Court of Appeal of The Hague
Docket date: 10 September 2013
Case number: 200.126.849

MOTION TO PRODUCE DOCUMENTS

in the matter of:

the association with corporate personality **Vereniging Milieudefensie**,
established in Amsterdam,

plaintiff in the motion, appellant in the main action,
attorney conducting the case: Ch. Samkalden, LL.M.
attorney of record: W.P. den Hertog, LL.M.

versus:

1. the legal entity organized under the laws of the United Kingdom **Royal Dutch Shell Plc**,
with office in The Hague,

and

2. the legal entity organized under the laws of Nigeria **The Shell Petroleum Development Company of Nigeria Ltd**,
established in Port Harcourt, Rivers State, Nigeria,

defendants in the motion, respondents in the main action,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

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I. Introduction

1. By virtue of a notice of appeal dated 1 May 2013, Vereniging Milieudefensie ("Milieudefensie") lodged an appeal against the judgment of the District Court of The Hague dated 30 January 2013 and the previous judgment dated 14 September 2011 in the case of Friday Alfred Akpan and Milieudefensie versus Royal Dutch Shell Plc ("RDS") and The Shell Petroleum Development Company of Nigeria ("SPDC").
2. In a judgment dated 14 September 2011, the District Court of The Hague largely dismissed a motion of Akpan and Milieudefensie by virtue of Section 843a DCCP. In a statement of appeal, Milieudefensie will further work out its objections to this judgment. However, it has become clear from the final judgment that the District Court of The Hague rendered on 30 January 2013 that in the current situation, Milieudefensie has a legitimate interest in a copy of or access to the Shell documents specified in this document. In the latter judgment, the District Court held that specific decisive evidence to answer the question regarding whether RDS can be held liable for the oil spill at issue was missing. This evidence can only be furnished based on documents that are in Shell's possession. Accordingly, the absence of documents that Shell et al. refuse to grant access to was raised against Milieudefensie.
3. For that reason, Milieudefensie once again files a motion to produce documents by virtue of Section 843a in conjunction with Section 353 (1) in conjunction with Section 208 DCCP. Because Milieudefensie's possibility to further substantiate its arguments in the main action with facts depends in part on the Court of Appeal's opinion regarding this motion, it requests that the Court of Appeal stay the main action in conformance with Section 209 DCCP until a decision regarding the motion has been handed down.
4. If the Court of Appeal only concludes that Milieudefensie most certainly has an interest in access when dealing with the grounds for appeal, this would no longer help Milieudefensie in the main action if the appeal against the interlocutory judgment of 14 September 2011 were to be declared valid. Moreover, the subject motion can be distinguished from the motion to produce documents dated 12 January 2011, because the subject motion is specifically based on the judgment of 30 January 2013, which clearly demonstrates the evidentiary interest in the documents currently claimed. In addition, new information has become available in the interim, which demonstrates that Shell has documents that will serve as evidence for Milieudefensie. One important part of the subject claim pertains to documents that must be drawn up and kept up-to-date based on the internal Shell regulations that are currently available. Thus, the subject motion is not identical to the motion from 2011. For example, in the subject motion, predominantly other – and significantly fewer – documents are requested. Documents for which it has not been explicitly demonstrated in light of the final judgment of 30 January 2013 that a legitimate interest in access exists are not part of this motion. Thus, the subject motion does not pertain to documents that regard the cause of the oil spill or (the breach of) SPDC's duty of care; after all, the District Court held that SPDC is liable in respect of Akpan for allowing the oil spill to occur. This does not preclude that the dismissal of that previous motion regarding those documents can still be raised in the statement of appeal.

5. As may be demonstrated by the following, based on the current situation and the requirements set out in the Dutch Code of Civil Procedure, the Court of Appeal can assess whether the plaintiff is entitled to access to the documents claimed in this motion. However, were the Court of Appeal to conclude in contrast to the above that it cannot allow this new motion to produce documents as long as no decision has been rendered regarding whether or not the judgment of 14 September 2011 is correct, Milieudefensie in that case herewith requests permission to first file the statement of appeal to the extent it is directed against the District Court's judgment in the motion and only file the grounds for appeal in the main action after that.

6. Extremely alternatively, Milieudefensie requests that the Court of Appeal consider this document as a statement of appeal directed against that judgment in the motion to produce documents and rule on the appeal in the motion. In view of a separate statement of appeal, Milieudefensie's objections to the judgment in the motion of 14 September 2011 have only been briefly outlined in this document.

7. In any event, for the sake of clarity Milieudefensie emphasizes that it still wants to be given the opportunity to indicate its grounds for appeal against the final judgment. After all, the objective of this motion is to gain access to documents that will serve to substantiate those grounds for appeal. Given that the grounds for appeal against the final judgment will be worked out based on the outcome of this motion, it is important for Milieudefensie that it is given the opportunity to put forward grounds for appeal against the final judgment after a decision regarding the current motion has been handed down.

8. This statement is arranged as follows. First, the factual background of the case will be briefly explained (II), followed by a detailed specification of the legal framework of Section 843a DCCP (III). Chapter IV discusses the legal basis of the claim of Milieudefensie against RDS and explains why the plaintiff in the motion has a legitimate interest in the claimed documents. Those documents serve to substantiate SPDC's breach of its duty of care, and the existence of and breach by SPDC of its duty of care. Finally, Chapter V offers an overview of those documents and of the applicability of a number of the criteria of Section 843a DCCP.

II. Factual background

9. This case regards oil pollution in and near the village of Ikot Ada Udo in Akwa Ibom State, Nigeria. Just as the plaintiff in the first instance, Akpan, many inhabitants support themselves in Ikot Ada Udo by exploiting farmland and fish ponds. In these proceedings, Milieudefensie represents the interest of a clean environment for the victims of oil spills in the Niger Delta.

10. As the District Court of The Hague, in fact, established in the judgment of 30 January 2013, for years, there have been significant problems in Nigeria for people and the environment in the oil production operations of oil companies. According to Shell's figures, in the past 10 years, an average of 211 oil spills occurred each year in the Niger Delta. The Niger Delta's surface area is comparable to the Benelux. In the past 5 years, 174,000 barrels of oil were spilled on average in the Niger Delta each year (this is approximately 77,000 liters per day). According to Shell, approximately three quarters of those spills were caused by sabotage.

11. In 1959, SPDC's legal predecessor drilled an oil well in Ikot Ada Udo, the IBIBIO-I well. The well is capped by what is called a *Christmas tree*: a steel structure with valves that can be opened and closed to regulate the outflow of oil and gas. The IBIBIO-I well was an exploratory well and has never been used as a production well. Despite this, the well and wellhead were not shut down or properly abandoned; the IBIBIO-I well was not fenced off and third parties could continue to access the well unhindered.

12. Since 1959, various spills have occurred from the *wellhead*. The proceedings in the first instance focused on oil spills in 2006 and 2007. The District Court established that the oil spill in 2007 was reported to SPDC on 10 August 2007. On 7 November 2007, the oil spill was stopped; according to the final judgment, until that time, Shell had been unable to gain access. The report by the *Joint Investigation Team* – from which the District Court starts – estimates that 629 barrels of oil had been spilled at that time.

13. During the proceedings in the first instance, SPDC secured the IBIBIO-I well against oil spills by installing a concrete plug to definitively seal off the *wellhead*.

14. Milieudefensie holds SPDC and RDS liable for allowing the spill to occur and failing to adequately remedy the oil spill, as well as for failing to properly clean up the pollution.

15. In the judgment of 30 January 2013, the District Court of The Hague determined that the oil spill from the Ibibio-I well was caused by sabotage. The District Court also ruled that SPDC had breached its duty of care in respect of Akpan to take measures against this, given that – in brief – the sabotage was foreseeable and would have been easy to prevent. The District Court held that the declaratory judgment claimed by Milieudefensie could not be allowed.

III. Section 843a DCCP

16. Based on Section 843a DCCP, a party who has a legitimate interest can claim access to specific documents regarding a legal relationship to which he is a party. Based on Section 353 DCCP, Section 843a DCCP also applies on appeal. If the criteria of Section 843a DCCP are satisfied, exceptions are only possible in the event of serious reasons, or if the proper administration of justice is also otherwise safeguarded (sub-section 4).

17. The District Court of The Hague has designated the legitimate interest criterion as an evidentiary interest: "An evidentiary interest exists if documentary evidence can contribute to substantiating and/or demonstrating a possibly decisive argument that is relevant for the claims to be assessed, which has been sufficiently substantiated and sufficiently challenged in concrete terms."[1] In the statement of appeal, it will be further explained that this definition used by the District Court of The Hague (or at least the application of this definition) is extremely narrow, especially in view of the stage of the proceedings at the time of the motion to produce documents in the first instance. After all, the District Court requires that it be precisely determined how a specific item of evidence will contribute to substantiating a specific argument, even though the circumstances may compel the arguments to be structured in part based on the documentary evidence. This was certainly the case given that until the interlocutory judgment of 14 September 2011, which law would govern the legal relationship had not yet been established. After all, in that judgment the District Court ruled that Nigerian law applied to the case, on the one hand, and that Akpan and Milieudefensie

1 Judgment in the motion,14 September 2011, ground 4.5

had insufficiently substantiated that the blamed conduct was unlawful under Nigerian law and accordingly constituted a legitimate interest, on the other. However, as will be submitted in the statement of appeal, the court should establish the contents and application of foreign law *ex officio*; this is not subject to the parties' obligation to contend facts and circumstances. In the statement of appeal, Milieudefensie will also work out that and why the interest of establishing the substantive truth and the principle of *equality of arms* should have led to a different approach by the District Court. After all, all the relevant information that may lead to establishing the factual conduct of events and (un)lawfulness in these proceedings is in Shell's possession.

18. Without getting ahead at this stage, it must be noted that a legitimate interest in the right to access exists all the more especially because in the judgment of 30 January 2013, the District Court of The Hague established that Akpan and Milieudefensie failed to demonstrate that the circumstances under which a duty of care may fall on RDS according to Nigerian law indeed occurred. As long as the District Court's judgment has not been set aside, this means that it has been established in any event that the plaintiff in the motion has a legitimate interest in access to documents that will enable it to prove the relevant circumstances.

19. The documents that Milieudefensie claims access to in this motion serve to demonstrate that RDS had superior know-how of relevant aspects of management, safety and the environment and that it was aware or should have been aware of the circumstances in Nigeria, so that RDS was also under a duty of care.

20. As a result of the approach by the District Court of The Hague in the first instance, Milieudefensie, in fact, does not have any option other than to once again file a motion. 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. As already explained before, the District Court held in the motion that the plaintiffs had failed to sufficiently demonstrate that the claimed documents are decisive for awarding their claim; subsequently, in the final judgment, the District Court dismissed their claim given that the circumstances specified (which could be substantiated based on the claimed documents) had been insufficiently demonstrated. By anticipating the assessment of the main action and the fact that the applicant is substantively right so emphatically, the District Court eroded the right of Section 843a DCCP in a manner that is not supported in law or by the case law. Even if, as the District Court notes, Section 843a DCCP works out the principle of *equality of arms* and the interest of establishing the substantive truth, allowing any claims based on that right may not be made dependent on the requirement that it is assumed beforehand that the applicant is substantively right. The case law and literature demonstrate that the starting point in assessing a claim for access or copies is that one of the parties is not unreasonably favored or prejudiced because a specific (evidentiary) document is made available (or not) as evidence in the proceedings. In the case at issue it may be clear that without access to the claimed documents before a decision regarding whether or not the final judgment is correct is handed down, Milieudefensie cannot escape from the disadvantaged position in which it was placed by the proceedings in the first instance.

21. On appeal, Shell will probably again argue that the Dutch court has no jurisdiction over the disputes.[2] However, this does not stand in the way of Milieudefensie's right from Section 843a DCCP. As the Supreme Court recently confirmed, Section 843a DCCP also applies to foreign legal relationships or proceedings.[3]

IV. Shell's duty of care

22. Milieudefensie takes the position that RDS as well as SPDC breached their duty of care in allowing the occurrence of, remediating and cleaning up the oil spills. In any event according to the District Court's judgment dated 14 September 2011, this duty of care must be worked out based on Nigerian law – which is largely based on English law.

23. Milieudefensie requested Queen's Counsel Robert Weir to give his opinion regarding the applicable law in the case at issue based on the judgments rendered by the District Court of The Hague on 14 September 2011 and 30 January 2013 and his expertise in the area of *common law*. Weir has years of experience in liability law; moreover, he was the barrister representing the plaintiffs in *Chandler v Cape*. His opinion and CV are submitted as **Exhibit N2**.

24. Recent case law that the District Court of The Hague referred to in the judgment of 30 January 2013 further demonstrates that a parent company that actively interferes in the work of its subsidiary may be liable for the damage that was caused if it failed to exercise its influence to prevent that damage. To demonstrate that this situation applies to Shell, access to Shell documents from which the applicability of these criteria can be inferred is required.

25. In the judgment of 30 January 2013, the District Court concludes that Milieudefensie's claim for a declaratory judgment to the effect that SPDC committed tort against Milieudefensie is inadmissible, given that Milieudefensie itself did not suffer any damage and no duty of care in respect of Milieudefensie can exist. Milieudefensie will argue in the statement of appeal that it follows from Section 3:305a DCC that the interests and the persons to which these interests are attached and who are represented by Milieudefensie in the subject proceedings must be deemed to be Milieudefensie's interests. However, the District Court apparently construed this claim so rigidly that tort committed against Milieudefensie cannot be deemed to include the tort committed against the interests Milieudefensie represents or against the persons whose interests are similar to these interests. For the sake of clarity, Milieudefensie makes the purpose of its claim explicit by changing its claim in the sense that it moves for a declaratory judgment to the effect that RDS and SDPC committed tort against Milieudefensie and/or against the victims of the oil spills near Ikot Ada Udo. This claim change - which according to Milieudefensie does not comprise any substantive change - will be further substantiated in the statement of appeal.

26. In the judgment of 30 January 2013, the District Court extensively addresses the question regarding whether RDS breached a duty of care in respect of Akpan and Milieudefensie. Below, Shell's duty of care will be addressed fairly extensively. After all, as the District Court determined in the judgment in the motion of 14 September 2011, only if it is likely that a duty of care falls or may fall on Shell, can it be assumed that a legitimate interest exists in documents demonstrating the breach or existence of that duty of care.

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2 See: Shell's response in the press (**Exhibit N1**).

3 *Abu Dhabi Islamic Bank/ABN AMRO* (HR 8 June 2012, LJN BV8510).

IV.1 *Common law* duty of care

27. In order to establish whether *negligence* is involved under *common law*, it will have to be determined whether a duty of care existed under the circumstances specified, whether this duty of care was breached and whether any damage occurred as a result.

28. More than in case of interpretation of the law, the *common law* system demands that the applicability of a rule of law is assessed on a case-by-case basis. Under common law, case law does not replace the law, but rather indicates applicable principles of law:

> Whereas in a Statute every word is law, the precise words of judges are not law at all, but merely an indication of it. […] In order to discover what a decision is an authority for, one must first understand the relevant facts, and analyse the decision in the light of those facts, ignoring asides (obiter dicta). The aim is to ascertain the rule (the *ratio decidendi*) that the judge must have had in mind in order to reach his decision. Then one must decide whether that rule is applicable to the case in hand, which depends on whether its facts are different enough to enable the prior decision to be 'distinguished'; if so, the judge may disregard the prior decision or, if he thinks it right, extend it to the case in hand.[4]

29. *Common law* and *common tort law* are constantly being developed. Tony Weir illustrates how, in addition to an expansion of statutory provisions, the case law demonstrates altered views regarding liability and legal protection:

> Sometimes […] the courts themselves have imposed liability where none had existed before. In 1789 they held that a liar was answerable for the harm caused by his deceit although he obtained nothing by his false pretences. In 1862 they held it is tortuous knowingly to persuade a person to break his contract with the plaintiff. In 1866 they held the occupier of premises liable for failing to make them reasonably safe for people who came there on business. In 1891 they allowed injured workmen to sue for breaches of safety legislation. In 1897 they held it tortuous to play a nasty practical joke which made the victim ill. In recent years the courts have increasingly held defendants liable for failing to protect people against third parties, or even themselves; this really started in 1940 when an occupier was held liable to his next door neighbour for not defusing a danger created on his property by a tresspasser, and it has since been expanded to many other cases where the defendant could and arguably should had prevented the occurrence of the harm, though he had done nothing to contribute to the danger.[5]

30. In ground 4.23 of the judgment dated 30 January 2013 in Akpan and Milieudefensie versus SPDC and RDS, the District Court sets out the general framework in which a general duty of care exists under English and Nigerian law. Three requirements were formulated for this in *Caparo Industries plc v. Dickman*:

> a. There must be *foreseeability* for the defendant that the plaintiff would suffer damage;
>
> b. There must be *proximity* between the plaintiff and the defendant;

4 Tony Weir, p 8.

5 Tony Weir, pp. 3-4.

c. It must be *fair, just and reasonable* to assume that a *duty of care* exists in a specific situation.[6]

31. One important factor in determining a duty of care is the requirement of *proximity*, also called the *neighbourhood principle*. This principle was put forward for the first time by Lord Atkin in *Donoghue v. Stevenson* (1932). This latter case comprises the foundation of today's *common law* regarding the existence of a *duty of care*. Lord Atkins expressed this as follows:

> At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes m law you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[7]

32. Foreseeable damage that directly results from such acts or omissions automatically falls within this category. In the event of an omission as a result of which other parties inflict damage on third parties, it must be further examined whether the *proximity* or *neighbourhood principle* still applies. To this extent, the District Court's approach is adequate. The framework for this further assessment was set forth in *Smith v Littlewoods*.[8]

33. One important factor for the requirement of *proximity*, especially in the event of a parent company, is control or responsibility. In *Chandler v Cape*, the principles previously developed in *common law* were worked out. In this latter case, the court ruled that the parent company had a duty of care to take measures preventing health damage for the employees of its subsidiary.[9]

IV.2 Duty of care of the parent company

34. The District Court also establishes that Shell's situation does not fully correspond to that of *Cape*. However, that does not mean that the case cannot be used very well as an example for the situation in which a duty of care can be assumed. In such cases, the *common law* court uses an *incremental approach*.[10] The District Court's line of reasoning that a duty of care is

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6 *Caparo Industries plc* v. *Dickman* [1990] UKHL 2, AC 605.
7 *Donoghue* v. *Stevenson* [1932] UKHL 100, A.C. 562.
8 *Smith* v. *Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241.
9 *Chandler v. Cape plc* [2012] EWCA Civ 525.
10 Weir, par. 42 and following.

less likely, because the current situation fundamentally differs from the one in *Chandler* in a number of respects is incorrect in that light.[11] Weir submits the following in this regard:

> The fact that this case can be distinguished from the Chandler decision is not, therefore, a bar to the finding that there was a duty of care imposed upon RDS. The case of Chandler is not to be understood as the last word on the imposition of a duty of care on a parent company. It is a case involving the imposition of a duty of care on a parent company in the context of a claim by an employee of a subsidiary. On that factual premise, a duty of care is capable of being owed. It would be wrong to construe from this decision that it is necessarily harder to establish a duty of care in a different factual matrix involving damage to those living near plant operated by a subsidiary and subject to sabotage.[12]

35. Weir also notes that the District Court's opinion that the number of potential victims (in the case at issue indeed a large group) is allegedly relevant in answering the question regarding whether *neighbourhood* or *proximity* is involved is not supported by law:

> At 4.29 of the January 2013 judgment, the court took into account, as a factor militating against the imposition of a duty of care, that such a duty would then be owed "in respect of a virtually unlimited group of people in many countries." The actual number of people who could sue in respect of a claim is not the key in English law. If, for instance, there was an explosion in the heart of London as a result of a trivial but negligent act, causing injury and property damage to many tens of thousands, that would not be treated as a factor against the imposition of a duty of care. If that were so, it would mean that the more likely a defendant was to cause injury and to a greater extent, the less likely the defendant was to owe a duty, a paradoxical and unjust result.
>
> The real test is not how many people may be able to sue but whether the class of individuals wishing to sue are in a relationship of sufficient proximity. In this case, the Claimants are, as I understand it, all individuals who were living close to the pipeline at the time of the incident. In that case, they form a class which is discrete and has a proximate relationship with the pipeline and hence those responsible for preventing its sabotage. That is a different class of individuals from, say, employees of SPDC working on the pipeline (to draw an analogy of sorts with the Chandler) case but no less a valid and confined class of individuals.[13]

36. The circumstances described in *Chandler* are valuable guidelines for determining whether or not the parent company also had a duty of care in the subject case. Weir also explains that in this context, it is irrelevant whether this involves a tort or omission on the part of the subsidiary.[14] The District Court sets out the circumstances deemed decisive in *Chandler* as follows in ground 4.33 of the final judgment:

    1 The businesses of the parent company and of the subsidiary are essentially the same;

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11 Ground 4.29.

12 Weir, par. 15.

13 Weir, par. 16-17. This will be addressed in more detail in the statement of appeal.

14 Weir, par. 50.

2 The parent company has more knowledge or should have more knowledge of a relevant aspect of health and safety in the industry than the subsidiary;

3 The parent company knew or should have realized that the working conditions at the subsidiary were unhealthy;

4 The parent company knew or should have foreseen that the subsidiary or its employees would rely on the fact that the parent company would use its superior knowledge to protect those employees.

37. As will be worked out in more detail in the statement of appeal, with regard to the circumstance first mentioned, the District Court wrongfully assumed that the businesses of the Shell parent companies and SPDC 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".[15] However, the *core business* of both the parent companies and SPDC is the production and distribution of oil; it is this core business in which the damage occurred. Weir notes the following in this regard:

> The first issue is whether the businesses of the parent and subsidiary are in a relevant respect the same. In this case, they clearly are: RDS is in the business of oil production/manufacture etc. and so is its subsidiary SPDC. The assessment of the District Court of the Hague in its January 2013 judgment at 4.31 draws a false distinction between the business of RDS (formulating general policy lines, risk management) and SPDC (the production of oil in Nigeria). It is difficult to envisage any situation in which a parent's business is in all respects the same as that of its subsidiary: it is very much in the nature of a parent's business that it will be involved in overall group strategy etc. whereas the subsidiary will be involved in more concrete activities of manufacture etc. That is why Arden LJ was careful to ask the question whether the businesses were <u>in a relevant respect</u> the same.[16] [emphasis added by Weir]

In contrast to what the District Court assumes, the situation within Shell is no different in this respect from the one in *Chandler v Cape*: Weir explains that in this latter case, as well, the parent company was more involved in determining the outline, but the production of asbestos was the core business of both the parent company and the subsidiary.[17]

38. With regard to the second circumstance, the District Court also submits: "It is further not clear why the parent companies should have more knowledge of the specific risks of the industry in which SPDC operates in Nigeria than SPDC itself".[18] This conclusion of the District Court is incomprehensible. First of all, without apparently being capable of this, the District Court cannot conclude by way of assumption that a situation will probably not occur; see in this regard also Weir, par. 24. To this end, at a minimum, the District Court should have examined the existing evidence and, if necessary, should have rendered an order to furnish evidence. The District Court's finding is even more bitter, because on 14

15 Ground 4.31.
16 Weir par. 21.
17 Weir par 23.
18 Ground 4.31.

September 2011, the District Court had dismissed the plaintiffs' request for access to Shell's documents – which would demonstrate the superior knowledge – due to a lack of a legitimate interest.

39. In addition, in the first instance it has been repeatedly argued and substantiated that the 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. With a globally operating group of companies like Shell it is also obvious that it centralizes its know-how in the area of technology, as well as health and safety issues that occur in the production and distribution of oil instead of having each subsidiary re-invent the wheel. In *Chandler*, LJ Arden states:

> It would have been very surprising if Cape did not make technical know-how available to Cape products in view of its long experience in the Asbestos industry.[19]

Based on the information shared in the disclosure, she ultimately concluded that this technical know-how was indeed shared.

40. In any event, it is clear from the judgment of the District Court of 30 January 2013 that Milieudefensie has an evidentiary interest in access to documents that will enable the appellant to further demonstrate that the parent company has superior know-how in the area of safety and the environment, as well as in the area of *well maintenance* and *abandonment*. This know-how regards both the maintenance and abandonment of *wells*, and taking technical and other measures to prevent and limit damage and clean up contamination. Moreover, the parent company was familiar with the fact that the circumstances in Nigeria entailed impermissible risks. This will be explained below.

41. Within Shell, the division into separate businesses is decisive for streamlining this know-how and these responsibilities. Formerly the *Business Exploration and Production*, today *Upstream International*, is a highly centralized organization within which the lines for SPDC are plotted. This organization is headed by the responsible member of the *Executive Committee* (formerly the *Board of Directors*). In addition to information from the *Business* regarding administrative and operational affairs, the current *Executive Committee* (the *Chief Financial Officer*) is also sent direct financial information from Nigeria by the *Finance Directors*. The concentration and coordination of technical know-how is conducted from Rijswijk (Netherlands). Shell *Projects & Technology*, which also includes *Safety & Environment*, "provides engineering services and support, technological solutions, and major project management services for both upstream and downstream operations. It provides stand-out technical IT solutions for Shell, and researches and develops innovative engineering solutions for the future."[20]

42. In contrast to what Shell submits, the implementation of that know-how is not voluntary. The general Shell standards are worked out in detail in *standards* and *manuals*, which extensively set out the procedure to be followed in a specific situation. This also regards the use of specific technologies, materials and methods. The operating companies must assess if and when a specific situation occurs; however, their margin of discretion is very precisely defined by the central guidelines. All Shell companies are required to observe those

19 *Chandler* v. *Cape plc,* par. 14.

20 http://www.shell.nl/nld/aboutshell/who-we-are/locations/rijswijk.html, consulted on 5 September 2013.

regulations. In addition, specific targets are set – for example in the area of maintenance and the environment – in the annual ***Business Plans*** and related budgets, which are approved by the parent company and checked for *compliance*.[21] These plans stipulate in detail how the operating companies will operate. *Key Performance Indicators* are determined for numerous factors, which are reported on a monthly basis.[22] *Compliance* is further demonstrated by ***Audits*** and ***Assurance letters*** to be mentioned below.

43. As soon as an operating company is shown to deviate from the targets, action is taken. The 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. The business issues instructions to this end; the results of the discussions are further also reflected in the new budgets and in the annual bonuses.[23] Shell also has a protocol for the manner in which audit results and *remedial actions* are to be documented.[24] For example, the parent company is constantly kept abreast of the specific situation in Nigeria. In 1997, Shell's CEO at the time, Hekströtter, emphasized the importance of this role of the parent company, when he explained that from that time, the managers of the subsidiaries had to declare in writing that they had applied the code of conduct and had complied with the centrally adopted environmental policy. On the Dutch talk show Buitenhof he said: This is quite something [...], I believe that as a manager, you are in a cold sweat.[25]It may be assumed that Hekströtter was referring to the ***Assurance letters***, in internal rules defined as "statements regarding assurance of compliance to HSSE and related standards made annually by OpCos through the accountable Directorates/Regions/EP to the Shell Group Executive".[26] Thus, on the one hand, via *Projects and Technology*, the parent company monitors the development of special technical and business know-how that the operating companies like SPDC use. On the other hand, via the *business*, the parent company ensures that it is extensively informed of the conditions of the work in Nigeria and the manner in which the policy is implemented. Based on the ***Business plans and reports*** and ***Recommendations and follow-up of Audits***, the parent company is informed of the general situation and the implementation of the policy, such as the HSE policy and *asset integrity management*. If specific business activities or conditions entail a special risk, the parent company ensures that it receives detailed information, so that the action to be taken can be determined in consultation.

44. The situation does not differ fundamentally from the one in *Chandler v Cape*. The *ratio decidendi* that led LJ Arden to conclude that Cape had assumed responsibility in respect of the employees of Cape Products lies in the combination of know-how and guidance, as well as how the activities of the parent company and the subsidiary were shown to relate. LJ Arden *inter alia* submitted as follows in this connection:

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21 Claimed documents are printed in italic and bold typeface. The documents mentioned here will be explained.

22 See also Kevin Dwyer at http://www.changefactory.com.au/articles/business-management/common-mistakes-with-kpis/ (visited: 15 August 2013): "I counted that from the different divisions of Shell that had an influence over our planning we had over 100 KPIs upon which we had to report no less than monthly and two hundred more we were required to record as PIs but not report on."

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> … where the grant of a license affected the interests of a group, Cape products was making corporate decisions with regard to those interests, as well as those of itself as a separate legal entity. It was acting as a company which had been integrated into a larger group of companies.

45. In turn, the Cape board took an interest in issues relating to the management by subsidiaries of their own business.[27]Starting from the *ratio decidendi* in *Chandler*, it will be further substantiated below that within the Shell group structure, as well, the parent company has assumed responsibility by means of the central development of know-how and the guidance of specific activities of SDPC. It is obvious that the parent company limits this interference to affairs that have a certain relevance or consequence. Liability by analogy to *Chandler* does not require that the parent company had absolute control of the circumstances that resulted in the damage, or that there is an exact correlation between the responsibilities of the parent company and the subsidiary. LJ Arden also felt that it was obvious that there is a difference in the manner of involvement:

46. Moreover, if a parent company has responsibility towards the employee of a subsidiary there may not be an exact correlation between the responsibilities of the two companies. The parent company is not likely to accept responsibility towards its subsidiary's employees in all respects but only for example in relation to what might be called high level advice or strategy.[28]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. For example, LJ Arden finally found as follows in *Chandler*:

> In the present case, Cape was clearly in the practice of issuing instructions about the products of the company, for instance, about product mixes [...]. There is nothing wrong with that but it suggests that the company policy of Cape on subsidiaries was that there were certain matters in respect of which they were subject to parent company direction, No doubt the illness of the employee of Cape products which brought Dr. Smiher to Uxbridge had had to be reported to Cape under directions given by Cape."

I accept [...] that Cape was not responsible for the actual implementation of health and safety measures at Cape Products. However [...] the problem in the present case was not due to non-compliance with recognised extraction procedures. [...] The judge inevitably found as a fact that Cape was fully aware of the 'systemic failure' which resulted in the escape of dust [...]. Cape therefore knew that the Uxbridge asbestos business was carried on in a way which risked the health and safety of others at Uxbridge.[29] Know-how

47. Meanwhile, the appellant knows that from the time pipelines, wells and facilities are installed, SPDC is required to use the technical drawings, methods, and materials selection from manuals that have been imposed from above and which apply to all operating companies (and Joint Ventures). These manuals fall under the *Design and Engineering*

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Practice publications (DEPs), which are largely prepared by *Shell Global Solutions*. Over the years, hundreds of *DEPs* have been drawn up, for example regarding *Materials & Integrity, Asset Management, Pipelines, Technical Safety Engineering, Wells Engineering*, etc. **Exhibit N3** contains the DEP *Global Technical Standards Index* (DEP 00.0005.05-Gen).

48. The overview submitted dates from 2012, but comprises manuals that are much older and also refers to guidelines that no longer exist. Thus, this is a representative overview of the specific, central know-how in the area of technique and business operations. It is pointed out that these DEPs do not contain the *Health, Safety* and *Environment* (HSE) guidelines; the HSE policy is worked out in different manuals and standards and will be discussed later. The DEPs contain technical regulations and a detailed specification of the technical requirements that must be satisfied and the margin for discretion in this. They pertain to all facets of the operating companies' work, up to materials selection, packaging, paint and fencing. *Shell Global Solutions* submits the following in a preface:

> The objective is to set the standard for good design and engineering practice to be applied by Shell companies in oil and gas production, oil refining, gas handling, gasification, chemical processing, or any other such facility, and thereby to help achieve maximum technical and economic benefit from standardization.[30] Milieudefensie has a number of DEPs. Here it will only refer to a number of documents and will submit a few but not all available DEPs; if desired, it is prepared to do so, of course. According to DEP 00.0000.30 (*Procedure for global technical standards publications*), the DEPs are accompanied by *Informatives*; "one-to-one companions for each DEP Specification. The DEP Informative documents the reason or background for certain requirements". The DEPs also have different *supporting documents,* such as *Requisitions (Datasheets)*: ("these provide the information required for the procurement of equipment and materials"); *Standard Forms* ("used to present information in a consistent manner") and *Standard Drawings*: ("drawings of equipment or configurations that are considered to have wide applicability in Shell").[31] These documents are not discussed here.The *Selection of Materials for life cycle performance (Upstream Facilities) - Materials selection process* manual (DEP 39.01.10.11: **Exhibit N4**) is a document of more than one hundred pages, intended "to contain all materials-related information".[32] The document not only involves the selection of materials, but also the manner in which the estimated life cycle of those materials can be guaranteed. Paragraph 2.4 contains the following in this context:In selecting materials with a view to minimising the estimated life cycle costs, it will often be necessary to make use of materials which may, at some stage of their service lives, be subject to corrosion damage.
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> Whilst such damage can sometimes occur during either predicted of unforeseen periods outside the normal operating envelope for a plan, in many cases equipment will be designed and constructed using carbon steel with a corrosion allowance which takes into account the corrosion expected during normal operation over the design life.

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49. In either case, the threat of corrosion must be adequately managed if the intended design life is to be achieved at minimum life cycle cost.[33] To this end, Shell operating companies are required to specify their Corrosion management in documents such as a *Corrosion Management Manual*, a *Corrosion Management Database*, a *maintenance reference plan* and a *Risk Based Assessment*.[34] DEP 39.01.10.12 (**Exhibit N5**) regards the *Selection of Materials for life cycle performance*; *(Upstream Facilities) – Equipment* (**Exhibit N5**). The DEP "specifies requirements and gives recommendations for materials for production systems from the reservoir to the export point". The manual includes specific recommendations and regulations regarding the material to be used in *Xmas trees:*

Table 2: Xmas trees

Conditions				Material
Temp	**pH_2S**	**NaCl**	**Other**	
°C (°F)	mbar (psi)	g/l		
Any	<3.5 (<0.05)	<200	SLC <3	Carbon steel with Alloy 625 trims
<140 (<284)	<3.5 (<0.05)	<165		Martensitic stainless steel (F6NM/CA6NM) with Alloy 625 trims.
<200 (<392)	<3.5 (<0.05)	<20		Martensitic stainless steel (F6NM/CA6NM) with Alloy 625 trims.
As non-sour	<5 (<0.07)	As non-sour	pH >3.5	Martensitic stainless steel (F6NM/CA6NM) with Alloy 625 trims.
<200 (<392)	<10 (<0.15)	<250		22Cr Duplex
<200 (<392)	<20 (<0.29)	<250		25Cr Super Duplex
<200 (<392)	<80 (<1.16)	<50		25Cr Super Duplex
<200 (<392)	<5,000 (<73)	<200		Alloy 718 or Alloy 925 with Alloy 625 sealing faces (4)
<240 (<392)	<30,000 (<435)	<250		Alloy 625 type, e.g., Alloy 625+, Alloy 625PH or Carbon steel clad throughout with Alloy 625 (4)

NOTES: (1) - (3) notes no longer used

(4) For Alloy 625 the partial pressure of carbon dioxide has an impact on performance. For the conditions quoted here the maximum pCO_2 is 23 bar. At lower H_2S levels higher CO_2 levels can be allowed. When using this alloy in such conditions expert advice should be sought.

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50. EP 39.01.30.30 regards *Wellhead and Christmas Tree Equipment*. The document contains additions and amendments to ISO 10423. Documents also refer to EP63: *Design, Drill, Modify and Abandon Well.* Milieudefensie does not have this document.

51. The manuals mentioned here are only a fraction of the DEPs, which demonstrates that technological know-how was centrally developed, coordinated and distributed. In addition to the DEPs, there are other technical standards; Milieudefensie does not have these standards. For example, there is a separate category of standards for wells, the WS-Gen (*wells standard*), "specifying requirements for a product, material or process specifically for oil and gas wells". In addition, there are RMP-Gen standards (*Run & Maintenance Practice*). These standards: "specify requirements and recommendations for activities being performed

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during the running and maintenance (as distinct from engineering, procurement and construction), of a facility**.** By their nature, RM Practices contain information that is not routinely distributed outside Shell."[35] Milieudefensie believes that the superior know-how of the parent company is sufficiently demonstrated by the documents that are in its possession and therefore does not claim access to any other *standards and manuals*. However, should the Court of Appeal rule at any time in the proceedings that in order to determine Shell's liability, it is necessary to examine the contents of manuals that Milieudefensie is unable to submit, Milieudefensie requests that the Court of Appeal orders Shell to submit the relevant manuals into the proceedings by virtue of Section 22 DCCP.

52. 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 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.

    The know-how and involvement of the parent company is not limited to technical standards. In the area of *Health, Safety and Environment*: HSE, as well, specific know-how is collected and shared at the central level. This is done in the *Shell HSE Control Framework*, more specifically in the *Shell EP HSE Manuals EP2005* and *95000*, again sub-divided into many specific regulations. To a significant extent, the HSE policy is determined by risk management. Shell HSE *Manuals* precisely prescribe how operating companies must set up their risk management systems,[36] the information they must document for this purpose, how they must weigh specific risks, and the specific cases in which they must report risks and incidents to the parent company.[37] The general environmental policy is based on the *Global Environmental Standards*, which prescribe *compliance* with the Shell policy.[38] This also shows that central rules have been drawn up setting out the procedures that operating companies must follow after (and during) oil spills:

    The management of identified environmental, social and health aspects shall comply with the appropriate Shell Group and Business standards;

53. Plans shall be in place to deal with spills arising from the activities of a Business Unit/site. These plans shall: i) link to a national oil and chemical spill response plan, which includes interfaces with the relevant local authorities and ii) comply with the Group MOSAG 'Guidelines for Shell Companies on Preparedness, Response and Compensation for Oil and Chemical Spills.[39] MOSAG refers to the *Multi-business Oil and Chemical Spill Advisory Group*, "responsible for developing and promoting advice on the mitigation and control of pollution risk. The group provides advice and guidance to Shell companies based on

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international conventions."[40] EP 95-0100 on *Health, Safety and Environmental Management Systems* (**Exhibit N7**) describes how operating companies must structure their HSE management, the sources that they must use for this and the documents they must keep on this.[41] EP 95-300 (**Exhibit N8**) regards the *Overview Hazards and Effects Management Process*. It discusses different specific risks and risk areas that operating companies deal with in their oil production activities and refers to group documents and standards containing regulations and recommendations, for example for the 'development of recovery procedures'.[42] The know-how in the area of safety and the environment is more specifically expressed in *Group Specifications*, *inter alia* regarding organizing an *Environmental Assessment* (EP-0370); *Drinking Water Guidelines* (EP-0330) and *Environmental Quality Standards* regarding *air (*EP 95-0375), *water (*0380*)* and *soil and groundwater (*0385). There are also *guidelines* ("from initial desk studies to more detailed site investigations") on monitoring the air quality (EP 95-0376); the water quality (EP 95-0381) and soil and groundwater (EP 95-0386); regarding dealing with contaminated soil and groundwater (EP 95-0387) and *Waste management* (EP 95-0390). Further there are rules regarding *Emergency response* (EP 95-0316); *Fire plans and Fire Control* (EP 95-0350, 0351), *H2S in operations* (EP-0317), *Oil Spill Dispersants* (EP95-0397), etc. The documents also refer to the EP *Minimum Environmental Expectations.* Milieudefensie does not have these documents. According to the documentation, there is also an EP *(Exploration and Production) Crisis Guide.*

54. There will be *standards* and *guidelines* regarding many subjects; however, Milieudefensie is not familiar with the existence of these documents. It does not have all the documents or a complete overview of rules. The documents mentioned do demonstrate that the know-how that the parent company has extends to the entire area of asset management, safety and the environment. It is this know-how that the operating companies rely on in taking measures that may combat material problems and sabotage and in dealing with oil spills and contamination.

55. The next section addresses how the parent company had itself informed regarding the details of and deviations from *standards and manuals* at the operating companies in more detail. It follows from the compulsory nature of the internal rules that it may be assumed that the documents mentioned in those rules - access to a number of these documents will be claimed to demonstrate that SPDC breached its duty of care - actually exist. If it is demonstrated that in reality, these documents do not exist, the mere absence of these documents strongly indicates negligence on the part of the parent company. It is pointed out 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; after all, the issue is that these manuals demonstrate that specific relevant know-how is organized at the central level.

Knowledge

56. Shell is informed of SPDC's work through monthly budget meetings and reports regarding *Key Performance Indicators*, through reports of (potentially) high-risk incidents and through the results of regular audits. It is clear and unchallenged that the parent company was aware

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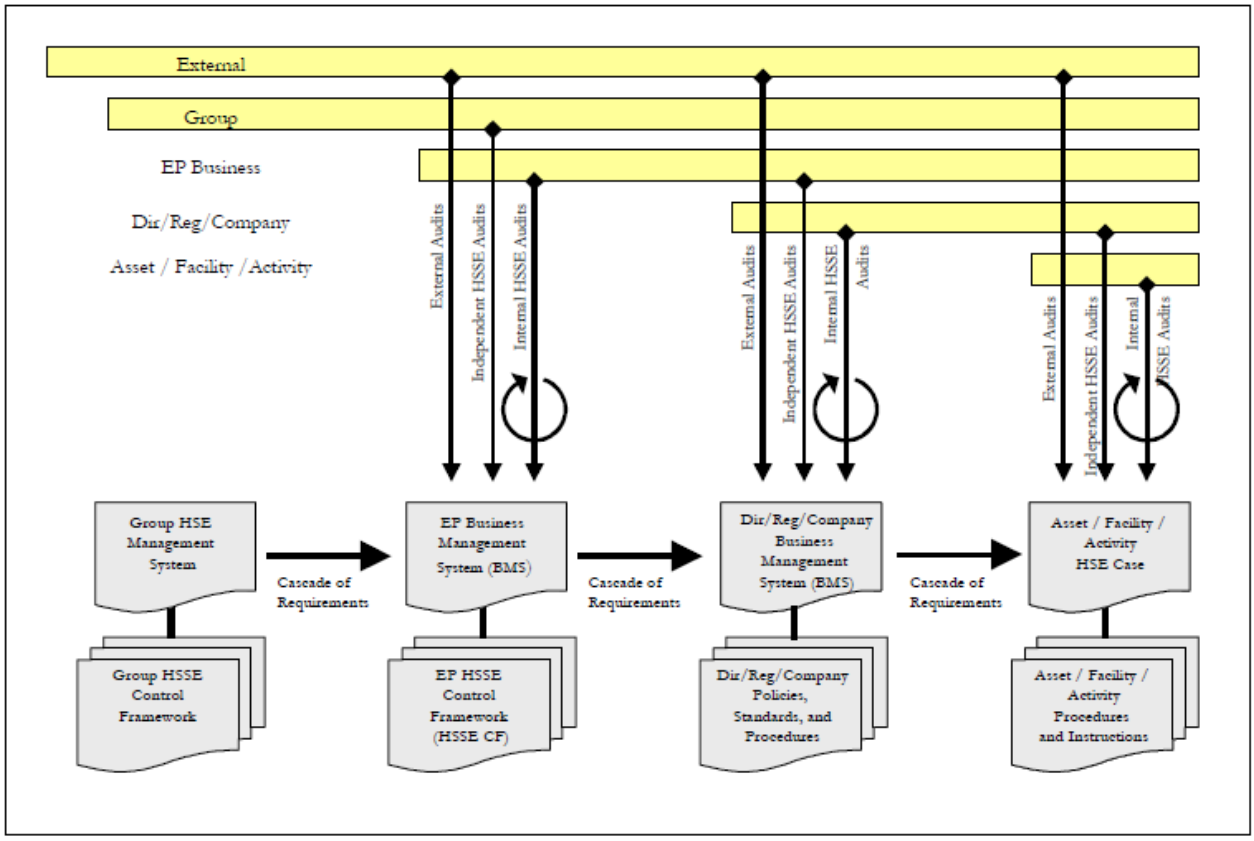
of the influences that SPDC was exposed to in Nigeria; the parent company was familiar with the problems surrounding sabotage and defective maintenance. The parent company undoubtedly was aware of the fact that many wells and other facilities that were no longer in use had not been (sufficiently) dismantled and were thus extremely subject to damage as a result of corrosion or sabotage.

57. Each year, the ***Business Plans*** determine the objectives in the area of production, maintenance, safety and the environment, etc. Those objectives are recorded in *targets* based on which the operating companies are assessed. Measuring the progress of those targets is done using the previously mentioned *Key Performance Indicators*. This progress is reported to the Business each month. This way, the priorities to be set are also centrally determined. Headquarters is consistently informed in detail of the progress made in the area of safety and the environment; important affairs are discussed at the highest level.

58. Regular ***audits*** also play an important role in this system. Those audits are conducted at several levels. The system is presented as follows in HSE Standard EP2005-0180-ST on *Auditing* **(Exhibit N10)**:

The HSSE Audit System Framework and Interfaces



59. The audits are aimed at health, safety and the environment. There are different types of audits regarding a non-exhaustive number of subjects, such as the ISO 14001 Environmental Protection System, different types of audits of the HSE Management System, *Well engineering* and other HSSE *Assurance Products*, including *Emergency and Oil Spill Response*.[43] Audits are conducted both in-house and externally, based on internal standards

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and requirements that are determined at the group level in consultation with the *businesses*. The EP Global Assurance Leader is closely involved in the performance and control of the audits. He reports to the *EP Business Assurance Committee* (BAC); the *Group HSSE Risk & Assurance Committee* is also informed of the results.[44] The guidelines clearly stipulate that audits must be followed up on and that *corrective actions* must be determined. *Best practices* and *key lessons learned* must be shared with the other Shell companies.[45] All the companies must use the same web-based EP HSE *Tracking System* "for recording ***audit reports, findings and recommendations*** *and for monitoring the* ***approval and closeout of actions***".[46] The *Business Assurance Committee* monitors the progress and must approve the results.[47] Serious findings must always be submitted to the *'next level up BAC'*.[48] This in any event includes findings "likely to cause a significant undesirable effect on the entity's objectives and likely to have a notable impact on the HSSE Objectives of the Group, therefore warranting immediate reporting to senior management".[49] Each year, operating companies must prepare an *Assurance Plan*: an "outline of the various forms of appraisal [...] to provide assurance regarding the effectiveness of a risk based control framework"[50]. These Assurance Plans and the consequences to be attached to these plans are also monitored.[51] Moreover, the parent company is continuously kept informed of operational activities of its subsidiaries that entail a certain (potential) risk. As explained in EP-950100 on *Health, Safety and Environmental Management Systems* (version 2001):

> The system concentrates on critical activities and should ensure that they are properly controlled and that measurements are made and reported so as to enable monitoring of overall performance and identification of areas for improvement.

Management systems should provide a structured process for the achievement of continual improvement, the rate of that is generally set by the organisation itself taking into account client and parent company requirements.[52] Manuals and regulations provide for the implementation and coordination of the health, safety and environmental policy (at Shell: the HSE or HSSE management system). As already demonstrated above, this is done by setting substantive standards and determining minimum requirements, on the one hand, and by regulations stipulating how the operating companies must set up and record their HSE management system, on the other. This documentation is more or less uniform at all the operating companies. The documents that those companies are required to keep include *risk assessments*, *incidents* and *follow up actions,* situations in which the HSE policy is deviated from, inspection and maintenance reports, etc.[53] The Manual prescribes: *"Records supporting the performance data provided to the Shell Group on an annual basis shall be kept in an auditable form."*[54] The HSE

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Management System (MS) as a whole is described in an *HSE MS Manual* of the operating company. An HSE MS Manual includes a catalogue setting out the specific activities that the HSE policy applies to and the relevant goals and procedures. A *shortfall and Remedial Action Plan* is also part of this manual, which describes how shortcomings described in audits, reviews, etc. are improved. Another part of the HSE Manual is formed by the *records* of "*HSE Hazards, Effects and Aspects which are relevant to the business as a whole and for which generic control procedures can be applied."* According to the manual, the latter applies to "*many health, workplace safety and environmental aspects"*.[55]Part of the HSE Management involves *Planning and Procedures*. In this connection, operating companies must prepare an ***HSE Plan*** each year "to meet the company policy and continuous improvement objectives, one and five year targets, as well as making good any deficiencies identified in the HSE MS".[56] HSE plans *inter alia* involve "*existing operations; modifications to existing facilities, acquisitions; new developments; abandonment programmes; geological surveys; exploration of development programmes."* The HSE Plan must *inter alia* discuss *intolerable hazards, effects and aspects* and *technological options*.[57] In the scope of *Asset integrity*, the companies must also keep a *Change Control Register* and a *Variance Control Register*, documenting any deviations from the *codes and standards*.[58] *Contingency Emergency Plans* are also part of the *HSE Management System*.[59]Another important element of the HSE Management System is the *Hazards and Effects management.*[60] Group regulations determine that an inventory must be made of the '*major hazards to the environment and to the health and safety of people of all the activities, materials, products and services'*, as well as the *related risks, implementation of measures to control these risks and to recover in case of control failure*. Operating companies must keep a *hazards and effects register* demonstrating the identification and evaluation of risks, as well as the steps that have been taken to meet significant risks. HSE management in respect of high-risk activities and facilities must be worked out in separate ***HSE cases***.[61]The HSE standards and guidelines contain extensive documentation addressing the manner in which operating companies must assess risks and how they must document and report risks.[62] A central computer system, *Fountain*, has been used for this at least since 2005, but before that time a uniform system was used, as well. Different *manuals* contain further risk assessment guidelines.[63]The *Shell Risk Assessment*

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Matrix is the general reference point in risk assessment and reporting:[64]

Risk Assessment Matrix

CONSEQUENCE					INCREASING LIKELIHOOD >>				
SEVERITY <<	PEOPLE	ASSETS	ENVIRONMENT	REPUTATION	A	B	C	D	E
					Never heard of in the industry	Heard of in the industry	Has happened in the organization or more than once per year in the industry	Has happened at the location or more than once per year in the organization	Has happened more than once per year in the location
0	No injury or health effect	No damage	No effect	No impact					
1	Slight injury or health effect	Slight damage	Slight effect	Slight impact					
2	Minor injury or health effect	Minor damage	Minor effect	Minor impact					
3	Major injury or health effect	Moderate damage	Moderate impact	Moderate impact					
4	Permanent Total Disability (PTD) or up to 3 fatalities	Major damage	Major effect	Major impact					
5	More than 3 fatalities	Massive damage	Massive effect	Massive impact					

INCREASING RISK

For definitions of industry, organization and location, refer to the RAM Yellow Guide

60. Incidents with *actual consequences* 4 and 5 are *Significant Incidents*; incidents and *near misses* within the red zone are *High Potential Incidents*. A combination score is determined for these *high potential incidents* based on probability and possible effect. According to the guidelines, all *significant incidents* must be reported to the *Business Head, senior Business Leader, Business HSSE VP and Group HSSE VP* within 24 hours*; High Potential Incidents* with a *Ram Risk Rating* of C5, D5 or E5 must be reported to the *Regional or Class of Business Executive VP* and the *Business HSSE VP*.[65] EP95-0300 shows how crude oil spills must be scaled on this matrix:

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Severity	Environment		Reputation			
	Potential Impact	Definition	Oil Contaminationper incident(litres)		Potential Impact	Definition
			Sensitive areas	Offshore		
0	No effect	No environmental risk, no financial consequences	Several		No impact	No public awareness
1	Slight effect	Negligible financial consequences, local environmental risk within the fence and within systems	<10	0-100	Slight impact	Public awareness of the incident* may exist; there is no public concern
2	Minor effect	Contamination, damage sufficiently large to affect the environment, single exceedance of statutory or prescribed criteria, single complaint, no permanent effect on the environment	<100	100 - 1,000	Limited impact	Some local public concern; some complaints received; slight local media and/or local political attention with potentially negative aspects for Opco operations
3	Localised effect	Limited loss of discharges of known toxicity, repeated exceedance of statutory or prescribed limit and beyond fence/neighbourhood	100 -1,000	1,000- 10,000	Considerable impact	Regional public concern; numerous complaints; extensive negative attention in local media; slight national media and/or local/regional political attention with possible negative stance of local government and/or action groups
4	Major effect	Severe environmental damage, the Opco is required to take extensive measures to restore the contaminated environment to its original state. Extended exceedance of statutory or prescribed limit	1000 - 10,000	10,000 - 100,000	National impact	National public concern; continuing complaints; extensive negative attention in national media and/or regional/national politics with potentially restrictive measures and/or impact on grant of licences; mobilisation of action groups
5	Massive effect	Persistent severe environmental damage or severe nuisance extending over a large area. In terms of commercial or recreational use or nature conservancy, a major economic loss for the Opco. Constant high exceedance of statutory or prescribed limit	>10,000	>100,000	International impact	International public attention; extensive negative attention in international media and national/international politics; potential to harm access to new areas, grants of licences and/or tax legislation; concerted pressure by action groups; adverse effects in Opcos in other countries

Severity rating for risk matrix, EP 95-0300, table V.1

61. With regard to the oil spill in Ikot Ada Udo, the District Court of The Hague found on 30 January 2013 that an estimated 629 barrels of oil had spilled. In the statement of appeal, Milieudefensie will further address this establishment. However, if this is started from, this means that more than 100,000 liters of oil leaked during the spill. Thus, according to the standard in the schedule above, an oil spill with ultimately a *massive environmental effect.* Oil spills that have a *major* or *massive environmental effect* are qualified as a ***significant incident****;* according to the guideline, these had to be reported within 24 hours to the *Business Head, senior Business Leader, Business HSSE VP and Group HSSE VP*. For incidents that must be reported within 24 hours according to the guideline, an ***investigation report*** must be sent to the same persons within one month; a ***review*** by the *Business Head* is conducted within three months.[66] In the first instance, Shell stated that the oil spill near Ikot Ada Udo "was not reported to RDS and/or Malcolm Brinded".[67] Based on the guideline, the oil spill did have to be reported to the *Business HSSE VP* and *Group HSSE VP*. In any event, whether or not the oil spill was reported to RDS cannot relieve RDS of its duty of care. Whether the parent company was aware of the specific circumstances surrounding this oil spill near Ikot Ada Udo is not a decisive factor in answering the question regarding whether

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the parent company had a duty of care; this may be demonstrated by the previously described framework of *Chandler v Cape*.[68] The parent company is reproached for failing to intervene, even though it was aware of the systematic failures on the part of SPDC. The observation that oil spills of this magnitude – many of such oil spills occur (and occurred) in the Niger Delta – are centrally monitored is already sufficient for the conviction that the parent company was aware of or should have been aware of the special risks that were being taken in the Niger Delta. Knowledge of the specific circumstances surrounding the *wellhead* and the oil spill in Ikot Ada Udo does mean that the existence of a duty of care is pertinent. Based on the ***budget meetings, budget priorities and budget reports***, ***audit reports*** and the ***risk assessments*** – and even apart from the publicity and political aspects of Shell's work in Nigeria – the parent company was undoubtedly aware of those systematic shortcomings in Nigeria. The parent company knew – or should have known – that there was a disproportionately large risk of damage as the result of oil spills due to the fact that the IBIBIO-I well had still not been abandoned, even though it had not been in use for years. The parent company knew that equipment that had not been properly *decommissioned* and *abandoned* was a structural problem at SPDC. In addition, the parent company knew or should have known that the risk of damage as the result of sabotage in the Niger Delta was very high. Finally, the parent company knew or should have known that methods that were used to contain the damage caused by the oil spills and remediate the contamination were defective. To be able to further substantiate the specific knowledge of the parent company regarding these issues, Milieudefensie claims access to the relevant ***Budgets*** and ***Budget Reports***, ***Audit Reports***, ***reports of Significant Incidents and High Potential Incidents*** and ***Assurance Letters***, as well as ***communication*** and ***minutes*** regarding these issues, as further specified in Chapter V.

62. Accordingly, the parent company plays a central role in the area of finances, risk management and reputation. Important choices regarding the problems in the Niger Delta, measures against the unsafe situation in this area, including measures against sabotage and *bunkering*, and the question regarding the efforts that SPDC had to make to remediate the contamination in the Niger Delta 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. Moreover, the parent company knew exactly what would be needed to do something about those problems. Within those relationships, 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.

V. Claimed documents by virtue of Section 843a DCCP

63. In the above, Milieudefensie argued extensively that and why it has a legitimate interest in access to specific Shell documents. That legitimate interest in part results from the judgment rendered by the District Court of The Hague on 30 January 2013. In this judgment, the District Court equates a legitimate interest with an evidentiary interest. In applying Section 843a, the principle of *equality of arms* and the interest of establishing the substantive truth should be expressed.

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64. Before listing the documents claimed, Milieudefensie will briefly address the other criteria of Section 843a DCCP. This involves the requirement of sufficiently specified documents; the existence of a legal relationship and the requirement that the defendant in the motion can dispose of or holds the documents. In addition, Section 843a DCCP stipulates an exception in sub-section 4.

65. Below, the documents have been described as specifically as possible, with reference to terms used in the case documents, regulations or internal Shell rules. In practice, a few documents may be referred to by other names; it is not always possible to indicate the documents using exact names or dates, given that internal Shell documents are involved, few of which Shell has disclosed. However, in the context it may be clear which documents are involved. In this connection, please refer to the following finding of the Netherlands Supreme Court in 2012 in respect of a claim by virtue of Section 843a DCCP, as well:

66. Given that [the plaintiff] reported the misconduct that he observed to the AFM, there are reasonable grounds for assuming that the AFM initiated an investigation at TGB, or at least that there has been some exchange of correspondence in this context. The claim regards a subject that has been precisely demarcated by a description of the file and naming the persons and agencies involved in the documents. This means that the documents of which a copy is demanded have been sufficiently specifically designated in the claim to be designated as "specified" in the sense of Section 843a DCCP. This is not altered by the fact that the documents have not been individually described, given that [the plaintiff] was not familiar with the documents.[69] It is obvious that the plaintiff and the defendants in this motion are parties to a legal relationship. Nor is the existence of this legal relationship prejudiced by a possible successful invocation by Shell of a lack of jurisdiction of the Dutch court.[70] Section 843a DCCP further provides that the documents can be claimed from the party who can dispose of or holds the documents. According to the literature and case law, this can also refer to documents that are held by a third party, if it may be assumed that the defendant can dispose of such documents.[71] The claimed documents pertain to SPDC, the parent company and the relationship between them. In the event that a few of the documents claimed in this motion are not held by SPDC or the parent company, but by one of the other subsidiaries guided by the parent company, based on the relationships outlined above it may be assumed that the parent company can also dispose of these documents. Milieudefensie believes that the claimed documents do not entail any serious reasons referred to in Section 843a (4) DCCP that may relieve Shell from its obligation to provide a copy or access. According to Milieudefensie, the documents do not include any confidential business information; should the Court of Appeal hold otherwise after Shell's defense, such objections can be simply eliminated for specific documents, for example by reserving access to the Court of Appeal and attorneys.

V.1 Claimed documents

67. Milieudefensie claims access to documents based on which it can be demonstrated that the parent company assumed responsibility and that this means that it had a duty of care. The parent company's knowledge and involvement can *inter alia* be substantiated with the

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following documents. Most documents and their relevance have been extensively described above. These are only briefly explained below.

a. ***Business plans and reports (2004-2007)***

Milieudefensie claims access to the annual business plans and monthly business reports in respect of maintenance, the environment and safety regarding the vicinity of Ikot Ada Udo and regarding *abandonment programs* in the three years prior to the oil spill of 2007.

The business plans demonstrate the goals that were set in the area of maintenance and HSE in consultation with the parent company; the reports demonstrate if and how those goals were met, and to what extent budgetary measures were taken.[72] These business plans and reports show that and which priorities were discussed and decided on with the parent company, so that it can be demonstrated whether the parent company had or should have had knowledge of the conditions in Nigeria and that it had a duty of care.[73] The documents further serve to demonstrate that the parent company breached its duty of care.**b.** ***Audit reports and follow-up***

Milieudefensie claims access to the most recent audit report at the time of the oil spill regarding *asset integrity* of SPDC, in particular regarding *wells and well abandonment*, 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*.

The *HSE framework* demonstrates that Shell companies are audited in these areas. The results and follow-up must be documented; relevant data are reported.[74] These documents show that the parent company is extensively informed of the activities of its subsidiaries, so that it can be demonstrated that it was aware of or should have been aware of the conditions in Nigeria and that it had a duty of care.

c. Assurance letters (2004-2007)

Milieudefensie claims access to the *Assurance letters* from the three years prior to the oil spill of 2004.

In these Assurance letters, the operating companies must indicate that and how they complied with the Group's health, safety and environmental (HSE) policy.[75] These documents show that the parent company was aware of the conditions in Nigeria and SPDC's health, safety and environmental management, so that it can be demonstrated that SPDC had a duty of care.[76]***d. Reports of Significant Incidents and High Potential Incidents (2004-2007)***

Milieudefensie claims access to the *Significant Incidents* and *High Potential Incidents* reported by SPDC within a radius of 200 kilometers around Ikot Ada Udo as well as regarding abandoned wells in the Niger Delta in the three years prior to the oil spill of 2007.

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Based on internal regulations, operating companies must report 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.[77]These documents show that the parent company was aware of the special risks in Nigeria, so that it can be demonstrated that it had a duty of care.[78] **e. *Incident report, investigation report and review***

Milieudefensie claims 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*.

Based on the Shell guidelines, SPDC had to report the oil spill near Ikot Ada Udo to the *Business Head, senior Business Leader, Business HSSE VP and Group HSSE VP* and send an investigation report on the oil spill for assessment to the Business Head.[79]These documents show that the parent company was aware of or could be aware of the conditions near Ikot Ada Udo, so that it can be demonstrated that it had a (increased) duty of care. In addition, these documents may serve to demonstrate that the parent company breached its duty of care.[80] **f. *Minutes***

Milieudefensie claims 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*.

These documents show that the parent company had knowledge of the high-risk conditions in Nigeria and sometimes actively interfered in its subsidiary, so that it can be demonstrated that the parent company had a duty of care.

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Consequently

That it may please the Court of Appeal, in a ruling in the motion that is declared provisionally enforceable:

I. To order SPDC and RDS to give Milieudefensie access to the documents specified in this motion (or the part of these documents that the Court of Appeal believes is advisable) and to order Shell to provide a copy of or extract from the part of these documents that Milieudefensie wishes to receive within four weeks after the date of the ruling to be rendered in this motion, by means of a photocopy or in a digital form, or in any other form deemed advisable by the Court of Appeal;

Alternatively, to the extent that the Court of Appeal determines that awarding the claim depends on an opinion regarding the accuracy of the judgment in the motion of 14 September 2011,

To offer the plaintiff the opportunity to first and separately file a statement of appeal against that ruling handed down in the motion, or at least

As a second alternative

To consider the subject document as the statement of appeal against the judgment of the District Court of The Hague of 14 September 2011 to the extent that it pertains to the motion and after upholding that judgment, still provide Milieudefensie access to the claimed documents, as well as

To still offer Milieudefensie – in any event – the opportunity to file a statement of appeal against the final judgment of 30 January 2013,

II. to order SPDC and RDS to pay the costs of this motion.

Attorney

Exhibits

N 1. SPDC's response in the press regarding the appeal, distributed in early May 2013 (available at http://www.shell.nl/nld/aboutshell/nigeria/reactie-sunmonu.html)

N 2. Opinion of Robert Weir QC + curriculum vitae

N 3. *Design and Engineering Practice* (DEP) 00.00.05.05-Gen, *Global Technical Standards Index*

N 4. DEP 39.01.10.11-Gen, *Selection of Materials for Life Cycle Performance - Materials*

N 5. DEP 39.01.10.12-Gen, *Selection of Materials for Life Cycle Performance - Equipment*

N 7. Shell folder on *Oil Spill Emergency Response*

N 8. EP 95-0100: *Health, Safety and Environmental Management Systems*

N 9. EP 95-0300 *Overview Hazards and Effects Management Process*

N 10. EP 2005-0180: *HSSE Auditing (standard; procedures, specifications)*

N 11. HSSE Management System Manual: *Incident Investigation and Learning*