

~~400.7.102.7~~ The TNP was constructed in 1963 with a design life of 30 years. The TNP reached the end of its design life in 1993. SPDC failed to carry out the necessary inspections and remedial actions in order to extend its design life. The Defendant had been aware for years prior to the 2008 spills that the TNP pipeline was old and in urgent need of replacement. It was aware that there was a strong chance of the pipeline leaking because of its age and, further, that the ability of its engineers to effectively isolate the pipeline in such circumstances was extremely limited. It was or should have been aware that Bodo was classified as a High Consequence Area under international oil industry standards because of its sensitive ecology and the high number of residents living around the pipeline. Despite this, SPDC took the decision to continue pumping oil through the TNP and was reckless as to the damage this might cause to the environment and local communities. Further, oil was pumped in the knowledge that the pipeline did not operate a Leak Detection System that would allow for the quickest method of detecting a spill and then locating the spill point. The Claimants rely, not least upon the contents of the following disclosed documents:-

~~400.7.102.7.1~~ Document 2066, an internal SPDC presentation on pipeline integrity dated 1st September 2001 states "*SPDC Eastern Division (SPDC-E) Major Oil Trunklines were built more than 30 years ago. A series of spills have occurred in recent times due in most cases to sabotage and in some cases technical failure of the pipelines resulting in major losses, crude oil deferment, environmental pollution and serious damage to the company's image. A technical integrity and risk status of major SPDC Oil Trunkline System was conducted in 2000 by a joint team of SPDC and Shell Global Solutions International. The result of the study indicate that the remaining life of most of the SPDC Oil*

Trunklines is more or less non-existent or short, while some sections contain major risk and hazards ”

~~400.7.2~~102.7.2 Document 3280. An SPDC project report dated February 2002 reported that in relation to the 24” TNP SPDC should *“initiate an immediate replacement of this line”*.

~~400.7.3~~102.7.3 Document 1077. SPDC acknowledged in an email dated 10 December 2008 that the company failed to maintain pipeline integrity in Ogoniland as a whole: *“(we are also corporately exposed the pp lines in ogoni have not been maintained properly or integrity accessed in over 15 yrs) we have depended on ensuring high CP availability over this same period.”*

~~400.7.4~~102.7.4 Document 3850. An internal email dated 5 November 2008 noted the need for a pipeline bypassing Ogoniland because the current pipeline had integrity issues and because access can be an issue. The email states *“It is time to take away the exploitative opportunity of our infrastructure running through Ogoni”*.

~~400.8~~102.8 SPDC decided to continue operating an old, continually leaking, pipeline, with no adequate safeguards to prevent the leaks or to minimise the scale of the impact when they occur. SPDC has failed to make the necessary investments in its facilities to bring them up to industry standards, and minimise the risk of damage to the environment. SPDC prioritised the continued operation of its pipeline and its profits, over the expense of upgrading their pipeline, at great cost to the people of Bodo and the environment.

Failure of TNP to isolate and identify oil leaks

~~100.9~~102.9 As set out at paragraph 52.3 above, the Defendant kept the 24" and 28" pipelines operational despite knowing that the pipeline installations were not capable of being fully isolated. The Defendant was aware that there had been a history of issues with the valves at both the downstream and upstream manifolds. Further, the Defendant was aware of potential delays in gaining access to the Bomu manifold in Kdere, where isolation valves were located and which was the point from which flow was redirected between the 24" and 28" pipelines in the event of a spill.

~~100.10~~102.10 The Defendant operated a high pressure pipeline in a High Consequence Area despite knowing that the pipeline had no Leak Detection System capable of quickly detecting a leak and locating the leak point as described at paragraph 16 above. Further, they did not make adequate efforts to physically verify the location of spills despite knowing that their LDS was unable to remotely detect spills (in line with 'Best Available Technology' under international oil industry standards). As a result of the lack of an effective LDS, for periods during the First Oil Spill, the location of the leak point was mistaken and thought to be on a different pipeline (see paragraphs 53 and 54 above). During the Second Oil Spill, the location of the spill remained unknown for a period because SPDC staff were unable to navigate the creeks due to the use of boats ill-equipped for the tidal channels in the area (as detailed in paragraph 69 above). The Claimants refer to the contents of the following disclosed documents:

~~100.10.1~~102.10.1 As described in paragraph 68.1 above, the Weekly Report for Ogoni states that on 6 and 8 October 2008, FTO ('Freedom to Operate') was secured for access to the First Oil Spill site at Bodo (SPDC's Tranche 1 disclosure at Tab 1). Despite this, SPDC staff did not enter the creek to verify the location of the spill or

repair the leaking pipeline. The location of the spill remained mistaken until the day of clamping on 7 November.

~~100.10.2~~102.10.2 On 10 December an internal email states that the SPDC team was unable to locate the Second Oil Spill site because the boat used by the team was inappropriate for the terrain (document 1080). The email demonstrates that access was not an issue at that date, and yet the location was not visited and neither was the spill capped for a further two months from that day.

Failure to reduce flow of oil, shut down or cap the oil spills

~~100.11~~102.11 The Defendant failed to adequately reduce the flow of oil, shut down or expeditiously cap and contain the two spills from the pipeline in 2008/9 for over two months on each occasion despite being aware of the existence of the oil spills. It is averred that these acts and omissions demonstrated a motivation to prioritise profits over the environmental impact caused by oil spills. The Claimants rely not least upon the following facts, borne out the disclosed material:

~~100.11.1~~102.11.1 During the period 11 October to 7 November 2008 SPDC wrongly assumed that the leak was on the 28" line. Notwithstanding this the 28" pipeline was allowed to run at pressure because it was internally reported that the flow could not be switched to the alternate 24" pipeline due to a fire on that line. It appears therefore that either a conscious decision was made to allow oil to spill into the environment for an extended period of time rather than shut down both pipelines or the Defendant had a reckless disregard for the impact of

the decision not to close down both pipelines. (See paragraphs 68.5, 68.7 and 68.12 above.)

~~100.11.2~~102.11.2 Document 1048. An email dated 9 December states that an overflight team observed that oil was still bubbling out of the spill point, despite the purported isolation of the line. In addition to this, as set out in paragraph 59.5 above, the original report from the JIV team that visited the Second Spill for clamping also stated that “oil was still bubbling” on arrival at the site (document 1629).

~~100.11.3~~102.11.3 Document 3811. An email dated 13 February 2009 and stating that downstream isolation did not take place and that there are reports of the spill still leaking.

~~100.11.4~~102.11.4 As noted at paragraph 59.5 above, on 18 February 2009, two months after the start of the Second Spill and while it was ongoing, an SPDC email reported: *“We have confirmed that isolation at the Opobo channel BVS is not effective due to defective valve.”* (document 3847)

~~100.12~~102.12 Matters set out in paragraph 27 of this Reply. SPDC’s use of clamps as permanent repair method of the pipeline fell short of the standard of repair required for the operation of any pipeline, not least one operating in the highly sensitive ecological environment of mangrove swamps.

~~100.13~~102.13 SPDC stood to make a profit by failing to isolate the pipeline as soon as leaks were identified and reported. The cost of shutting down production for just one day far outstripped the loss accrued from allowing a spill to carry on

for a number of weeks or months, despite the catastrophic environmental consequences of such spills. SPDC took a strategic decision to allow oil to leak into the environment and prioritised profits over its duty to protect the environment, and local communities and their livelihoods.

Failure to accurately assess the quantity of oil spilled

~~100.14~~102.14 SPDC adopted the DAM method to assess the amount of oil spilled in the Niger Delta. The DAM method is not only a poor method of undertaking the assessment in a tidal area it is a method that is of nugatory, if any value, for any spill that lasts more than a few days. SPDC has, on one hand admitted the method to be inaccurate, but at the same time has made widespread use of the figures produced by the DAM. The DAM greatly underestimates the amounts of oil spilled in the tidal areas for the reasons set out in paragraph 57 above. SPDC purposefully uses an assessment method which enables it to lower the volume of oil spilled, minimise the issue of spillage to the outside world and cover up the real magnitude of pollution taking place in a highly sensitive ecosystem by reason of the negligent operation of their installations.

~~100.15~~102.15 Further, SPDC's implementation of the DAM method was itself erroneous. The figures for spill volume were further minimised by SPDC's staff using unreasonably low figures for the areas of oil covered and depth of oil in the soil, as set out in paragraph 57.8 above.

Failure to clean up and remediate

~~100.16~~102.16 SPDC failed to clean up the 2008 Oil Spills adequately, and to carry out any remediation. After nearly four years and

eight months, SPDC have made next to no effort to clean up or remediate the 2008 Oil Spills despite their admission of liability.

~~100.17~~102.17 The Claimants come from communities highly dependent on the fisheries for their subsistence and their livelihoods. The 2008 Oil Spills deprived them of a source of food as well as their earnings. The consequences on their life and lifestyles were immense, including depriving pupils and students of a means of funding their education, and depriving the community of its traditional way of life from time immemorial.

~~100.18~~102.18 Further particulars of the profound impact of the 2008 Oil Spills on the Claimants' lives will be produced by way of witness statements as and when directed by the Court within these proceedings.

(J) MATTERS OF NIGERIAN LAW

Jurisdiction

~~101~~103 SPDC avers in paragraph ~~14~~13.4 of the Defence that these proceedings are principally concerned with questions of title to, or the rights to, possession of property, for the purposes of section 30 of the Civil Judgments and Jurisdiction Act 1982 ("the 1982 Act") and therefore the Courts lack jurisdiction to try some or all of the claims (paragraphs ~~4~~3.3 and ~~14~~13.4 of the Defence). SPDC asserts *inter alia* that the Claimants do not have the necessary interest in land to maintain a claim in *Rylands v. Fletcher* or Private Nuisance.

~~102~~104 Section 30 of the 1982 Act states:

"Proceedings in England and Wales or Northern Ireland for torts to immovable property.

(1) *The jurisdiction of any court in England and Wales or Northern Ireland to entertain proceedings for trespass to, or any other tort affecting, immovable property shall extend to cases in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property.*”

403.105 The Claimants aver that, on any view, the claims do not infringe the 1982 Act:

403.1105.1 As a matter of Nigerian law it is settled law (by statute and the relevant case law) that individual claimants have sufficient interest in land to maintain a claim both under the rule in *Rylands v. Fletcher* and Private Nuisance.

403.2105.2 Although s.1 of the Land Use Act 1978 (“the 1978 Act”) does vest the title of land in the Governor (in trust for the use and common benefit of all Nigerians), pursuant to sections 34 and 36 of the 1978 Act, the customary rights of possession, use and occupancy that existed prior to the Act continue to subsist and enure after it.

403.3105.3 Further, pursuant to s.36(2) of the 1978 Act, in non-urban areas customary land tenure of agricultural land shall be treated as if a customary right of occupancy had been granted to the occupier or holder by the appropriate Local Government. Therefore, individuals who enjoy a customary right of occupancy of land do have the requisite legal title/exclusive possession of land to maintain a claim under the rule in *Rylands v. Fletcher* notwithstanding the 1978 Act (see for example *SPDC v. Ohaka* [2008] 8 CLRN and *SPDC v. Amaro* [2000] 10 NWLR.)

105.4 Therefore, it is denied that Section 30 of the 1982 Act has any relevance to these proceedings since there is no “*question of the*

title to, or the right to possession of, that property” to be determined. Nigerian law is clear: a community does enjoy sufficient interest in land to maintain both statutory and common law claims arising out of oil spill pollution.

403.4105.5 SPDC further avers at paragraph 13.4(i) of their Defence that there are two claims proceeding in Nigeria in which other claimants assert ownership and/or the right to possession of some or all of the Bodo creek. The Claimants aver that the individuals who have brought these putative proceedings have no standing to represent the interests of the Bodo Community, a fact which is averred by SPDC themselves in their Defences to both cases. Further, one of the two claims is no longer being pursued and has been formally withdrawn. The interests of the Bodo Community are lawfully represented by the Paramount Ruler and Council of Chief & Elders of Bodo who are the claimants in the Bodo Community Claim, a fact which is formally recognised by the Gokana Local Government Council. Further, even if the individuals who have brought these putative proceedings did have standing to do so, the current case is not, on any view, “principally concerned with a question of the title”. Therefore, it is denied that Section 30 of the 1982 Act has any relevance to these proceedings.

The Bodo Community’s Interest in Land

404106 SPDC avers at paragraphs 4312.1 and 4918.1 of the Defence that:

404.1106.1 The Claimants are not the legal owner(s) of the communal lands, in particular the mangroves, shrines and water sources.

~~404.2~~106.2 The land described by the Claimants as communal lands (whether land or waterways) were at all material times vested in either the Governor of Rivers State or the Government of the Federation of Nigeria respectively.

~~404.3~~106.3 The Claimants, therefore, do not have the requisite proprietary interest to entitle them to bring a claim for an injunction with respect to undertaking reasonable and necessary remedial work to communal lands or alternatively damages in lieu of the same.

~~405~~107 The Claimants aver that the members of the Community have communal proprietary rights of use and occupation of the Community land as set out in paragraphs 3,4,8 and 10 -15 of the Claimants' Part 18 Replies.

~~405.4~~107.1 The Claimants join issue with paragraph ~~49~~18.1(a): Nigerian law confers capacity to sue and be sued on the Community in respect of its members' communal rights in the Community land and other common interests as set out in paragraph 12a of the Claimants' Part 18 Replies (*SPDC v. Amadi & 12 Others* (2010) 13 NWLR (Pt.1210) 82)

~~405.2~~107.2 The Claimants join issue with paragraph ~~49~~18.1(b): the First Claimant is the trustee and legal owner of the collective proprietary rights of the members of the Community in the Community Land for the benefit of the members of the Community, or, alternatively the members of the Community are collectively the legal owners of them.

~~405.2.1~~107.2.1 As to paragraphs (i) and (ii) the statutory provisions cited by the Defendant vested radical title to land and watercourses in the State and Federal

governments respectively (in the same way as radical title to land in the United Kingdom is held by the Crown) and do not preclude ownership of proprietary rights in land and watercourses by other persons.

~~105.2.2~~107.2.2 As to paragraphs (iii) and (iv) it is averred that the proprietary rights of the members of the Community in the Community Land under customary law survived the enactment of the statutory provisions because they were not abrogated thereby as set out in paragraphs 2 and 4 of the Claimants' Part 18 Replies.

~~105.3~~107.3 The Claimants join issue with paragraph ~~13~~12.1(a): Nigerian law confers the right upon a community to bring a claim for mandatory relief in the form that the Defendant undertake reasonable and necessary remedial work or alternatively damages in lieu of the same (SPDC v. Farah [1995] 3 NWLR 148.)

~~106~~108 In any event, the above is at odds with the Defendant's historical position whereby rent was paid by SPDC to the King of Bodo for the use of the Bodo West area.

Common Interest

~~107~~109 SPDC admits and avers at paragraphs ~~19~~18.2 to ~~22~~21 of the Defence that:

~~107.1~~109.1 The First Claimant, as a matter of Nigerian customary law is entitled to bring a Representative Claim on behalf of the members of the Bodo Community by virtue of his status as King.

~~407.2~~109.2 That the First to Eighteenth Claimants are entitled to bring a Representative Claim in respect of common rights to use the communal lands.

~~407.3~~109.3 That the Bodo Community have common rights of use over communal lands, in particular the rights to use the mangroves, water sources and shrines.

~~407.4~~109.4 If rights of members of the Community to use communal lands are exercised under licences granting exclusive possession, those individual rights of members of the Community cannot be the subject of any claim in a representative action.

~~407.5~~109.5 It is denied that the First to Eighteenth Claimants occupy the position of trustees and that the interests and causes of action pleaded are the subject of a trust as a matter of Nigerian law.

~~408~~110 The Claimants join issue with paragraph ~~49~~18.2: the members of the Community have the other common interests set out at paragraphs 16 – 18 of the Bodo Community RRFIs. Further:

~~408.1~~110.1 It is denied that paragraph 11 of the Claimants' Responses to SPDC's RFIs of the Particulars of Claim pleads that rights of members of the Community to use the Community land are exercised under licences granting use with exclusive possession to individual members of the Community. On the contrary, the said paragraph expressly states only that "*the rights of the Community as a whole in the Community land as against outsiders are rights to exclusive possession.*" and that the occupation of Community land by particular members of the Community is under licence from the King and Council in accordance with customary law. The rights of use and

occupation of the Community in the Community land are, under customary law, owned collectively, and individual occupiers do not have individual rights of possession exclusive of other members of the Community: rather, the individuals exercise the Community's collective rights of use and occupation, as regulated by the King and Council in accordance with customary law.

~~408.2~~110.2 It is admitted that in cases where the King and Council have conveyed or leased land to an individual or individuals the freehold (in the case of conveyance) or leasehold (in the case of lease) property rights thereby transferred to the individual(s) do not form part of the Community land.

~~408.3~~110.3 It is averred that damages to compensate the members of the Community for loss and damage suffered by them in respect of their use, ownership and occupation of the Community land are recoverable in a representative action.

~~408.4~~110.4 It is further averred that damages for loss and damage suffered by individuals in respect of their individually held rights are also recoverable in a representative action if their rights are of the same nature as each other and they have been caused loss and damage in respect of those rights in the same way by the same acts or omissions of the Defendant, such that their interest in the claim is therefore the same.

Common Law Remedies

~~409~~111 SPDC avers at paragraph ~~787~~787.1 of the Defence that the statutory remedy provided by the strict liability regime of the Oil Pipelines Act 1990 Act ("the 1990 Act") is the only remedy available under Nigerian law for claims for damages arising out of oil spills. In

particular, by operation of section 32(1) of the Interpretation Act, the provisions of the 1990 Act disapply the common law of England in relation to claims arising from oil spills.

~~440.112~~ SPDC's reliance on section 32(1) of the Interpretation Act is misconceived. The Nigerian courts have consistently applied the common law torts of *Rylands v. Fletcher*, Nuisance and Negligence to claims arising from oil spills:

~~440.112.1~~ Section 32(1) of the Interpretation Act (Chapter 192, Laws of the Federation of Nigeria 1990) provides as follows:

“32. (1) Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.”

~~440.2112.2~~ The judicial interpretation of section 32(1) by the Nigerian Courts is that judicial decisions, common law, doctrines of equity and the law in force in England before 1st January 1900 constitute binding authority in Nigerian courts, whilst decisions of English Courts made after 1st January 1900 are of persuasive value (*Inakoju v. Adeleke* (2007) NWLR pt 1025 pg 423 at 593).

~~440.3112.3~~ Further, where Nigerian courts have applied any such persuasive decisions or principle of English law over a number of years, they become binding authority in Nigeria: see *Adetoun Oladeji (Nig) Ltd v. Nigeria Breweries plc* 5 NWLR pt 1027 pg. 415 at 443.

410.4112.4 The common law torts of *Rylands v. Fletcher*, Nuisance and Negligence have been followed and adopted over many years by the Nigerian courts and have become part of Nigerian case law. Nigerian case law on oil spills all cite the torts of *Rylands v. Fletcher*, Negligence, Nuisance as valid causes of action in addition to the statutory regime under the Oil Pipelines Act 1990. These common law causes of action are pleaded independently and in the alternative to claims pursuant to the Oil Pipelines Act 1990.

410.5112.5 The Claimants deny that the statutory scheme provided by the 1990 Act is the only remedy available under Nigerian statutory law. Other statutory remedies are available to claimants, in addition to the Oil Pipelines Act 1990, *inter alia* regulation 23 of the *Petroleum and Drilling Production Regulations 1969*, which confers a right on any person whose fishing rights have been impacted in the course of drilling operations to claim for damages.

The Petroleum Drilling and Production Regulations 1969

411113 SPDC avers at paragraphs 78.277.3, 78.377.4 and 8079.2 of the Defence that the Petroleum Drilling and Production Regulations 1969 (“the 1969 Regulations”) apply to the holder of an Oil Prospecting Licence granted under the Petroleum Act 1969 (“*the 1969 Act*”) and not to SPDC as the operator of a pipeline and, in any event, the Regulations do not give rise to civil liability.

412114 The Claimants aver that:

412.1114.1 Pursuant to regulation 1, the 1969 Regulations apply to the holder of an Oil Mining Licence in addition to the holder of an Oil Prospecting Licence. SPDC, through the vehicle of an unincorporated joint venture of which it is the operator, is the

holder of an Oil Mining Licence. The standard of care imposed by regulations 25 and 37, therefore, apply to the TNP and to SPDC as the holder of the Oil Mining Licence.

~~412.2~~114.2 The 1969 Regulations do give rise to civil liability pursuant to regulation 23 which provides for compensation to be paid to any person who suffers unreasonable interference in the exercise of fishing rights.

~~412.3~~114.3 Further, regulations 25 and 37 are relied upon in construing the relevant standard of care which SPDC should have followed as the operator of the TNP irrespective of any distinct civil liability imposed by the 1969 Regulations.

Oil Minerals (Safety) Regulations 1963 and 1997

~~413~~115 SPDC avers at paragraphs ~~77.5~~78.4 and ~~80~~79.3 of the Defence that Regulation 7 of the Oil Minerals (Safety) Regulations 1963 (“the 1963 Regulations”) was revoked by Regulation 76 of the Mineral Oil (Safety) Regulations 1997 (“the 1997 Regulations”), and that the 1997 Regulations did not re-enact regulation 7 of the 1963 Regulations. Further, the 1963 Regulations do not give rise to civil liability.

~~414~~116 The Claimants aver that:

~~414.1~~116.1 Regulation 7 of the 1963 Regulations was substantially re-enacted in Regulation 6 of the 1997 Regulations, which provides that:

“6. Except as otherwise provided in these Regulations, every drilling, production and other operation which is necessary for the production and subsequent handling of crude oil and natural gas shall conform with good oil field practice which, for the

purpose of these Regulations, shall be considered to be adequate if it conforms with:-

- (a) the appropriate current Institute of Petroleum Safety Codes;*
- or*
- (b) the American Petroleum Institute Codes; or*
- (c) the American Society of Mechanical Engineers Codes; or any other internationally recognised and accepted systems.”*

~~114.2~~116.2 The 1997 Regulations came into force on 1 October 1997 and SPDC was therefore required to comply with Regulation 6 at the material time.

~~114.3~~116.3 Further, Regulation 6 is relied upon in construing the relevant standard of care which SPDC should have followed as the operator of the TNP.

The Environmental Guidelines and Standards for the Petroleum Industry

~~115~~117 SPDC avers at paragraphs ~~78.5~~77.6 and ~~80~~79.4 of the Defence that the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (“*the Guidelines*”) do not impose a statutory duty and are not actionable as a private law cause of action. Further, they aver that the relevant sections of the Guidelines pleaded in the Particulars of Claim contain a typographical error.

~~116~~118 The Claimants aver that:

~~116.1~~118.1 SPDC correctly identifies that the relevant sections of the Guidelines which have been pleaded in the Particulars of Claim contain a typographical error and are in fact VIII B.4.1, VIII B.2.6.3. VIII B.2.11 and VIII B.7.1 respectively.

~~416.2~~118.2 Section 8(1) of the 1969 Act grants the Minister of Petroleum Resources powers of general supervision over all operations carried on under licenses and leases granted pursuant to the 1969 Act.

~~416.3~~118.3 The Guidelines were issued by the Department of Petroleum Resources in 1991 and revised in 2002 to “effectively carry out these regulatory activities” with regard to the protection of the environment pursuant to its statutory functions and the Minister’s general supervisory powers under s. 8(1) of the 1969 Act.

~~416.4~~118.4 The Guidelines contain enforcement powers and sanctions for the purpose of enforcing compliance with the provisions of the Guidelines and Standards, including powers of inspection, arrest and financial sanctions if the Guidelines are breached.

~~416.5~~118.5 Although the Guidelines do not give rise to distinct civil liability, they are binding upon SPDC pursuant to the Minister’s general supervisory powers under s. 8(1) of the 1969 Act and are relied upon in construing the relevant standard of care which SPDC should have followed as the operator of the TNP.

The rule in *Rylands v. Fletcher*

~~417~~119 SPDC avers at paragraphs ~~81-80~~ to ~~83-82~~ of the Defence that:

~~417.4~~119.1 SPDC operated the TNP under statutory authority of the 1990 Act and the claim in strict liability in *Rylands v. Fletcher* will fail by operation of the principle in *Geddis v. Proprietors of Bann Reservoir* [1878] 3 APP Cas 430 (paragraph ~~828~~1.2 of the Defence).

~~417.2119.2~~ As a matter of substantive Nigerian law, a claim under the rule in *Rylands v. Fletcher* may only be maintained by a Claimant who has either legal title to and/or is in exclusive possession of, land damaged by the escape of oil. It is denied that the Bodo Community are the legal owners of the communal lands (paragraph ~~8281.3~~ of the Defence).

~~418120~~ The Claimants aver that:

~~418.1120.1~~ The principle of statutory authority provides that a defendant is under no liability for acts which a statute has authorised either by express direction or necessary implication. Further, a defendant who interferes with a claimant's common law rights through the exercise of statutory powers will be liable if he exercises those powers negligently. The 1990 Act grants SPDC powers to construct, operate and maintain the TNP, but acts resulting in leakage of oil from the TNP are not authorised by the statute. It was not the intention of the legislature to grant SPDC licence to oust the common law rights of the Claimants by subjecting them to interference by the consequences of oil pollution. SPDC should have had measures in place to prevent leakage which was likely to cause damage to the Claimants.

~~418.2120.2~~ The Claimants have sufficient standing to maintain an action under the rule of *Rylands v. Fletcher* by reason of the long-established and undisturbed use of the land they occupy. The Claimants rely in particular on the following:

~~418.2.1120.2.1~~ Although s.1 of the 1978 Act does vest the title of land in the Governor (in trust for the use and common benefit of all Nigerians), pursuant to sections 34 and 36 of the 1978 Act, the customary rights of possession, use and occupancy that existed prior to the Act continue to subsist and enure after it.

~~418.2.2~~120.2.2 Pursuant to s.36(2) of the 1978 Act, in non-Urban areas customary land tenure of agricultural land shall be treated as if a customary right of occupancy had been granted to the occupier or holder by the appropriate Local Government. Therefore, a Community which enjoys a customary right of occupancy of land does have the requisite legal title/exclusive possession of land to maintain a claim under the rule in *Rylands v. Fletcher* notwithstanding the 1978 Act.

Nuisance

Private Nuisance

119121 SPDC avers at paragraphs 83 and 84 and ~~85~~ of the Defence that a claim may only be maintained by a claimant who either has legal title to and/or is in exclusive possession of the land damaged as a result of nuisance.

120122 The Claimants repeat the averments made with respect to the rule in *Rylands v. Fletcher* above with regard to the purported requirement of legal title and/or exclusive possession.

121123 As to paragraph ~~85~~84.1(e) it is denied that paragraph 11 of the Claimants' Responses to SPDC's RFIs of the Particulars of Claim pleads that rights of members of the Community to use the Community land are exercised under licences granting use with exclusive possession to individual members of the Community. On the contrary, the said paragraph expressly states only that "*the rights of the Community as a whole in the Community land as against outsiders are rights to exclusive possession.*" and that the occupation of Community land by particular members of the Community is under licence from the King and Council in accordance with customary law. The rights of use and occupation of the Community in the Community land are, under customary law, owned collectively, and individual occupiers do not have individual rights of possession exclusive of other members of the Community: rather, the individuals exercise the Community's collective rights of use and occupation, as regulated by the King and Council in accordance with customary law.

Public Nuisance

122124 At paragraph ~~86~~85.2 of the Defence, SPDC "requires the Claimants to prove the nature and extent of the alleged damage, injury

and inconvenience and the members of the affected class who it is alleged suffered the same”.

~~423~~125 The Claimants aver that:

~~423.1~~125.1 As a matter of Nigerian law, members of a Community are able to bring public nuisance claims arising out of oil spills as is clear from the relevant Nigerian case law (see for example *SPDC v. Adamkulle* [2003] 11 NWLR);

~~423.2~~125.2 The Claimants have particularised that they have suffered damage beyond general inconvenience and injury suffered by the public in the form of damage to property and loss of amenity and exposure to a polluted and toxic environment;

~~423.3~~125.3 For each of the Claimants, the losses detailed were caused by the acts and omissions of SPDC, they were directly suffered and substantial in nature;

~~423.4~~125.4 The Claimants have particularised the nature and the extent of the damage to their communal lands caused by the 2008 Oil Spills.

Negligence

~~424~~126 SPDC avers at paragraph ~~87~~86 of the Defence that it does not owe the Claimants a duty of care:

~~424.1~~126.1 The affected lands and waterways are vested in the Governor of the State and in the Federal Government of Nigeria respectively.

~~124.2~~126.2 The interests of the members of the Community in the communal lands are and were limited to a right to use those lands and are not sufficient to give rise to a duty of care.

~~124.3~~126.3 As a matter of both English and Nigerian law, no duty is owed by a defendant who negligently damages property belonging to a third party, to a claimant who suffers loss because of dependence upon that property.

~~125~~127 The Claimants aver that:

~~125.1~~127.1 The Claimants repeat the averments made above with regard to the nature of the Community's interest in communal lands.

~~125.2~~127.2 A community's interest in land is that of customary ownership, including the right to use, occupy, control, manage and alienate the land. It is wrong in law to characterise these rights as "limited to a right to use those lands".

~~125.3~~127.3 The Claimants aver that the relevant Nigerian statutory law and case law are clear: a defendant who negligently damages property belonging to a third party owes a duty of care to a claimant who suffers loss because of dependence upon that property and is accordingly bound to pay compensation.

~~125.4~~127.4 The statutory regime under *s.11(5)(b)* and *s.11(5)(c)* of the Oil Pipelines Act 1990 provides that compensation should be paid to any person who suffers damage as a result of neglect or leakage of a pipeline and does not limit the ambit of the duty owed by the holder of a licence as SPDC suggests.

~~125.5~~127.5 The 1969 Regulations also give rise to civil liability pursuant to regulation 23 which provides for compensation to be

paid to any person who suffers unreasonable interference in the exercise of fishing rights.

~~125-6~~127.6 Further, the common rights of fishery in tidal water is recognised under Nigerian law and the right is not affected by the Minerals and Mining Act 2004 (*Elf (Nig.) Ltd v. Sillo* [1994] 6 NWLR, *Adeshina v. Lemonu* [1965]). The Nigerian Courts have consistently found that individual fishermen and fish pond owners can claim damages arising from negligence caused pollution to communal lands and waters: *SPDC v. Adamkue* [2003] 11 NWLR Pt. 832, *Adeshina v. Lemonu* (1965), *SPDC v. Amaro* [2000] 10 NWLR Pt. 615.

Liability for Damage Caused by Third Parties

~~126-1~~128 At paragraphs ~~7877.1~~ (c), ~~7877.1~~ (d), ~~8079.1~~ and ~~90-89~~ of the Defence, SPDC:

~~126-4~~128.1 Avers that they are not liable, as a matter of causation, to compensate a Claimant under s.11(5) of the Oil Pipelines Act 1990 in respect of any damage caused by third parties.

~~126-2~~128.2 Require the Claimants to prove the nature and scope of any alleged duty to prevent and/or reduce the incidence of bunkering and/or other illegal activities.

~~126-3~~128.3 Deny that SPDC failed to take any or any adequate steps to prevent and/or reduce the incidence of bunkering and/or other illegal activities.

~~127-1~~129 The Claimants aver that:

~~127-1~~129.1 As a matter of Nigerian statutory law SPDC does have a duty to prevent and/or reduce the incidence of bunkering and/or

other illegal activities. Section 11(5)(b) of the Oil Pipelines Act 1990 creates a statutory duty for an oil pipeline operator to protect an oil pipeline and liability to pay compensation if they “neglect” to do so:

*“The holder of a licence shall pay compensation –
(b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good;”*

~~127.2~~129.2 Further, SPDC owed the Claimants, at the material time and subsequently, a duty of care to take adequate steps to prevent the practice or reduce the incidence of the practice of bunkering. (See for example **SPDC v. Otoko** 6 NWLR [1990])

~~127.3~~129.3 The Claimants aver that:

~~127.3.1~~129.3.1 SPDC operated an ineffective surveillance programme that was not adequately staffed, equipped, trained or supervised;

~~127.3.2~~129.3.2 SPDC relied heavily on the Joint Task Force for security and surveillance despite knowing of the JTF's widespread complicity in illegal oil activities;

~~127.3.3~~129.3.3 SPDC did not use appropriate technologies to protect its infrastructure against illegal third party activities in breach of international standards and, therefore, Nigerian law;

~~127.3.4~~129.3.4 SPDC failed to ensure physical infrastructure of the oil pipelines was sufficiently robust to minimise the risk of bunkering;

~~127.3.5~~129.3.5 SPDC left well-heads unprotected on the Bodo West oil field until at least late 2010. It is around these locations that many of the illegal acts of third parties were concentrated.

Unoccupied Land

~~128~~130 At paragraphs ~~78~~77.1 (e) & ~~92-91~~ of the Defence, SPDC avers that mangrove swampland and waterways that are alleged to form part of the communal lands are “unoccupied land” within the meaning of the Land Use Act 1978. Further, no damages are payable for damage to “unoccupied land” pursuant to s 20(4) Oil Pipelines Act 1990.

~~129~~131 The Claimants aver that:

~~129.1~~131.1 Pursuant to sections 34 and 36 of the Land Use Act 1978, the customary rights of possession, use and occupancy that existed prior to the Act continue to subsist and enure after it.

~~129.2~~131.2 The Bodo Community have used and occupied the Bodo creek as a vital economic and social resource for the Community for hundreds of years.

~~129.3~~131.3 The proprietary rights of the community are expressly preserved by s.36(2) of the Land Use Act 1978 if mangroves, swamps and waterways are used for agricultural purposes such as hunting, fishing and firewood collection then.

~~129.4~~131.4 Nigerian law is clear that activities such as hunting, fishing, firewood collection and the gathering of raffia palms are

all “agricultural activities” (cf. *Abuioye v. Yakub* (1991) 5 NWLR (PT.190) 1). The customary rights of possession, use and occupancy, therefore, extends to mangrove swamplands and waterways.

~~429.5~~131.5 There is no precedent in the relevant Nigerian jurisprudence relating to oil spill compensation, whereby community lands, including waterways used for fishing or lands used for farming, have been held to be “unoccupied” pursuant to s.20 of the OPA in the sense suggested by SPDC.

Aggravated Damages

~~430~~132 SPDC avers at paragraph ~~97-96~~ that as a matter of principle, under both the law of Nigeria and England, aggravated damages are only recoverable as damages for the tort of nuisance.

~~434~~133 The Claimants deny that aggravated damages are only recoverable as damages for the tort of nuisance. It is averred that as a matter of principle, under both the law of Nigeria and England, that aggravated damages are recoverable for a wide range of torts, including nuisance, assault, trespass to land, deceit, breach of confidence, false imprisonment and libel. The Claimants accept (nor have they sought to suggest otherwise) that under English law aggravated damages are not available in actions for negligence *Kralj v. McGrath* [1986] 1 All ER 54, 60-61.

Exemplary Damages

~~432~~134 SPDC avers at paragraph ~~98-97~~ of the Defence that:

~~432.4~~134.1 Exemplary damages are not recoverable under the 1990 Act;

132-2134.2 Exemplary damages are recoverable, in principle, in cases of breach of statutory duty, negligence and nuisance.

133135 SPDC's pleaded case as to the recoverability of exemplary damages under Nigerian law is admitted.

Interest


134136 In paragraph 120 of the Defence, SPDC avers that the right to claim interest on tortious damages is a substantive issue to be determined by Nigerian law.

135137 The Claimants admit that the right to claim interest on tortious damages is to be determined by Nigerian law. The Claimants aver that as a matter of Nigerian law interest is awarded in respect of both special damages and with respect to general damages.

RICHARD HERMER QC
JONATHAN GLASSON QC
PIERS FELTHAM
DANIEL LEADER
CLAIRE MCGREGOR

STATEMENT OF TRUTH

The Claimants believe that the facts stated in this Amended Reply are true. I am duly authorised by the Claimant to sign this statement.

Signed ... 

Name: **MARTYN JEREMY DAY**

Position: Senior Partner, Leigh, Day & Co Solicitors

Dated ~~11 October 2013~~ 31 January 2014

Appendix A: Extracts from pipeline industry standards

U.S Code of Federal Regulations governing hazardous liquid pipeline operation and maintenance

CFR (b)(1): an operator must develop a written integrity management program that addresses the risks on each pipeline segment that could affect a high consequence area.

CFR (b)(iii)(2): An operator must implement and follow the program it develops.

CFR (c)(i): An operator must assess the integrity of the line pipe by:

*(A) **Internal inspection tool or tools capable of detecting corrosion and deformation anomalies including dents, gouges and grooves;***

*(B) **Pressure test** conducted in accordance with subpart E of this part; or*

(C) Other technology that the operator demonstrates can provide an equivalent understanding of the condition of the line pipe.

CFR (h)(1): An operator must take prompt action to address all pipeline integrity issues raised by the assessment and information analysis. An operator must evaluate all anomalies and repair those anomalies that could reduce a pipeline's integrity.

CFR (i)(1): An operator must take measures to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area.

These measures include conducting a risk analysis of the pipeline segment to identify additional actions to enhance public safety or environmental protection.

*Such actions may include, but are not limited to... better **monitoring of cathodic protection where corrosion is a concern**, establishing*

shorter inspection intervals... **modifying the systems that monitor pressure and detect leaks, providing additional training to personnel on response procedures, conducting drills with local emergency responders...**

CFR (i)(3): Leak detection. **An operator must have a means to detect leaks on its pipeline system.** An operator must evaluate the capability of its leak detection means and modify, as necessary, to protect the high consequence area.

CFR (i)(4): Emergency Flow Restricting Devices (EFRD). If an operator determines that an EFRD is needed on a pipeline segment to protect a high consequence area in the event of a hazardous liquid pipeline release, **an operator must install the EFRD.**

CFR (j)(1): After completing the baseline integrity assessment, **an operator must continue to assess the line pipe at specified intervals and periodically evaluate the integrity of each pipeline segment that could affect a high consequence area.**

CFR (j)(2): **An operator must conduct a periodic evaluation as frequently as needed to assure pipeline integrity.**

CFR (j)(3): Assessment intervals. An operator must establish intervals not to exceed five (5) years for continually assessing the line pipe's integrity. An operator must base the assessment intervals on the risk the line pipe poses to the high consequence area to determine the priority for assessing the pipeline segments.

Appendix C (II)(A): Risk factors for establishing frequency of assessment:

- (1) Populated areas, **unusually sensitive environmental areas, National Fish Hatcheries...**
- (2) Results from previous testing/inspection.

(3) **Leak History** [*Leak History table indicates that where **more than 3 spills in the last 10 years should be considered high risk***]

(4) **Known corrosion** or condition of the pipeline

(5) **Cathodic protection history.**

(6) **Type and quality of pipe coating** (*disbanded coating results in corrosion*)

(7) **Age of pipeline** (*older pipe shows more corrosion – may be uncoated or have ineffective coating*) and type of pipe seam [*Age of Pipeline table indicates that pipeline **over 25 years should be considered high risk***]

(8) **Product transported** (*highly volatile, highly flammable and toxic liquids present a greater threat for both people and the environment*)

(9) **Size of pipe** (*higher volume release if the pipe ruptures*) [*Line Size Table indicates that **above 18” should be considered high risk***]

(13) **Time since the last internal inspection/pressure testing”**

(16) **Location of the pipeline segment** as it relates to the ability of the operator to detect and respond to a leak (*e.g. pipelines deep underground, or in locations that make leak detection difficult without specific sectional monitoring and/or significantly impede access for spill response or any other purpose*)s.

[Emphasis supplied]

API 1160 (Managing System Integrity for Hazardous Liquid Pipelines, 1st Edition November 2001)

Relevant extracts of API 1160, which gives guidance on the implementation of the CFR, include:

1.2

The [integrity management] program must be continually evaluated and modified to accommodate changes in the pipeline design and operation, changes in the environment in which the system operates, and new operating data and other integrity-related information. **Continuous evaluation is required to be sure the**

program takes appropriate advantage of improved technology and that the program remains integrated with the operator's business practices and effectively supports the operator's integrity goals.

...

New technology should be evaluated and utilized, as appropriate. New technology must be understood and incorporated into integrity management programs.

5.2

Reassess risk.

Risk assessments should be performed periodically to factor in recent operating data, consider changes to the pipeline system design (e.g., new valves, newly replaced pipeline segments or rehabilitation projects, etc.) and operation (e.g., a change in flow or the hydraulic pressure profile), and analyze the impact of any external changes that may have occurred since the last risk assessment (e.g., population encroachment in new areas). The results of integrity assessments, such as internal inspection or pressure testing, should also be factored into future risk assessments, to assure the analytical process reflects the latest understanding of pipe condition.

Revise mitigation and inspection plan.

*The baseline assessment plan should be transformed into an on-going integrity assessment plan that is periodically updated to reflect new information and the current understanding of integrity threats. **As new risks or new manifestations of previously known risks are identified, additional preventive or mitigative actions to address these risks should be performed, as appropriate.***

10.3.3 Improved Emergency Response

Information about active unintended release events occurring on a pipeline may be presented to an operator through pipeline system operation alarms, release detection testing, third-party

observations, emergency response agencies, etc. It is important to develop response procedures for each. These procedures should define an action plan that includes:

- Definition of organizational lines of responsibility and notification for response to unintended releases.
- Training of all personnel responsible for unintended release events.
- Immediate verification of unintended releases, if necessary.
- Isolation and control of the unintended release source.
- Control of the released product according to procedures developed for specific environmental impacts and unintended release volumes.

10.3.6 Release Verification

Procedures for verifying unintended release alarms and notifications need to be well defined and practiced. **If verification is necessary, the process should be completed in the shortest possible time.** There should then be no hesitation by the operator to enact control measures for active releases.

13.1

The operator shall collect performance information and periodically evaluate the effectiveness of its integrity assessment methods, and its preventive and mitigative risk control activities, including repair. The operator should also evaluate the effectiveness of its management systems and processes in supporting integrity management decisions. **A combination of performance measures and system audits is necessary** to evaluate the overall effectiveness of a pipeline integrity program.

[emphasis supplied]

ASME B31.4 (Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids)

434.23.1

Positive displacement meters, turbine meters, or equivalent liquid measuring devices and their proving facilities shall be designed and installed.

461.2

The operating company shall establish procedures for determining the external condition of its existing buried or submerged piping systems and take action appropriate for the conditions found, including, but not limited to, the following.

(a) Examine and study records available from previous inspections and conduct additional inspections where the need for additional information is indicated. The type, location, number, and frequency of such inspections shall be determined by consideration of such factors as knowledge of the condition of the piping system and environment, and public or employee safety in the event of leakage. Corrective measures shall be in accordance with para. 464.

(b) Install cathodic protection on all buried or submerged piping systems that are coated with an effective external surface coating material, except at pump stations, tank farms, and terminals. All buried or submerged piping at pump stations, tank farms, and terminals shall be electrically inspected and cathodic protection installed or augmented where necessary.

461.3(a):

Cathodic protection facilities for new or existing piping systems shall be maintained in a serviceable condition, and electrical measurements and inspections of cathodically protected buried or submerged piping systems, including tests for stray electrical currents, shall be conducted at least each calendar year, but with

intervals not exceeding 15 months, to determine that the cathodic protection system is operating properly and that all buried or submerged piping is protected in accordance with applicable criteria.”

462.2

The operating company shall establish procedures for determining the corrosive effect of the commodity being transported, and the internal condition of its existing piping systems, and take appropriate action for the conditions found.

[Emphasis supplied]

Appendix B: Gross Oil Volume at Bomu Manifold graph