying about whether these contended facts are correct. In assessing its international jurisdiction, the court must consider all circumstances of the case (or, in the words of the ECJ: all the necessary elements of the file). This also includes everything that the defendant advances in defense to the plaintiff's arguments.

110. In her opinion for ECJ 1 December 2011, case C-145/10, *NJ* 2013, 66 (*Painer*), Advocate General Trstenjak wrote the following regarding the required factual connection and foreseeability:

> "91. The first requirement for the existence of a connection between the anchor claim and another claim is that the claims arise in the context of a single factual situation. It should be borne in mind in this connection that Article 6(1) of the regulation must be highly predictable for the defendant. A minimum requirement for a single factual situation must therefore be that it is at least clear to a defendant that he may be sued, as the co-defendant of another defendant, under Article 6(1) of the regulation, at a court in the place where that anchor defendant is domiciled.

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60 ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*), paragraph 81.

61 ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*), paragraph 83.

> 92. That minimum requirement is not satisfied where the facts on which the applicant bases its anchor claim and the other claim are such that the conduct of the anchor defendant and of the other defendant concerns the same or similar legal interests of the applicant and is similar in nature, but occurs independently and without knowledge of one another. In such a case of unconcerted parallel conduct, it is not sufficiently predictable for the other defendant that he can also be sued, under Article 6(1) of the regulation, at a court in the place where the anchor defendant is domiciled."

111. Advocate General Trstenjak rightfully places the requirement of foreseeability (in part) in the scope of the question regarding the factual relationship between the claim against the defendant who is domiciled in the country of the court to which application is made (also called the "anchor claim") and the other claim. In contrast to what the District Court started from in its final judgment (ground 4.6), the foreseeability review applies in general (and not only if the claims initiated against the different defendant have a different legal basis). The foreseeability requirement follows from recital 11 of the Brussels Regulation, which finds that the rules of jurisdiction must be highly predictable. It is not clear that this finding only applies if the claims initiated against the different defendants have a different legal basis.[62] On the contrary, the ECJ ruled that the principle of legal certainty inter alia requires that jurisdiction rules that deviate from the general rule of Article 2 of the Brussels Convention are interpreted such that on that basis, an average expert defendant can reasonably foresee in which other court he might be sued other than the court of the State where he is domiciled.[63] In its decision cited in no. 78 above, the District Court of Amsterdam also starts from a "generally applicable" requirement of foreseeability in the scope of Section 7 (1) DCCP.

112. In the opinion for the Painer ruling, Advocate General Trstenjak gives a number of examples of cases in which she believes there is sufficient legal connection (this is not an exhaustive list[64]):

> "83. (…) In a case of contingent liability (alternative liability) in which one of the defendants is liable only where the other defendant is not liable,

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62 Possibly the District Court relied on the fact that in paragraph 81 of the *Painer* judgment, the ECJ specifically mentions the requirement of foreseeability in connection with the case in which the claims initiated against the different defendants have a different legal basis. In that case, this requirement plays an especially important role to conclude that there is sufficient connection, but this does not mean that the ECJ ruled that the requirement of foreseeability only applies in that case.

63 ECJ 1 March 2005, *NJ* 2007, 369 (*Owusu*), paragraph 40.

64 See paragraph 99 of the opinion.

there is, in my view, a clear interest that the case is decided by the same court in order to avoid the risk of irreconcilable judgments. (33)[65] In such a case, the legal connection between both claims is not dependent on whether the same law is applicable to both claims. (…)

95. The second requirement for a close connection for the purposes of Article 6(1) of the regulation is that a sufficient legal connection exists. Because a single factual situation does not appear to exist in the present case, I would like to comment briefly on the second requirement.

96. The theoretical starting point must be whether the two claims have such a close legal connection that the applicant could not be reasonably expected to seek to have the claims decided by two courts. It is clear from the wording of Article 6(1) of the regulation that this may be the case in particular where the legal connection between two claims is so close that inconsistencies between them would not be acceptable. Some account can also be taken in this connection of considerations of procedural economy, although strict regard must be had to the defendant's interest in the predictability of jurisdiction.

97. Cases where the legal connection between two claims is so close that inconsistencies between the decisions would not be acceptable are, first and foremost, cases where the outcome of one claim is dependent on the outcome of the other claim. I refer in this respect to the example of contingent liability (alternative liability) given in point 83 of this Opinion. Furthermore, a sufficiently close legal connection exists in particular where the defendants are jointly and severally liable, co-owners or a community of rights.

98. In cases in which comparable claims are made and the requirements under the applicable law are essentially comparable, application of Article 6(1) of Regulation No 44/2001 is suggested, first of all, by the fact it is possible to avoid inconsistencies which could result from a different appraisal of the facts by two courts. In so far as common stipulations under Union law are concerned, this is also supported by the avoidance of legal inconsistencies. Considerations of procedural economy also indicate the existence of such a connection. However, in such cases the requirement that the anchor claim and the other claim arise in the context of a single factual situation is of crucial importance. The risk of a different

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65 "An irreconcilable outcome would exist, for example, if one court decides that the defendant who is the primary liable party is not liable, whilst the other court decides that the other defendant, who is the secondary liable party, is not liable because, in its view, the primary liable party should have been liable." (footnote 33 in the original text)

> appraisal of the facts and a different legal assessment can justify a transfer of jurisdiction under Article 6(1) of the regulation only where this is predictable for the defendant."

113. Thus, in the assessment of both the factual and the legal connection, the requirement of foreseeability plays a decisive role.

114. As an example of sufficient legal connection, Advocate General Trstenjak first of all (paragraph 83) mentions the situation in which the outcome in one of the cases depends on the outcome in the other case. In addition, she refers to the case in which the defendants are jointly and severally liable co-debtors, co-owners or (otherwise) partners in a community.

115. In the interlocutory judgment in the jurisdiction motion of 24 February 2010 (ground 3.6), the District Court found that RDS and SPDC are held liable for the same damage, which follows from the claim for a joint and several order for RDS and SPDC. According to the District Court, this means that the same complex of facts in Nigeria must be assessed in respect of the claims against both RDS and SPDC. The District Court is of the opinion that this means that sufficient connection is involved in the sense of Section 7 DCCP. This is incorrect.

116. Although Milieudefensie et al. hold RDS and SPDC jointly and severally liable, this does not mean that for this reason alone, a sufficient factual connection is involved. Nor is the joint and several liability of RDS and SPDC the type of several liability that Advocate General Trstenjak may have had in mind in her opinion cited above. Advocate General evidently refers to two debtors who bound themselves jointly and severally for the same debt ("joint and several co-debtors"). However, in the event of RDS and SPDC, the issue is several liability (allegedly) resulting from liability for the same damage. In and of itself, such several liability does not mean that sufficient legal connection is involved. After all, in and of itself, the mere fact that two parties are held liable for the same damage does not mean that it was foreseeable for one of the defendants that it would be sued together with the other defendant in the court of this other defendant’s domicile.

117. In addition – as stated before – the mere fact that two defendants are held jointly and severally liable for the same damage does not mean that there is sufficient factual connection between the two claims. Although in that case, the claims regard the same "legal goods" of the plaintiff, this is without prejudice to the possibility that the accused conduct occurred independently of one another, without either of the defendants being aware of this, or: "unconcerted parallel conduct" (see paragraph 92 of Advocate General Trstenjak’s opinion, cited in no. 110 above).

6.5 Insufficient factual and legal connection

118. That there is insufficient factual connection in the case at issue already follows from the fact that at the time that RDS was placed at the head of the Royal Dutch Shell Group, the events surrounding the oil spill at issue, i.e. the cause of this oil spill (sabotage) and closing the leak, extinguishing the fire and taking measures to prevent the spilled oil from spreading, had already occurred a long time ago.[66] Thus, is goes without saying that Milieudefensie et al.'s arguments regarding facts and circumstances that occurred in the period during which RDS was not yet at the head of the Royal Dutch Shell Group are irrelevant in assessing Milieudefensie et al.'s claims against RDS. Thus, the complex of facts in Nigeria that is relevant in assessing the cause of the oil spill at issue and SPDC's response to the oil spill cannot be relevant in assessing the claims against RDS.

119. For this reason alone, the requirement of connection of Section 7 DCCP has not been satisfied. After all, the main point of the case is the alleged liability of RDS and SPDC for the oil spill itself, because this caused the damage that was allegedly suffered. Although Milieudefensie et al. argue that the area of impact was allegedly not adequately cleaned up and remediated, but that is not true and in any event, this does not constitute an independent cause of the damage. The damage that was caused by the oil spill cannot have been caused "again" by an alleged failure in the remediation.[67] Moreover, RDS was not involved in that clean-up and remediation work in any way whatsoever. RDS was not even informed of the oil spill at issue or the clean-up and remediation of the consequences of the oil spill. Cleaning up the oil spill at issue is an operational affair that does not and did not involve RDS. RDS itself does not conduct any operational activities, including not in Nigeria. The Royal Dutch Shell Group is so large that it is unrealistic to assume that RDS could be involved in cleaning up the oil spill at issue. Thus, RDS cannot be blamed for failing to do something in this connection, either. Nor can sufficient connection be construed by the injunctions that Milieudefensie et al. claimed in respect of both RDS and SPDC (relief sought in the Initiatory summons, paragraphs III through VIII). Those claimed injunctions pertain to operational work regarding the pipeline near Goi and cleaning up the affected area. It is obvious that these claimed injunctions cannot be awarded in respect of RDS, because RDS is not directly involved in SPDC's operations in Nigeria.[68]

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66 See the Motion for the court to decline jurisdiction and transfer the case, also containing conditional statement of defense in the main action, § 18 and § 65 and footnote 51.

67 See the Third Supplementary Opinion of Prof. Oditah dated 13 March 2012, nos. 51 and 56.

68 Defense, no. 161.

120. Nor are the claims against RDS, on the one hand, and those against SPDC, on the other, based on the same complex of facts to be assessed otherwise, either. This already follows from Milieudefensie et al.'s arguments in the Initiatory summons, no. 17:

> "Where the plaintiffs reproach Shell plc for having taken insufficient measures to prevents its subsidiary Shell Nigeria from inflicting damage on people and the environment in the oil production in the Niger Delta and for having taken insufficient measures to ensure that Shell Nigeria fully cleans up the pollution caused by oil spills in a timely fashion, they blame Shell Nigeria as the pipelines operator for not preventing the spills near Goi and for not containing and cleaning up the damage."

Milieudefensie et al. base the claims against SPDC on the complex of facts regarding the oil spill near Goi of 10 October 2004. The claims against RDS are not based on that complex of facts, given that the complex of facts on which Milieudefensie et al. base their claims against RDS is the situation in the Niger Delta *in general*.

121. To the extent that Milieudefensie et al.'s argument must be taken to mean that the general situation in the Niger Delta also covers the oil spill at issue, the following is pointed out. RDS is not directly involved in SPDC's operational activities, let alone was RDS involved in SPDC's operations regarding the oil spill at issue. Milieudefensie et al. did not contest this (of course). Milieudefensie et al. even argue that it is irrelevant whether RDS (prior to the subject proceedings) was aware of the oil spill at issue. On the contrary, they take that fact into account in their arguments regarding RDS' liability:[69]

> "Moreover, whether or not the parent company was aware of the specific circumstances surrounding this oil spill near Goi is not a decisive factor in answering the question regarding whether the parent company had a duty of care;…"

And:[70]

> "Thus, the issue is not whether or not The Hague was aware of the specific conduct of events around the oil spills in Goi, in Ikot Ada Udo and in Oruma. The issue is that the head office should have taken measures, already at the end of the 1990s but certainly in the early 2000s, when it was confronted with the reports. At that time, it should have made sure that SPDC replaced the pipelines and tightened security. If Shell had

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69 2013 Motion to produce documents, no. 121.

70 Written pleadings of Milieudefensie et al. dated 11 October 2012, no. 174.

> fulfilled its duty of care at that time, the damage in Goi, in Oruma and in Ikot Ada Udo would not have occurred."

In their argument regarding RDS, Milieudefensie et al. abstract from the question regarding whether RDS was aware of the oil spill at issue. This means that there is insufficient factual connection with the claims against SPDC, which was, of course, aware of the oil spill at issue, closed the leak, cleaned up the spilled oil and remediated the affected area.

122. Nor can sufficient factual connection be derived from Milieudefensie et al.'s argument cited above to the effect that if RDS had fulfilled its duty of care, the damage in Goi would not have occurred. In the interim, the 2013 Motion to produce documents has demonstrated that Milieudefensie et al. feel that this is not required for the claims against RDS to be awarded:[71]

> "Nor is it required to demonstrate that Shell directly contributed to the damage due to its central policy. The issue is that the parent company had special know-how; knowledge of the general situation and risks in Nigeria, on the one hand, and failed to intervene, even though it had demonstrated that it could intervene, on the other."

Thus, according to Milieudefensie et al., to award the claims against RDS it is not required that the breach of the duty of care for which RDS is blamed resulted in the damage that was allegedly caused by the oil spill at issue.

123. Nor can connection be derived from Milieudefensie et al.'s argument that the conduct for which SPDC is reproached in respect of the oil spill at issue was determined by RDS' policy, given that this argument is incorrect. This has already been dealt with extensively in the first instance and is once again explained below. Shell explicitly refers to this. In this place it is sufficient to observe that the conduct for which RDS and SPDC, respectively, are blamed qualifies as unconcerted parallel conduct (see no. 117 above). In this context, it should be borne in mind that RDS is reproached for a pure failure. Milieudefensie et al. do not substantiate that the specified failure of RDS influenced the acts (or omissions) of SPDC regarding the oil spill at issue. See more extensively: Rejoinder, nos. 39-49 and nos. 224-242 below.

124. It already follows from the above that no sufficient legal connection can be involved, either. In contrast to what the District Court found, the mere circumstance that RDS and SPDC are jointly and severally held liable does not

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[71] 2013 Motion to produce documents, no. 86.

indicate sufficient legal (and factual) connection.[72] As stated before (see nos. 116-117 above), this several liability results from (alleged) liability for the same damage. In and of itself, such several liability does not mean that sufficient connection is involved. After all, in and of itself, the mere fact that two parties are held liable for the same damage does not mean that one of the defendants could foresee that he would be sued together with the other defendant in the court of this other defendant's domicile.

125. Nor do the claims against RDS, on the one hand, and those against SPDC, on the other, have an identical legal basis. The District Court also failed to recognize this in ground 4.6 of the final judgment. Although *tort of negligence* is invoked both against RDS and against SPDC, this is where the similarity ends. At the center of the case against RDS is the question regarding whether RDS had a duty of care in respect of the victims of the oil spill. This is not a subject of discussion in the case against SPDC. None of the other specific torts (*nuisance, trespass to chattel*, and the *Rule in Rylands* v. *Fletcher*) have been invoked against RDS.

126. Nor is there any overlap in respect of the alleged content of the duty of care that was allegedly breached. With regard to RDS, Milieudefensie et al.'s argument is that RDS should have modified its environmental policy and its supervision of SPDC. On the other hand, the reproaches made of SPDC are that it should have maintained the pipeline near Goi better, should have taken more preventive measures against sabotage and should have stopped and cleaned up the oil spill both better and more rapidly.

127. Milieudefensie et al. themselves emphasize that RDS is blamed for a different tort than SPDC and that awarding their claims against RDS does not depend on the question regarding whether SPDC committed a tort:[73]

> "As the Court rightfully found in the judgment in the jurisdiction motion, Dooh et al.'s claims against Shell Plc are based on tort committed by Shell Plc itself, comprising – in the summary of the Court – breach of Shell Plc's duty to exercise due care as the parent company of Shell Nigeria. After all, Shell Plc should have exercised its influence on and control over Shell

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72 See also the Court of Appeal of 's Hertogenbosch 26 November 2013, ECLI:NL:GHSHE:2013:5658, ground 4.4.3.: "although the appellant claims compensation of the same damage from Armas et al. and [the respondent], this is without prejudice to the fact that the Court of Appeal believes that in this case, the close connection between the claim initiated against [the respondent] and the claim against Armas et al. as required in Article 6 (1) of the Brussels Regulation is absent."

73 Reply in the motion to produce documents by virtue of Section 843a DCCP, also containing a change of the claim in the motion dated 8 September 2010, no. 33.

> Nigeria's (environmental) policy to prevent Shell Nigeria from inflicting the damage at issue on people and the environment to the extent possible. Shell's argument that Shell Plc can only have committed tort if Shell Nigeria *also* committed tort is therefore incorrect."

And:[74]

> "The responsibility of Shell's head office does not result from the mere fact that its subsidiary did or failed to do something. The plaintiffs hold The Hague liable for what it itself did, or: what it failed to do. I emphasize once again: this is not about piercing or lifting the corporate veil, this is about an independent unlawful act due to negligence on the part of Shell, the parent company."

And:[75]

> "Moreover, the ruling in *Chandler v. Cape* also demonstrates that and why liability on account of negligence on the part of the parent company may be involved, even without the subsidiary being liable. This concerns structural failure: in theory, it is possible that strictly speaking, SPDC satisfies Nigerian legislation; for this reason, it cannot be reproached at the operational level whereas The Hague knew or at least should have realized that structural failure and incalculable environmental damage were involved. Its liability results from this."

128. The claims against RDS are based on an "independent tort" of RDS, which according to Milieudefensie et al. does not depend on the answer to the question regarding whether SPDC can be blamed for anything, whether RDS was aware of the circumstances surrounding the oil spill at issue and whether the breach of the duty of care for which RDS is blamed resulted in the damage allegedly caused by the oil spill at issue.

129. It is obvious that this argument is not supported in Nigerian law (or in any law whatsoever). Liability on the part of RDS in any event requires that the alleged breach of a duty of care resulted in the oil spill near Goi on 10 October 2004. However, this is irrelevant for assessing the jurisdiction by virtue of Section 7 (1) DCCP. It is up to Milieudefensie et al. to contend (and if necessary prove) that there is sufficient connection. Milieudefensie et al. argue that RDS is liable on account of its know-how and knowledge of the situation in the Niger Delta in general, irrespective of whether RDS was also aware of the oil spill at issue, irrespective of whether SPDC committed a tort in this respect and irrespective

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74 Written pleadings of Milieudefensie et al. dated 11 October 2012, no. 163.

75 Written pleadings of Milieudefensie et al. dated 11 October 2012, no. 198.

whether RDS' breach of a duty of care resulted in the oil spill at issue. In view of those arguments, no sufficient connection is involved.

130. In addition, it was not foreseeable for SPDC that it would be summoned together with RDS to appear before the Dutch court in respect of this oil spill. As 'operating company', SPDC is responsible for operational affairs related to oil production and oil transport, including oil spills like the one near Goi of 10 October 2004. As stated before, RDS is not involved in this in any way whatsoever. Superfluously, this is also demonstrated by the fact that when RDS received Milieudefensie et al.'s notices of liability, RDS had to check with SPDC regarding what this was about.[76]

131. In this connection it is relevant that, as stated before, in the *Painer* ruling the ECJ found that in answering the question regarding whether the connection criterion of Article 6 (1) of the Brussels Regulation is satisfied, it may be relevant whether or not the defendants acted independently of one another.[77] This finding is understandable. If two parties acted independently of one another, they will be unable to foresee that they will be summoned to appear before the same court for facts with which one of the parties was not even familiar. It may be clear from the above that where the case at issue involves three oil spills, SPDC acted independently of RDS. As stated before, prior to these proceedings RDS was not even aware of these oil spills.

132. Thus, SPDC could not and was not required to allow for the fact that it would be summoned to appear before the Dutch court. The District Court wrongfully assumed the contrary based on the finding that "for quite some time, there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent company on several occasions" (ground 4.5 of the final judgment). The trend referred to by the District Court – assuming such a trend even exists – does not say anything about the question regarding whether it was foreseeable for SPDC that it would be summoned together with RDS to appear before the Dutch court in connection with the oil spill near Goi of 10 October 2004. This was not foreseeable for SPDC. As far as SPDC knows, RDS was not and is not involved in operational affairs such as this oil spill and that under the applicable Nigerian law, RDS is not liable for this oil spill. How could SPDC have foreseen that RDS would be held liable for this oil spill and in this connection that it would be co-summoned before the Dutch court?

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76 See, for example, Exhibit A-2 of Milieudefensie et al. (letter from RDS dated 20 June 2008 in response to the notice of liability of 8 May 2008).

77 ECJ 1 December 2011, *NJ* 2013/66 (*Painer/Standard*), paragraph 83.

133. Moreover, SPDC was and is not familiar with an international trend that based on a jurisdiction rule that is similar to Article 6 (1) of the Brussels Regulation or Section 7 (1) DCCP, the foreign (sub-) subsidiary in question is co-summoned to appear before the court of the country where the parent company is domiciled. The District Court also refers to an article by Enneking in NJB 2010, pp. 400 to 406, but this does not infer, either, that it was foreseeable for SPDC that it would be summoned together with RDS to appear before the Dutch court. In this regard, that article – which dates from a few years after the Initiatory summons – only says:[78] "The claims are principally directed against the parent company of the multinational, even though in most cases, in addition to the parent company, various other group companies are also sued." SPDC was unable to infer from that sentence that it should have allowed for the fact that it might be summoned to appear before the Dutch court, even apart from the fact that SPDC is not familiar with the contents of the NJB. Even apart from this, SPDC is not familiar with proceedings in which a foreign subsidiary has been summoned to appear before a court in a European country by virtue of a jurisdiction rule that is similar to Article 6 (1) of the Brussels Regulation or Section 7 (1) DCCP.

134. The District Court also finds that the claims against RDS and SPDC do not have a different legal basis, because the *tort of negligence* is invoked against them both. As stated before (see nos. 125-126 above), the legal basis is not identical in the case at issue. Apart from this, the requirement of foreseeability must always have been satisfied if the Dutch court is to have jurisdiction over SPDC by virtue of Article 7 (1) DCCP (see no. 111 above). In the case at issue, this requirement has not been satisfied.

6.6 Abuse

135. As is true for each (procedural) authority, the jurisdiction by virtue of Section 7 (1) DCCP can also be abused. Abuse of Section 7 (1) DCCP occurs if the claim against the anchor defendant (meaning the defendant who is domiciled in the Netherlands or over whom the Dutch court otherwise has jurisdiction) is initiated for the exclusive purpose of creating jurisdiction in respect of the co-defendant. This intention can *inter alia* be demonstrated if it is obvious that the claim against the anchor defendant is certain to fail.[79]

136. As stated before, it is obvious that the claims against RDS are certain to fail, because they have no basis in Nigerian law. This means that Milieudefensie et al. are abusing Section 7 (1) DCCP by summoning SPDC to appear before the

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78 L.F.H. Enneking, Aansprakelijkheid via '*foreign direct liability claims*', NJB 2010/7, p. 404.

79 See Advocate General Strikwerda's opinion, no. 18, for HR 23 February 1996, *NJ* 1997, 276 (*Blue Aegean*).

Dutch court based on a writ of summons with claims against RDS that are certain to fail.

137. In the event that under the circumstances of this case, no basis for the claims of Milieudefensie et al. against RDS can be designated in Nigerian legislation or Nigerian case law, summoning SPDC before the Dutch court qualifies as abuse. This must be assessed according to the applicable Nigerian law, regardless of whether according to the Initiatory summons, Milieudefensie et al. acknowledged which law applies. After all, an objective review is involved in this connection. See with regard to the anti-abuse provision of Article 6 (2) of the Brussels Convention: Advocate General Strikwerda's opinion, no. 17, for HR 20 September 2002, *NJ* 2005, 40:

> "The Court of Appeal correctly found that Instala's and/or Delbouw's intention to oust the jurisdiction of the competent court over Siplast must be demonstrated by objective circumstances. Apart from the difficulty in determining what occurred in the mind of the parties involved, a criterion stipulating that the actual intentions of the applicant and/or the defendant in the anchor proceedings are determined is too uncertain to establish jurisdiction. Cf. the opinion of Advocate General Darmon, no. 7, for ECJ 27 September 1988, case 189/87 (*Kalfelis/Bank Schröder*), ECP 1988, p. 5565, *NJ* 1990, 425 with commentary from JCS, in connection with the (unwritten but in the *Kalfelis* ruling accepted) abuse exception to the jurisdiction rule of Article 6, preamble and (1):
>
> > 'A subjective criterion, which would involve trying to decide whether or not the plaintiff was trying to deny any of the defendants the right to be sued in the court which would normally have jurisdiction, would be difficult to apply in practice. In any event, it must be possible to determine the jurisdiction based on objective rules. Legal certainty would be poorly served by an analysis, as delicate as it would be uncertain, of the plaintiff's intentions.'
>
> It is required, but also sufficient, that the circumstances demonstrate that initiating the original claim can only have been done for the purpose of ousting jurisdiction of the court that according to the convention has jurisdiction over the party summoned in the third party proceedings."

138. Thus, it is irrelevant whether of nor Milieudefensie et al. sought to hold RDS liable for the oil spill near Goi of 10 October 2004. Jurisdiction of the Dutch court does not depend on the plaintiff's subjective state of mind. The only issue is to determine that according to the filing of claims against RDS without a proper basis in the applicable law, assessed according to objective standards, Milieudefensie et al. are abusing the jurisdiction basis of Section 7 (1) DCCP.

139. In ground 3.2 of the interlocutory judgment in the jurisdiction motion, the District Court found that first and foremost, abuse of procedural law can only be assumed very rarely, in particular if a claim is based on facts and circumstances that the plaintiffs knew or should have known were (obviously) incorrect or based on arguments that the plaintiffs should have realized in advance had no chance of success (whatsoever) and thus were completely unsound. In that connection, the District Court refers to the ruling HR 29 June 2007, *NJ* 2007, 353. According to the District Court, these requirements have not been satisfied, because SPDC acknowledged that the corporate veil may be pierced under specific circumstances and it has been insufficiently advanced or demonstrated that facts and circumstances are involved which the plaintiffs knew or should have known were obviously incorrect (ground 3.3; see also ground 4.4 of the final judgment).

140. (According to the ruling HR 29 June 2007, *NJ* 2007, 353 cited by the District Court), the criterion used by the District Court is the criterion that generally applies in the scope of answering the question of whether initiating proceedings constitutes abuse of procedural law. The Supreme Court repeated that criterion in the ruling HR 6 April 2012, *NJ* 2012, 233, in which it found that in view of the right to access to the court that is, in part, safeguarded by Article 6 EHRC, the court should adopt a reticent stance in assuming abuse of procedural law or a tort by initiating proceedings. A decisive point of view in the reticent stance underlying the criterion formulated by the Supreme Court in the previously mentioned rulings of 2007 and 2012 is that in principle, the party involved may not be refused access to the court, not even if he presents a case that is very unlikely to succeed.

141. The criterion formulated by the Supreme Court does not apply in the case at issue. The previously mentioned principle of right of access to the court applies in the event that a defendant who invokes his interest is not unnecessarily harassed with proceedings that are certain to fail. In that case, the criterion formulated by the Supreme Court and applied by the District Court in the case at issue does indeed apply. However, this is not the case in the event that the defendant invokes abuse of procedural law in view of other interests.[80] The latter is the case here.

142. In the case at issue, the right to access to the court is not at issue. After all, if the invocation of abuse of procedural law is accepted, this will not result in Dooh and the alleged victims of the oil spill (whose interests Milieudefensie claims to represent) being denied access to the court. The invocation of abuse

[80] The fact that depending on the precise procedural context, in specific situations a less strict abuse of procedural law criterion may apply follows from the Opinion of A-G Huydecoper, no. 27, for the ruling HR 29 June 2007, *NJ* 2007, 353.

of procedural law is only made in the scope of the question regarding the international jurisdiction of the Dutch court over SPDC. The only consequence of accepting the invocation of abuse of procedural law is that SPDC cannot be subjected to the opinion of the Dutch court, but can be subjected to the opinion of the Nigerian court, of course. Moreover, with regard to the claims against RDS, it is an established fact that the Dutch court has jurisdiction over those claims.

143. Shell is not interested in a finding that Milieudefensie et al. committed tort in respect of RDS in order to claim compensation, for example in the form of an order to pay the realistic costs of the proceedings. It is sufficient to establish that as a result of the abuse of procedural law, the Dutch court has no jurisdiction over the claims against SPDC.

144. Thus, in assessing SPDC's invocation of abuse of Section 7 (1) DCCP, there is no reason to exercise the restraint that is appropriate in the situation in which access to the court is at issue.

7 MILIEUDEFENSIE'S CLAIMS ARE INADMISSIBLE AND DOOH DID NOT PROVE HIS RIGHT OF ACTION

7.1 Introduction

145. In section 7.2 it is argued that Milieudefensie's claims by virtue of Section 3:305a DCC in the main action are inadmissible. For that reason, its claims by virtue of Section 843a DCCP are inadmissible, as well. Moreover, Milieudefensie can only claim the production of documents regarding a legal relationship to which it is a party, while in any event no tort has been committed against Milieudefensie (cf. ground 4.40 of the District Court's final judgment).[81]

146. Section 7.3 explains that Eric Dooh must first prove that his father Dooh has a right of action in the main action. In the absence of such right of action, Eric Dooh does not have any legitimate interest in his claim for the production of documents.

147. The 305a defense that Shell puts forward against Milieudefensie is an inadmissibility defense. The other defenses are defenses on the merits, with the proviso that those defenses can be assessed without any substantive examination of Milieudefensie et al.'s claim in the motion. The following is further pointed out regarding these defenses.

148. In this motion, Milieudefensie and Eric Dooh will first have to explain that in the main action, they are each entitled to a right of action regarding the alleged tort committed by Shell. The party who fails to do so is not entitled to the production of documents that are allegedly required to substantiate the claims in the main action, either. After all, in that case the requirement that the party in question is a party to the legal relationship to which the claim by virtue of Section 843a DCCP pertains is not satisfied, or at least he or she lacks the required legitimate interest to invoke Section 843a DCCP.

149. In addition, the dismissal of the claim for the production of documents of one of the plaintiffs means that the claim for the production of documents of the other plaintiff must also be dismissed. This follows from the fact that the plaintiffs elected to be represented by the same attorney. If Milieudefensie is not entitled to access to documents, but Eric Dooh's claim for the production of documents is awarded, Milieudefensie would nevertheless obtain access to documents "by the backdoor". Given that Milieudefensie and Eric Dooh are represented by the

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81 For this defense, see the documents in the first instance: Defense in the Motion to produce documents of RDS and SPDC, nos. 42-64; Rejoinder in the Motion to produce documents of RDS and SPDC, nos. 89-92; Defense in the Motion to produce documents of SPNV and Shell Transport, nos. 95-99; Rejoinder in the Motion to produce documents of SPNV and Shell Transport, nos. 115-119.

same attorney, inspection by (the attorney of) Eric Dooh of documents to which access is granted will automatically lead to inspection by (the attorney of) Milieudefensie. That is unacceptable if the Court of Appeal rules that Milieudefensie is not entitled to access to documents. The same is true if Eric Dooh's claim for the production of documents is inadmissible, of course. In that case, Eric Dooh should not obtain access to documents because Milieudefensie's claim for the production of documents is awarded.

150. Given that Milieudefensie and Eric Dooh are represented by the same attorney, the above means that their claims for the production of documents can only be awarded if both Milieudefensie and Eric Dooh can derive a right to the production of documents from Section 843a DCCP. If the both of them do not have a right to access to documents, the claim of each of them must be dismissed.

151. The same applies *mutatis mutandis* with respect to Oguru and Efanga (the appellants in the cases with numbers 200.126.804 and 200.126.834), as well as Akpan (the respondent in the appeal with case number 200127813-0 initiated by Shell against the District Court's final judgment), who are all also represented by the same attorney. This even constitutes an independent reason to dismiss Milieudefensie et al.'s claims for the production of documents in all cases. If the claims would be awarded, documents would become available to Akpan, even though it has not been established that he has a legitimate interest in access. Although Akpan is not a party to these proceedings, the fact that in parallel appeal proceedings, he is represented by the same attorney as Milieudefensie et al. means that if it were to be found in this motion that Milieudefensie et al. are entitled to access to specific documents, Akpan will also get access to those documents "by the backdoor". Akpan could use that knowledge in his defense against Shell's appeal, or possibly for a cross appeal. However, Akpan did not initiate a motion to produce documents; thus, the Court of Appeal cannot establish in respect of Akpan whether he has a legitimate interest in access to documents. Under those circumstances, it is unacceptable that he nevertheless should become aware of documents via (the attorney of) Milieudefensie et al. to which Milieudefensie et al. claim access in this motion. For that reason alone, Milieudefensie et al.'s claims for the production of documents must be dismissed in full.

7.2 Milieudefensie's claims by virtue of Section 3:305a DCC are inadmissible

152. Milieudefensie's claims are based on Section 3:305a DCC, both in the main action and in this motion. However, Milieudefensie's claims in this motion (and in the main action) are inadmissible, because Section 3:305a DCC does not

apply, or because Milieudefensie does not satisfy the requirements of Section 3:305a DCC. Shell will explain this below.

Section 3:305a DCC does not apply; Nigerian law does not allocate any class action right to Milieudefensie

153. In the first instance, Shell argued that Milieudefensie's claims by virtue of Section 3:305a DCC are inadmissible, because this section does not apply in the case at issue. Milieudefensie's authority to initiate a class action is a substantive law question that must be assessed according to the *lex causae*, in this case Nigerian law. However, Nigerian law does not offer any basis for a class action for the interests of others like the one initiated by Milieudefensie in these proceedings.[82] Thus, Milieudefensie's claims are inadmissible. The District Court failed to recognize this by ruling in the interlocutory judgment of 14 September 2011 (ground 4.4) and the final judgment (ground 4.12) that Section 3:305a DCC is a rule of Dutch procedural law. To this end, the District Court *inter alia* finds that the parliamentary history of Section 3:305c DCC allegedly demonstrates that the legislator designates Section 3:305a DCC as a rule of Dutch procedural law. However, this is not demonstrated by that parliamentary history, including not at the location that the District Court refers to in ground 4.4 of the interlocutory judgment of 14 September 2011. The District Court's finding is also otherwise incorrect for the reasons that Shell already put forward on this point in the first instance and to which it refers.[83]

154. Even if the Court of Appeal were to assume that Section 3:305a DCC is a rule of Dutch procedural law, Milieudefensie is still not a party to the legal relationship to which the claim by virtue of Section 843a DCCP pertains. After all, according to substantive Nigerian law, no tort has been committed against Milieudefensie, as the District Court rightly found in the final judgment.[84] For this reason alone, Milieudefensie is not entitled to the production of documents (see no. 145 above).

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82 See the Defense of RDS and SPDC, nos. 90-91; Defense in the Motion to produce documents of RDS and SPDC, no. 37 (with Exhibit 21, legal opinion of Professor F. Oditah QC dated 14 June 2010, nos. 36-48); Rejoinder in the Motion to produce documents of RDS and SPDC, no. 53; Defense of SPNV and Shell Transport, nos. 112-114; Rejoinder in the Motion to produce documents of SPNV and Shell Transport, no. 85; Written pleadings of Shell dated 19 May 2011, no. 50.

83 See the Defense of RDS and SPDC, nos. 85-89; Defense in the Motion to produce documents of RDS and SPDC, no. 36; Rejoinder in the Motion to produce documents of RDS and SPDC, nos. 53-62; Defense in the Motion to produce documents, nos. 108-111; Defense in the Motion to produce documents of SPNV and Shell Transport, nos. 71-80; Rejoinder in the Motion to produce documents of SPNV and Shell Transport, nos. 86-91; Rejoinder, no. 53.

84 Final judgment, ground 4.40.

Effective legal protection is not served by Milieudefensie's action

155. The Parliamentary History of Section 3:305a DCC demonstrates that there is only room for an action by virtue of Section 3:305a DCC if this results in more effective legal protection:[85]

> "In Supreme Court case law, the question regarding whether more effective and/or efficient legal protection can be obtained by means of the class action plays an important role in the admissibility. I believe that this is the added value that this form of litigating offers compared to individual dispute resolution. If a class action does not offer any advantage over litigating in the name of the interested parties themselves in a concrete situation, preference should be given to the latter action. After all, this is a deviation from the normal rule of civil procedural law to the effect that you represent your own interests and that other parties cannot do so without your permission. In principle, the other party is entitled to be sued by the party whose interests are, in fact, at issue in the proceedings."

156. This has been explicitly confirmed in the Parliamentary History to the recent modification of Section 3:305a DCCW:[86]

> "In this connection, the parliamentary history to Section 3:305a DCC referred to the alternative character of the class action right. In the event that an individual action, whether or not by means of documents appointing a representative *ad litem*, can be easily realized, initiating a class action is not the obvious path. The explanatory memorandum emphasized that if a class action does not offer any advantage over litigating in the name of the interested parties themselves, there is no room for initiating a class action."

157. In this case, litigation by Milieudefensie offers no advantage whatsoever over litigation by the interested parties themselves; thus, this does not lead to more effective legal protection. All of Milieudefensie's claims (including the claimed declaratory judgment) could have been initiated by one or more representatives of the Goi community on behalf of the entire community. Normally, in Nigeria, proceedings like the ones at issue are conducted by a number of members of the community in question, for themselves and on behalf of the other members of that community, by means of a *representative action.* Under Dutch law, as

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[85] See the Explanatory Memorandum, Dutch Lower House 1991-1992, 22 486, no. 3, pp. 22-23. Cf. Dutch Upper House 1993-1994, 22 486, no. 103b, pp. 1 and 3.

[86] Dutch Lower House 2011–2012, 33 126, no. 3, pp. 6-7. The modified Section 3:305a DCC took effect on 1 July 2013.

well, one or more members of the Goi community could act on behalf of the community by means of documents appointing a representative *ad litem*.

158. Accordingly, the interests of the Goi community could have been explicitly defended by (representatives of) the community itself. However, for reasons of their own, they failed to do so. It is not clear why in these proceedings Milieudefensie should represent the role that (representatives of) the Goi community could have played. Let alone that this could achieve more effective legal protection than if one or more members of the Goi community would do so. The members of the Goi community themselves must be deemed to be able to represent their interests better than Milieudefensie. The fact that the largest part of Dooh's claims also regard the general interest of the Goi community and the fact that Dooh acts as plaintiff in these proceedings demonstrates that individual members of the Goi community are most certainly capable, not only of representing their own interests, but also of representing those of the Goi community in general in proceedings like the ones at issue. This means that Milieudefensie being a party to these proceedings does not offer any advantage over litigating in the name of Dooh and possibly a number of other individual members of the Goi community and does not result in more effective legal protection. With this state of affairs, there is no room for a claim of Milieudefensie by virtue of Section 3:305a DCC and the District Court's decision on this point cannot be maintained.

159. In the final judgment, the District Court found as follows in this regard:[87]

> "In the statement of rejoinder and during the pleadings, Shell et al. pointed out that there is no room for a class action if the interests of the persons who are represented in the class action are not sufficiently safeguarded. According to Shell et al., this situation occurs because Milieudefensie fails to specify the interests of what specific other people it is representing and because Milieudefensie allegedly has insufficient knowledge of the extremely complex situation in Nigeria. The District Court also ignores this argument. Milieudefensie moves that Shell et al. are ordered to take a number of measures to reduce the risk of oil spills near Goi in Nigeria and to minimize the results of oil spills. The District Court fails to see that this could contravene the interests of Nigerian citizens who may be affected by oil spills."

160. The finding that Milieudefensie's claims are admissible because it is not clear how Milieudefensie's claims could contravene the interests of Nigerian citizens who may be affected by oil spills, is incorrect. Firstly, as set out in no. 155 above, Milieudefensie being a party to these proceedings must lead to *more*

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87 Final judgment, ground 4.14

effective protection of the interests of the people affected by the oil spill at issue in these proceedings. The admissibility of Milieudefensie's claims must be assessed based on that criterion, not based on the – much less stringent – criterion of whether Milieudefensie being a party to these proceedings *contravenes* the interests of the people whose interests Milieudefensie claims to represent, as the District Court did. Secondly, the criterion used by the District Court is far too broad: these proceedings involve the interests of the people who were affected by the oil spill near Goi in October 2004. In its finding on this point, the District Court incorrectly started from the interests of "the Nigerian citizens who may be affected by oil spills". However, that is incorrect. After all, in these proceedings Milieudefensie claims that it represents the interests of people who were affected by the oil spill near Goi in October 2004.

161. Not only does Milieudefensie's action fail to result in more effective legal protection of the interests of the people whose interests Milieudefensie claims to represent, it is even extremely doubtful whether their interests are sufficiently safeguarded by Milieudefensie's class action. According to the Explanatory Memorandum to the recent modification of Section 3:305a DCC, this is an important reason for not allowing a class action:[88]

> "The question regarding whether or not a class action sufficiently safeguards the interests of the persons involved can only be answered for each specific case. Two central questions that have to be answered in the event of a challenge are the extent to which the persons involved ultimately benefit from the class action if the claim is awarded and the extent to which the persons involved may rely on the fact that the claiming organization has sufficient know-how and skills to conduct the proceedings. In that scope, a number of factors can be mentioned that can generally play a role. For example, attention can be paid to the other work that the organization performed to promote the interests of aggrieved parties or the question regarding whether in the past, the organization has actually been shown to be capable of realizing its own objectives. Another indication may be the number of aggrieved parties that is affiliated with or a member of the organization and the question regarding the extent to which the aggrieved parties themselves support the class action. (…) With regard to an event that resulted in many duped parties, whether or not the organization that acted as a discussion partner not only represented the party (parties) responsible for the event but also, for example, the government may be an indication, as well. Acting as mouthpiece in the media may be another indication. In answering the question of the extent to which the persons involved ultimately benefited from the class action

[88] Dutch Lower House 2011–2012, 33 126, no. 3, pp. 12-13.

> initiated against a foreign defendant, it is very important whether a judgment in favor of the plaintiff can actually be enforced."

162. Reviewed based on the circumstances of the case at issue, the conclusion is that the interests Milieudefensie claims to represent are insufficiently safeguarded with this action. As stated before, Dooh and the members of the Goi community know perfectly well what their interests are and how they can best defend those interests. In any event, Dooh and the Goi community must be deemed to be better able to do so than Milieudefensie. Measured based on the standards referred to in the above quote from the Parliamentary History, it is also demonstrated that the interests of the people involved are insufficiently safeguarded at Milieudefensie. Milieudefensie is a Dutch environmental organization that does not have any knowledge of and experience with the (extremely complex) situation in Nigeria. In addition, apart from the subject proceedings, Milieudefensie has never taken any action to look after the interests of Nigerians in the vicinity of Goi. Moreover, to Shell's knowledge, not a single Nigerian in the vicinity of Goi is a member of Milieudefensie. In as far as any Nigerians in the vicinity of Goi are members of Milieudefensie, this will undoubtedly have occurred in the scope of the lawsuit at issue. In general, it is hard to imagine that Nigerian citizens would become members of Milieudefensie, all the more so given that Nigeria has a sister organization of Milieudefensie: ERA.[89] If any interest group could represent the interests of the Goi community, it is far more obvious that ERA rather than Milieudefensie would do so; as a Nigerian organization, ERA must be deemed to have far more knowledge of the local situation in Nigeria in general and around Goi in particular.

163. In addition, in respect of Milieudefensie's claims against SPDC: ultimately, the people whose interests Milieudefensie claims to represent will not benefit from any declaratory judgment to be obtained by Milieudefensie in these proceedings. In and of itself, this is sufficient reason for not allowing a class action. This is demonstrated by the Parliamentary History as set out in no. 161 above:

> "In answering the question of the extent to which the persons involved ultimately benefit from the class action initiated against a foreign defendant, it is very important whether a judgment in favor of the plaintiff can actually be enforced."

164. The declaratory judgment that Milieudefensie claimed in respect of SPDC cannot form any basis in the Netherlands for actions for damages by individual members of the Goi community. After all, the Dutch court will not have

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89 See the Defense, no. 104.

jurisdiction in respect of an action by an individual interested party against SPDC in the Netherlands based on a possible declaratory judgment to be obtained by Milieudefensie to the effect that SPDC committed tort against members of the Goi community.

165. Moreover, in the interim, the claims for damages following the oil spill near Goi in October 2004 have become time-barred. Under Nigerian law (the law that applies to those claims), the statute of limitations for such claims is five or six years (depending on the laws of the State that apply). This period expired a long time ago. The period was not interrupted. Although it is true that under Dutch law, proceedings by virtue of Section 3:305a DCC interrupt the limitation of the claims for damages (including) in respect of other interested parties, but in this case, Nigerian law applies to these claims – and to the limitation of those claims. Nigerian law does not recognize proceedings like the ones of Section 3:305a DCC and there is no rule that the limitation of claims for damages is interrupted by conducting such proceedings. No other act to interrupt the limitation was performed.

166. All this means that in respect of the claimed declaratory judgment in respect of SPDC, even if this claim would be awarded, ultimately the members of the Goi community will be unable to benefit from this. It will not be possible to litigate against SPDC in the Netherlands due to lack of jurisdiction of the Dutch court; moreover, the claims have become time-barred. With this state of affairs, Shell cannot help feeling that with its action by virtue of Section 3:305a DCC, Milieudefensie had a completely different goal in mind than representing the interests of people, which were violated as a result of environmental contamination caused by the oil spill near Goi on 10 October 2004. Shell believes that the actual goal of Milieudefensie acting in these proceedings is to conduct a campaign against Shell and requesting attention for the situation in Nigeria. Milieudefensie is using these proceedings as an instrument for that campaign. However, Section 3:305a DCC is not designed for such a goal, of course; Section 3:305a DCC is not a campaign instrument, let alone for a campaign that has nothing whatsoever to do with Dutch jurisdiction. Milieudefensie's claims must be declared inadmissible; if not all its claims, than in any event its claims against SPDC.

167. With this state of affairs, there is no room for a class action by Milieudefensie. Shell's right to be sued by the party whose interests are actually at issue in these proceedings should prevail.[90]

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[90] See the Explanatory Memorandum, Dutch Lower House 1991-1992, 22 486, no. 3, pp. 22-23. Cf. Dutch Upper House 1993-1994, 22 486, no. 103b, pp. 1 and 3, cited in no. 155 above.

Milieudefensie cannot use the class action of Section 3:305a DCC to represent a purely local Nigerian interest

168. The interest that Milieudefensie claims to represent in these proceedings is a purely local Nigerian interest that has no ties whatsoever with Dutch jurisdiction. The oil spill at issue in these proceedings only has consequences in the immediate vicinity of Goi, Nigeria. Section 3:305a DCC is not intended to enable a Dutch interest group to request protection for such a purely local foreign interest, which – moreover – has no ties whatsoever with Dutch jurisdiction. All claims in these proceedings regard a limited geographical area in Nigeria and the people who might have an interest in these claims are residents of that area. This has nothing to do with Dutch jurisdiction. In that light, it is not clear why Milieudefensie should nevertheless be able to represent those interests in Dutch proceedings. Thus, the finding of the District Court that there are insufficient reasons to assume that local environmental damage abroad allegedly falls outside the scope of Section 3:305a DCC[91] is incorrect.

Milieudefensie's charter is insufficiently specific and Milieudefensie develops insufficient actual work

169. Milieudefensie's claims are also inadmissible in these proceedings because Milieudefensie does not represent the interest it claims to represent in these proceedings by virtue of its charter. The description of Milieudefensie's objective in its charter is not only insufficiently specific on this point; Milieudefensie does not develop any actual work regarding the environment near Goi or the Niger Delta in general, either. This means that the requirements stipulated by Section 3:305a DCC in this regard are not satisfied.

170. The description of Milieudefensie's objective in its charter reads:[92]

> "The objective of the association is to contribute to solving and preventing environmental problems and preserving cultural heritage, as well as to aim for a sustainable society, all this at a global, national, regional and local level, in the broadest sense and in the interest of the members of the association and in the interest of the environmental quality, nature and countryside in the broadest sense for current and future generations."

171. This description of the objective is insufficiently distinctive to hold on that basis that protecting the environment near Goi falls within this description. The description of the objective does not say anything regarding acting against environmental pollution in or near Goi. The description of the objective does not

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91 Final judgment, ground 4.13.

92 See Exhibit F.1 of Milieudefensie et al.

even say that Milieudefensie's objective includes fighting environmental pollution in the Niger Delta or even in Nigeria in general. The description of Milieudefensie's objective ("*solving and preventing environmental problems at a global level*") is so broad that it qualifies as insufficiently specific. See in this connection Frenk:[93]

> "Thus, the charter must describe the interests that the organization intends to take up, and it can only represent these interests in law. In my opinion, it should not be possible to easily circumvent this requirement by formulating the objective as broadly as possible. If an objective is not very specific so that it is, in fact, impossible to determine its contents, an organization's claims should be held inadmissible."

172. Thus, the District Court's finding in the final judgment (ground 4.13) in this regard is incorrect. The District Court found:

> "Finally, the description of Milieudefensie's objective in its charter is to promote environmental protection worldwide. Although this is a comprehensive objective, this does not mean that it is insufficiently specific. Nor is there sufficient reason to assume that local environmental damage abroad allegedly falls outside that description of Milieudefensie's objective or outside the scope of Section 3:305a DCC."

173. With this finding, the District Court fails to recognize that an all-encompassing description of the objective, such as Milieudefensie's description of its objective, lacks specificity and is therefore insufficiently distinctive to lead to admissibility under Section 3:305a DCC. If it is held that Milieudefensie's description of its objective is sufficiently specific to act in law to protect the environment near Goi, this would render the requirement of the objective in charters a mere formality.

174. Moreover, the requirement that Milieudefensie also developed sufficient actual work to represent these interests is not satisfied. Milieudefensie does not develop any actual work to protect the environment near Goi or to represent the people who may have been affected by oil spills near Goi.

175. The District Court wrongfully ignored the arguments that Shell put forward in respect of this point in the first instance. The District Court found:[94]

> "In addition, in contrast to Shell et al., the District Court considers conducting campaigns aimed at stopping environmental pollution in the

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93 Frenk, *Kollektieve akties in het privaatrecht*, 1994, p. 126.

94 Final judgment, ground 4.13.

production of oil in Nigeria as a factual activity that Milieudefensie developed to promote the environmental interests in Nigeria."

176. With this finding, firstly, the District Court once again fails to recognize (see no. 160 above) that according to its own arguments, in these proceedings Milieudefensie represents the environmental interests of people that were violated as a result of environmental pollution caused by an oil spill near Goi on 10 October 2004,[95] and (thus) not the much broader interest of "*the environmental interests in Nigeria*". This means that the District Court's finding in this respect is incorrect. Given that Milieudefensie represents the environmental interests of people that were violated as a result of environmental pollution caused by an oil spill near Goi on 10 October 2004, if it seeks admissibility of its claims by virtue of Section 3:305a DCC, Milieudefensie must demonstrate that it developed activities that specifically pertain to the representation of those interests. Milieudefensie did not do so. On the contrary, at best, Milieudefensie undertook activities that regard environmental problems in Nigeria in general. This is hardly surprising in view of the fact that Milieudefensie does not have the interest of the people who Milieudefensie claims to represent in these proceedings in mind as much as conducting a campaign against Shell regarding Nigeria. However, protecting the environment in Nigeria in general is insufficiently specific to declare that Milieudefensie's claims that pertain to environmental interests of people that were violated as a result of an oil spill near Goi in October 2004 are admissible. Nigeria is a large country: its surface area is over 20 times the size of the Netherlands. The Niger Delta alone is 1.5 times the size of the Netherlands. Campaigns directed against stopping environmental pollution in the production of oil in Nigeria in general cannot be considered to be an actual activity that entails the right to conduct an action by virtue of Section 3:305a DCC. Thus, the District Court's finding in this regard is incorrect.

177. Moreover, Milieudefensie's arguments in the first instance cannot support the District Court's conclusion that Milieudefensie conducted "*campaigns aimed at stopping environmental pollution in the production of oil in Nigeria*"[96], and that this constitutes sufficient actual work to hold that its claims by virtue of Section 3:305 DCC are admissible. The activities that Milieudefensie advanced in this scope[97] do not qualify as such. The activities advanced are only protests and the conduct of legal proceedings. In the first instance[98], Shell set out extensively why those protests do not qualify as sufficient actual work.

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95 See the Reply in the 843a DCCP motion in the first instance, no. 131.

96 Final judgment of 31 January 2013, ground 4.13.

97 Reply in the 843a DCCP motion in the first instance, no. 152.

98 See the Rejoinder in the 843a DCCP motion in the first instance, nos. 76 - 81.

178. The actions advanced by Milieudefensie can be broken down into three categories: Milieudefensie allegedly (i) conducted legal proceedings, (ii) published a report on the environmental pollution in the Niger Delta, and (iii) conducted protest campaigns. With regard to the legal proceedings contended by Milieudefensie, these all regard proceedings in Nigeria, in which Milieudefensie is not even a party. Milieudefensie cannot invoke work of other parties to demonstrate that it performed actual work that pertains to the interest that Milieudefensie claims to represent in these proceedings, of course. The work of other parties is not work of Milieudefensie. In addition, merely conducting legal proceedings does not qualify as actual work.[99] In this context, there is a connection with administrative law. The Dutch General Administrative Law Act (Awb - Section 1:2 (3)) stipulates that an interest group like Milieudefensie can challenge a legal decision in the event that the general or group interest it specifically represents according to the description of its objective in its charter and its actual work is involved in the decision in question. In that context, the Administrative Jurisdiction Division already ruled that initiating and participating in legal proceedings does not qualify as actual work in the sense of Section 1:2 (3) Awb.[100] It is not clear why the same should not apply in the scope of admissibility based on Section 3:305a DCC, as well, given that here, too (i) the issue is interest groups that represent a general or collective interest, and (ii) in the scope of admissibility based on Section 3:305a DCC, the requirement is stipulated that the interest group must represent the interests in question according to its charter and must perform actual work in this regard.

179. With regard to the reports referred to by Milieudefensie[101] these only regard Nigeria and the Niger Delta in general to a very limited extent. In any event, these reports do not specifically regard the situation around Goi. In addition, the two reports are based on a single visit in April 2005 by Friends of the Earth England, Wales and Northern Ireland. Thus, this visit was not made by Milieudefensie, but by another organization.[102] As stated before, work

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99 See also the Defense in the 843a DCCP motion in the first instance, par. 39 and the case law mentioned in that paragraph.

100 See ABRvS 1 October 2008, AB 2008, 348, with commentary from Michiels, and for a recent example, ABRvS 20 November 2013, ECLI:NL:RVS:2013:2033

101 This involves the reports "Use your profit to clean up your mess" and "Lessons Not Learned. The Other Shell Report."

102 Again, Milieudefensie has to face the consequences of the fact that it completely fails to distinguish between different (legal) entities. Just as Milieudefensie fails to distinguish between the actions of RDS and SPDC, it likewise fails to do so in respect of its own actions and the actions of other, affiliated organizations. Naturally, Milieudefensie does so (fails to do so) because it is convenient, but lumping (the conduct of) various entities together is inappropriate, of course.

performed by other parties does not qualify as work by Milieudefensie, of course, let alone as sufficient actual work that justifies the admission of Milieudefensie's claims in these proceedings by virtue of Section 3:305a DCC. To the extent that Milieudefensie conducted protest campaigns, again, these do not pertain to the specific problems at issue in this case, namely the consequences of the oil spill near Goi of 10 October 2004. In the campaigns mentioned by Milieudefensie, it only focused on gas flaring and oil pollution in the Niger Delta in general. That is insufficiently specific to qualify as relevant actual work. Nor does unilaterally adopting a position on this qualify as actual work that contributes to combating or preventing the consequences of the oil spill near Goi, the issue in these proceedings. This means that it is clear that Milieudefensie did not perform (sufficient) actual work to represent the interests it claims to represent in these proceedings. Thus, the District Court's finding on this point cannot be maintained and Milieudefensie's claims should still be declared inadmissible.

180. Milieudefensie also contended that through consultations with Shell, it allegedly tried to get Shell to conduct its oil production operations in an environmentally-friendly manner, and that in and of themselves, those consultations already qualify as sufficient actual work.[103] This argument also fails, if only because Milieudefensie fails to clarify the consultations it is referring to in any way. No such dialogue took place between Shell and Milieudefensie. Merely listening to unilateral protest campaigns and points of view does not qualify as "consultations" and certainly does not qualify as actual work, of course. Moreover, the requirement that this actual work must pertain to the representation of the interests that Milieudefensie claims to represent in these proceedings, i.e. the interests of people that have been violated as a result of environmental pollution caused by the oil spill near Goi on 10 October 2004, has not been satisfied.

The Goi community objects to the action by Milieudefensie

181. Fifthly, Milieudefensie's claims must be dismissed because the Goi community objects to Milieudefensie acting in these proceedings. Shell explained this at length in the first instance[104] and submitted a number of letters and statements indisputably demonstrating this.[105] Milieudefensie only submitted a statement on the occasion of the pleadings[106], which according to Milieudefensie demonstrates that the Goi community most certainly supports these

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103 Reply in the 843a DCCP motion in the first instance, no. 152.

104 See, *inter alia*, the Defense of RDS and SPDC, nos. 10-106; Rejoinder in the Motion of RDS and SPDC, nos. 82-88.

105 Exhibits 16, 18, 24, 25 and 36.

106 Exhibit M-04.

proceedings and Milieudefensie acting as plaintiff in these proceedings. As Shell contended during the pleadings[107], there are valid reasons to doubt the accuracy and reliability of this statement. Firstly, the statement says that plaintiff Dooh acts as plaintiff in the subject proceedings and that he is supported by the entire Goi community in this. However, at the time this statement was prepared, at the end of August 2012, Dooh had been dead for over 7 months.[108]

182. Moreover, in any event this statement does not imply that the Goi community supports Milieudefensie acting in these proceedings, since the statement does not pertain to Milieudefensie being a party to these proceedings, but to Dooh being a party to these proceedings. The statement reads:[109]

> "The case in the Netherlands has both Chief Barizaa Macson Tete Dooh and Milieudefensie/Friends of the Earth Netherlands as Plaintiffs. While Milieudefensie/Friends of the Earth Netherlands is representing the general interests of the environment and the litigating communities in the suit, Chief Barizaa Macson Tete Dooh has the right to sue for the losses incurred as a result of the oil spill of 2004 and the consequent inferno. Chief Barizaa thereto has the support of the entire Goi community."

183. Thus, the District Court's finding on this point is incorrect. The District Court found:[110]

> "The statement cited in ground 2.13 above [Exhibit M-04; added by attorney] further demonstrates that the community of Goi no longer objects to Milieudefensie being a party to these proceedings, so that it cannot be held based on Section 3:305a (4) DCC that Milieudefensie's claims are inadmissible."

184. The statement referred to above and the text of the statement cannot support the District Court's conclusion. The statement by no means demonstrates that the Goi community no longer objects to Milieudefensie being a party to these proceedings. This statement clearly seeks to refute Shell's defense that Dooh is not the owner of the fish ponds and surrounding land and therefore does not have any right of action and was prepared for that purpose. After all, the statement refers to the fish ponds and land at issue and claims that "*Chief Barizaa*" is the owner of these fish ponds and that land. The statement further says that Dooh "*has the right to sue for the losses incurred as a result of the oil*

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107 Written pleadings of Shell dated 11 October 2012, no. 124.

108 Dooh died on 14 January 2012, see Exhibit 35.

109 Exhibit M-04, under 1.

110 Final judgment, ground 4.14.

spill of 2004 and the consequent inferno" and that "*Chief Barizaa thereto has the support of the entire Goi community*".

185. It does not follow from the passage of the statement cited above that Milieudefensie is supported by the Goi community. The statement only notes in respect of Milieudefensie that it acts as plaintiff in the subject proceedings and represents the "*general interests of the environment and the litigating communities in the suit*". This is a bare observation that does not mean that the Goi community no longer objects to Milieudefensie being a party to these proceedings. With this state of affairs, the statements that Shell previously submitted must be fallen back on, in particular Exhibit 25, which explicitly sets out on behalf of the Goi community that it objects to Milieudefensie being a party to these proceedings. This explicit objection is not set aside by the statement of the end of August 2012[111].

7.3 Dooh has no right of action

186. In the Initiatory summons, Dooh based his claims on the argument that he is allegedly the (exclusive) owner of lands, plants and trees, and fish ponds that were allegedly damaged by the oil spill of 10 October 2004.[112] The adoption of this position gave Shell a reason to take the position that Dooh must prove his right of action.[113] In Nigeria, in principle, land - and plants and trees, and fish ponds on this land – is owned[114] by the community in question (*'community'*) or the clan in question (*'family'*).[115] Thus, a claim based on that ownership must be initiated by the community (i.e. all members of the community). In practice,

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111 Exhibit M-04.

112 Initiatory summons in the case Milieudefensie et al./SPDC and RDS, nos. 9 and 342, Initiatory summons in the case Milieudefensie et al./SPNV and Shell Transport, nos. 9 and 342.

113 Defense of RDS and SPDC, nos. 107-111, Defense in the Motion to produce documents of RDS and SPDC, nos. 29-33, Rejoinder in the Motion to produce documents of RDS and SPDC, nos. 42-50, Defense of SPNV and Shell Transport, nos. 130-134, Defense in the Motion to produce documents of SPNV and Shell Transport, nos. 64-68, Rejoinder in the Motion to produce documents of SPNV and Shell Transport, nos. 75-84, Rejoinder, nos. 65-78, Written pleadings of Shell dated 11 October 2012, nos. 111-128.

114 Strictly speaking, the land is owned by the Governor of the state in question (Rivers State in the case at issue). This is a technical aspect of Nigerian property law, which is irrelevant for the question regarding Dooh's right of action. See the Rejoinder, no. 77.

115 Defense of RDS and SPDC, no. 108, Defense in the Motion to produce documents of RDS and SPDC, no. 30, Rejoinder in the Motion to produce documents of RDS and SPDC, nos. 29-33, Defense of SPNV and Shell Transport, no. 131, Defense in the Motion to produce documents of SPNV and Shell Transport, no. 65, Rejoinder in the Motion to produce documents, no. 77, Rejoinder, no. 67, Written pleadings of Shell dated 11 October 2012, no. 112.

such a claim is usually initiated on behalf of the community by the "*family head*" or the "*communal head*" in a *representative action*. See also the legal opinion of Professor F. Oditah QC, Supplementary Opinion dated 21 February 2011:[116]

> "26. Where the parties' title is joint, as is the case with family or communal property prior to partition, proceedings to vindicate that title or protect jointly owned property **must** be representative. This is not a mere matter of case management convenience. It is more deeply based. By definition no member of the family or community has a several or divisible interest in family or communal property capable of being protected or vindicated in a personal action. Therefore, the only way in which damage to community or family property can be vindicated is by representative rather than personal proceedings."

187. The above does not apply, of course, if in deviation of the starting point that land is owned by the community in question, an individual member of that community exclusively owns or exclusively possesses a certain portion of land. However, in that case, the person in question must prove how he acquired the (exclusive) title to that land. The ruling of the '*Supreme Court of Nigeria*' in *Ewo* v. *Ani* contains the following finding:[117]

> "If a member of a family claims ownership of family land he or she, the *claimant*, must prove how he or she came to own family land to the exclusion of other members of the family."

188. In view of the above, in the interlocutory judgment of 14 September 2011, the District Court rightly decided that Dooh had to "substantiate that and why Dooh qualifies as (exclusive) owner".[118] However, in the case documents following this interlocutory judgment, Dooh principally argued that he "uses and occupies" those lands, plants and trees, and fish ponds.[119] Only in as far as required to demonstrate his right of action, Dooh contended that he was the (exclusive) owner.

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116 Exhibit 24 with the Defense in the Motion to produce documents of RDS and SPDC in the case against Akpan and Milieudefensie dated 23 February 2011 (docket number 2009/1580, currently case number 200.126.849).

117 *Ewo* v. *Ani*, (2004) 3 NWLR (Pt 861) 611, p. 629H-630A (see Exhibit 2.J with the Defense of RDS and SPDC and Exhibit 5.J with the Defense of SPNV and Shell Transport).

118 Interlocutory judgment dated 14 September 2011, ground 5.4.

119 Reply in the Motion to produce documents in the case Milieudefensie et al./RDS and SPDC, nos. 108-109, Reply, nos. 50 and following, Written pleadings of Milieudefensie et al., nos. 32-52.

189. In the final judgment (ground 4.19), the District Court wrongly found that it has been sufficiently established that at the time the proceedings against Shell were initiated, Dooh "was in any event the co-possessor of two of the fish ponds contaminated by this oil spill and the surrounding land; thus, for this reason Dooh in any event had a right of action at that time".[120] With this finding, the District Court fails to recognize that Dooh initiated his claims *pro se* and not as a member of the Goi community, in part on behalf of the other members of the community. Had Dooh wanted to initiate a claim on behalf of the community, the initiatory summons should have clearly demonstrated this (compare nos. 49 and 50 above). The question to be answered in connection with Dooh's right of action is not whether as member of the community, he was entitled to the land or fish ponds that were contaminated by the oil spill of 10 October 2004; the question to be answered is whether Dooh was the exclusive owner or had exclusive possession of what he continuously refers to as "his" land and fish ponds. The reasons for this are as follows.

190. The District Court failed to recognize that in Nigeria, in principle, the fact that land and plants and trees and fish ponds on that land are owned by the relevant community or clan (*'family'*), demonstrates that the mere circumstance that a member of that community or clan "occupies and uses" part of that land does not mean that he acquires the exclusive title or possession in respect of the community. The fact that the District Court failed to recognize this is demonstrated by its findings in ground 4.18:

> "Dooh submitted that he came in possession of the land and the fish ponds by using and cultivating them. Under Nigerian common law, this can lead to possession of land and fish ponds, as *inter alia* follows from *Mogaji & Ors. v. Cadbury Fry Export Ltd.* (1972), given that in that matter, the Nigerian court found that if a person demonstrates that he cultivates agricultural land, this constitutes sufficient evidence to determine that he is in possession of that land. The same will apply for the fish ponds on the land. In addition, after the interlocutory judgment of 14 September 2011, Milieudefensie et al. furnished the statement described in ground 2.13 above by the Goi community, from which the District Court understands that according to the local community, Dooh in any event had and has the required co-possession of the contaminated land and fish ponds at issue with regard to two of the four locations. Shell et al. failed to submit any concrete facts and circumstances indicating that when he was alive, Dooh should not be considered to be the co-possessor of that land and the fish ponds on that land, in contrast to the previous statement described in ground 2.12, which resulted from conflicts in the Goi community, which has apparently been superseded by the later statement."

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120 Final judgment dated 30 January 2013, ground 4.19.

191. In contrast to what the District Court apparently assumes, the *Mogaji* case did not deal with the question at issue here, namely how a member of a community can obtain exclusive possession of part of the land of the community (meaning to the exclusion of possession by the other members of the community). The fact that as member of the Goi community, Dooh may use part of the land does not mean that he has become the exclusive possessor of the land:[121]

> "proof of user does not necessarily prove exclusive possession for the simple reason that the communal ownership entitles every member of the community to use the land, though quite often the head of the family or community allocates portions of the land to individual members for their use."

192. Dooh has still not contended anything demonstrating that he qualifies as the exclusive (co-) owner or (co-) possessor of the lands, plants and trees and/or fish ponds contaminated by the oil spill of 10 October 2004. In the first instance, Milieudefensie et al. did no more on this point than submit a statement dated 28 August 2012 by members of the Goi community at the very last moment, which includes the following:

> "The four fishponds subject to the suit [see map attached] in The Hague belong to Chief Barizaa. Of the four fishponds in the suit, the two fishponds situated at the right hand side are located in saline mangrove swamps fringing farmlands partly owned by Chief Barizaa. The other two on the left hand are situated in saline mangrove swamps fringing farmlands, partly owned by the Kobani Family."[122]

193. Apart from the fact that there are valid reasons to doubt the reliability of that statement,[123] the statement does not demonstrate on what basis Dooh allegedly

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121 *Ojibah v. Ojibah* (1991) 5 NWLR (pt 191) 296, p. 315-B. See the Supplementary Opinion of Professor F. Oditah QC, SAN of 19 October 2010 (Exhibit 23 with the Rejoinder in the Motion to produce documents of RDS and SPDC), no. 5. This ruling has been submitted as Exhibit 26 with this opinion.

122 Exhibit M-4 of Milieudefensie et al. in the first instance.

123 On the occasion of the pleadings in the first instance, Shell pointed out the following in this connection. Firstly, the statement dates from August 2012, but suggests that Chief Barizaa Dooh is still alive, even though he died in January 2012. Secondly, one year previously, a number of the people who signed the statement signed a "Letter of Authority with the following text: "It has been brought to the community's notice that one Mr Manson Barizaa Dooh, who goes by the appellation of Chief (Deacon) Barizaa M.T. Dooh, has been parading himself in the courts of the Netherlands as the owner of farmlands, swamps, mangroves, fishponds, and other property of the entire community. Please note that the said Mr Manson Barizaa Dooh

acquired exclusive (co-) ownership of the fish ponds in question. Nor is it clear what is meant with the term "owned" in the statement. After all, Dooh was a member of the Goi community and to this extent, the fish ponds were also co-owned by him. However, this co-ownership does not entitle him to any right of action, unless he would act in part on behalf of the other members of the community. However, it has not been demonstrated that Dooh initiated his claims on behalf of the other members of the community, as well. Thus, Dooh exclusively initiated his claims *pro se*. Dooh would only have a *pro se* right of action if he acquired exclusive ownership (or possession) in respect of the community. The fact that the latter occurred cannot be inferred from the statement by the members of the Goi community, let alone can it be inferred when and how this occurred.

194. As long as it has not been proven that Dooh was entitled to initiate his claims in the subject case, Eric Dooh does not have any right of action, either. Apart from the fact that (as explained in no. 48 above) it is not likely that Eric Dooh is Dooh's sole heir, with regard to the land and fish ponds that were contaminated by the oil spill of 10 October 2004, Eric Dooh cannot have inherited more rights from Dooh than the rights to which Dooh was entitled regarding that land and those fish ponds.

195. In view of the above, Shell concludes that Eric Dooh does not have any legitimate interest in his claim in the motion to produce documents. Eric Dooh will first have to demonstrate that and how his father Dooh became the exclusive owner or exclusive possessor of the lands, plants and trees, and fish ponds that have allegedly been damaged as a result of the oil spill of 10 October 2004 near Goi (and that with respect to those rights he is his father Dooh's sole heir). Failing this, he is not entitled to any right of action against Shell; nor is he entitled to the production of documents that he allegedly needs for his claims in the main action.

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has a history of making false and mendacious claims on communal property, one of which resulted in his conviction by a Bori Magistrate court on the 19th of May 1989." See Shell's written pleadings dated 11 October 2012, nos. 124-125 and Shell's Exhibit 36 in the first instance.

8 LEGAL FRAMEWORK OF SECTION 843a DCCP

196. Section 843a DCCP offers a plaintiff the opportunity to obtain access to documents of the party who has these documents in his possession or custody. Section 843a DCCP stipulates six cumulative requirements that a claim for access to documents must satisfy:[124]

1. the plaintiff must have a legitimate interest in the access to the documents; if a party is just interested, this is in no event sufficient[125];
2. the claim must relate to specific documents;
3. the claim must relate to documents that the defendant actually has in his possession;
4. the claim must relate to documents regarding a legal relationship to which the plaintiff or his legal predecessors are a party.

Section 843a (4) DCCP further stipulates that access can be refused:

5. on account of serious reasons; and
6. in the event that the interest of a proper administration of justice is also safeguarded without access.

197. Dutch law does not recognize any general duty to produce documents in the sense that parties to legal proceedings can be required to provide one another all conceivable information and documents. Section 843a DCCP may not be used for *fishing expeditions*.

198. In ground 4.6 of the interlocutory judgment in the motion to produce documents of 14 September 2011, the District Court found as follows in this connection:

> "Section 843a DCCP regards a special duty to produce documents in and out of court. This duty to produce documents serves to ensure that specific supporting documents become available in the proceedings as evidence. In the Netherlands there is no general duty to produce documents for parties to legal proceedings in the sense that as a main rule, they can be required to provide one another all conceivable information and documents. In view of this and to prevent so-called fishing expeditions, allowing a claim based on Section 843a DCCP is bound by several limiting conditions in that section. Firstly, the plaintiff in the motion to produce

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[124] For an explanation of these conditions, see the opinion of A-G Mr Wesseling-van Gent, nos. 2.21-2.25, for HR 29 January 2010, LJN BK 2007, RvdW 2010, 214, and also the District Court of The Hague 2 February 2011, LJN BP4605, ground 3.13. See also the interlocutory judgment of 14 September 2011 in the subject case, ground 4.6, cited in no. 198 below.

[125] See the Parliamentary History of the Code of Civil Procedure, Van Mierlo/Bart, p. 553.

documents must contend and have a *legitimate interest*, in which a legitimate interest must be interpreted as an *evidentiary interest*. An evidentiary interest exists in the event that a supporting document can contribute to substantiating and/or demonstrating a relevant argument that may be decisive for the claims to be assessed, which has been sufficiently specifically substantiated and sufficiently specifically contested. Secondly, the claims must regard "*specific documents*" that – thirdly – the *defendant actually has or can have in his possession*. Fourthly, the *plaintiff in the motion to produce documents must be a party to the legal relationship* to which the claimed specific documents pertain. This also includes the legal relationship that results from a tort. In the event that all these conditions are satisfied, there is nevertheless no requirement to produce any documents if – fifthly – *serious reasons* oppose this or in the event that – sixthly – it may be reasonably assumed that a *proper administration of justice* is also safeguarded without the provision of that information. In the event that a claim to produce documents is not refuted by the other party, Section 24 DCCP applies and the District Court is not authorized to *ex officio* present one or more defenses against this claim and on that basis dismiss the claim."

199. In sections 8.1 and 8.2 below, the requirements of a legitimate interest and the definition of the claimed documents in particular are discussed in more detail. In section 8.3, a few general comments will be made regarding serious reasons as a ground for dismissal.

8.1 Legitimate interest

200. In the first instance, the District Court dismissed Milieudefensie et al.'s claims to produce documents for lack of a legitimate interest in the sense of an evidentiary interest.[126] According to the District Court, in the case at issue, this evidentiary interest is absent, because Milieudefensie et al. insufficiently substantiated their arguments (as regards the facts or in legal terms). For example, according to the District Court, Milieudefensie et al. do not have a legitimate interest in access to documents that shed light on the (maintenance) condition of the pipeline in question, because Milieudefensie et al. advanced an insufficiently substantiated refutation against Shell's substantiated defense that the oil spill was caused by sabotage.[127] The District Court also held that Milieudefensie et al. *inter alia* do not have a legitimate interest in access to documents that could be used to substantiate the argument that RDS, the Koninklijke and Shell Transport had influence on and control over SPDC's allegedly failing environmental policy, because Milieudefensie et al. did not

[126] Interlocutory judgment of 14 September 2011, grounds 4.6, 4.8, 4.9, 4.13, 4.14.

[127] See the interlocutory judgment of 14 September 2011, grounds 4.8-4.9.

offer sufficiently concrete reasons for the fact that under Nigerian law, this argument could lead to liability on the part of RDS, the Koninklijke and Shell Transport.[128]

201. According to Milieudefensie et al., the "definition" of evidentiary interest used by the District Court is too narrow, because the District Court allegedly requires that it be precisely determined how a specific item of evidence will contribute to substantiating a specific argument. However, according to Milieudefensie et al., the circumstances may compel the arguments to be structured in part based on the documentary evidence.[129]

202. Milieudefensie et al.'s argument fails. A plaintiff who claims the production of documents by virtue of Section 843a DCCP must sufficiently demonstrate that and how those documents can contribute to evidence of an argument that he must prove in order to see his claim in the main action awarded. In this scope, the District Court rightly uses the term "evidentiary interest" that is used in literature.[130] A plaintiff is only entitled to the production of documents if he satisfied his duty to contend facts and circumstances, meaning that he presented a sufficiently specific substantiation of the arguments to which the claimed documents pertain, both in legal terms and as regards the facts, in part in light of the defendant's challenge of those arguments.[131] A *legally relevant* argument of the plaintiff must be involved, meaning an argument that can support this plaintiff's claim in the main action. If the plaintiff contends insufficient facts and circumstances to ensure that his claims are awarded, there is no need to furnish evidence; thus, in that case there is no legitimate interest in the production of documents.

203. Section 843a DCCP does not offer the possibility to request access to documents that the party claiming the production of documents merely

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128 See the interlocutory judgment of 14 September 2011, grounds 4.13-4.14.

129 2013 Motion to produce documents, no. 23.

130 Defense in the Motion to produce documents, nos. 9-10; see also J.M. Barendrecht and W.A.J.P. van den Reek, *Exhibitieplicht en bewijsbelang*, WPNR 1994 (6155), p. 741; T.S. Jansen, *"Art. 843a Rv in de ondernemingsrechtpraktijk"*, Tijdschrift voor de ondernemingsrechtpraktijk, 2009/3, pp. 89-91, and B.T.M. van der Wiel, *De rechtsverhouding tussen procespartijen*, dissertation Leiden 2004, p. 52.

131 See the Court of Appeal of The Hague 29 October 2013, ECLI:NL:GHDHA:2013:3941, ground 16, in a copyright infringement case: "The Court of Appeal finds that the claims can in any event be awarded if the plaintiff contended such concrete facts and circumstances that even **in view of the challenge by the other party** and the plaintiff's reaction to this, these may demonstrate a reasonable suspicion of (threatening) infringement, and that the documents to which access is claimed are relevant to (further) substantiate the specified (threatening) infringement and allowing an infringement claim based on this." (emphasis added by attorney)

suspects could support his arguments. The plaintiff must demonstrate that he needs the documents to prove an argument from which the possibility of liability may be inferred based on normal empirical rules.[132]

204. According to Milieudefensie et al.'s arguments mentioned in no. 200 above, a *fishing expedition* is involved in the case at issue: Milieudefensie et al. want access to documents in order to "structure" their arguments based on those documents. In other words, after examining the claimed documents, Milieudefensie et al. want to determine the arguments that they will submit. In so doing, Milieudefensie et al. fail to recognize that – as stated before – they only have a legitimate interest in access to documents after they have satisfied their duty to contend facts and circumstances.

205. Milieudefensie et al. further submit that they have a legitimate interest in the production of documents "*especially because in the judgment of 30 January 2013, the District Court in The Hague established that the plaintiffs failed to demonstrate that SPDC allegedly breached a duty of care in the occurrence and remediation of the oil spills, as well as in cleaning up the pollution*" and that "*the plaintiffs failed to demonstrate that the special circumstances under which a duty of care may fall on RDS according to Nigerian law indeed occurred*".[133] According to Milieudefensie et al., this establishes that they have a legitimate interest in access to documents that will enable them to prove the relevant circumstances.

206. This argument of Milieudefensie et al. also fails. The mere fact that Milieudefensie et al.'s claims have been dismissed does not mean that they allegedly now have a legitimate interest in access to documents, of course. Milieudefensie et al. wrongfully suggest that the District Court dismissed Milieudefensie et al.'s claims, because they were unable to *prove* ("aantonen") their claims. The District Court dismissed their claims because Milieudefensie et al. failed to satisfy their duty to contend facts and circumstances.

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132 See the recent ruling of the Court of Appeal of Arnhem-Leeuwarden 2 July 2013, ECLI:NL:GHARL:2013:4664, ground 2.5. See also the Court of Appeal of The Hague 29 October 2013, ECLI:NL:GHDHA:2013:3941, grounds 16-17, cited in the previous footnote. In this latter ruling, the Court of Appeal finds in ground 17: "Moreover, the Court of Appeal notes that, in view of Article 6 of the Enforcement Directive, the ruling of the Supreme Court dated 26 October 2012, LJN: BW9244 and its ruling (in response to preliminary questions regarding the seizure of evidence in non-IP cases referred to the Supreme Court) dated 13 September 2013, the bar may be lowered even further and it could be sufficient that the legal relationship has been contended and substantiated." Shell understands this finding to mean that a legal relationship that has been *sufficiently substantiated in concrete terms* must in any event be involved.

133 2013 Motion to produce documents, no. 24.

Milieudefensie et al. will first have to satisfy their duty to contend facts and circumstances before they are entitled to the production of documents.

207. In concrete terms, this means that Milieudefensie et al. will first have to indicate what specific arguments they want to use as the basis for challenging the District Court's judgments. As stated before, Shell believes that this must be done by formulating grounds for appeal against the interlocutory judgment in the 2010 Motion to produce documents and the final judgment of the District Court (see nos. 10-19 above). In the unlikely event that the Court of Appeal holds a different opinion, it is pointed out that in the 2013 Motion to produce documents, as well, Milieudefensie et al. contended insufficient facts and circumstances to be entitled to the production of documents. This is further worked out below in the discussion of the different categories of documents that are being claimed.

8.2 Sufficiently specific documents

208. By virtue of Section 843a DCCP, only specific, well-defined documents can be claimed. The documents must be indicated in concrete terms such that the documents that are being claimed are clear to everyone and a review can be conducted of whether the party claiming those documents also has a legitimate interest in this.[134] The plaintiff in the motion to produce documents must indicate why he expects that the documents are relevant for the dispute that has arisen.[135] Thus, he will have to demonstrate sufficiently that and how the documents to which access is being claimed can contribute to the evidence of an argument he must prove to see his claim awarded. It follows from this that Section 843a DCCP does not offer the possibility to request information.

209. As stated before, with regard to the alleged knowledge of and guidance by "the parent company", in the subject motion, Milieudefensie et al. claim access to documents that they also claimed in the first instance (see nos. 245, 255, 263, 270, 279 and 282 below). The difference with the motion to produce documents in the first instance is that this time, Milieudefensie et al. use different designations for the claimed documents and no longer claim access to specific categories of documents. In the 2013 Motion to produce documents, Milieudefensie et al. indicate the claimed documents with English terms that they apparently found in Shell documents or on Shell's website.[136] However, this does not satisfy the requirement that the documents to which access is

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134 See in this regard also the Explanatory Memorandum to the bill to amend the right to access to, a copy of or extract from documents, Dutch Lower House 2011-2012, 33 079, no. 3, p. 6.

135 Dutch Lower House 2011-2012, 33 079, no. 3, p. 10.

136 Cf. the 2013 Motion to produce documents, no. 140.

being claimed this time have been "sufficiently specified" or that this time a legitimate interest in the production of those documents exists.

210. In nos. 79 and following of the 2013 Motion to produce documents, Milieudefensie et al. explain extensively how the Shell Group is allegedly organized, the "*standards* and *manuals*" that are allegedly imposed on the operating companies and how and what must allegedly be reported to "the parent company". Milieudefensie et al. submit that "*[t]he whole system is designed for centrally organizing know-how, on the one hand, and spotting deviations at the earliest possible stage in order to make adjustments in a timely fashion, on the other*".[137] Milieudefensie et al. wrongfully create the picture that as listed holding companies, RDS, the Koninklijke and Shell Transport allegedly determine everything and are even aware of every detail of and exercise control over the operational activities of their group companies. This picture does not correspond to reality. Milieudefensie et al. ignore the distinction between the various Shell companies. None of the documents that Milieudefensie et al. believe imply that "the parent company" has specific knowledge originate from RDS, the Koninklijke or Shell Transport.

211. The result is that a number of the documents to which Milieudefensie et al. are now claiming access to do not exist; in other cases, the claimed documents have been insufficiently defined. This is also worked out in more detail below, in discussing the various categories of documents that are being claimed.

8.3 Serious reasons: confidential documents

212. A number of the claimed documents regards confidential business information, so that there are serious reasons preventing Milieudefensie et al. from being granted access to those documents (Section 843a (4) DCCP).

213. In this connection, in the consideration of interests to be conducted by the Court of Appeal in this scope, Shell's interest in confidentiality must prevail, in view of the fact that the subject proceedings are part of the campaign that Milieudefensie et al. have been conducting against Shell for quite some time and because it is likely that Milieudefensie will want to use the documents that do not specifically pertain to the oil spill at issue for additional campaigns or to initiate legal proceedings against Shell regarding subjects other than the subject oil spill. Not only is Section 843a DCCP not intended for this purpose; it also emphasizes the serious interest that Shell has in protecting the confidential nature of the documents referred to.

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137 2013 Motion to produce documents, no. 82.

9 CLAIMED DOCUMENTS REGARDING THE PARENT COMPANY'S DUTY OF CARE

9.1 General defenses against categories a. through f.

214. Milieudefensie et al. primarily claim the documents mentioned in paragraphs a. to f. in view of their claims against RDS, the Koninklijke and Shell Transport. They want to use those documents to demonstrate "*that the parent company assumed responsibility and that this means that it had a duty of care*".[138] However, Milieudefensie et al. have no legitimate interest in the production of documents in view of their claims against RDS, the Koninklijke and Shell Transport.

215. Firstly, the claims against RDS, the Koninklijke and Shell Transport are certain to fail due to the absence of a legal basis in Nigerian law (see nos. 84-100 above). Briefly summarized: Nigerian case law does not include any case of liability of a parent company based on *negligence* that can offer support for the claims against RDS, the Koninklijke and Shell Transport. Nor can any relevant precedent be found in English case law. The circumstances in *Chandler* v. *Cape* were incomparable to those in the case at issue, even apart from the fact regarding whether the Nigerian court would take that ruling into account. To the extent that the claim for access to documents is made in view of the claims against RDS, the Koninklijke and Shell Transport, it must be dismissed for that reason alone.

216. Secondly, Milieudefensie et al. wrongfully do not distinguish between the various companies. Milieudefensie et al. consistently refer to "the parent company" or the "parent" and submit that this "parent company" is liable, because it allegedly failed to intervene in the situation in Nigeria. Milieudefensie et al. fail to recognize that instead of a single "parent company" there are three different companies: RDS, the Koninklijke and Shell Transport. Milieudefensie et al. fail to specify the basis on which they want to hold which of these three companies liable for what, even though such specification is required, of course.

217. RDS was only placed at the head of the group on 20 July 2005 at the earliest. The documents claimed in paragraphs a. to f. all date from the period 2001-2004. At that time, RDS had not yet been placed at the head of the group. It is not clear how these documents can be relevant for the alleged knowledge of or interference by RDS regarding the situation in Nigeria. Thus, the legitimate interest in access to documents from the period 2001-2004 is absent to the extent that Milieudefensie et al. want to examine those documents in view of their claims against RDS.

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138 2013 Motion to produce documents, no. 144.

218. Before RDS was placed at the head of the group in the scope of the *unification*, the Koninklijke and Shell Transport were the listed parent companies of the Koninklijke/Shell Group ('*Group Parent Companies*'). The Koninklijke and Shell Transport were not part of the Koninklijke/Shell Group. They held the shares in the Group's Holding Companies (the '*Group Holding Companies*'), SPNV and SPCo. Thus, SPNV and SPCo were the top holding companies *within* the group. In turn, they directly or indirectly held the shares in the group companies, including *operating companies* such as SPDC. The shares in SPDC were held by SPCo as Group Holding Company (3.7 billion shares). Because Nigerian law stipulates the requirement that a company has several shareholders, one share was held by SPNV. To the extent that any exercise of influence on SPDC's policy by a "parent company" was involved by means of exercising the rights attached to the shares in SPDC, this guidance was thus conducted by SPCo as Group Holding Company and not by the Koninklijke and Shell Transport as Group Parent Companies (nor by SPNV, which only held one share in SPDC).

219. For this reason alone, the Koninklijke and Shell Transport did not fulfil the role that Milieudefensie et al. ascribes to them. Shell explained all this extensively in the first instance.[139] Shell also indicated that all this was known from public sources; moreover, this also follows from the Group Governance Guide, which Milieudefensie et al. themselves have submitted into the proceedings.[140] In this light, Milieudefensie et al. could have been and can be expected to further substantiate the basis of the alleged liability of the Koninklijke and Shell Transport, in any event in the scope of this new request for the production of documents. They fail to do so. To the extent that the claim for access to documents is made in view of the claims against the Koninklijke and Shell Transport, it must be dismissed due to lack of a legitimate interest for this reason, as well.

220. Moreover, Milieudefensie et al. claim the production of a large number of documents without explaining which documents they are claiming from which company. They must do so to substantiate the legitimate interest. To the extent that Milieudefensie et al. claim the production of documents in view of their claims against RDS, the Koninklijke and Shell Transport, at a minimum they must explain why they have a legitimate interest in access to documents that are solely held by SPDC. Milieudefensie et al. act as if every document somewhere in the Royal Dutch Shell Group may be relevant to substantiate their claims against RDS, the Koninklijke and Shell Transport. That is not true, of course.

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139 See the Defense of SPNV and Shell Transport, nos. 32-48 and 149; and the Rejoinder, nos. 25-52.

140 See the Defense of SPNV and Shell Transport, no. 40.

221. Thirdly, Milieudefensie et al.'s submissions in the 2013 Motion to produce documents regarding the duty of care of the "parent company" cannot lead to the conclusion that they have a legitimate interest in the production of documents in view of their claims against RDS, the Koninklijke and Shell Transport otherwise, either.

222. Milieudefensie et al. claim that they have a legitimate interest in the production of the documents in paragraphs a. to f. because they want to demonstrate that the "parent company" had knowledge in the area of pipeline management, safety and the environment, and that the parent company was aware or should have been aware of the conditions and risks in Nigeria and SPDC's safety and environmental management, and that it "sometimes actively interfered in its subsidiary".[141] Milieudefensie et al. also submit that SPDC "set goals in the area of maintenance and HSE in consultation with the parent company" and that "the parent company was or could have been aware of the conditions near Goi."[142]

223. Milieudefensie et al. insufficiently substantiated these arguments. This means that they do not have a legitimate interest in the production of documents. Their wish to further substantiate these arguments by receiving a large number of internal documents is insufficient in law to justify the production of documents. Milieudefensie et al.'s argument set out in no. 221 above can be broken down into three parts: knowledge, awareness and interference. Shell will briefly address these subjects below.

Knowledge

224. Milieudefensie et al. submit that they want to use the claimed documents to demonstrate that "RDS had superior knowledge of relevant aspects of pipeline management, safety and the environment", so that RDS also had a duty of care.[143] Milieudefensie et al. derive the term "superior knowledge" from the ruling of the English Court of Appeal in *Chandler v. Cape*. As at issue in *Chandler v. Cape*, they are referring to "superior knowledge" compared to the subsidiary in question, in this case SPDC.[144]

225. Milieudefensie et al. fail to provide any well-reasoned substantiation whatsoever for their argument that compared to SPDC, RDS, the Koninklijke and/or Shell Transport had "superior knowledge" of pipeline management, safety and the environment in Nigeria. In the final judgment, the District Court

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141 2013 Motion to produce documents, no. 144.

142 2013 Motion to produce documents, no. 144, (a) and (e), respectively.

143 2013 Motion to produce documents, no. 25. According to no. 28 of the 2013 Motion to Produce Documents, RDS as used in this connection is the "parent company", the generic designation that Milieudefensie et al. use for RDS, the Koninklijke and Shell Transport.

144 See the 2013 Motion to produce documents, nos. 75 and 105.

rightly found that it is not clear why the parent companies allegedly have more knowledge of the specific risks of SPDC's industry in Nigeria than SPDC itself.[145] Milieudefensie et al. do not counter this with any concrete argument in the 2013 Motion to produce documents.

226. In the 2013 Motion to produce documents, Milieudefensie et al. explain extensively how "know-how in the area of the production and distribution of oil is pre-eminently coordinated at the central level by the parent company, including with regard to the oil production in Nigeria."[146] To this end, they quote extensively from "*standards* and *manuals*" that they believe prescribe the use of specific "technologies, materials and methods". The margin of discretion of the *operating companies* is allegedly "very precisely defined by the central guidelines".[147] Milieudefensie et al. add to this that to answer the question regarding whether "*superior knowledge*" as in *Chandler v. Cape* is involved, it is irrelevant whether or not "the *manuals* have a compulsory nature". According to Milieudefensie et al., the issue is that the *manuals* demonstrate that the relevant knowledge in the area of pipeline management, safety and the environment was available at the parent company."[148]

227. This argument already fails to hold because, as Milieudefensie et al. themselves recognize, the "*standards* and *manuals*" they invoke to substantiate the alleged "knowledge of the parent company" do not originate from RDS, the Koninklijke or Shell Transport.[149] Milieudefensie et al. write:[150]

> "The technical standards are managed by the *Technical Standards Group* under the direction of *Shell Global Solutions*. With a company the size of Shell, it is obvious that this know-how development is performed by a separate company, under the overall guidance of the parent company. The development of that know-how does not result in any duty of care for *Shell Global Solutions*, of course. The issue – in *Chandler v. Cape*, as well – is

145 Ground 4.36.

146 2013 Motion to produce documents, no. 78.

147 2013 Motion to produce documents, no. 81.

148 2013 Motion to produce documents, no. 105.

149 Milieudefensie et al. cite a large number of DEPs and HSE Manuals and submit part of these documents. It is not clear to Shell how Milieudefensie et al. managed to get these documents; DEPs and HSE Manuals comprise confidential and sensitive business information. Shell did not examine whether the DEPs and HSE Manuals cited by Milieudefensie are authentic and whether these DEPs and HSE Manuals applied to SPDC at the time of the oil spill at issue. Nor was it necessary to examine this, because for the reasons mentioned in the body text, the DEPs and HSE Manuals do not constitute any evidence of the presence of specific knowledge at RDS, Shell Transport or the Koninklijke.

150 2013 Motion to produce documents, no. 99.

that a parent company is aware of the special risks that a subsidiary runs in respect of a group of parties involved, on the one hand, while it has special know-how that is required to combat those risks and nevertheless fails to intervene, on the other."

228. Milieudefensie et al. apparently feel that all the knowledge present within the group can be attributed to RDS, the Koninklijke and Shell Transport. Otherwise, it is incomprehensible why they offer an extensive explanation based on *Design and Engineering Practices* ("DEPs"), even though they recognize that those documents do not originate from RDS, the Koninklijke or Shell Transport, but from other group companies, such as Shell Global Solutions B.V., Shell International Exploration and Production B.V. ("SIEP") and Shell International Chemicals B.V. However, the applicable Nigerian law does not offer a legal basis for such attribution (nor does Dutch law). Milieudefensie et al. rightfully recognize that the DEPs do not imply any duty of care for Shell Global Solutions B.V. This applies *a fortiori* for RDS, the Koninklijke and Shell Transport. The same is true for the HSE Manuals that Milieudefensie et al. invoke, of course.[151] These HSE Manuals have been drawn up by SIEP. What Milieudefensie et al. mean in this connection by "overall guidance by the parent company" is not clear. In any event, this vague statement cannot be used to attribute all the knowledge present within the group to RDS, the Koninklijke and Shell Transport.

229. The above does not mean that the knowledge present within the group is not shared between the group companies, of course. One example of this is knowledge in the area of building and maintaining pipelines and HSE management. This knowledge is indeed shared by means of DEPs and HSE Manuals. This means that the knowledge present within the Royal Dutch Shell Group was available to SPDC. However, this does not mean that this knowledge originates or originated from RDS, Shell Transport or the Koninklijke. As stated before, as Milieudefensie et al. also recognize, DEPs and HSE Manuals are not and were not drawn up by the listed parent companies, but by other group companies. Moreover, this involves knowledge that is pre-eminently relevant for *operating companies*, such as SPDC. Thus, the DEPs and HSE Manuals do not say anything about the knowledge of the parent companies, let alone do they imply that RDS, the Koninklijke and Shell Transport had "superior knowledge" compared to SPDC of pipeline management, safety and the environment in Nigeria. In *Chandler v. Cape*, in order to assume that the parent company had a duty of care, it was not sufficient that the parent company had "knowledge" of a subject that was relevant for the occurrence of the damage. The issue in *Chandler v. Cape* was "*superior knowledge*". Cape plc., the parent company, "*had superior knowledge*

151 2013 Motion to produce documents, no. 102, with Exhibits N.8 and N.9.

about the asbestos business."[152] In the case at issue, the group's "parent company" does not have any "superior knowledge" compared to SPDC of pipeline management, safety and the environment in Nigeria.

230. Moreover, the DEPs and HSE Manuals do not infer, either, that compared to SPDC, the group companies that prepared these documents allegedly have "superior knowledge" of pipeline management, safety and the environment in Nigeria. Milieudefensie et al. wrongfully assume that the DEPs and HSE Manuals specifically pertain to the challenges that SPDC faces in the scope of the production of oil in Nigeria. The DEPs and HSE Manuals that were submitted do not demonstrate whether SPDC used these documents at the time of the oil spill at issue (even apart from the question of whether these documents are authentic, see footnote 149). Whatever can be said of this, the DEPs and HSE Manuals that Milieudefensie et al. cite have been prepared for use by *operating companies* worldwide. Thus, they are general. Each DEP includes the following on the cover page:

> "The information set forth in these publications is provided to Shell companies for their consideration and decision to implement. This is of particular importance where DEPs may not cover every requirement or diversity of condition at each locality. The system of DEPs is expected to be sufficiently flexible to allow individual Operating Units to adapt the information set forth in DEPs to their own environment and requirements."[153]

231. Thus, the DEPs and HSE Manuals contain guidelines and recommendations that the operating companies in question must work out and modify to the specific situation in which the operating company in question works. The cases at issue deal with a specific oil spill, namely the oil spill near Goi of 10 October 2004. Milieudefensie et al. argue that the oil spill was caused by defective maintenance and that the consequences of the oil spill were allegedly inadequately addressed. Shell contests that argument. The discussion between the parties regarding these subjects focuses on details that occurred in the case at issue, such as the fact that this oil spill was caused by sabotage and, once the oil spill had been detected, the difficulties that SPDC encountered in obtaining permission from the local communities to access the site of the oil spill to close the leak and clean up and remediate the consequences of the oil spill. These problems do not occur elsewhere in the world, or only very incidentally. The DEPs and HSE Manuals do not contain any concrete recommendations or guidelines in this respect.

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152 *Chandler* v. *Cape* [2011] EWHC 951 (QB), per Arden, LJ, para. 75.

153 See p. 2 of Exhibits N3 through N6.

232. As Milieudefensie et al. acknowledge according to their arguments,[154] the operating companies are not required in all cases to simply comply with the guidelines and recommendations in the DEPs and HSE Manuals. As stated before, the operating companies must work out and modify these guidelines and recommendations in concrete terms to the specific situation in which the operating company in question works. In light of this, Milieudefensie et al.'s argument that the "margin for discretion" of operating companies "is very precisely defined by the central guidelines"[155] is incorrect and otherwise also misses its mark. As stated before, not only do the operating companies most certainly have a "margin for discretion", namely in respect of the question regarding how the DEPs and HSE manuals must be applied in the specific circumstances in which the operating company in question works, but, moreover, Milieudefensie et al. – rightfully – do not argue that the guidelines and recommendations are defective. The DEPs and HSE Manuals do not contain any recommendations for defective maintenance procedures or defective policy to tackle the consequences of oil spills. It is not clear that the DEPs and HSE Manuals nevertheless can be used to substantiate the liability of RDS, the Koninklijke and Shell Transport.

233. The above means that Milieudefensie et al. also insufficiently substantiated that the "parent company" could foresee that "SPDC would rely on the parent company for the manner in which it would have to deal with the challenges that it faced in the Niger Delta and Ogoniland."[156] This is not what SPDC did. Nor was this required, because it is not the "parent company", but SPDC itself that has "*superior knowledge*". Milieudefensie et al. apparently take this position to focus their argument on the criteria developed by the English Court of Appeal in *Chandler v. Cape*. Milieudefensie et al. fail to recognize that the case at issue is incomparable to *Chandler v. Cape*.

Awareness

234. Milieudefensie et al. submit that they want to use the claimed documents to demonstrate that "RDS was aware or should have been aware of the circumstances in Nigeria, so that RDS was also under a duty of care".[157] They also submit that "the parent company was aware or could be aware of the

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154 2013 Motion to produce documents, no. 81.

155 2013 Motion to produce documents, no. 81.

156 2013 Motion to produce documents, no. 123.

157 2013 Motion to produce documents, no. 25. According to no. 28 of the 2013 Motion to produce documents, RDS as used in this connection refers to the "parent company", the generic designation that Milieudefensie et al. use for RDS, the Koninklijke and Shell Transport.

conditions near Goi."[158] It is pointed out that Milieudefensie et al. believe that the fact that the "parent company" was aware of the "specific circumstances of this oil spill near Goi" is not a decisive factor.[159] Milieudefensie et al. blame the "parent company" for failing to intervene, even though it was aware of the systematic failures of SPDC. According to Milieudefensie et al., oil spills with the magnitude of the oil spill near Goi are "centrally monitored" and the "parent company" was thus aware of the special risks that were being taken in the Niger Delta.

235. This position by Milieudefensie et al. also fails. RDS, the Koninklijke and Shell Transport have never been informed of the oil spill near Goi of 10 October 2004. Shell explained this repeatedly in the first instance.[160] Milieudefensie et al. have never submitted any concrete argument to counter this. They also fail to do so in their 2013 Motion to produce documents. Apparently for this reason, Milieudefensie et al. fall back on the argument that oil spills with the magnitude of the oil spill near Goi are "centrally monitored" and that the "parent company" was thus aware of the special risks that were being taken in the Niger Delta.[161]

236. As the District Court rightfully held first in all its judgments, these two proceedings deal with the oil spill near Goi of 10 October 2004.[162] They do not deal with the situation in the Niger Delta in general:[163] "However, in these two proceedings, the Dutch court cannot and will not render an opinion regarding the discussion between Milieudefensie et al. and Shell et al. regarding Shell et al.'s general policy in its oil production operations in Nigeria. In these two proceedings, the District Court may and will only rule on the specific claims lodged by Milieudefensie et al. in response to this specific oil spill in 2004 near Goi."

237. Already against this background it is not clear that Milieudefensie et al. have a legitimate interest in the production of documents they want to use to demonstrate that the "parent company" was aware of the "special risks that were being taken in the Niger Delta". It is not clear that being aware of the situation in the Niger Delta in general might lead to the opinion that RDS, the Koninklijke or Shell Transport are liable for the damage suffered as a result of

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158 2013 Motion to produce documents, no. 144 (e).

159 2013 Motion to produce documents, no. 121.

160 See, *inter alia*: the Defense in the case Milieudefensie et al. versus RDS and SPDC, no. 66; the Defense in the case Milieudefensie et al. versus SPNV and Shell Transport, no. 94; the Rejoinder, no. 36.

161 2013 Motion to produce documents, no. 121.

162 Judgment in the jurisdiction motion of 24 February 2010, ground 2.2; judgment in the 2010 Motion to produce documents of 14 September 2011, ground 4.3; final judgment, ground 4.16.

163 Final judgment, ground 4.16.

the oil spill of 10 October 2004 near Goi. If any "awareness" is relevant in this scope – Shell contests this – this must be awareness of a circumstance that is relevant in connection with the oil spill at issue. Milieudefensie et al. fail to recognize that the question regarding whether SPDC in general fails "structurally" in connection with oil spills is not the issue in these proceedings; the issue here is whether *in the case at issue*, SPDC is liable in connection with the oil spill of 10 October 2004 near Goi. In addition, Shell contests that any "systematic" failure by SPDC is involved.

238. Milieudefensie et al. do not advance any concrete argument regarding the fact that "the parent company was aware" of the circumstances of the oil spill at issue. Milieudefensie et al. get no further than the general submission that the "parent company should have known that the risk of damage as the result of sabotage of the pipelines in the Niger Delta and in Goi, Ogoniland, in particular, was very high" and that "the methods that were used to contain the damage caused by the oil spills and remediate the contamination were defective."[164] As stated before, that is insufficient. This is not changed by Milieudefensie et al.'s argument that is allegedly "not required to demonstrate that Shell directly contributed to the damage due to its central policy."[165] This argument is simply incorrect. To assume any liability on the part of RDS, the Koninklijke or Shell Transport in any event also requires that the challenged "central policy" resulted in the alleged damage.

239. The District Court rightfully found that the businesses of RDS, the Koninklijke and Shell Transport, on the one hand, and the business of SPDC, on the other, are not essentially the same "because the parent companies formulate general policy lines from The Hague and/or London and are involved in worldwide strategy and risk management, whereas SPDC is involved in the production of oil in Nigeria".[166] In the 2013 Motion to produce documents, Milieudefensie et al. contest this finding to no avail by referring to Weir's opinion.[167] Milieudefensie et al. and Weir fail to recognize that RDS, the Koninklijke and Shell Transport themselves did not and do not have any operational activities.[168]

Involvement

240. Finally, Milieudefensie et al. also create an incorrect picture regarding the involvement of RDS, the Koninklijke and Shell Transport in respect of pipeline

164 2013 Motion to produce documents, no. 122.

165 2013 Motion to produce documents, no. 86.

166 Ground 4.36.

167 2013 Motion to produce documents, no. 76.

168 See the Rejoinder, nos. 42-49.

maintenance, safety measures and clean-up work. They argue that "specific targets" are set in the "annual Business Plans and related budgets". These are allegedly "approved by the parent company and checked for compliance." According to Milieudefensie et al., these plans "stipulate in detail how the operating companies will operate."[169] They also argue that: "Important choices, such as the one to leave Ogoniland, the question regarding if and to what extent investments in the pipelines in Ogoniland would still have to be made after this departure, measures against the unsafe situation in Ogoniland, including measures against sabotage and *bunkering,* and the question regarding if and at the expense of how much effort and means attempts would have to be made to clean up the contamination in Ogoniland, are all choices that could not be made without involving the parent company. Within this dependency relationship, SPDC hardly had any room to make an independent consideration, in particular regarding these important subjects."[170]

241. This argument is also incorrect and lacks adequate substantiation. As Shell already explained in the first instance, RDS, the Koninklijke and Shell Transport are not and were not involved in the details of the operations of SPDC.[171] These proceedings involve the question regarding whether the oil spill near Goi was caused by sabotage or corrosion, and whether SPDC responded adequately to the oil spill and remediated the affected area. Milieudefensie et al. wrongfully assume that there are business plans and budgets of SPDC that have been "approved" by RDS, the Koninklijke or Shell Transport, which are so detailed that these plans and budgets contain information that may be helpful in answering these questions. Milieudefensie et al. likewise wrongfully assume that RDS, the Koninklijke and Shell Transport were involved in SPDC's "choice" of whether or not to invest in pipelines in Ogoniland after the departure from Ogoniland, or to take measures against sabotage and *bunkering*, let alone in the decision regarding whether or not to make efforts or make means available to clean up the contamination caused by the oil spill at issue. The argument that a "dependency relationship" is involved within which SPDC "hardly had any room" to make an "independent consideration" is incorrect. Nor do Milieudefensie et al. explain what "consideration" they have in mind here. To the extent that Milieudefensie et al. want to suggest that RDS, the Koninklijke or Shell Transport prevented SPDC from doing what it had to do in any respect, that suggestion lacks each and every ground. With regard to the departure from Ogoniland: this was not a voluntary choice by SPDC, it was simply forced to do so by the circumstances.

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169 2013 Motion to produce documents, no. 81.

170 2013 Motion to produce documents, no. 123.

171 Rejoinder, nos. 39-49.

Conclusion

242. What it comes down to is that based on DEPs and HSE Manuals, Milieudefensie et al. give a detailed explanation regarding "superior knowledge", "being aware of the circumstances near Goi", or at least "in the Niger Delta" and SPDC's assumed "dependency relationship" with the "parent company", but they fail to indicate what specific knowledge and awareness of RDS, the Koninklijke and Shell Transport were, in fact, involved that are relevant to the case at issue. Apparently, they hope to discover this with the aid of the documents they claim access to. However, the right to the production of documents is not intended for this purpose. Milieudefensie et al.'s motion to produce documents comprises an inadmissible *fishing expedition*.

243. Superfluously it is noted that Milieudefensie et al.'s invocation of Weir's opinion, where he writes in a number of places that the English judge would proceed with the furnishing of evidence, cannot serve to support a right to the production of documents by virtue of Section 843a DCCP, of course.[172] On this point (as well), Dutch law differs too much from English law to take this opinion of Weir into account, whatever can be said of the accuracy of this opinion under English law.

244. Shell notes the following in response to the individual documents.

9.2 a. *Business plans and reports (2001-2004)*

245. In paragraph a., Milieudefensie et al. claim access to "the annual business plans and monthly business reports in respect of maintenance, the environment and safety regarding Ogoniland and the vicinity of Goi for the three years prior to the oil spill of 2004". By way of explanation, Milieudefensie et al. submit that these business plans allegedly demonstrate the goals that were set in the area of maintenance and HSE "in consultation with the parent company", if and how those goals were met and to what extent budgetary measures were taken. Milieudefensie et al. submit that this will enable them to demonstrate that "the parent company" had or should have had knowledge of the conditions in Nigeria and that it had a duty of care.[173]

Documents were already claimed in the first instance; Milieudefensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

246. This part of the claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed the production of "annual policy plans"

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172 See, for example, the 2013 Motion to produce documents, no. 77.

173 2013 Motion to produce documents, no. 144 (a), p. 50.

and "maintenance plans" and the "communication" regarding (the contents of) these documents between SPDC and RDS or its subsidiaries[174] and the District Court dismissed that claim.[175] Milieudefensie et al. fail to explain that the currently claimed "annual business plans and monthly business reports in respect of maintenance, the environment and safety" do not fall into this category of documents that were claimed in the first instance. Milieudefensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

Documents have not been sufficiently concretely described

247. In addition, the requirement that the claimed documents must have been sufficiently defined has not been satisfied. There are no annual business plans or monthly business reports in respect of maintenance, the environment and safety regarding the vicinity of Goi, let alone do these documents describe the goals that were set in the area of maintenance and HSE "in consultation with the parent company", if and how those goals were met and to what extent budgetary measures were taken by "the parent company". Nor does the 2013 Motion to produce documents demonstrate on what basis Milieudefensie et al. assume that these documents exist. The term "business plan" is mentioned in nos. 81, 83 and 107 of the 2013 Motion to produce documents, but it is not explained anywhere what specific documents Milieudefensie et al. are referring to or based on which they assume that business plans or monthly business reports exist specifically with respect to the vicinity of Goi..

No legitimate interest

248. Moreover, Milieudefensie et al. lack a legitimate interest in access to the documents claimed in paragraph a. The reasons for this are as follows.

249. Milieudefensie et al. submit that the documents allegedly demonstrate the goals that were set in the area of maintenance and HSE "in consultation with the parent company", if and how those goals were met and to what extent

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174 See the Motion to produce documents in the case of Milieudefensie et al. versus RDS and SPDC, no. 21 (xvi), p. 10, where access is claimed to "documents regarding the years 1993-2008 and containing the annual work programs, the maintenance plans and the related budgets of the Joint Venture" and no. 21 (xviii), on p. 11, where access is claimed to "the communication regarding the (contents of the) documents specified in par. xvi above between Shell Nigeria, on the one hand, and Shell plc or its subsidiaries established in the Netherlands or the United Kingdom, on the other". See also the Motion to produce documents in the case of Milieudefensie et al. versus SPNV and Shell Transport, (xv), p. 16.

175 See the interlocutory judgment of 14 September 2011, grounds 4.12 (a) and (b), 4.13 and 4.14.

budgetary measures were taken by "the parent company". This argument is insufficient to substantiate the legitimate interest.

250. As stated before (see nos. 239-240 above), Milieudefensie et al. incorrectly represent the involvement by RDS, the Koninklijke and Shell Transport in respect of pipeline maintenance, safety measures and clean-up work regarding the oil spill near Goi of 10 October 2004. Moreover, they fail to specify which "goals" they believe were set "in consultation with the parent company" and which "budgetary measures" by the "parent company" they have in mind. What it comes down to is that Milieudefensie et al. advance the unfounded submission that there are business plans and reports of SPDC that have been drawn up in consultation with RDS, the Koninklijke or Shell Transport, which contain relevant information regarding the occurrence and clean-up of the oil spill at issue. No such business plans and reports exist. The assumption that RDS, the Koninklijke or Shell Transport allegedly took "budgetary measures" in a manner that is relevant for the dispute between the parties regarding the occurrence of and cleaning up the oil spill at issue is just as unfounded.

251. The documents that are covered by the description in paragraph a. do not contain any information regarding the oil spill at issue; they do contain an abundance of information regarding other subjects. Milieudefensie et al.'s argument in respect of the awareness on the part of RDS, Shell Transport and the Koninklijke regarding the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 233-238 above. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with subjects other than the oil spill at issue near Goi in October 2004.

252. Moreover, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in documents claimed here for "the three years prior to the oil spill of 2004". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

253. The argument in respect of the alleged "superior knowledge" and awareness on the part the "parent company" and a "dependency relationship of SPDC" is insufficient to substantiate a legitimate interest in the production of the documents claimed in paragraph a.; see nos. 220-242 above.

Confidentiality

254. Finally, this part of the claim to produce documents fails based on the confidential nature of business plans and monthly reports (see nos. 212-213 above).

9.3 b. *Audit reports and follow-up*

255. In paragraph b., Milieudefensie et al. claim access to the "most recent audit report at the time of the oil spill regarding maintenance (*asset integrity*) of SPDC, in particular for Ogoniland and the pipeline near Goi, as well as regarding the health, safety and environmental policy (including *Emergency and Oil Spill response*), including *findings* and *recommendations, approval and closeout of actions*". According to Milieudefensie et al., these documents show that "the parent company is extensively informed of the activities of its subsidiaries". With these documents, Milieudefensie et al. want to demonstrate that the parent company "was aware or should have been aware of the conditions in Nigeria and that it had a duty of care". In addition, Milieudefensie et al. want to use these documents to demonstrate that SPDC breached its duties of care.[176]

Documents were already claimed in the first instance; Milieudefensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

256. The claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed the production of "all (management) reports and other communication between Shell Nigeria or the Joint Venture on the one hand, and the Executive Committee and/or the Board of Directors and/or Shell International Exploration and Production B.V., on the other, regarding oil spills in the Niger Delta in the period 1993-2008 and regarding the oil spill near Goi in October 2004 in particular"[177] and the District Court dismissed that claim.[178] Milieudefensie et al. fail to explain that the currently claimed "audit reports", including *findings* and *recommendations, approval and closeout of actions*" allegedly do not fall into this category of documents that were claimed in the first instance. Milieudefensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

Documents do not exist or do not pertain to the oil spill at issue

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176 2013 Motion to produce documents, no. 144 (b), p. 50.

177 See the Motion to produce documents in the case of Milieudefensie et al. versus RDS and SPDC, no. 21 (xix), p. 11. See also the Motion to produce documents in the case of Milieudefensie et al. versus SPNV and Shell Transport, (xviii), p. 17.

178 See the interlocutory judgment of 14 September 2011, grounds 4.12 (a) and (b), 4.13 and 4.14.

257. In addition, there are no "audit reports" that satisfy the description in paragraph b. In nos. 108 and following of the 2013 Motion to produce documents, Milieudefensie et al. refer to "audits" that are conducted "at several levels". They infer this from the "Standard: HSSE Auditing" document that they submitted as Exhibit N-10. The document in question dates from 2009 and for that reason alone, it is not clear what its relevance is for the case at issue. In and of itself it is correct that within the Royal Dutch Shell Group, compliance with the HSSE policy is monitored by means of audits,[179] but this does not mean that there allegedly is an audit report regarding the "pipeline near Goi" or regarding the *Emergency and Oil Spill response*, including *findings* and *recommendations, approval and closeout* of the oil spill at issue near Goi. Moreover, the fact that Milieudefensie et al. claim the "most recent audit report at the time of the oil spill (…)" already demonstrates that they do not know the specific report to which they are claiming access. In this respect, as well, the request to produce documents constitutes an unacceptable *fishing expedition*.

No legitimate interest

258. Moreover, there is no legitimate interest in this part of the claim, as well. Milieudefensie et al. do not establish any concrete relationship between the alleged contents of the claimed documents and their argument regarding the liability of Shell for the oil spill at issue, let alone do Milieudefensie et al. substantiate that and how the claimed documents might contain evidence of an argument they must prove in order to see their claims against Shell regarding the oil spill at issue awarded.

259. To the extent that the documents claimed in paragraph b are claimed in view of the claims in the main action against RDS, the Koninklijke and Shell Transport, Milieudefensie et al.'s argument regarding awareness on the part of RDS, Shell Transport and the Koninklijke of the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 233-238 above.

260. With regard to the alleged legitimate interest in substantiating the alleged breach of the duty of care by SPDC, Milieudefensie et al. fail to explain in what respect SPDC allegedly breached its duty of care according to the documents claimed in paragraph b. Moreover, Milieudefensie et al. fail to recognize that, as stated before, section 11(5)(c) OPA provides for strict liability on the part of SPDC. To answer the question regarding whether SPDC is liable, it is irrelevant whether it was under a duty of care and whether it breached this duty of care. Milieudefensie et al.'s wish to use the claimed documents to demonstrate that SPDC was under a duty of care and that SPDC breached its duty of care

[179] See the Rejoinder, no. 45.

cannot constitute any legitimate interest in the production of documents, either (see no. 57 above).

261. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with subjects other than the oil spill at issue near Goi in October 2004.

Confidentiality

262. Finally, the claim in paragraph b. fails based on Section 843a (4) DCCP, given that an audit report regarding *asset integrity* (in as far as such a report exists) contains confidential business information.

9.4 c. *Assurance letters (2001-2004)*

263. In paragraph c., Milieudefensie et al. claim access to the *assurance letters* from the three years prior to the oil spill of 2004. According to Milieudefensie et al., the operating companies must indicate in these *assurance letters* "that and how they complied with the Group's health, safety and environmental (HSE) policy". Milieudefensie et al. submit that the *assurance letters* show that "the parent company was aware of the conditions in Nigeria and SPDC's health, safety and environmental management". Milieudefensie et al. believe that these documents can be used to demonstrate that "the parent company" had a duty of care.[180]

Documents were already claimed in the first instance; Milieudefensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

264. The claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed the production of these documents[181] and the District Court dismissed that claim.[182] Milieudefensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

No legitimate interest

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180 2013 Motion to produce documents, no. 144 (c), p. 51.

181 See the Motion to produce documents in the case of Milieudefensie et al. versus RDS and SPDC, no. 21 (xx), p. 11, claiming access to "the assurance letters from Shell Nigeria to the Executive Committee for the period 1993-2008". See also the Motion to produce documents in the case of Milieudefensie et al. versus SPNV and Shell Transport, (xix), p. 18.

182 See the interlocutory judgment of 14 September 2011, grounds 4.12 (b), 4.13 and 4.14.

265. In addition, there is no legitimate interest in access to the *assurance letters*, given that the *assurance letters* pertain to compliance with the HSSE policy in general and do not regard specific oil spills.

266. RDS, Shell Transport and the Koninklijke were not aware of the condition of the pipeline near Goi, the oil spill that occurred at that location in 2004 or cleaning up and remediating the consequences of this oil spill. Milieudefensie et al.'s argument in respect of awareness of RDS, Shell Transport and the Koninklijke regarding the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 233-238 above. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with oil spills or issues other than the oil spill at issue near Goi in October 2004.

267. Moreover, there is no legitimate interest in this part of the claim, either, because Milieudefensie et al. fail to establish a concrete relationship between the alleged contents of the claimed documents and their arguments regarding the liability of RDS, Shell Transport and the Koninklijke for the oil spill at issue, let alone do Milieudefensie et al. substantiate that and how the claimed documents might contain evidence of an argument they must prove in order to see their claims against RDS, Shell Transport and the Koninklijke regarding the oil spill at issue awarded.

268. Finally, once again, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in assurance letters "from the three years prior to the oil spill of 2004". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

Confidentiality

269. Finally, this part of the claim fails based on the fact that the assurance letters contain confidential business information.

9.5 d. *Reports of Significant Incidents and High Potential Incidents (2001-2004)*

270. In paragraph d., Milieudefensie et al. claim access to "the *Significant Incidents* and *High Potential Incidents* reported by SPDC regarding the vicinity of Goi and Ogoniland in the three years prior to the oil spill of 2004". Milieudefensie et al. are referring to "incidents with serious consequences (*severity 4 or 5*) as well as incidents and *near misses* with a *Shell Ram Risk Rating* of C5, D5 or E5". Milieudefensie et al. want to use these reports to demonstrate that SPDC had a

duty of care, because "in Ogoniland, there was a significant risk of damage as a result of oil spills, including or in particular caused by sabotage". In addition, according to Milieudefensie et al. these documents show that the parent company was aware of these risks, so that it also had a duty of care.[183]

Documents were already claimed in the first instance; Milieudefensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

271. The claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed access to "all (management) reports and other communication between Shell Nigeria or the Joint Venture on the one hand, and the Executive Committee and/or the Board of Directors and/or Shell International Exploration and Production B.V., on the other, regarding oil spills in the Niger Delta in the period 1993-2008 and regarding the oil spill near Goi in October 2004 in particular"[184] and the District Court dismissed that claim.[185] Milieudefensie et al. fail to explain that the currently claimed "*Significant Incidents* and *High Potential Incidents* reported by SPDC regarding the vicinity of Goi and Ogoniland in the three years prior to the oil spill of 2004" allegedly do not fall into this category of documents that were claimed in the first instance. Milieudefensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

No legitimate interest

272. In addition, there is no legitimate interest in the documents claimed in paragraph d., because these do not regard the oil spill at issue, but do regard a number of other oil spills not at issue in these proceedings. Milieudefensie et al.'s argument regarding awareness on the part of RDS, Shell Transport and the Koninklijke of the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 233-238 above. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with oil spills other than the oil spill at issue near Goi in October 2004.

273. Moreover, there is no legitimate interest in this part of the claim, as well, because Milieudefensie et al. fail to establish a concrete relationship between

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183 2013 Motion to produce documents, no. 144 (d), p. 51.

184 See the Motion to produce documents in the case of Milieudefensie et al. versus RDS and SPDC, no. 21 (xix), p. 11. See also the Motion to produce documents in the case of Milieudefensie et al. versus SPNV and Shell Transport, (xviii), p. 17.

185 See the interlocutory judgment of 14 September 2011, grounds 4.12 (a) and (b), 4.13 and 4.14.

the alleged contents of the claimed documents and their arguments regarding the liability of RDS, Shell Transport and the Koninklijke for the oil spill at issue, let alone do Milieudefensie et al. substantiate that and how the claimed documents might contain evidence of an argument they must prove in order to see their claims against RDS, Shell Transport and the Koninklijke regarding the oil spill at issue awarded.

274. To the extent that Milieudefensie et al. seek this broad description of documents to obtain documents in which the oil spill at issue is reported to the "parent company", it is pointed out that the oil spill at issue does not fall within the "incidents with serious consequences" category that Milieudefensie et al. obviously have in mind. In view of the relatively minor scope of the oil spill of 10 October 2004 (150 barrels), the Koninklijke and Shell Transport were not informed of this oil spill. In accordance with the prevailing guidelines, the volume of oil that was spilled in the leak of 10 October 2004 was included in an aggregated quarterly report, which was sent to the HSE team of Shell International Exploration and Production B.V. The oil spill at issue is not individually included as such in this report. Shell submitted and substantiated this in the first instance.[186] Milieudefensie et al. have not advanced a (substantiated) challenge against these arguments.

275. Moreover, Milieudefensie et al.'s arguments in the 2013 Motion to produce documents regarding reporting oil spills to "the parent company" are incorrect. In no. 119 of the 2013 Motion to produce documents, a table is cited from an *HSE Manual* from October 1995 (Exhibit N9), from which they infer that in view of its scope (150 barrels or approximately 24,000 liters), the subject oil spill allegedly qualifies as a *severity 5* incident with a "*massive environmental effect*". According to Milieudefensie et al., "the guideline" – they are apparently referring to the "*Incident Investigation and Learning*" document from March 2009 that has been submitted as Exhibit N11 – demonstrates that such an incident must be reported within 24 hours as a "*significant incident*", *inter alia* to the Group HSSE VP.

276. Milieudefensie et al.'s interpretation of the parts of Exhibits N9 and N11 cited by them is incorrect. First of all, Milieudefensie et al. wrongfully fail to recognize that Exhibit N9 dates from 1995, whereas Exhibit N11 dates from 2009. Secondly, Milieudefensie et al. fail to recognize that the table they cited from Appendix V of Exhibit N9 is only an "example of further definition of consequence – severity rating for risk matrix" (see the table's title). See also p. 22 of Exhibit N9: "The above matrix gives an indication of risk tolerability but

186 See, *inter alia*: the Defense in the case Milieudefensie et al. versus RDS and SPDC, no. 66; the Defense in the case Milieudefensie et al. versus SPNV and Shell Transport, no. 94; the Rejoinder, no. 36.

this should relate to the operation under consideration. An example of how the matrix can be further defined for a particular operation is included in Appendix V." Thus, the values presented in the table have only been included by way of *example*. This is demonstrated by the fact that it is obvious that an oil spill of the magnitude as the one near Goi does not satisfy the definition of a *severity 5* incident listed in the table, i.e. an incident with "*International public attention; extensive negative attention in international media and national/international politics; potential to harm access to new areas, grants of licenses and/or tax legislation; concerted pressure by action groups; adverse effects in Opcos [operating companies] in other countries*".

277. To the extent that Milieudefensie et al. want to examine documents to substantiate their argument that SPDC breached its duty of care, they fail to recognize that, as stated before, section 11(5)(c) OPA provides for strict liability on the part of SPDC. To answer the question regarding whether SPDC is liable, it is irrelevant whether it was under a duty of care and whether it breached this duty of care. Milieudefensie et al.'s wish to use the claimed documents to demonstrate that SPDC was under a duty of care and that SPDC breached its duty of care cannot constitute any legitimate interest in the production of documents, either (see no. 57 above). Moreover, the documents claimed here will be unable offer any insight into the condition of the pipeline near Goi at the location of the leak (see nos. 291, 298 and 300 below). For that reason, as well, there is no legitimate interest in access.

278. Again, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in documents as claimed here "from the three years prior to the oil spill of 2004". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

9.6 e. *Incident report, investigation report and review*

279. In paragraph e., Milieudefensie et al. claim access to "the incident report regarding the oil spill in 2004 prepared based on the guideline mentioned above, as well as the *investigation report* and *review*". Milieudefensie et al. are obviously referring to the report that was allegedly prepared because the oil spill at issue falls within the "incidents with serious consequences" category (see no. 269 above).

Documents were already claimed in the first instance; Milieudefensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

280. The claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed access to "all (management) reports and other communication between Shell Nigeria or the Joint Venture on the one hand, and the Executive Committee and/or the Board of Directors and/or Shell International Exploration and Production B.V., on the other, regarding oil spills in the Niger Delta in the period 1993-2008 and regarding the oil spill near Goi in October 2004 in particular"[187] and the District Court dismissed that claim.[188] Milieudefensie et al. fail to explain that the currently claimed "*incident report* regarding the oil spill in 2004, as well as the *investigation report* and the *review*" allegedly do not fall into this category of documents that were claimed in the first instance. Milieudefensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

Documents do not exist or do not pertain to the oil spill at issue

281. In addition, the subject part of the claim cannot be awarded because – as stated before – Milieudefensie et al. wrongfully assume that the oil spill at issue falls into the "incidents with serious consequences" category (see no. 273 above). Thus, the reports that Milieudefensie et al. obviously have in mind in this part of the claim do not exist.

9.7 f. *Minutes*

282. In paragraph f., Milieudefensie et al. claim access to "the minutes of the (*Executive Committee*, formerly called the *Committee of Managing Directors* and/or the *Board of Directors* of the) parent company regarding the categories mentioned under b, d and e", i.e. regarding, in brief, the audit reports (b), the reports of *significant incidents* and *high potential incidents* (d) and the *incident* and *investigation report* (e). According to Milieudefensie et al., these documents show "that the parent company had knowledge of the high-risk conditions in Nigeria and Ogoniland and sometimes actively interfered in its subsidiary". Milieudefensie et al. want to use these documents to demonstrate that "the parent company" had a duty of care.

Documents were already claimed in the first instance; Milieudefensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

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187 See the Motion to produce documents in the case of Milieudefensie et al. versus RDS and SPDC, no. 21 (xix), p. 11. See also the Motion to produce documents in the case of Milieudefensie et al. versus SPNV and Shell Transport, (xviii), p. 17.

188 See the interlocutory judgment of 14 September 2011, grounds 4.12 (a) and (b), 4.13 and 4.14.

283. The claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed access to these minutes.[189] To the extent that the claim pertains to minutes regarding the *asset integrity* audit report claimed in paragraph b., the claim corresponds to part (xviii) of the claim that was initiated in the first instance.[190] In the first instance, Milieudefensie et al. claimed access to the minutes of meetings of, *inter alia*, the Executive Committee in which the work programs, maintenance programs and budgets of the Joint Venture were discussed. Milieudefensie et al. wanted to use these documents to demonstrate that RDS or the Koninklijke and Shell Transport have or had knowledge of and control over SPDC's activities in respect of oil spills in the Niger Delta (specifically near Goi in October 2004). Given that the similar claim in the first instance was dismissed,[191] Milieudefensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

Documents do not exist or do not pertain to the oil spill at issue

284. This part of the claim for the production of documents further fails based on the fact that there are no minutes of the "parent company" regarding the documents mentioned in paragraphs b., d. and e. which contain anything regarding the oil spill at issue or the pipeline near Goi. As already explained, the oil spill near Goi of 10 October 2004 was not reported to the "parent company" (see nos. 271 and 279 above); nor are there any audit reports that pertain to this oil spill or the pipeline near Goi (see no. 257 above).

No legitimate interest

285. To the extent that Milieudefensie et al. want to use the claimed documents to demonstrate " that the parent company had knowledge of the high-risk conditions in Nigeria and Ogoniland and sometimes actively interfered in its subsidiary", it is pointed out that Milieudefensie et al.'s argument in respect of

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189 See the Motion to produce documents in the case of Milieudefensie et al. versus RDS and SPDC, no. 21 (x), p. 11. See also the Motion to produce documents in the case of Milieudefensie et al. versus SPNV and Shell Transport, (xvii), p. 17.

190 See the Motion to produce documents, no. 21 (xviii), p. 11, where access was claimed to "the communication regarding the (contents of the) documents specified in par. xvi above [the annual work programs, the maintenance programs and the related budgets of the Joint Venture] between Shell Nigeria on the one hand, and Shell plc or its subsidiaries established in the Netherlands or the United Kingdom, on the other" and also to "minutes of the meetings of the Executive Committee and/or the Board of Directors in which this communication and/or these documents have been discussed". See also the Motion to produce documents in the case of Milieudefensie et al. versus SPNV and Shell Transport, (xvii), p. 17.

191 See the interlocutory judgment of 14 September 2011, grounds 4.12 (a) and (b), 4.13 and 4.14.

awareness of RDS, Shell Transport and the Koninklijke regarding the conditions in Nigeria in general is insufficient to substantiate any legitimate interest in the production of documents, see nos. 233-238 above. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with oil spills or issues other than the oil spill at issue near Goi in October 2004.

286. Moreover, there is no legitimate interest in this part of the claim, either, because Milieudefensie et al. fail to establish a concrete relationship between the alleged contents of the claimed documents and their arguments regarding the liability of RDS, Shell Transport and the Koninklijke for the oil spill at issue, let alone do Milieudefensie et al. substantiate that and how the claimed documents might contain evidence of an argument they must prove in order to see their claims against RDS, Shell Transport and the Koninklijke regarding the oil spill at issue awarded.

287. Milieudefensie et al. further lack the requisite legitimate interest because they fail to focus their arguments on the structure of the group in the period prior to the time at which RDS was placed at the head of the group (see nos. 217-218 above). The same occurs in paragraph f. of the claim, which refers to “minutes of the (*Executive Committee*, formerly called the *Committee of Managing Directors* and/or the *Board of Directors* of the) parent company”. Milieudefensie et al. fail to recognize that at the time of the oil spill at issue, RDS had not yet been placed at the head of the group and that Shell Transport and the Koninklijke were (and are) two different legal entities, each with its own corporate bodies. They wrongfully equate the *Committee of Managing Directors* to a board of directors. Moreover, they fail to recognize that the *Committee of Managing Directors* was not instituted by the Koninklijke and Shell Transport, but by the boards of directors of the ‘*Group Holding Companies*’. They also fail to recognize that in SPDC’s case, decisions regarding exercising shareholders’ rights were taken by the Board of Directors of SPCo and not by the board of Shell Transport, the Koninklijke or SPNV, nor by the *Committee of Managing Directors*.[192] For this reason, as well, Milieudefensie et al. do not have any legitimate interest in production of the documents mentioned in paragraph f.

288. Again, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in assurance letters "from the three years prior to the oil spill of 2004". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

[192] See the Defense of SPNV and Shell Transport, nos. 40-41 and 149.

Confidentiality

289. Finally, by their nature, the minutes that Milieudefensie et al. have in mind here contain confidential business information. Minutes of the "board of the parent company" (in Milieudefensie et al.'s words) do not contain any information regarding the oil spill at issue; these minutes do contain – strictly confidential – information on subjects that have nothing whatsoever to do with the subject dispute. Against the background of the fact that Milieudefensie et al. fail to specify the information that they believe they will find in the minutes in question to substantiate their claims against RDS, the Koninklijke and Shell Transport, this confidentiality constitutes serious reasons in the sense of Section 843a (4) DCCP, based on which the claim for access to or submission of these documents must be dismissed.

10 CLAIMED DOCUMENTS REGARDING SPDC'S DUTY OF CARE

10.1 Introduction

290. In paragraphs g. to m., Milieudefensie et al. claim access to the documents mentioned, in particular in view of their claims against SPDC. They submit that they want to use these documents to demonstrate "that the pipeline near Goi showed serious defective maintenance, as well as that Shell took insufficient measures to prevent sabotage or to limit contamination".[193]

291. To the extent that Milieudefensie et al. want access to documents to substantiate their argument that SPDC breached its duty of care, they fail to recognize that as stated before, section 11(5)(c) OPA provides for strict liability on the part of SPDC. In answering the question regarding whether SPDC is liable, it is irrelevant whether it has a duty of care and whether it breached this duty of care. Thus, Milieudefensie et al.'s wish to use the claimed documents to demonstrate that SPDC had a duty of care and that SPDC breached its duty of care cannot constitute a legitimate interest in the production of documents (see no. 57 above).

292. To the extent that Milieudefensie et al. want access to documents to substantiate their argument that "the pipeline near Goi showed serious defective maintenance" – in other words: the oil spill of 10 October 2004 was caused by defective maintenance – they have no legitimate interest in this claim, because they failed to satisfy their duty to contend facts and circumstances regarding this point (see no. 206 above). The District Court dismissed the access to documents regarding the maintenance condition of the pipeline claimed by Milieudefensie et al. in the first instance, because "for the present, Shell et al.'s argument that this oil spill was caused by sabotage (…) must be deemed to be correct", because Milieudefensie et al. had advanced an insufficiently substantiated refutation against that argument.[194] Even after they could have done so in the statement of reply and on the occasion of the pleadings, Milieudefensie et al. failed to satisfy their duty to contend facts and circumstances regarding the cause of the oil spill alleged by them. Thus, in the final judgment, the District Court ruled that Milieudefensie et al. "have not advanced a sufficiently concrete and/or substantiated challenge of the fact that Shell et al.'s argument that this oil spill near Goi in 2004 was, in fact, caused by sabotage (…) must be deemed to be factually correct".[195] In the 2013 Motion to produce documents, Milieudefensie et al. have not advanced a single concrete argument based on which they want to challenge the decision that the oil spill

193 2013 Motion to produce documents, no. 145.

194 Interlocutory judgment of 14 September 2011, ground 4.9.

195 Final judgment, ground 4.23.

was caused by sabotage on appeal. As will be explained in more detail in nos. 296-298 below, Milieudefensie et al. fail to explain what the documents they claim allegedly demonstrate regarding the condition of the pipeline at the location of the leak. Against that background, there is no legitimate interest in access to documents that pertain to the (maintenance) condition of the pipeline near Goi.

10.2 g. *Corrosion Management Framework (2001-2004)*

293. In paragraph g., Milieudefensie et al. claim access to "documents from the *Corrosion management Framework* regarding the pipeline near Goi in the three years prior to the oil spill of 2004". According to Milieudefensie et al., these documents show "the gravity of the corrosion, the risks foreseen in this connection and what action was taken in response, so that it can be demonstrated that SPDC breached its duty of care." Milieudefensie et al. also want to use these documents to demonstrate that "the parent company" had a duty of care, because the documents allegedly demonstrate that "the parent company must have been aware of the serious nature of the situation."

Documents claimed in paragraph g (ii) were already claimed in the first instance; Milieudefensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

294. In paragraph g (ii), Milieudefensie et al. claim access to "*inspection plans* and *pigging program* of the pipeline and weld seams, as well as the *inspection* and *pigging results* in the three years prior to the oil spill of 2004". They also claimed access to these documents in the first instance, namely as part of the claim for access to "documents showing the inspections of the pipelines near Goi that have been conducted since Shell's departure from Ogoniland in 1993,[196] and the District Court dismissed that claim.[197] Milieudefensie et al. fail to explain that the currently claimed "*inspection* and *pigging results*" do not fall into this category of documents that were claimed in the first instance. Given that the similar claim in the first instance was dismissed,[198] Milieudefensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

295. To the extent that this part of the claim regards a "*pigging program*" of the pipeline near Goi and *"pigging results*", it is pointed out that – N.B.: as

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196 See the Motion to produce documents in the case of Milieudefensie et al. versus RDS and SPDC, no. 21 (iv), p. 6. See also the Motion to produce documents in the case of Milieudefensie et al. versus SPNV and Shell Transport, (iv), p. 11.

197 See the interlocutory judgment of 14 September 2011, grounds 4.8 and 4.9.

198 See the interlocutory judgment of 14 September 2011, grounds 4.12 (a) and (b), 4.13 and 4.14.

Milieudefensie et al. submit themselves – since 1993, SPDC no longer has access to Ogoniland to conduct '*Intelligent Pig runs*'. It is not clear why Milieudefensie et al. believe that SPDC nevertheless has documents regarding '*Intelligent Pig runs*'. For this reason, as well, this part of the claim must be dismissed.

No legitimate interest

296. Milieudefensie et al. apparently want to use the documents claimed in paragraph g. to further substantiate that the leak was caused by corrosion rather than by sabotage. However, all the evidence that has been furnished into the proceedings to date indicates that the leak was caused by sabotage. For example, the JIT report – which Milieudefensie et al. submitted with the initiatory writ of summons – records the following observations of the *'Joint Investigation Team'*:[199]

- The *'Joint Investigation Team'* found that the oil was spilling from a (46 cm long) saw cut in the pipeline, which was between the 10.00 to 2 o-clock positions and thus on top of the pipeline and which had been made by a hacksaw;

- The soil at the site of the oil spill showed signs of prior digging: the soil at the site of the oil spill was much looser than the surrounding soil, and there was (dislodged) fresh grass in the soil that had been dug up;

- The *'Joint Investigation Team'* observed by means of UT measurements that the thickness of the pipeline wall around the leak was not significantly thinner than the original thickness, which rules out internal corrosion of the pipe as the cause of the spill. These measurement results indicate that the thickness of the pipeline wall around the leak had not or hardly decreased compared to the original wall thickness. Given that a hole caused by corrosion always includes wall loss around the hole, these measuring results rule out corrosion as the cause of the leak;

- The *'Joint Investigation Team'* determined that the external surface of the pipeline did not show any sign of corrosion. In addition, the Joint Investigation Team found that the surrounding *'coalton enamel coating'* of the pipeline was in good condition, while the *'coating'* around the leak was damaged.

297. The video footage of the inspection by the *'Joint Investigation Team'* that Shell submitted with the Defense in the first instance also indicates that the oil spill of

199 Exhibits A.4 and A.5 of Milieudefensie et al.

10 October 2004 was caused by sabotage.[200] This video footage shows the (46-cm long) saw cut that was made in the top of the pipeline, which was also already reported in the JIT report.

298. As the District Court found in grounds 4.8 and 4.9 of the interlocutory judgment of 14 September 2011 and grounds 4.20 to 4.24 of the final judgment, in the face of this evidence, Milieudefensie et al. have not advanced any concrete refutation. Milieudefensie et al. did no more than advance general arguments regarding possible alternative causes of the oil spill, without presenting any facts actually demonstrating a cause of the subject oil spill other than sabotage. As the District Court found, the Accufacts report[201] that Milieudefensie et al. submitted on the occasion of the pleadings in the first instance does not contain any concrete indications that could lead to the conclusion that the subject oil spill has any cause other than sabotage, either.[202] For all these reasons, in its final judgment the District Court definitively ruled that the oil spill of 10 October 2004 near Goi was, in fact, caused by sabotage.[203]

299. In light of the above and the concrete information regarding the oil spill that is demonstrated by the JIT report and the video footage submitted by Shell, Milieudefensie et al. do not have a legitimate interest in the documents claimed in paragraph g., because they fail to indicate what the claimed documents allegedly demonstrate regarding the condition of the pipeline at the location of and immediately surrounding the leak. Milieudefensie et al. apparently assume that these documents demonstrate "the age of the pipeline near Goi, what the estimated life cycle was, how serious the corrosion was and what measures were taken in this regard."[204] Even if the claimed documents could demonstrate this for the pipeline near Goi in general, in light of the already furnished evidence, this does not say anything regarding corrosion *at the location of the leak*, let alone that those documents demonstrate that *the subject oil spill* was caused by corrosion.

300. The JIT report and the video footage that Shell submitted into the proceedings provide a detailed definitive answer regarding the condition of the pipeline *at the location of and immediately surrounding the leak*. Against this background, it is not clear that and how the documents claimed by Milieudefensie et al. could help them 'structure' their grounds for appeal regarding this point, refute the available evidence that the oil spill was caused by sabotage and challenge the District Court's opinion on this point with any chance of success.

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200 Exhibit 14 of Shell.

201 Exhibit M-2 of Milieudefensie et al.

202 Final judgment, ground 4.24.

203 Final judgment, ground 4.25.

204 2013 Motion to produce documents, no. 128.

301. Shell is not familiar with any document that can provide a better insight into the question regarding whether the leak in the pipeline near Goi was caused by sabotage or corrosion than the documents and video footage that have already been submitted into the proceedings. Apparently, Milieudefensie et al. are not familiar with any such document, either. It is true that they argue that they want to demonstrate that "the state of repair of the pipeline near Goi was simply defective at the time of the oil spill by means of reports on the conditions of the pipeline and inspection reports".[205] However, this argument is insufficient to substantiate the legitimate interest. In this connection, the issue is not to determine the overall "state of repair" of the pipeline in which the leak occurred. The only issue is the condition of the pipeline *at the location of the leak*. The "reports" that Milieudefensie et al. want to examine do not offer any decisive answer regarding this. The UT measurements performed at the time the leak was closed do provide a decisive answer regarding this (see no. 296, third dash, above). In addition, in general an *Intelligent Pig run* can provide information regarding this, but not in this case (see no. 295 above). Moreover, Shell contests that the overall state of repair of the pipeline near Goi was "simply defective" at the time of the oil spill; however as stated before, this is not the issue here.

302. In addition, Milieudefensie et al.'s argument regarding awareness of RDS, Shell Transport and the Koninklijke is insufficient to substantiate a legitimate interest in the production of documents, see nos. 233-238 above. RDS, Shell Transport and the Koninklijke were not and are not informed of documents of the nature as claimed in paragraph g.

303. Finally, once again, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in assurance letters "from the three years prior to the oil spill of 2004". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

304. Given this state of affairs, Milieudefensie et al. do not have a legitimate interest in access to the documents claimed in paragraph g.

10.3 h. *HSE Plan and* i. *Hazards and Effects Register and HSE Case*

305. In paragraph h., Milieudefensie et al. claim access to "the *HSE Plan* that applied to Ogoniland and the pipeline near Goi at the time of the oil spill of 2004" and in paragraph h. (i) the "*Hazards and Effects Register* and the *HSE Case* regarding Ogoniland and the pipeline near Goi at the time of the oil spill in

[205] 2013 Motion to produce documents, no. 56.

2004. According to Milieudefensie et al., these documents show "the risks that were foreseen in the area of health, safety and the environment", so that it can be demonstrated that SPDC had a duty of care and that SPDC breached its duty of care.

No legitimate interest

306. This claim fails based on a lack of legitimate interest. There is no specific *HSE Plan* for "Ogoniland and the pipeline near Goi at the time of the oil spill in 2004", or a "*Hazards and Effects Register* and the *HSE Case* regarding Ogoniland and the pipeline near Goi at the time of the oil spill in 2004". To the extent that with the documents claimed in paragraphs h. and i., Milieudefensie et al. have HSE plans, Hazards and Effects Registers and/or HSE cases regarding SPDC's operations in general in mind (assuming that such documents even exist), it is pointed out that Milieudefensie et al. fail to establish a concrete link between the alleged contents of the claimed documents and their arguments regarding the alleged breach of SPDC's duty of care in the scope of the oil spill at issue, let alone do Milieudefensie et al. substantiate that and how the claimed documents contain evidence of an argument they must prove in order to see their claims against SPDC regarding the oil spill at issue awarded. Milieudefensie et al. argue that the claimed documents allegedly demonstrate "the risks that were foreseen in the area of health, safety and the environment", but fail to explain what those documents allegedly demonstrate in respect of the oil spill of 10 October 2004 near Goi and the measures that SPDC took in that connection. After all, that oil spill is the subject of the dispute at issue, not the situation in Nigeria in general. Thus, in view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with subjects other than the oil spill at issue near Goi in October 2004.

307. Moreover, to the extent that Milieudefensie et al. want access to the documents claimed in paragraphs h. and i. to substantiate their argument that "the pipeline near Goi showed serious defective maintenance", the claim must be dismissed due to a lack of legitimate interest. The documents claimed here cannot offer any insight into the condition of the pipeline near Goi at the location of the leak (see nos. 292, 299 and 301 above).

10.4 j. *Surveillance contracts and* k *Helicopter logs*

308. In paragraph j., Milieudefensie et al. claim access to "contracts with local surveillance contractors that were in force at the time of the oil spill near Goi in 2004 or other documents showing the obligations of local surveillance people, how frequently they were deemed to conduct surveillance rounds and the training and means that were available for them." In paragraph k., Milieudefensie et al. claim access to "logs or other documents showing how

frequently and how long helicopters conducted surveillance rounds near Goi in the year prior to the oil spill in 2004." Milieudefensie et al. submit that these documents show that SPDC breached its duty of care, because the surveillance contractors and helicopters did not constitute an adequate measure to prevent sabotage.

No legitimate interest

309. Milieudefensie et al. also submit that in the main action, the question will have to be answered regarding whether SPDC's statutory obligation to protect its pipelines ("to protect", see section 11(5)(b) OPA), includes the obligation to take measures to prevent sabotage.[206] In this light, at this stage of the proceedings, Milieudefensie et al. do not have any legitimate interest in access to documents they want to use to demonstrate that SPDC violated its alleged duty of care to take measures to prevent sabotage. After all, it must first be determined whether based on section 11(5)(b) OPA, SPDC can be liable on account of the alleged failure to take measures to prevent sabotage (which is not the case, see no. 59 above).

Documents are no longer available

310. In addition, this claim cannot be awarded because SPDC no longer has such documents.

10.5 l. *Leak Detection System (2001-2004)*

311. In paragraph l., Milieudefensie et al. claim access to "documents showing which *Leak Detection System (LDS)* was used for the pipeline near Goi, how this system functioned and how the system was maintained." According to Milieudefensie et al., these documents show that "no proper system was present in Goi, or at least that the system did not function properly". According to their own statements, Milieudefensie et al. seek to use these documents to demonstrate "that Shell breached its duty of care".[207]

No legitimate interest

312. Milieudefensie et al. do not have a legitimate interest in access to these documents. After all, even if the documents claimed in paragraph l. demonstrate "that no proper system was present in Goi, or at least that the system did not function properly", it is not clear that and how this could be used "to demonstrate that Shell breached its duty of care". The following is pointed out in this connection.

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206 2013 Motion to produce documents, no. 42.

207 2013 Motion to produce documents, no. 145 (l).

313. Shell understands that – apparently in the scope of their argument that SPDC allegedly did not respond adequately to the oil spill of 10 October 2004 – Milieudefensie et al. first of all want to use the documents claimed in paragraph l. "to again substantiate in the statement of appeal that SPDC's failures in the event of oil spills were structural".[208] "Even if a Leak Detection System was installed, the effectiveness of such a system is virtually zero", still according to Milieudefensie et al.[209] However, with these arguments Milieudefensie et al. fail to recognize that these proceedings do not involve the question of whether in general, SPDC "structurally" responds to oil spills adequately, but the question of whether *in the case at issue*, SPDC adequately responded to the oil spill of 10 October 2004 near Goi. Whether or not the *Leak Detection System* is effective is irrelevant for that discussion. After all, it is a fact that *in the case at issue*, SPDC remedied the oil spill of 10 October 2004 within three days. As Shell indicated in the first instance, in this context it is *inter alia* relevant that the Mogho community – in whose area the site of the oil spill was located – only gave the *'Joint Investigation Team'* organized by Shell permission to access the area of the oil spill on 12 October 2004.[210] Immediately afterwards, the leak was provisionally stopped, after which the leak was definitively repaired on 13 October 2004 around 16.30 hours.[211]

314. In view of the above, the District Court rightly ruled in its final judgment that "(in brief) in the case at issue, in October 2004 SPDC, in fact, remedied the oil spill within three days and as quickly as reasonably possible, so that it cannot be held that this response was inadequate".[212] In the 2013 Motion to produce documents, Milieudefensie et al. did not offer any concrete argument to the contrary. Nor did Milieudefensie et al. indicate what the documents claimed in paragraph l. allegedly demonstrate regarding this point. In this light, Milieudefensie et al. do not have a legitimate interest in access to the "documents showing which *Leak Detection System (LDS)* was used for the pipeline near Goi, how this system functioned and how the system was maintained." claimed in paragraph l.

315. The same is true to the extent that Milieudefensie et al. want access to those documents to substantiate their argument that SPDC did not take sufficient measures to prevent sabotage, as seems to follow from footnote 150 of their 2013 Motion to produce documents. After all, Milieudefensie et al. fail to explain how a *Leak Detection System* can prevent sabotage. In the absence of such an explanation, Milieudefensie et al.'s position is incomprehensible regarding this

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208 2013 Motion to produce documents, no. 133.

209 Idem.

210 Defense, nos. 38-40, Rejoinder, nos. 21-22.

211 See also the Defense, no. 43.

212 Final judgment, ground 4.51.

point, as well: at best, a *Leak Detection System* can detect sabotage, but it cannot prevent it. Thus, in that light, as well, Milieudefensie et al. do not have a legitimate interest in the documents claimed in paragraph l.

10.6 m. *Accident Report*

316. In paragraph m., Milieudefensie et al. claim access to "the *Accident Report* as issued to the *Department of Petroleum Resources*" regarding the subject oil spill.

317. This claim cannot be awarded, because SPDC does not have (or no longer has) this *Accident Report*.

11 INTERIM APPEAL IN CASSATION; NO DECLARATION OF PROVISIONAL ENFORCEABILITY

318. Shell requests that the Court of Appeal allows an interim appeal in cassation in the – unlikely – event that any part of Milieudefensie et al.'s claims for the production of documents is awarded. To substantiate this request, Shell points out the following.

319. In the event that appeal in cassation against a ruling in favor of Milieudefensie et al. in this motion can only be initiated together with the final ruling (or a later interlocutory ruling that can be appealed in cassation), the cassation proceedings, in fact, no longer have any meaning, because in that case, Milieudefensie et al. will already have obtained access to the relevant documents. For this reason, Shell believes that there is sufficient reason to allow an interim appeal in cassation to be initiated against a ruling in favor of Milieudefensie et al. in this motion. This also prevents Shell from being placed in a relatively more unfavorable position in respect of the situation in which Milieudefensie et al. would have initiated the claim to produce documents in separate interlocutory proceedings.[213] For that same reason, Shell requests that the Court of Appeal does not declare any ruling in favor of Milieudefensie et al. provisionally enforceable.

[213] Cf. S.M. Kingma, TCR 2010/1, p. 3 and the Court of Appeal of Den Bosch 23 October 2007, LJN BB6845.

12 CONCLUSION

In view of the above, Shell moves that the Court of Appeal, in a ruling that is declared provisionally enforceable to the extent possible:

In the case with number 200.126.843:

directs that the appeal instance has ended, or at least declares Milieudefensie et al.'s appeal inadmissible; or at least declares Eric Dooh's appeal inadmissible;

declares that the Dutch court has no jurisdiction over the claims in the motion against SPDC;

declares Milieudefensie et al.'s claims in the motion inadmissible, or at least dismisses those claims;

In the case with number 200.126.848:

declares Eric Dooh's appeal inadmissible;

declares Milieudefensie et al.'s claims in the motion or at least Milieudefensie's claims in the motion inadmissible, or at least dismisses those claims;

In both cases:

orders Milieudefensie et al. to pay the costs of the proceedings, stipulating that these costs must be paid within fourteen days after the ruling to be rendered in the case at issue, failing which Milieudefensie et al. will be in default by operation of law.

Attorney

This case is handled by J. de Bie Leuveling Tjeenk, LL.M., of De Brauw Blackstone Westbroek N.V., P.O. Box 75084, 1070 AB Amsterdam, T +31 20 577 1661, F +31 20 577 1775, E jan.tjeenk@debrauw.com

List of exhibits with this statement on appeal

39. Writ dated 31 May 2013, by virtue of which RDS and SPDC were summoned to appear at the docket hearing of 2 July 2013;

40. Color copies of the ten copies of the notices on appeal that were served at attorney Tjeenk's office on 1 May 2013;

41. Fax letter from attorney Tjeenk to the bailiff dated 24 May 2013;

42. Fax from the bailiff's office to attorney Tjeenk dated 24 May 2013;

43. Fax letter from attorney Tjeenk to the bailiff dated 28 May 2013;

44. Written statement from Mr. W.D. van der Voorden, who received the copies of the notices of appeal from the bailiff on 1 May 2013;

45. Letter from the bailiff to attorney Tjeenk dated 30 May 2013;

46. Fax letter from attorney Tjeenk to the bailiff dated 6 June 2013.

List of case documents in the proceedings of Dooh et al. / RDS and SPDC in the first instance (currently case number: 200.126.843)

Case document	Date	Exhibits
Summons	27 April 2009	A.1 - J.10
Motion for the court to decline jurisdiction and transfer the case, also containing conditional defense in the main action	28 October 2009	1 - 18
Statement of defense in the jurisdiction motion	25 November 2009	-
Statement of reply in the jurisdiction motion	13 January 2010	19 and 20
Statement of rejoinder in the jurisdiction motion	27 January 2010	-
Judgment	24 February 2010	-
2010 Motion to produce documents	7 April 2010	-
Statement of defense in the motion by virtue of Section 843a DCCP	16 June 2010	21
Statement of reply in the motion to produce documents by virtue of Section 843a DCCP	8 September 2010	-
Statement of rejoinder in the motion by virtue of Section 843a DCCP	20 October 2010	22 - 25
Document for submitting exhibits	19 May 2011	B.14
Document for submitting exhibits	19 May 2011	26 and 27
Further document submitting exhibits	19 May 2011	28
Written pleadings of attorneys M.J.G. Uiterwaal and Ch. Samkalden in the motion to produce documents by virtue of Section 843a DCCP	19 May 2011	-
Written pleadings in the motions by virtue of Section 843 DCCP of attorney J. de Bie Leuveling Tjeenk	19 May 2011	-
Interlocutory judgment	14 September 2011	-
Statement of reply	14 December 2011	L1 - L12
Statement of rejoinder	14 March 2012	32 - 34
Document for submitting exhibits	11 September 2012	M1 - M12
Document for submitting exhibits	11 October 2012	35 - 38
Written pleadings of attorney Ch. Samkalden	11 October 2012	-
Written pleadings of attorney J. de Bie Leuveling Tjeenk	11 October 2012	-

Judgment	30 January 2013	-

List of case documents in the proceedings of Dooh et al. / SPNV and ST&T
(currently case number: 200.126.848)

Case document	Date	Exhibits
Summons	21 April 2010	A.1 - K.2
Statement of defense	1 September 2010	1 - 24
2010 Motion to produce documents	27 October 2010	-
Statement of defense in the motion by virtue of Section 834a DCCP	24 November 2010	25
Statement of reply in the motion to produce documents by virtue of Section 843a DCCP	2 February 2011	-
Statement of rejoinder, also defense in change of claim in the motion by virtue of Section 843a DCCP	30 March 2011	26 - 29
Document for submitting exhibits	19 May 2011	30
Document for submitting exhibits in the motion	19 May 2011	B.14
Further document submitting exhibits	19 May 2011	31
Written pleadings of attorneys M.J.G. Uiterwaal and Ch. Samkalden in the motion to produce documents by virtue of Section 843a DCCP	19 May 2011	-
Written pleadings in the motions by virtue of Section 843 DCCP of attorney J. de Bie Leuveling Tjeenk	19 May 2011	-
Interlocutory judgment	14 September 2011	-
Statement of reply	14 December 2011	L1 - L12
Statement of rejoinder	14 March 2012	32 - 34
Document for submitting exhibits	11 September 2012	M1 - M12
Document for submitting exhibits	11 October 2012	35 - 38
Written pleadings of attorney Ch. Samkalden	11 October 2012	-
Written pleadings of attorney J. de Bie Leuveling Tjeenk	11 October 2012	-
Judgment	20 January 2013	-