Court of Appeal of The Hague
Docket date: 10 September 2013
Case numbers: 200.126.834, 200.126.804

MOTION TO PRODUCE DOCUMENTS

in the matter of:

case/docket number: 200.126.834

1. **Fidelis Ayoro Oguru**,
2. **Alali Efanga**,

both residing in Oruma, Bayelsa State, Nigeria
and

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

plaintiffs in the motion, appellants 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.

as well as

in the matter of: case/docket number:
200.126.804

1. **Fidelis Ayoro Oguru**,
2. **Alali Efanga**,

both residing in Oruma, Bayelsa State, Nigeria

and

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

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

versus:

1. the public limited company **Shell Petroleum N.V.**, established in The Hague,

and

2. the legal entity organized under the laws of the United Kingdom **The "Shell" Transport and Trading Company Ltd**, established in London, United Kingdom

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, Oguru, Efanga and 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 cases of Oguru, Efanga and Milieudefensie against Royal Dutch Shell Plc ("RDS") and The Shell Petroleum Development Company of Nigeria ("SPDC"), as well as against Shell Petroleum N.V. ("Shell Petroleum") and The "Shell" Transport and Trading Company Ltd ("Shell T&T"). In the following, Shell Petroleum and Shell T&T are also referred to as the "old parent companies". The Shell companies (relevant in the specific context) are hereinafter collectively referred to as "Shell".

2. In a judgment dated 14 September 2011, the District Court of The Hague largely dismissed a motion of the plaintiffs by virtue of Section 843a DCCP. In a statement of appeal, the appellants will further work out their 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, the appellants have 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 Shell 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 Oguru et al.

3. For that reason, the appellants once again file a motion to produce documents by virtue of Section 843a in conjunction with Section 353 (1) in conjunction with Section 208 DCCP. Because the appellants' possibility to further substantiate their arguments in the main action with facts depends in part on the Court of Appeal's opinion regarding this motion, they request 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 the appellants most certainly have an interest in access when dealing with the grounds for appeal, this would no longer help the appellants 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 7 April 2010, 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 Oguru et al. 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 2010. 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. This does not preclude that the dismissal of the 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 plaintiffs are 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, Oguru et al. in that case herewith request 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, Oguru et al. request 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, Oguru et al.'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 Oguru et al. emphasize that they still want to be given the opportunity to indicate their grounds for appeal against the final judgment. After all, the objective of this motion is to gain access to documents that can 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 Oguru et al. that they are 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. Below, the factual background of the case will first 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 Oguru, Efanga and Milieudefensie and explains why the plaintiffs in the motion have 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. The case of Oguru, Efanga and Milieudefensie regards oil pollution in and near the village of Oruma in Bayelsa State, Nigeria. Oguru and Efanga supported themselves in Oruma by exploiting farmland and fish ponds.

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. Near Oruma runs a pipeline that exhibited significant problems soon after it had been put into operation in 1994. Upon an initial inspection in February 1996, *wall reduction* of up to 55% was already observed.[1] In November 1996, this had increased to 80% in some places. In 1999, it was concluded that the corrosion was 'unmanageable': "recent inspection of the existing line indicates that the corrosion rate continues unabated and that the line is likely to leak before the year 2003/2004". The decision is taken to replace the pipeline.

12. On 26 June 2005, an oil spill from the pipeline occurred near Oruma; at that time, the pipeline had not yet been replaced and was still being used. In the judgment of 30 January 2013, the District Court establishes that on 29 June 2005, following an initial verification of the oil spill, SPDC stopped the oil flow 'to the extent possible' and that the leak was definitively repaired on 7 July 2005. According to the JIT report, an estimated 400 barrels of oil had spilled from the pipeline in the interim. As Oguru et al. argued in the first instance and as they will substantiate once again on appeal, the damage and the number of barrels of oil spilled was larger.

13. Oguru et al. hold SPDC and the parent company 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. In its judgment dated 30 January 2013, the District Court of The Hague established that the oil spill in Oruma had been caused by sabotage and that neither SPDC nor RDS are liable.

III. Section 843a DCCP

14. 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).

15. 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."[2] In the statement of appeal, it will be

[1] Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project, SPDC 2004, Exhibit M3 in the first instance. See also ground 2.5 of the judgment of 30 January 2013.
[2] Judgment in the motion, 14 September 2011, ground 4.6.

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 Oguru et al. 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, Oguru et al. 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.

16. 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 the plaintiffs failed to demonstrate that SPDC allegedly breached a duty of care in the occurrence and remediation of the oil spills, as well as in cleaning up the pollution. The District Court also established that the plaintiffs failed to demonstrate that the special circumstances under which a duty of care may fall on RDS according to Nigerian law indeed occurred. 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 plaintiffs in the motion have a legitimate interest in access to documents that will enable them to prove the relevant circumstances.

17. The documents that Oguru et al. claim access to in this motion serve to demonstrate:

    a. that SPDC breached its duty of care to properly maintain the pipelines. Even though Oguru et al. believe that the burden of proof in this regard does not fall on the appellants, by virtue of the judgment of the District Court of The Hague dated 30 January 2013, in any event they have a legitimate interest in documents based on which they can further substantiate their arguments that the oil spills were caused by defective maintenance rather than sabotage;

    b. that SPDC breached its duty of care to take adequate measures to prevent sabotage;

    c. that SPDC breached its duty of care to ensure that it responds to oil spills properly and promptly;

d. that RDS had superior know-how of relevant aspects of pipeline 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.

18. As a result of the approach by the District Court of The Hague in the first instance, Oguru et al., in fact, do 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 one of the parties 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, Oguru et al. cannot escape from the disadvantaged position in which they were placed by the proceedings in the first instance.

19. On appeal, Shell will probably again argue that the Dutch court has no jurisdiction over the disputes.[3] However, this does not stand in the way of the plaintiffs' right from Section 843a DCCP. As the Supreme Court recently confirmed, Section 843a DCCP also applies to foreign legal relationships or proceedings.[4]

20. In the two cases regarding the oil spill near Oruma, Oguru, Efanga and Milieudefensie hold SPDC, RDS, as well as the 'old parent companies' Shell Petroleum and Shell T&T liable. Until 2005, the latter companies were at the head of the Shell Group; subsequently, RDS acquired their position. Below, the term 'parent company' will be used for each of these companies without any further specification.

[3] See: Shell's response in the press (**Exhibit N 1**).
[4] *Abu Dhabi Islamic Bank/ABN AMRO* (HR 8 June 2012, LJN BV8510).

IV. Shell's duty of care

21. Oguru et al. take the position that the parent company and 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.

22. Oguru et al. 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 is submitted as **Exhibit N 2**.

23. Weir *inter alia* points out that common law is not the only law source in the case at issue. Under Nigerian and English law, a duty of care can result from a statutory duty or from common law. With a statutory provision, the existence of the duty of care is an established fact. The discussion then focuses on the question regarding whether or not that statutory duty of care was *breached* in the specified circumstances. In the absence of a statutory provision, it must be assessed under the common law system whether a duty of care exists under the specified circumstances and, if that conclusion is positive, whether this duty of care has been satisfied. The statutory duties were largely disregarded during the proceedings in the first instance. However, a further consideration of the statutory duties under Nigerian law leads to the conclusion that it may be assumed that a duty of care exists for SPDC – and thus that there is a legitimate interest in access to documents demonstrating that this duty of care has been breached.[5]

24. The starting point in Nigerian legislation and case law is that oil companies are liable for damage caused by oil spills from their pipelines and facilities. The exceptions by virtue of which oil companies can claim exemption from their liability are also embedded in Nigerian legislation and case law. If an oil company invokes such an exception, the burden of proof in respect of demonstrating that such a situation indeed occurs falls on this oil company. SPDC's responsibility must be assessed within this relatively simple framework.

25. However, in its judgment dated 30 January 2013, the District Court of The Hague principally asked itself the question if and why SPDC would be liable for the oil spill at issue. To answer that question, the District Court ordered the appellants to demonstrate that the oil spills were caused by a fact that results in liability for compensation. In the statement of appeal, Oguru et al. will submit that according to

[5] All this will be further worked out in the statement of appeal, of course, given that Oguru et al. believe that this should also lead to a different outcome of the case. The duties of care will be further discussed here, in order to further substantiate the argument that Oguru et al. have a legitimate interest in access to the claimed documents: Oguru et al.'s evidentiary interest not only results from the interpretation of common law by the District Court of The Hague, but also from the statutory duties mentioned here.

the system of Nigerian law, the District Court should have assumed that liability; subsequently, the District Court should have asked itself whether Shell managed to demonstrate beyond reasonable doubt that an exception applies that releases Shell from its liability for compensation. However, as long as the relevant burden of proof falls on Oguru et al., they have a legitimate interest – in the sense of an evidentiary interest – in access to documents that they can use to demonstrate the cause of the oil spill and the breach of Shell's duty of care.

26. 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.

27. 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. Oguru et al. 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 Oruma. This claim change - which according to Milieudefensie does not comprise any substantive change - will be further substantiated in the statement of appeal.

28. 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.

IV.1 Statutory duty of care

29. SPDC's duty of care to prevent damage that is caused by oil spills first of all results from a statutory provision. If a statutory duty exists, the duty of care described is a given.

30. Such a statutory duty of care is expressed in the Oil Pipelines Act. Section 11 (5) of this act stipulates:

> The holder of a licence shall pay compensation-
>
> *(a)* to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the right conferred by the licence, for any such injurious affection not otherwise made good; and
>
> *(b)* to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good; and
>
> *(c)* to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good
>
> and if the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.

31. Section 11 (5) (c) of the Oil Pipelines Act creates a *strict liability* regime for oil spills that have not been caused by third parties. Thus, strict liability exists for oil spills that are caused by defective materials.

32. Section 11(5) (b) codifies the opinions of the Nigerian legislator if a duty of care is in any event involved. This section embeds the obligation of the license holders "to protect, maintain or repair any work, structure or thing executed under the license". Thus, a duty of care that not only regards the *maintenance*, but also the *protection* of the pipelines. Any failure to fulfill that duty of care explicitly carries the consequence that the license holder is liable to "any person suffering damage".

33. Consequently, protecting and maintaining, as well as repairing pipelines is a statutory duty for license holders. SPDC's duty of care has been established to this extent. Thus, based on this statutory duty there is no longer any need to examine whether a duty of care exists – given that this question has been answered by the legislator – but only whether or not the duty of care described has been breached.[6]

34. The fact that the duty *to maintain* comprises the obligation to conduct proper maintenance to prevent oil spills as a result of defective material is obvious. The question that will have to be answered in the main action is whether Shell's statutory duty of care to protect its pipelines also comprises the obligation to take measures to prevent sabotage (and subsequently: whether or not Shell observed that duty of care). The term 'to protect' – especially when used alongside 'to maintain' – refers to measures against external threats; within the Niger Delta, sabotage is by far the best known and most frequent threat. The limited case law dealing with liability in the event of sabotage in any event does not imply that the provision should be taken to

[6] Please refer to Robert Weir's opinion (Exhibit 2, par. 10 and following) and Tony Weir's handbook: *An introduction to Tort Law*, New York: OXFORD University Press 2006.

mean anything else.[7] In that case, it is up to Shell to prove that it took sufficient measures to protect the pipeline near Oruma. In the first instance, the District Court accepted Shell's argument that it takes sufficient measures to protect the pipeline from sabotage, without offering any substantial substantiation. This will be addressed in more detail in the statement of appeal. In light of this conclusion by the District Court, Oguru et al. in any event have a legitimate interest in access to documents based on which the appellants can demonstrate the opposite. This will be discussed in more detail in Section V.3.

35. In addition to the obligation to maintain and protect, Section 11 (5) (b) also contains the obligation to repair a pipeline. Thus, after the oil spill had been detected and Shell was aware of the defect in the pipeline, SPDC had the statutory duty to immediately take measures to repair the pipeline.[8] The cause of the oil spill is completely irrelevant in this regard.

IV.2 *Common law* duty of care

36. In contrast to a statutory duty, for a claim based on *negligence* it will have to be determined each time whether a duty of care can be assumed under the circumstances specified. These are different legal grounds; it is pointed out that these can exist side by side very well.

37. 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.[9]

38. *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:

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[7] In the statement of appeal, Oguru et al. will further address the District Court's findings in which the District Court refers to the *negligence* doctrine in this connection – which does not apply here. In addition, it cannot be concluded based on the assumed absence of decisions ruling against oil companies that no duty of care allegedly exists in the case at issue (under either *negligence law* or *statutory law*). After all, the existence of a duty of care does not establish the liability: this requires that a duty of care has been breached, as well.

[8] See also Weir's opinion, p. 35.

[9] Tony Weir, p. 8.

> 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.[10]

39. In ground 4.29 of the judgment dated 30 January 2013 in Oguru et al., 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;

    c. It must be *fair, just and reasonable* to assume that a *duty of care* exists in a specific situation.[11]

40. Thus, to answer the question regarding whether Shell breached its duty of care, it is first of all important to establish that these conditions have been satisfied. As the District Court rightly established in ground 4.49, if an oil spill occurs from an SPDC oil pipeline or facility, it is always foreseeable that this has harmful consequences for the people living in the vicinity of the location where the oil spill originates, who farm or breed fish at that location. Thus, the requirement of *foreseeability* has been satisfied.

41. The next question to be dealt with is whether *proximity* (or *neighbourhood*) is involved and whether it is *fair, just* and *reasonable* to assume such a duty of care. The *neighbourhood 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:

[10] Tony Weir, pp. 3-4.
[11] *Caparo Industries plc* v. *Dickman* [1990] UKHL 2, AC 605.

> 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 in 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.[12]

42. 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*.[13]

43. For this reason alone it is important to determine the cause of the oil spills at issue. In the event of defective materials, generally and subject to what will be submitted (once again) in this regard in the statement of appeal, it will be more quickly assumed that a general duty of care exists.

IV. 2.1. Duty of care to prevent defective materials

44. Oguru et al. have consistently taken the position that the relevant oil spills were caused by defective maintenance. The fact that Shell was under a duty of care to properly maintain its pipelines is obvious and is not contested by Shell. Weir also arrives at this conclusion in par. 32 and 33 of his opinion.

45. Oguru et al. further pointed out that under Nigerian law, it is up to Shell to prove that the oil spills were caused by sabotage. It is pointed out that the same is true under Dutch law, given that Shell invokes a defense that absolves a party. In the statement of appeal, Oguru et al. will further substantiate that and why the District Court started from an incorrect division of the burden of proof.

46. In its judgment of 30 January 2013, the District Court ruled: “[Those] quotations from Accufacts merely create general doubts. However, the Accufacts report does not

[12] *Donoghue* v. *Stevenson* [1932] UKHL 100, AC 562.
[13] *Smith* v. *Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241.

contain sufficient concrete indications – nor are these visible on the available video footage – that can lead to the conclusion that the subject oil spill was caused by anything other than sabotage, such as – for example – the corrosion hole suggested by Accufacts."[14] In the statement of appeal, Oguru et al. will submit that based on the evidence, the District Court should have arrived at a different conclusion, or at least under Nigerian law should have demanded that Shell – rather than Oguru et al. – eliminate these 'general doubts'.[15] However, because the District Court is of the opinion that the plaintiffs insufficiently demonstrated in concrete terms that the oil spill was caused by defective maintenance, it confirms its provisional opinion of 14 September 2011 – in which the District Court dismissed the access to further evidence – and concludes that the oil spill was, in fact, caused by sabotage.

47. In that case, the question is what would be required to sufficiently concretely demonstrate that the oil spill was caused by something other than sabotage. As victims of the oil spill – and especially without any documentation from Shell – Oguru et al. will never be able to furnish conclusive evidence of the fact that the oil spill was caused by corrosion. In contrast to Shell, Oguru et al. are not in the position (nor have they been in the position) to isolate the section of the pipeline in question and investigate this section, or, for example, to take high-resolution photographs of that section. On the other hand, Oguru et al. can demonstrate that the sabotage defense has been insufficiently substantiated and that it is very likely that the oil spill was caused by defective maintenance. In the first instance, Oguru et al. already submitted numerous circumstances demonstrating this. First of all, this involves the Accufacts report, of course, which unambiguously and emphatically refutes Shell's argument that everything indicates sabotage. Added to this is the previously mentioned internal SPDC report from 2004, which considers:

> **Option 1: do-nothing option**
> A no-project scenario where the pipeline is used under its current status without the replacement of the line would result in the following
> - Extensive and severe corrosion at a rate of approx 0.6 mm/yr
> - Increased rate of crude leakage into the environment
> - Contamination of the environment with crude leading to degradation
> - Loss of revenue to the federal government from further de-rating of the line and crude spillage into the environment
> - Increase community unrest due to crude contamination of their environment
> - Increase in compensation payments and clean-up due to crude spillage
> - Continuous repairs to the line which in the long run would not be cost

[14] Ground 4.23.
[15] In *Shell Petroleum Development Company Nigeria Limited v. Edamkue & Ors.*, Tobi, J.S.C. considered: "The allegation that the spillage was caused by hostile act of some people is an allegation of a criminal act which needs to be proved beyond reasonable doubt." (emphasis added by attorney). SPDC had failed to do so in that case. Tobi, J.S.C. concluded: "The point is that if proper care is taken such a spillage would not have occurred. The onus was therefore on the appellant as defendant to prove that there was no negligence on its part."

effective

> The list is not exhaustive as constant spillage could spiral into areas not mentioned.
>
> For these reasons listed a no-project option is **Not Recommended** [emphasis present in report][16]

Not all arguments will be repeated here; to this end, please refer to the exhibits submitted in the first instance and the statement of appeal still to be filed.

48. In the judgment dated 30 January 2013, the District Court found as follows:

> If the risk of corrosion that SPDC's internal report from 2004 warns about could have resulted in leak holes like the subject leak hole in June 2005 near Oruma, without any concrete explanation – which is absent – it is not clear why no similar oil spills from this obsolete and corrosion-sensitive pipeline have been reported and/or demonstrated near Oruma or elsewhere in the period from July 2005 until 2009. This also indicates that sabotage and not corrosion was involved in June 2005 near Oruma.[17]

This finding again demonstrates that the District Court blames Oguru et al. for being unable to furnish evidence of information that Shell primarily holds. In any event, this conclusion of the District Court demonstrates that Oguru et al. have a legitimate interest in access to documents demonstrating that oil spills occurred from the pipe line in question and how often.

49. Oguru et al. can only specify these arguments in more detail by demonstrating based on documentary evidence that the state of repair of the pipeline near Oruma was simply defective at the time of the oil spills. They can do this *inter alia* by means of reports on the condition of the pipeline and inspection reports.[18] Accordingly, for such documents the requirement of a legitimate interest of Section 843a DCCP has been satisfied, including in the narrow definition of *evidentiary interest* used by the District Court - which Oguru et al. challenged (and will further challenge in the statement of appeal). This will be discussed in more detail in Chapters IV.3.1 and V.2.

IV.2.2 Duty of care in respect of safety / prevention of sabotage

50. In its judgment of 30 January 2013, the District Court rightly pointed out that under Nigerian and English *common law*, under circumstances a duty of care may be

[16] Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project, SPDC 2004, Exhibit M3 in the first instance, par 2.3.3.1 (pp. 2-41).

[17] Ground 4.26. Until the judgment, Oguru et al. were unaware of the fact that whether or not oil spills occurred after the subject oil spill from 2005 would serve them as evidence; this has not been discussed during the proceedings.

[18] Moreover, the appellants also argued in the first instance – and they will repeat in the statement of appeal – that it was up to Shell to give Oguru et al. the opportunity to further substantiate their arguments in this respect with information – to the extent that any burden of proof still falls on Oguru et al. After all, Shell has the relevant information and expertise in spades. Shell wrongfully refused to share or was not required to share such information in the first instance. In addition, Oguru et al. are of the opinion that withholding the report regarding the condition of the pipeline near Oruma was in any event in breach with Shell's obligation to fully and truthfully put forward the facts that are relevant for the decision.

involved to prevent other parties from suffering damage as the result of the actions of third parties. In *Smith v. Littlewoods*, Lord Goff outlined a number of circumstances.[19] The situations referred to under iii and iv in that case are especially relevant here:

> [iii] The situation in which the defendant created a dangerous situation that could be abused by third parties, resulting in damage. Lord Goff described this situation as follows: "*an occupier who negligently causes or permits a source of danger to be created on his land, and can reasonably foresee that third parties may tresspass on his land and, interfering with the source of danger, may spark it off, thereby causing damage to the person or property of those in the vicinity*";
>
> [iv] The situation in which the defendant knew that a third party had created a dangerous situation, while the defendant was able to exercise some control over this situation; in the words of Lord Goff: *"an occupier of property has knowledge, or means of knowledge, that intruders are in the habit of trespassing on his property and starting fires there, thereby creating a risk that fire may spread to and damage neighbouring properties."*

51. In the judgment of 30 January 2013, the District Court of The Hague concludes that no *tort of negligence* by SPDC against Oguru et al. is involved. According to the District Court, no special circumstances have been demonstrated that 'justify a specific duty of care on the part of SPDC in respect of Oguru et al.'[20] To this end, the District Court *inter alia* finds that SPDC had already taken measures to prevent sabotage that can be deemed adequate, i.e. digging in the pipeline, conducting surveillance rounds and monitoring by means of helicopters, and using a system to measure the pressure in the pipelines.[21] The District Court reasons that under these circumstances, the risk of sabotage near Oruma was not larger than elsewhere in the Niger Delta.[22] According to the District Court, Shell could only have reduced or ruled out the general risk of sabotage near Oruma in 2004 'at very high cost'. Under those circumstances, the District Court feels that a *duty of care* of SPDC would not be *fair, just and reasonable*.[23]

52. In the statement of appeal, Oguru et al. will submit that the District Court confuses the question regarding whether a duty of care is involved and the question regarding whether that duty of care has been breached under the circumstances specified.[24] In addition, Oguru et al. will explain that the distinction between a general and a 'specific' duty of care used by the District Court is strained and its application inadequate. Weir notes the following in this regard: "I should emphasize that there is no difficulty, in principle, with a court finding that the risk of sabotage was sufficiently great that oil operators generally owed duties to protect those living near

[19] *Smith* v. *Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241.
[20] Ground 4.50.
[21] Grounds 4.50 – 4.51.
[22] Ground 4.50.
[23] Ground 4.52.
[24] See also Weir's opinion, par. 31.

to pipelines in Nigeria from damage caused by sabotage".[25] In this connection, the following factual establishment by the District Court is also relevant:

> For years, there have been significant problems in Nigeria for people and the environment in the oil production operations of oil companies. The Shell Group, a multinational headquartered in The Hague (Netherlands), is one of the oil companies that have been active in Nigeria for years. Each year, many oil spills occur in Nigeria from oil pipelines and oil facilities. Oil spills may be caused by defective and/or obsolete materials used by the oil companies or by sabotage in combination with, in fact, inadequate security measures. Sabotage is often committed to steal oil or to receive compensation from oil companies for the oil pollution in the form of cash or paid orders for the remediation work to be performed following an oil spill.[26]

53. In light of these circumstances, it can only be concluded that the oil pipelines constitute a source of danger, as Lord Goff described in *Smith v. Littlewood*. Weir does the same in par. 20 of his opinion. In that case, the question is whether Shell could reasonably foresee that third parties would manipulate this source of danger. As will be argued in the statement of appeal, in this context it is irrelevant whether this risk was larger near Oruma than elsewhere in the Niger Delta. Weir explains that the only requirement is that it can be demonstrated that the risk for those living in the vicinity of the pipeline near Oruma was large enough to assume that a duty of care existed.[27] Based on the factual circumstances, the District Court simply should have examined to what extent the risk near Oruma was foreseeable. Weir submits as follows in this regard:

> There is no assessment of the frequency and severity of oil spills in the years preceding this incident or of the risk of ongoing sabotage taking into account levels of poverty, corruption, numbers of saboteurs caught and convicted etc. Absent detailed findings of fact as to the level of the risk and of SPDC's knowledge, it is not possible to determine whether a duty of care was owed.[28]

According to Oguru et al., the fact that the damage as a result of sabotage was foreseeable in the entire Niger Delta - and that Shell actually did foresee this damage - is obvious in light of the previous passages. This will be further substantiated in the statement of appeal.

54. However, regardless of whether or not the Court of Appeal will follow Oguru et al. in this line of reasoning, it has already been established now that they have a legitimate interest in access to documents based on which they can demonstrate that the measures that Shell had allegedly taken were sub-standard. After all, based on these measures, the District Court concludes that Shell was not under any duty of care, or at least that it

[25] Weir's opinion, par. 19.
[26] Ground 2.1.
[27] See also Weir, par. 25: "If the Claimants can establish that there was a sufficiently high risk to all those living near the pipeline in Bayelsa State, that suffices to establish the relevant duty of care."
[28] Weir's opinion, par. 27.

had not breached its duty of care. Thus, if the Court of Appeal by and large follows the approach by the District Court, it is up to Oguru et al. to substantiate that Shell most certainly had a duty of care, because the measures it had allegedly taken were to no avail. If the Court of Appeal follows Oguru et al.'s argument that under the given circumstances, it must be assumed that a duty of care existed, the claimed documents serve to substantiate Oguru et al.'s point of view that Shell breached that duty of care. This will be addressed in more detail in Chapters IV.3.2 and V.3.

IV.2.3 Duty of care to adequately respond after an oil spill

55. In its judgment of 30 January 2013, with reference to its comments regarding a possible duty of care in the occurrence of the oil spill, the District Court of The Hague considers that none of the exceptions 'as prescribed by Lord Goff' occurs in answering the question regarding whether Shell had a duty of care to adequately respond to the oil spill.[29] In this connection, the District Court further concludes that Shell 'in fact, remedied the oil spill as quickly as reasonably possible, so that it cannot be held that its response was inadequate'. Here too, the District Court lumps the existence of a duty of care and the possible breach of such a duty together.

56. As explained in Chapter V.1, SPDC was under the statutory duty to repair the pipeline near Oruma after the oil spill, regardless of the cause of the spill. A duty of care to this effect also exists by virtue of Nigerian *common law*. The finding of the District Court of The Hague that none of the exceptions of Lord Goff applies is incomprehensible in light of the above. Weir submits as follows in this regard:

> I consider it clear that an operator of a pipe which is damaged (through no fault of its own) will owe a duty to repair its pipe and to stop the leak once it is or ought to be on notice of the leak. A passer-by can watch a house burning and lawfully do nothing under English law. The owner of the house, on the other hand, returning to discover that his home is on fire through no fault of his own, is, I think, obliged to take steps to stop the fire and so prevent or limit damage to others. This fits into category (iv) of Lord Goff's analysis in Smith v Littlewoods but it barely requires legal authority to support such an obvious statement. The duty would not arise simply because there is a leak – it arises when the operator is (or should be) on notice that the leak has occurred. The duty is, in substance, codified in section 11(5) OPA.[30]

57. In addition to the Oil Pipelines Act, the *Oil and Pipeline Regulations* further stipulate that a license holder shall prepare a *written emergency plan* 'for implementing in the event of systems failure, accidents or other emergencies':

> An *emergency plan* [...] shall include procedures for prompt and expedient action for-
> (i) the safety of the personnel of the operating company and the public;
> (ii) the protection of property and the environment;

[29] Ground 4.53.
[30] Weir's opinion, par. 39.

(iii) the control of accidental discharge for the handling of emergencies;
(iv) the adequate training of personnel for the handling of emergencies.[31]

58. The *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria* (EGASPIN) further specify this duty of care:

> An operator shall be responsible for the containment and recovery of any Spill discovered within his operational area, whether or not its source is known. The operator shall take prompt and adequate steps to contain, remove and dispose of the Spill.[32]

59. Moreover, SPDC had a special duty of care near Oruma, given that the damage caused by the oil spills was clearly foreseen. The SPDC report from 2004 contained the following recommendations:

> SPDC shall:
> • Ensure pigging wastes are sent to Bonny Terminal for treatment in the thermal desorption unit
> • Oil spill response equipment is stored at flow stations
> • Ensure that immediate repairs are done for corroded/sabotaged sections and there is clean-up of contaminated sites.[33]

60. In the first instance, Oguru et al. argued that SPDC failed to comply with these obligations. Moreover, 48 hours after an oil spill occurs, operators must submit a preliminary report to the *Department of Petroleum Resources* in Nigeria, *inter alia* reporting the *suspected cause of accident,* the *Estimated loss associated with the accident,* the *Emergency remediation response effected on discovery* and a *Plan for restoration of pipeline operations to its licensed conditions*.[34]

61. In light of the final judgment, Oguru et al. have a legitimate interest in access to documents demonstrating that Shell took insufficient measures to limit the damage after the oil spill. This is further discussed in Chapters V.3.3 and VI.4.

IV.2.4 Duty of care to properly remediate

62. In the first instance, Oguru et al. argued at length that Shell was under a duty of care to properly remediate any oil pollution following an oil spill, regardless of the cause. This duty of care is partly based on the provision in the EGASPIN referred to above.

63. In the final judgment, the District Court apparently starts from the fact that "Milieudefensie et al.'s assumption that the EGASPIN represent industry customs in the Nigerian oil industry and that on this basis, SPDC has a duty of care in respect of people living in the vicinity, like Oguru and Efanga, to also properly remediate oil contamination caused by sabotage like the one at issue", and subsequently concludes

[31] Oil and Pipeline Regulations (1995), Section 9 (a) and (b).
[32] EGASPIN (**Exhibit G.1**), p. 152, Section 4.1.
[33] Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project, SPDC 2004 (Exhibit M3 in the first instance), p. 24.
[34] *Guidelines and Procedures for the Design, Construction Operation and Maintenance of Oil and Gas Pipelines in Nigeria*, Section 8.1.

that Shell did not breach its duty of care.[35] In the statement of appeal, Oguru et al. will once again substantiate that and why Shell breached its duty of care to properly remediate the pollution and restore a clean living environment in Oruma.

64. Shell argued that the remediation journals and the *Post Impact* or *Environmental Evaluation Report* – compulsory based on the EGASPIN – claimed in the first instance in this connection that these allegedly do not exist.[36] According to Oguru et al., the failure to maintain documentation regarding the manner in which Shell acted and remediated after the oil spill should come at Shell's expense. In this connection, Oguru et al. currently do not claim any further documents.

IV. 2.5 Duty of care of the Parent Company

65. Oguru et al. submit that the parent companies also had a duty of care to take measures to prevent oil spills – both as the result of defective material and by sabotage – as well as to limit the resulting damage and remediate the pollution.

66. To assess the question regarding whether the parent company can be held liable for the damage that is the result of the oil spills, the District Court rightfully refers to *Chandler v Cape*.[37] 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*.[38] The District Court's line of reasoning that a duty of care is less likely, because the current situation fundamentally differs from the one in *Chandler* in a number of respects is incorrect in that light.[39] 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.[40]

67. 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

[35] Ground 4.54.
[36] In the rejoinder, Shell does refer to a Post Impact Assessment in another oil spill (footnote 98, Statement of Rejoinder in Oruma).
[37] *Chandler* v. *Cape plc* [2012] EWCA Civ 525, par. 14. The case has been submitted in the first instance. For the sake of convenience, a copy is enclosed.
[38] Weir's opinion, par. 42 and following.
[39] Ground 4.36.
[40] Weir's opinion, par. 46.

question regarding whether *neighbourhood* or *proximity* is involved is not supported by law:

> At 4.36 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, Oguru and Efanga were, as I understand it, living close to the pipeline at the time of the incident. The others on whose behalf VM acts in a representative capacity fall into a category of individuals living close to the pipeline. In that case, the Claimants 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.[41]

68. 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.[42]

69. The District Court sets out the circumstances deemed decisive in *Chandler* as follows in ground 4.33 of the final judgment:

> The businesses of the parent company and of the subsidiary are essentially the same;
>
> 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;
>
> The parent company knew or should have realized that the working conditions at the subsidiary were unhealthy;
>
> 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.

[41] Weir's opinion, par. 47-48. This will be addressed in more detail in the statement of appeal.
[42] Weir's opinion, par. 50.

70. 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".[43] 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 4.36 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.[44] [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.[45]

71. 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". 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's opinion, par. 55. 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 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.

72. 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

[43] Ground 4.38.
[44] Weir's opinion, par. 53.
[45] Weir's opinion, par. 54.

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.[46]

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

73. In any event, it is clear from the judgment of the District Court of 30 January 2013 that Oguru et al. have an evidentiary interest in documents that will enable the appellants to further demonstrate that the parent company has superior know-how in the area of safety and the environment, as well as pipeline management and maintenance. In the interim, Oguru et al. have received documents – not from Shell – that demonstrate this. This know-how regards both the installation and maintenance of the pipelines 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.

74. 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."[47]

75. 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 regulations. In addition, specific targets are

[46] *Chandler* v. *Cape*, par. 14.
[47] http://www.shell.nl/nld/aboutshell/who-we-are/locations/rijswijk-e.html, consulted on 5 September 2013.

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*.[48] 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.[49] *Compliance* is further demonstrated by ***Audits*** and ***Assurance letters*** to be mentioned below.

76. 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.[50] Shell also has a protocol for the manner in which audit results and *remedial actions* are to be documented.[51] 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. [52]

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".[53]

77. 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

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[48] Claimed documents are printed in italic and bold typeface.

[49] 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."

[50] See also: Paddy Briggs, "Where the Buck stops in a Multinational Corporation", Blogger News Network, 3 September 2012 (Exhibit M.7).

[51] This system is summarized as follows in Shell's HSSE brochure regarding oil sources: *"Over the last few years we have made some significant improvements. For example, we have expanded our post graduate development programme for Completions and Well Interventions staff and implemented our global system for Well Integrity Management which provides real time visibility on compliance with our Well Integrity Standard. We have also updated our Well Control Manual and introduced enhanced technical assurance processes as well as well control self-assessments and an audit program.*"

52 *De Volkskrant*, 3 March 1997: "Shell asks for a declaration to the effect that the code of conduct is complied with" (Exhibit M.10).

[53] HSSE Auditing Standard; see also EP EP950100: "it is now a requirement that operating units and joint ventures submit an annual letter of HSE assurance, confirming compliance with the group HSE Commitment, Policy and Procedure for an HSE MS".

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.

78. 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:

> … 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.
>
> In turn, the Cape board took an interest in issues relating to the management by subsidiaries of their own business.[54]

79. 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:

> 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.[55]

80. 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 [...].

[54] *Chandler v Cape*, par. 13.
[55] Id., par. 66.

> 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.[56]

Know-how

81. Meanwhile, the appellants know with respect to the pipeline maintenance to be conducted by SPDC that from the time pipelines 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 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 N 3** contains the DEP *Global Technical Standards Index* (DEP 00.0005.05-Gen). 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 regarding all facets of pipeline management. 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.[57]

82. 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, Milieudefensie is prepared to do so, of course. According to DEP 00.0000.30 (*Procedure for global*

[56] LJ Arden in *Chandler v Cape*, par. 73 and following.
[57] D.E.P. 00.00.05.05, p. 2.

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").[58] These documents are not discussed here.

83. The *Selection of Materials for life cycle performance (Upstream Facilities) - Materials selection process* manual (**Exhibit N 4**) is a document of more than one hundred pages, intended "to contain all materials-related information".[59] 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:

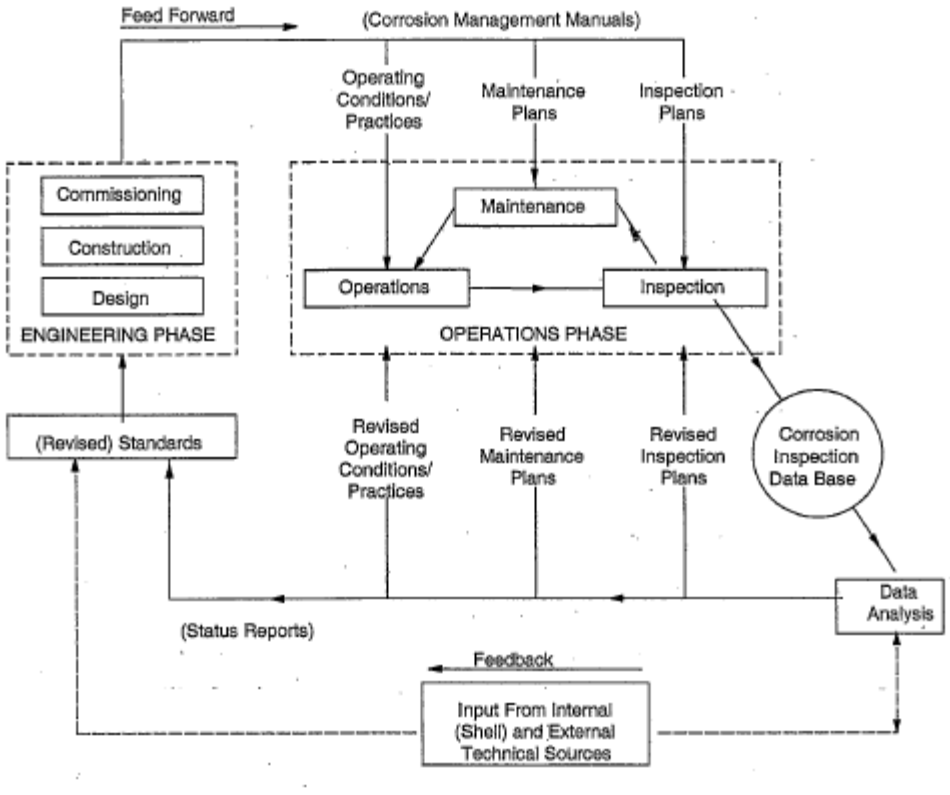
> In selecting materials with a view to minimising the estimated life cycle costs, it will often be necessary to make use of materials which may, at some stage of their service lives, be subject to corrosion damage.
>
> Whilst such damage can sometimes occur during either predicted of unforeseen periods 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.
>
> 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.[60]

84. DEP 39.01.10.11 contains descriptions of how operating companies are to organize their corrosion management, on the one hand, and specific regulations and values to perform that corrosion management, on the other. This demonstrates the data that must be available and the know-how that was made available to the operating companies. The ***Corrosion Management Framework*** *(CMF)* is at the center of pipeline maintenance and materials; starting from the design, operating companies must conduct inspections and keep a record of the data regarding corrosion. The CMF regards "all common threats and assesses the barriers to those threats. The CMF covers how those barriers are maintained and what inspection requirements are needed to assess the integrity of the system."[61] This *Corrosion Management Framework* includes a *Corrosion Management Manual*, a *Maintenance Plan*, a *Populated Corrosion*

[58] DEP 00.0000.30 (Procedure for global technical standards publications), par. 2.4.2.
[59] DEP 39.01.10.11-Gen. (Exhibit N4), par. 1.2. The version from June 2002 is discussed and submitted here, rather than the version from 2011 included in the index. DEP 39.01.10.12 further regards the *Selection of Materials for life cycle performance*; *(Upstream Facilities) – Equipment.* The latter "specifies requirements and gives recommendations for materials for production systems from the reservoir to the export point".
[60] DEP 39.01.10-11-Gen, June 2002, par. 24: Corrosion management.
[61] DEP 30.10.02.14 (Exhibit N5), par. 3.1.

Management Database, *Risk Based Assessments* and *Risk Based Inspections.* All this can be presented in a diagram as follows:

Figure 2 Corrosion management information flows



DEP 39.01.10.11-Gen (2002), p. 26

85. The documents not only regard the operating companies' obligation to take measures against corrosion and to keep records documenting this. They also stipulate specific regulations regarding the methods to be applied. For example, at the time of the oil spill in the case at issue, EP 2000-5721 was in force, which addresses measures to control and monitor corrosion; Appendix 4 deals with *Operational Pigging for Corrosion Control*.[62] EP 95-2580 contains provisions regarding *Pig selection and use*; SIEP (*Shell International Exploration and Production*); 97-6059 further regards the *Planning and application of pigging operations*. Reference is also made to SIEP 98-5703, *Pipeline risk based inspection outline of methodology.* Oguru et al. do not have these documents.

86. DEP 30.10.02.14-Gen. **(Exhibit N 5)** is the *Carbon steel corrosion engineering manual for upstream facilities* and specifically regards carbon steel. The DEP describes at length how the *corrosion allowance* must be determined and the data

[62] *Pigging* is a technique for pipeline inspection and maintenance using pipeline inspection gauges (pigs), without the need to first empty the pipeline.

based on which a corrosion management method must be selected, as well as the available options in this. The manual *inter alia* stipulates:

> Provision shall be made in the design so that the following Key performance indicators (KPI) can be measured or performed for inhibited systems, as required for the design availability per Table 2 in DEP 30.01.10.10:
>
> a) The number hours the inhibition system is not available
>
> b) Actual injected concentration compared with target injection concentration
>
> c) Inhibitor residual concentration compared to target concentration
>
> d) Average corrosion rate as compared to target inhibited corrosion rate. Depending on the sensitivity of the equipment for corrosive conditions this would be daily, weekly or monthly measurements
>
> e) Changes of corrosion rate or dissolved iron levels as a function of time.
>
> f) Unavailability of the corrosion monitoring data
>
> The required frequency of assessment of these KPI will depend on the required inhibitor system availability (2.4.3), and the response time of that particular KPI. For primary KPI the response time must be in line with the required reporting frequency (daily, weekly, monthly depending on the required availability). Some of the KPI can be designated as secondary KPI where a longer response time is acceptable.[63]

87. The DEP also contains specific information regarding measuring the *wall thickness* and explains that this method for measuring corrosion is not automatically suitable:

> This type of monitoring shall only be used if the worst location is known with certainty and is accessible. The type degradation, i.e. general or localised corrosion also has to be known for this type of monitoring to generate relevant data; it is rarely possible to use this approach if the type of degradation is localised corrosion.
>
> The wall thickness monitoring techniques that can be used are;
>
> • Corrosion rate monitoring spools (e.g., FSMTM)
>
> • Pulsed Eddy Current,
>
> • ultrasonic wall thickness
>
> • permanently mounted ultrasonic mats
>
> In view of the sensitivity of these methods they provide a semi-continuous or discontinuous record of the wall thickness of a (set of) location(s).

[63] DEP 30.10.02.14-Gen (Exhibit N5), par. 2.11.1.

> KPIs are in all cases recorded wall thickness (loss) compared to the target wall thickness and timely availability of wall data.[64]

88. Other *manuals* regard cathodic protection systems.[65] Cathodic protection is designed to combat steel corrosion by decreasing pipeline potential by supplying DC power. DEP 30.10.73.10-Gen notes:

> This DEP is meant to provide sufficient background information to enable staff, responsible for the operation and maintenance of cathodic protection systems, to decide (in the absence of a specialist) if cathodic protection may be technically feasible and economically justifiable, and also to deal effectively with specialist consultants and contractors normally called in to carry out cathodic protection work.[66]

It is not known whether Shell applied a cathodic protection system for the pipeline in Oruma. In the 1950s and 1960s, such systems were widely used; today, they are usually compulsory. In DEP 30.10.73.10-Gen, Shell writes: "It is Group practice to apply cathodic protection on all buried pipelines irrespective of soil conditions".[67] It is pointed out that a cathodic protection system can also be implemented for existing pipelines.[68]

89. DEP 31.40.60.11-Gen. (**Exhibit N 6**) regards *Pipeline Leak Detection Systems*. The importance of a ***Leak Detection System*** (LDS) is described as follows:

> An LDS reduces the consequences of failure by enabling fast emergency response. These consequences comprise economic consequences, safety consequences, environmental consequences and the more intangible socio-political consequences. Pipeline leaks can result in bad publicity and penalties, both of which can be reduced by having a proper pipeline integrity management and emergency response system in place including an LDS.

The *manual* describes various *leak detection* systems and the conditions under which these systems should be applied. For example, the manual demonstrates that there is a significant difference in the *response time* and reliability of different systems. The functioning of an LDS also depends on the settings and on whether or not periodic maintenance is performed.[69] The manual further describes how to select an LDS:

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[64] DEP 30.10.02.14-Gen (Exhibit N5), par 2.11.2. In ground 4.24 of the judgment dated 30 January 2013, the District Court unreservedly assumes that the method is correct.
[65] DEP 30.10.73.10-Gen. *Cathodic protection*; DEP 30.10.73.31-Gen. *Design of cathodic protection systems for onshore buried pipelines (amendments/supplements to ISO 15589-1:2003)*; DEP 30.10.73.33-Gen. *Installation and commissioning of onshore cathodic protection systems.*
[66] DEP 30.10.73.10-Gen, *Cathodic protection*, par. 1.1.
[67] Id., p. 62.
[68] DEP 30.10.73.10-Gen, p. 62: "When designing a cathodic protection system for retrofitting to an existing pipeline, certain repairs and modifications to the pipeline may be necessary to achieve effective cathodic protection. A current-drainage test is often the best and quickest method to assess the required protection current."
[69] DEP 31.40.60.11-Gen (Exhibit N6), H.3.

Unless there are substantial reasons for doing otherwise, the selected LDS shall be a real-time, corrected mass or volume balance system, see (6). The LDS can be totally integrated within the SCADA system, or the leak detection application can utilise a stand-alone platform and communicate via OPC or similar protocol with the SCADA system.

To preserve operators' confidence in the system and ensure reliable operation of the plant facilities, the LDS should not produce nuisance/false alarms. Reliability and robustness shall be the essential performance factors, with sensitivity and accuracy having a secondary role.

90. The manual summarizes the pros and cons of different leak detection systems as follows:

APPENDIX 1 SUMMARY OF THE CAPABILITIES AND APPLICATION OF LEAK DETECTION TECHNIQUES

LEAK DETECTION METHOD	LEAK TYPE	MODE OF OPERATION	RESPONSE TIME	LEAK LOCATION CAPABILITY	ROBUSTNESS	RELIABILITY	COST	REMARKS
Low Pressure	gas: full bore ruptures liquid: major leaks	any	seconds to minutes		good	poor	low	high thresholds required to avoid false alarms
Change in pressure / flow	gas: major leak liquid: large leaks	steady state	seconds to minutes	Offshore: None Onshore: Between block valves if pressure readings available	good	poor	low	
Wave alert	gas: medium to large leaks liquid: small to medium leaks	steady and transient state	seconds to minutes	within 1 km, depending on transducer spacing	good	poor	medium	detects only the onset of a leak
Mass or volume balance	gas and liquid: medium to large leaks	steady state	minutes to hours	none	good	poor	low	
Corrected mass or volume balance	gas and liquid: small, medium and large leaks	steady and transient state	minutes to hours	Offshore: None Onshore: Between block valves	good	medium	medium	
Statistical pipeline leak detection (SPLD)	gas and liquid: small, medium and large leaks	steady and transient state, shut in	minutes to hours	at best within 5 % of distance between pressure meters	good	good	medium	low probability of false alarm
Dynamic simulation model	gas and liquid: small, medium and large leaks	steady and transient state, shut in	minutes to hours	at best within 10 % of pipeline length	poor	poor	high	high false alarm rate
Acoustic techniques	liquids: large leaks (on-line), small to medium leaks (shut-in)	steady state	depends on monitoring frequency	within 1 km	good	medium	high	hard liquids only
Static pressure test	hard liquids: small leaks soft liquids: medium leaks gas: large leaks	during shut in	hours to days	none, between block valves	good	poor	low	capabilities depend on length and temperature effects
Sniffer tube, hydrocarbon sensing-cables	all fluids, including multiphase: small leaks	any	hours	within 100 m for hydrocarbon sensing cables	good	good	high	short lines only

Full bore rupture: ≥ 100 % of flow
Major leak: 50 % - 100 % of flow
Large leak: 25 % - 50 % of flow
Medium leak: 5 % - 25 % of flow
Small leak: 1 % - 5 % of flow

In addition to these systems, the DEP also describes ways of *off-line leak detection,* such as a *static pressure test* or a *leak detection pig*. In this connection, the manual further states:

> A pipeline patrolling program should be in place as a method of leak detection whether an on-line system is available or not. The frequency of this inspection should be based on the criticality of the pipeline. A record of this inspection should be maintained throughout the life of the pipeline.

91. 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".[70] In addition, there are RMP-Gen standards (*Run &*

[70] DEP 00.00.00.30, p. 11.

Maintenance Practice). These standards: "specify requirements and recommendations for activities being performed 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."[71] For example, RMP 31.40.00.51-Gen pertains to *Pipeline integrity* and RMP 31.40.60.50-Gen regards *pipeline repairs*.

92. 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.

93. 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.

94. The know-how and involvement of the parent company is not limited to pipeline integrity. 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,[72] 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.[73]

95. The general environmental policy is based on the *Global Environmental Standards*, which prescribe *compliance* with the Shell policy.[74] 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;

[71] DEP 00.00.00.30, p. 11.
[72] For example EP 95-0100 (Exhibit N8), regarding *Health, Safety and Environmental Management Systems.*
[73] For example EP 95-0300 (Exhibit N9), regarding *Overview Hazards and Effects Management Process;* EP 95-0352 regarding *Quantitative Risk Assessment*.
[74] Exhibit E.4 in the first instance.

> 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.[75]

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 international conventions."[76]

96. EP 95-0100 on *Health, Safety and Environmental Management Systems* (**Exhibit N 8**) 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.[77] EP 95-300 (**Exhibit N 9**) 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'.[78]

97. 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.* Oguru et al. do not have these documents. According to the documentation, there is also an EP *(Exploration and Production) Crisis Guide.*

98. There will be *standards* and *guidelines* regarding many subjects; however, Oguru et al. are not familiar with the existence of these documents. They do 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 pipeline 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.

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[75] Oguru et al. do not have this document. The Shell *Standards and Manuals* demonstrate that the use of the term "Shall" indicates an obligation. A recommendation is involved if the term "Should" is used.
[76] Shell folder on *Oil Spill Emergency Response,* p. 3 (**Exhibit N 7**).
[77] This document is discussed in more detail below.
[78] EP 95-0300 (Exhibit N 9), p. 28.

99. 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 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 the know-how in the area of pipeline management, safety and the environment was available at the parent company.

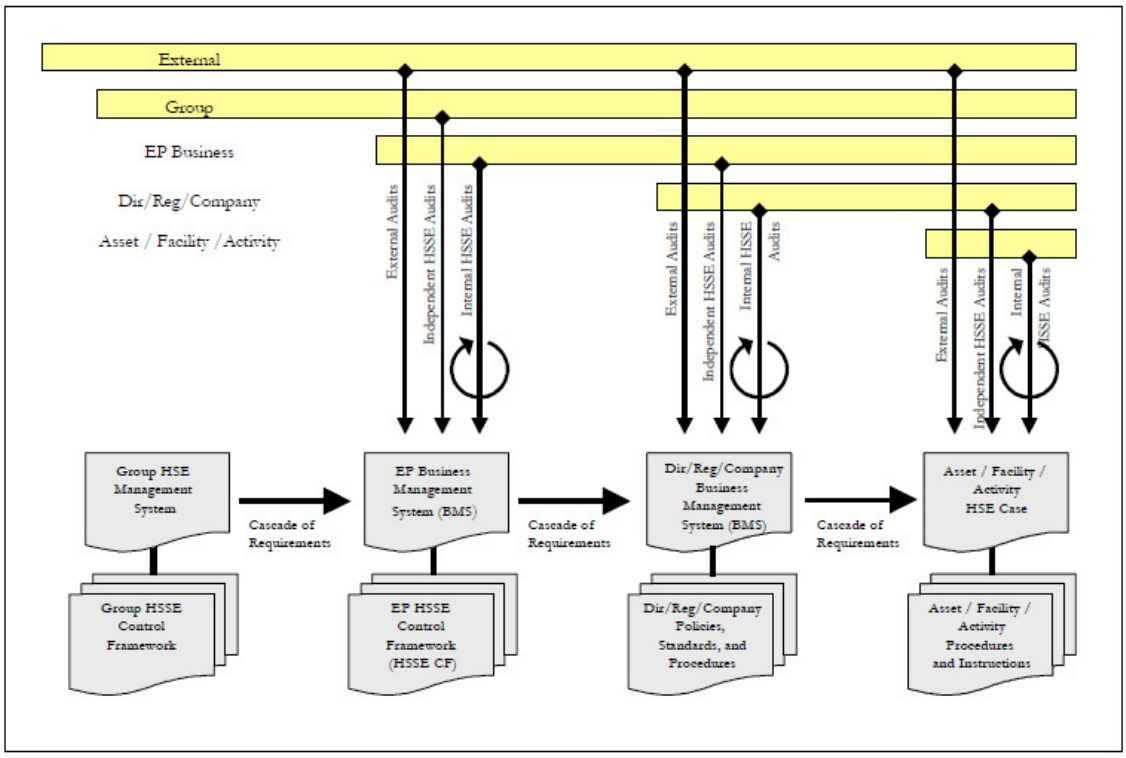
Knowledge

100. 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 of the influences that SPDC was exposed to in Nigeria; the parent company was familiar with the difficulties in the Niger Delta and the problems surrounding sabotage and *bunkering*; the parent company also knew which pipelines ran an increased risk of oil spills as a result of defective maintenance. The parent company frequently discussed these affairs in the press.

101. Each year, ***Business Plans*** are adopted in consultation with the parent company, which determine the objectives in the area of production, maintenance, safety and the environment, etc. Those objectives are recorded as 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. Replacing a (trunk) pipeline, setting up a safety system and the decision regarding whether or not to remain active in specific areas are all choices that have such large consequences (in terms of both finances and the company's reputation) that these can only be taken in consultation with the parent company.

102. 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 N 10**):

The HSSE Audit System Framework and Interfaces



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*.[79] Audits are conducted both in-house and externally, based on internal standards and requirements that are determined at the group level in consultation with the *businesses*.

103. 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.[80] 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.[81] 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***".[82] The *Business Assurance Committee* monitors the progress and must approve the results.[83] Serious findings must always be submitted to the *'next level up BAC'*.[84] This in any event includes findings

[79] A summary is given in EP 2005-0180 (Exhibit N10), *HSSE Auditing*, p. 11.
[80] EP 2005-0180 (Exhibit N10), *Manage the HSSE Audit Process*, p.2.
[81] EP2005-0180 (Exhibit N10), *HSSE Auditing* par. 4.5 and *Follow-up HSSE Audit Findings*.
[82] EP 2005-0180 (Exhibit N10), *HSSE Auditing*, p. 4.
[83] EP 2005-0180 (Exhibit N10), *Follow-up HSSE Audit Findings*, p. 2.
[84] Id., p. 8.

"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".[85]

104. 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".[86] These Assurance Plans and the consequences to be attached to these plans are also monitored.[87]

105. 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.[88]

106. 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.[89] The Manual prescribes: *"Records supporting the performance data provided to the Shell Group on an annual basis shall be kept in an auditable form."*[90]

107. The HSE 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*

[85] EP 2005-0180 (Exhibit N10), *Findings Assessment and Evaluation Criteria*, p. 2.
[86] EP 2005-0180 (Exhibit N10), *HSSE Auditing,* Appendix 1.
[87] EP 2005-0180 (Exhibit N10), *Follow-up HSSE Audit Findings*, p. 9.
[88] EP 95-0100 (Exhibit N8), p. 5.
[89] EP 95-0100 (Exhibit N8), par. 6.2: *Records.*
[90] Id. EP95-0325, which according to the documents specifically regards *HSE Performance Monitoring & Reporting*.

applied." According to the manual, the latter applies to "*many health, workplace safety and environmental aspects"*.[91]

108. 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".[92] 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*.[93] 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*.[94] *Contingency Emergency Plans* are also part of the HSE *Management System*.[95]

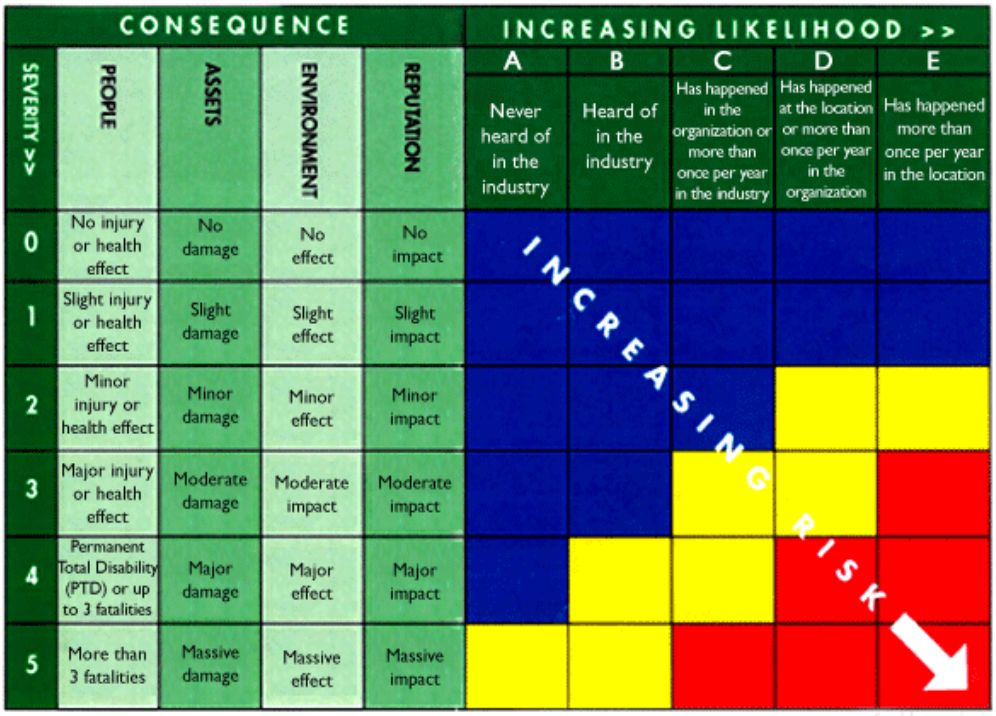
109. Another important element of the HSE Management System is the *Hazards and Effects management.* Group regulations determine that an inventory must be made of the '*major hazards to the environment and to the health and safety of people of all the activities, materials, products and services'*, as 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***.[96]

110. 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.[97] 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.[98]

111. The *Shell Risk Assessment Matrix* is the general reference point in risk assessment and reporting:[99]

[91] EP 95-0100 (Exhibit N8), Appendix 1.
[92] EP 95-0100 (Exhibit N8), par. 5.1.
[93] Id.
[94] EP 95-0100 (Exhibit N8), *Health, Safety and Environmental management Systems*, par. 5.2: *asset integrity*.
[95] Id., par. 5.5.
[96] Id. par. 3.8. In this context also: EP 95-0310, *Documenting and implementing an HSE Case and HSE MS* (which Oguru et al. do not have).
[97] See, *inter alia*, EP95-0300 (Exhibit N9), *Overview Hazards and Effects Management Process*.
[98] For example, EP 94-0101 and EP 94-0102, *ASPIN version 1.1 Pipeline Failure Risk Assessment*, Dec. 1993.
[99] For this also see: HSE 029: Risk Assessment Matrix and HSE 061: Health Risk Assessment.

Risk Assessment Matrix



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

112. 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*.[100]

113. EP95-0300 (Exhibit N9) shows how crude oil spills must be scaled on this matrix:

[100] *HSSE Management System Manual, Incident Investigation and Learning* (**Exhibit N 12**), Table 1: *Timelines for Notification, Investigation, and Review of Significant Incidents and High Potential Incident*, p. 5.

Severity	Environment				Reputation	
	Potential Impact	Definition	Oil Contamination per 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

114. With regard to the oil spill near Oruma, the District Court of The Hague found on 30 January 2013 that an estimated 400 barrels of oil had spilled. In the statement of appeal - again - Oguru et al. will further substantiate that and why the amount of oil actually spilled was much higher. However, if it is assumed that this establishment is correct, this means that approximately 64,000 liters of oil leaked during the spill. Thus, according to the standard in the schedule above, an oil spill with 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 must be reported within 24 hours to the *Business Head, senior Business Leader, Business HSSE VP and Group HSSE VP*. In this connection it is remarkable that in its statement of rejoinder, Shell submitted that "all oil spills of more than 1 barrel are reported to SIEP every quarter in an aggregate report – i.e. thus not individually."[101] For incidents that must be reported within 24 hours according to the guideline, an ***investigation report*** must be

[101] Shell's statement of rejoinder, note 34.

sent to the same persons within one month; a ***review*** by the *Business Head* is conducted within three months.[102]

115. In view of the serious *potential consequences* estimated in the SPDC report from 2004,[103] it is obvious that the parent company had already been aware of the problems and risks surrounding the pipeline near Oruma for quite some time. The decision regarding whether or not to replace this pipeline could not be taken without the parent company.

116. Moreover, whether or not the parent company was aware of the specific circumstances surrounding this oil spill near Oruma is not a decisive factor in answering the question regarding whether the parent company had a duty of care; this may be demonstrated by the previously described framework of *Chandler v Cape*.[104] 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 pipeline and the oil spill near Oruma does mean that the existence of a duty of care is pertinent.

117. Based on the ***business 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 that SPDC was unable to contend with the problems. The parent company knew - or should have known - that there was a disproportionately large risk of damage as the result of oil spills from the seriously corroded pipeline. In addition, the parent company knew or should have known that the risk of damage as the result of sabotage of the pipelines 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.

118. 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 Ogoniland, including measures against sabotage and *bunkering*, and the question regarding if and at the expense of how much effort and means attempts would have to be made to clean up the contamination in the Niger Delta, are all choices that could not be made without involving the parent

[102] *HSSE Management System Manual, Incident Investigation and Learning* (Exhibit N 12), Table 1.

[103] Extensive and severe corrosion at a rate of approx. 0.6 mm/yr; Increased rate of crude leakage into the environment; Contamination of the environment with crude leading to degradation; Loss of revenue to the federal government from further de-rating of the line and crude spillage into the environment; Increase community unrest due to crude contamination of their environment; Increase in compensation payments and clean-up due to crude spillage; Continuous repairs to the line which in the long run would not be cost effective. The list is not exhaustive as constant spillage could spiral into areas not mentioned. Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project, SPDC 2004, Exhibit M3 in the first instance, par. 2.3.3.1 (p. 2-41).

[104] V.2.5.

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.

IV.3. Breach of the duty of care

119. If a duty of care exists according to *statutory* or *common law*, the next question is generally whether or not this duty was breached under the circumstances. Oguru et al. claim access to documents that can be used to demonstrate this breach.

IV.3.1 Breach of the duty of care to properly maintain the pipelines

120. In the event that an oil spill is caused by defective maintenance, the party responsible is *strictly liable* based on the previously discussed Oil Pipelines Act. To assume *strict liability* there is no need to determine whether or not a duty of care has been breached. However, due to the appellant's evidentiary interest in demonstrating that the oil spill was caused by defective maintenance rather than sabotage, and in the scope of Shell's duty of care under *common law*, it is necessary to assess the condition of the pipeline at the time of the oil spills and the measures that Shell took to prevent oil spills caused by materials problems.

121. In the statement of appeal, Oguru et al. will again argue that and why the JIT reports (reports of field visits, signed by Shell employees, public servants and representatives of the community) cannot support the evidence of sabotage. In its judgment of 30 January 2013, the District Court unreservedly assumes that the JIT reports are reliable. On 21 March 2013, the Dutch *National Contact Point for the OECD Guidelines for Multinational Enterprises* held in this connection that Shell invokes the sabotage defense too easily (**Exhibit 12**).[105]

122. An important part of an *Asset Integrity Management System* is corrosion management. According to the *Manual on Selection of materials for life cycle performance*, the operating companies must keep plans and documentation recording the manner in which corrosion management is implemented. This is done in the ***Corrosion Management Framework***.[106] This includes a risk and life cycle estimate based on the materials used (in the ***Corrosion Management Manual***);[107] a database (the ***Populated Corrosion Management Database***); a maintenance plan (***Maintenance Reference Plan***)[108] and inspection plans (***Inspection Plans***); risk assessments (***Risk Based***

[105] NCP, Final report, 21 March 2013.
[106] DEP 39.01.10.11-Gen (Exhibit N4), version June 2002.
[107] DEP 39.01.10.11 (Exhibit N4), A5.1: "A corrosion management manual should derive from an installation's design documentation a brief description of the operating envelop assumed for each corrosion circuit, of the corrosion and materials threat foreseen, and of the design approach adopted. In addition, it should define the operating, maintenance and inspection activities required by the chosen approach."
[108] Moreover, oil companies are required to draw up such a plan according to the *Guidelines and Procedures for the Design, Construction. Operation and Maintenance of Oil and Gas Pipelines in Nigeria*, section 12.5.

Assessments)[109] and a program for *pigging* (***Pigging Program***). All data must be documented, including data regarding the frequency and locations of inspections and the type of instruments used.[110] According to the central manual, such "data on operating conditions, corrosion and integrity related design information, criticality definitions for individual systems, and Corrosion Management Manuals" must be made available in electronic form, preferably in an accessible database.[111]

123. Thus, based on this documentation, it must be possible to determine the extent of the corrosion problems of the pipeline near Oruma and what measures were taken in this regard. If, as Oguru et al. expect, it is demonstrated that the corrosion was serious but that the measures taken for this would not be sufficiently helpful in view of the risks, it can be established that Shell took irresponsible risks in respect of Oguru et al.; in the absence of the pipeline section in question, high resolution photographs or video or other means of definitively determining the cause, these risks produce a more likely scenario for the oil spill than the sabotage suggested by Shell.[112] These claimed documents are discussed in more detail in Chapter V.

IV. 3.2 Breach of the duty of care to take measures against sabotage

124. As argued in IV.2.2 above, Shell had a duty of care to take measures in order to reduce the risk of damage as the result of sabotage. That duty of care first of all results from SPDC's statutory obligation to maintain, protect and repair its pipelines. Moreover, a duty of care results from *common law,* given that it was foreseeable for SPDC that the people living in the vicinity of its pipelines would suffer damage as a result of sabotage. Under those circumstances, it is up to Shell to prove that it was not negligent:

> The point is that if proper care is taken such a spillage would not have occurred. The onus was therefore on the appellant as defendant to prove that there was no negligence on its part.[113]

125. In the first instance, the District Court accepted Shell's argument that it took adequate measures to prevent sabotage without reviewing this argument. To this end, Shell submitted that the pipelines are dug in, that it had the *Right of Way* inspected on a daily basis and that the pipelines are fitted with a system to measure the pressure. It is clear that the measures referred to were to no avail and that they were not very effective in general, either - as demonstrated by a glance at Shell's figures. In the statement of appeal, Oguru et al. will further explain that the District Court could not

[109] DEP 30.10.02.14 (Exhibit N5), par. 3.3.
[110] DEP 39.01.10.11 (Exhibit N4) notes the following in this context: "The Corrosion Management Manual, Risk Based Assessment and Maintenance Reference Plan are live documents for the lifetime of the facility. These shall be updated when there are (approved) materials substitutions (e.g. during procurement and fabrication), changes to the corrosion control system, changes to the operation and process and as monitoring, inspection and maintenance data is collected during the lifetime of the project."
[111] DEP 39.01.10.11-Gen (Exhibit N4), version June 2002, 2.4.5.
[112] Moreover, as demonstrated from Sections IV and IV.3, the documents serve to establish liability on the part of the parent company.
[113] *Shell Petroleum Development Company Nigeria Limited v. Edamkue & Ors.* 2009.

reasonably have concluded that the measures taken were adequate - and further, whatever can be said of this conclusion, that it should have led the District Court to find that Shell had not breached its duty of care instead of the establishment that Shell did not have a duty of care.

126. Oguru et al. contest that by their nature and method of implementation, the measures referred to could contribute to reducing the risk of sabotage. The frequency of the surveillance rounds alleged by Shell does not seem to correspond to reality. Especially since according to Shell's arguments, the surveillance rounds that it relies on so heavily were performed by local communities, the effectiveness further depends on the training, equipment and guidance of the surveillance contractors. It has recently been demonstrated that hired surveillance contractors also sabotage pipelines.[114] The limited reliability (and effectiveness) of the surveillance contractor is also demonstrated by the fact that Shell submits that it must first verify any reported oil spill itself, before taking any measures to limit the damage.[115] Helicopter surveillance is only effective as a preventive measure when used very frequently, but this has not been demonstrated. The system for measuring the pressure mentioned by Shell can limit the damage resulting from an oil spill provided that the system is technically sound and is followed by adequate action,[116] but is unable to prevent sabotage.[117]

127. Oguru et al. claim access to documents that they can use to demonstrate that Shell breached its duty of care to take measures to prevent sabotage. To this end, as further worked out in V.3, Oguru et al. *inter alia* claim access to the surveillance contracts for the surveillance on the ground and in the air. In addition, Oguru et al. claim access to the specifications of the pressure measurement system. However, given that Oguru et al. believe that this system cannot be deemed to be a measure for preventing sabotage, it will be discussed in the framework of the response to oil spills.

IV.3.3 Breach of the duty of care to take adequate action

128. As operator of the pipeline, Shell was required to take measures to prevent any further damage as soon as it knew that there was an oil spill from its facilities. That obligation results from Section 11 (5) (b) of the Oil Pipelines Act (*to repair*) and also from *common law*.[118] Oguru et al. argued and will again substantiate in the statement of appeal that SPDC's failures in the event of oil spills were structural. The wish to first verify the oil spill on site before taking any measures to limit the damage, a shortage of manpower and equipment in the immediate vicinity in order to quickly stop the spill and insufficient attention for the special problems with local communities all contribute to the fact that it takes days and sometimes weeks before the spill can be

[114] See also the news report of 24 June 2013 at http://www.stakeholderdemocracy.org/cgblog/535/89/Serious-questions-following-Trans-Nigerian-Pipeline-explosion-at-Bodo.html: "Just how limited Shell's oversight is was highlighted at the weekend when it was revealed that its own contractors working on the most recent spill had been arrested by a military joint task force on suspicion of oil theft."
[115] Statement of Rejoinder, par. 18.
[116] See DEP 31.40.60.11-Gen. (Exhibit N6).
[117] In this connection it is pointed out that in any event, no siphoning off of crude oil was involved near Oruma.
[118] See V.1 and V.2.3.

stopped.[119] Even if there was a properly functioning *Leak Detection System*, the effectiveness of such a system is virtually zero. According to the District Court's establishments, in all it took eleven days before the leak was repaired in Oruma. In that time, at least 64,000 liters of oil were spilled.[120]

129. In July 2013, the final report was issued by the International Union for Conservation of Nature, which has investigated the *Oil spill response* and *Remediation en rehabilitation* procedures of SPDC at SPDC's instructions following the UNEP report.[121] The report recommends that SPDC "speed up response to oil spill incidents" and concludes:

> Based on the observations by the Panel, the current remediation practices in oil-impacted areas in the Niger Delta do not visibly support the needs of biodiversity rehabilitation. This is due to inadequate benchmarks for target values of pollutants' residues in the environment and the fact that regulators, oil companies and communities have not taken concerted action to implement oil spill responses and remediation in a timely manner. The methods and regulatory standards for biodiversity and habitat rehabilitation have also not been adequately established.[122]

130. Based on *standards* and *manuals*, SPDC is required to keep records regarding the progress of the oil spills, report ***Significant Incidents*** to the Business Head, Business HSSE VP and the Group HSSE VP and prepare an ***investigation report*** on such spills.[123] Moreover, oil spills must be reported to the Department of Petroleum Resources.[124] Oguru et al. have a legitimate interest in access to this information, because they expect that based on that information they can demonstrate that Shell's action following the occurrence of the oil spill was defective.

IV.3.5 Breach of the parent company's duty of care

131. The plaintiffs in the motion explained at length in Chapter V.2.5 why the parent company had a duty of care. Its duty of care involved taking measures given that it could foresee damage as the result of oil spills caused by defective maintenance or

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[119] Moreover, SPDC apparently changed its policy in the event of oil spills. Where in the first instance SPDC still argued that the oil spills first had to be verified, because reports were frequently unreliable, regardless of whether these reports were made by communities or by surveillance contractors hired by SPDC, its website meanwhile states that: "Any reports, either by community surveillance teams under contract to SPDC or by the public, are responded to immediately. SPDC first shuts down the flow of oil to the leak before steps are taken to verify other details about the incident in preparation for the response, which starts with containment. By immediately shutting down pipelines or flowlines that are damaged and containing the spills, we minimize the damage to the environment"; http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills.html, consulted on 5 September 2013.

[120] See also par.

[121] *Sustainable Remediation and Rehabilitation of Biodiversity and Habitats of Oil Spill Sites in the Niger Delta*, IUCN, July 2013. The report will be submitted to the statement of appeal and can be found at https://cmsdata.iucn.org/downloads/sustainable_remediation_and_rehabilitation_report_by_ndp.pdf.

[122] Id., p. 14.

[123] *HSSE Management System Manual, Incident Investigation and Learning* (Exhibit N 12) and V.2.5 above.

[124] See par. 66.

sabotage, and as the result of the failure to adequately respond and clean up. The follow-up question is whether the parent company breached its duty of care.

132. To be able to further substantiate the existence of a duty of care of the parent company, Oguru et al. request access to documents demonstrating that the parent company was aware of or at least should have been aware of the situation in Nigeria and demonstrating that it interfered with aspects of the business operations.[125] These documents include ***business plans*** and ***reports***, ***audit reports*** and ***reports of Significant and High Potential Incidents***, including those regarding the oil spill near Oruma. These documents also serve to be able to demonstrate that the parent company breached its duties of care. This will be discussed in more detail in the next chapter.

V. Claimed documents by virtue of Section 843a DCCP

133. In the above, Oguru et al. argued extensively that and why they have 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.

134. Before listing the documents claimed, Oguru et al. 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.

135. 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 also refer to the following finding of the Netherlands Supreme Court in 2012 in respect of a claim by virtue of Section 843a DCCP:

> 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

[125] See IV.2.5 and V.1.

altered by the fact that the documents have not been individually described, given that [the plaintiff] was not familiar with the documents.[126]

136. It is obvious that the plaintiffs 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.[127]

137. 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. The claimed documents pertain to SPDC, the parent company and the relationship between them. In the event that a few of the claimed documents 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.

138. Oguru et al. believe 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 Oguru et al., 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 (in part) regarding the parent company's duty of care

139. Oguru et al. claim 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 following documents. A number of the documents mentioned below further contain information that serves to establish the breach of SPDC's duty of care. Most documents and their relevance have been extensively described above. These are only briefly explained below.

[126] HR 26-10-2012, LJN BW9244, ground 3.8.2.
[127] *Abu Dhabi Islamic Bank/ABN AMRO* (HR 8 June 2012, LJN BV8510).

a. ***Business plans and reports (2002-2005)***

Oguru et al. claim access to the annual business plans and monthly business reports in respect of maintenance, the environment and safety regarding Oruma and the entire pipeline near Oruma for the three years prior to the oil spill in 2005.

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.[128]

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 was are or should have been aware of the conditions in Nigeria and that it had a duty of care.[129] The documents further serve to demonstrate that the parent company breached its duty of care.

b. ***Audit reports and follow-up***

Oguru et al. claim access to the most recent audit report at the time of the oil spill regarding maintenance *(asset integrity)* of SPDC, in particular for the pipeline near Oruma, as well as regarding the health, safety and environmental policy (including *Emergency and Oil Spill response)*, including *findings* and *recommendations, approval and closeout of action*s.

The *HSE framework* demonstrates that Shell companies are audited in these areas. The results and follow-up must be documented; relevant data are reported.[130]

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. In addition, these documents serve to substantiate that SPDC breached its duties of care.[131]

c. ***Assurance letters (2002-2005)***

Oguru et al. claim 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.[132]

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.[133]

d. ***Reports of Significant Incidents and High Potential Incidents (2002-2005)***

[128] See par. 101.
[129] See IV.2.5 (par. 65 and following)
[130] See par. 102 and following.
[131] See V.2.5 and V.3.
[132] See V.2.5.
[133] See V.2.5.

Oguru et al. claim access to the *Significant Incidents* and *High Potential Incidents* reported by SPDC regarding Oruma and the entire pipeline near Oruma for the three years prior to the oil spill until 2009.

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.[134]

These documents show that there was a significant risk of damage as a result of oil spills from the pipeline near Oruma, so that it can be demonstrated that SPDC had a duty of care. The documents further show that the parent company was aware of these risks, so that it can be demonstrated that the parent company also had a duty of care.[135]

e. *Incident report, investigation report and review*

Oguru et al. claim access to the *incident report* regarding the oil spill in 2004 prepared based on the guideline mentioned above, as well as the *investigation report* and *review*.

Based on the Shell guidelines, SPDC had to report the oil spill near Oruma 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.[136]

These documents show that the parent company was aware of or could be aware of the conditions near Oruma, so that it can be demonstrated that it had a (increased) duty of care. In addition, these documents serve to demonstrate that the parent company and SPDC breached their duty of care.[137]

f. *Minutes*

Oguru et al. claim access to the minutes of the (*Executive Committee*, formerly called the *Committee of Managing Directors* and/or the *Board of Directors* of the) parent company regarding the categories mentioned under *b, d and e*.

These documents show that the parent company was aware 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.

V.2 Claimed documents (in part) regarding SPDC's duty of care

140. Oguru et al. claim access to the following documents based on which they can demonstrate that the pipeline near Oruma showed serious defective maintenance, as well as that Shell took insufficient measures to prevent sabotage or to limit contamination.

[134] See par. 112 and following.
[135] V.2.5.
[136] See par. 112 and following.
[137] IV.2 and IV.3

g. ***Corrosion Management Framework (2002-2005)***

Oguru et al. claim access to documents from the *Corrosion Management Framework* regarding the pipeline near Oruma in the three years prior to the oil spill of 2005, in any event including:

i. The *Maintenance Reference Plan* that Shell had to prepare by virtue of guidelines and Nigerian regulations;
ii. *Inspection plans and pigging program* of the pipeline and weld seams*, as well as the inspection and pigging results;*
iii. The *Corrosion Management Manual*;
iv. The *Risk Based Assessments* that had to be kept on an annual basis and after every *pig run;*[138]
v. (other) data from the *Populated Corrosion Management Database*.

SPDC had to keep these data based on Shell guidelines to monitor and combat corrosion and other risks.[139]

These documents show the gravity of the corrosion, the risks foreseen in this connection as well as that inadequate action was taken in response, so that it can be demonstrated that SPDC breached its duty of care.[140] These documents can also show that the parent company must have been aware of the serious nature of the situation, so that it can be demonstrated that the parent company also had a duty of care.[141]

h. ***HSE Plan***

Oguru et al. claim access to the *HSE Plan* that applied to (the vicinity of) the entire pipeline near Oruma at the time of the oil spill of 2005.

By virtue of Shell guidelines, SPDC had to prepare a health, safety and environmental plan each year regarding its business operations, facilities, etc., *inter alia* discussing risks and technological possibilities.[142]

These documents show the risks that were foreseen in the area of health, safety and the environment, so that it can be demonstrated that SPDC had a duty of care. In addition, these documents serve to demonstrate that SPDC breached its duty of care.

i. ***Hazards and Effects Register and HSE Case***

Oguru et al. claim access to the *Hazards and Effects Register* and the *HSE case* regarding the entire pipeline near Oruma at the time of the oil spill in 2004.

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[138] DEP 30.10.02.14 (Exhibit N5), par. 3.3.
[139] See regarding these documents par. 84 and following and DEP 30.01.10.11, *inter alia* par. 2.4.2, further DEP 30.10.02.14 (Exhibit N5).
[140] See IV.2.1 and IV. 3.1.
[141] See IV.2.5.
[142] See par. 108 and EP 95-0100 (Exhibit N8), par. 5.1.

By virtue of Shell guidelines, SPDC had to maintain and qualify threats and risks for health, safety and the environment as well as relevant measures in a register. If activities and assets are estimated to be high-risk, they must be discussed individually in an *HSE Case.* [143]

These documents show the risks that were foreseen in the area of health, safety and the environment, so that it can be demonstrated that SPDC had a duty of care. In addition, these documents can serve to demonstrate that SPDC breached its duty of care.

j. ***Surveillance contracts (2002-2005)***

Oguru et al. claim access to contracts with local surveillance contractors that were in force at the time of the oil spill near Oruma in 2004 or other documents showing the obligations of the local surveillance people, how frequently they were deemed to conduct surveillance rounds and the training and means that were available for them.[144]

These documents show that the surveillance contractors were unable to conduct effective and frequent monitoring and therefore did not constitute an adequate measure for preventing sabotage, so that it can be demonstrated that SDPC breached its duty of care.[145]

k. ***Helicopter logs (2002-2005)***

Oguru et al. claim access to logs or other documents showing how frequently and how long helicopters conducted surveillance rounds near Oruma in the year prior to the oil spill in 2004.[146]

These documents show that at best, helicopters conducted surveillance rounds incidentally and consequently did not constitute an adequate measure to prevent sabotage, so that it can be demonstrated that SPDC breached its duty of care.[147]

l. ***Leak Detection System (2002-2005)***

Oguru et al. claim access to documents showing which *Leak Detection System* (LDS) was used for the pipeline near Oruma, how this system functioned and how the system was maintained.[148]

These documents show that no proper system was present in Oruma, or at least that the system did not properly function, so that it can be demonstrated that Shell breached its duty of care.[149]

m. ***Accident Report***

[143] See par. 109 and EP 95-0100 (Exhibit N8), h. 4.
[144] See par. 126.
[145] See 2.2 and 3.2.
[146] See par. 126.
[147] See IV.2.2 and IV.3.2.
[148] See par. 89 and following.
[149] See 2.3 and 3.3; The District Court discusses the LDS as a measure for preventing sabotage, see in this connection also 2.2 and 3.2.

Oguru et al. claim access to the *Accident Report* as issued to the *Department of Petroleum Resources.*

By virtue of Nigerian regulations, SPDC had to issue a preliminary report regarding the oil spill, the estimated extent of the damage and the steps taken within 48 hours.[150]

These documents show the estimate that SPDC made immediately after the oil spill and the measures that it took, so that it can be demonstrated that SPDC breached its duty of care.[151] In addition, these documents can serve to demonstrate the limited evidentiary value of JIT reports.[152]

[150] See par.60.
[151] See par. V.2.3 and V.3.3.
[152] See par. 121.

Consequently

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

I. to order SPDC, RDS, Shell Petroleum and Shell T&T to give Oguru et al. 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 Oguru et al. wish 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 plaintiffs 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 Oguru et al. access to the claimed documents, as well as

to still offer Oguru et al. – in any event – the opportunity to file a statement of appeal against the final judgment of 30 January 2013;

II. to order SPDC, RDS, Shell Petroleum and Shell T&T 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 30.10.02.14-Gen, *Carbon Steel Corrosion Engineering Manual for Upstream Facilities*

N 6. DEP 31.40.60.11-Gen, *Pipeline Leak Detection*

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*

N 12. National Contact Point, *Final Statement,* 31 March 2013