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Citation

Groot, C. de. (2016). The 'Shell Nigeria Issue': Judgments by the Court of Appeal of The Hague, The Netherlands. *European Company Law*, 13(3), 98-104. doi:10.54648/eucl2016015

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

The 'Shell Nigeria Issue': Judgments by the Court of Appeal of The Hague, The Netherlands

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1 INTRODUCTION

On 18 December 2015, the Court of Appeal of The Hague in The Netherlands handed down three judgments in connection with the 'Shell Nigeria issue': a series of claims brought by Nigerian residents and by Vereniging Milieudefensie ('Milieudefensie', the Dutch member association of Friends of the Earth International) against four legal entities belonging to the Shell Group. The claims rest on allegations of environmental damage resulting from the Shell Group's operations in Nigeria. The purpose of the claims brought by Milieudefensie et al. is to obtain an injunction ordering the Shell companies to pay damages, undo the environmental pollution and take steps to prevent further harm to the environment. The three judgments of the Court of Appeal of The Hague follow appeals against three decisions that the District Court rendered on 30 January 2013.¹ The judgments on appeal are legally complex, involving a total of six cases that each include an interim judgment on the procedural aspects of 'Phase 1'.

The Court of Appeal's first judgment (*Shell-Nigeria I/Oguru & Efanga*, or 'S-N1') deals with 'Case A' and 'Case B': Case A is the appeal by Nigerian residents F.A. Oguru and A. Efanga and by Milieudefensie in the proceedings against Shell Petroleum NV of The Hague ('Shell Petroleum') and The 'Shell' Transport and Trading Company Ltd of London ('Shell T&T'). Case B is the same parties' appeal in the proceedings against Royal Dutch Shell Plc of London ('RDS') and the Nigerian company, Shell Petroleum Development Company of Nigeria Ltd. ('SPDC').² Cases A and B revolve around oil spills from an underground oil pipeline in

Bayelsa State (one of the states making up the Nigerian federation) and the impact on fishing ponds and farmland worked by Oguru and Efanga. The district court rejected the claims in these cases, finding that the damage had resulted from sabotage.

The second judgment (*Shell-Nigeria II/Dooh*, or 'S-N2') deals with 'Case C' and 'Case D': the appeals by Nigerian resident E.B. Dooh and Milieudefensie in the proceedings against RDS and SPDC (Case C) and against Shell Petroleum and Shell T&T (Case D).³ These cases also revolve around oil spills from an underground oil pipeline in Bayelsa State in the Nigerian federation, after which the oil caught fire, and the impact on fishing ponds and farmland worked by Dooh. Again, the district court rejected the claims in these cases, finding that the damage had resulted from sabotage.

Shell-Nigeria III/Akpan ('S-N3'), the Court of Appeal's third judgment, concerns the appeals in Cases E (Milieudefensie versus RDS and SPDC) and F (SPDC versus Nigerian resident F.A. Akpan).⁴ These cases revolve around oil spills from an oil exploration well (which was not used for oil extraction) in Akwa Ibom State (another state of the Nigerian federation) and the impact on fishing ponds worked by Akpan. The district court found against SPDC, holding that although the damage resulted from sabotage, SPDC (by the standards of Nigerian law) had been negligent and failed to sufficiently secure the oil well against that sabotage. However, the district court rejected all other claims. In Case E Milieudefensie appealed against the district court's other decisions, while in Case F SPDC lodged an appeal against the

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1 Cf. L. Enneking, 'Zorgplichten van multinationals in Nederland', *Nederlands Juristenblad* 2013/12, pp. 744–750 (no. 607).

2 Court of Appeal of The Hague, 18 Dec. 2015, ECLI:NL:GHDHA:2015:3588 (appeal against the judgment of the District Court of The Hague of 30 Jan. 2013, ECLI:NL:RBDHA:2013:BY9850).

3 Court of Appeal of The Hague, 18 Dec. 2015, ECLI:NL:GHDHA:2015:3586 (appeal against the judgment of the District Court of The Hague of 30 Jan. 2013, ECLI:NL:RBDHA:2013:BY9845).

4 Court of Appeal of The Hague, 18 Dec. 2015, ECLI:NL:GHDHA:2015:3587, *M en R* 2016/29 (appeal against the judgment of the District Court of The Hague of 30 Jan. 2013, ECLI:NL:RBDHA:2013: BY9854).

decision to award the claim that had been brought against it.

The interim judgments by the Court of Appeal of The Hague in Phase 1 primarily deal with sub-aspects of the proceedings based on a series of ancillary proceedings that had been instituted. The Court of Appeal has declared its judgments to be immediately enforceable, notwithstanding further appeal, and has referred the disputes to Phase 2 for consideration of the merits in the main action. Section 2 below discusses various general matters. Sections 3–6 then address a number of procedural issues on which the court ruled in Phase 1. The decisions in the court's interim judgments may become relevant and carry over to the Phase 2 proceedings on the merits; whether they do so, and if so, to what extent, is discussed in section 7.

2 GENERAL MATTERS

RDS (a publicly traded company) has been at the head of the Royal Dutch Shell Group since 2005. Before then, the group was run using a 'dual-listed companies' (DLC) structure that involved two publicly traded top-tier management companies: Shell Petroleum and Shell T&T.⁵ RDS, the new top-tier management company, is based in London, though its head office is in The Hague. SPDC is a Nigeria-based subsidiary. In the Shell Nigeria cases, the claimants summoned not only SPDC – the operating company – but also the former top-tier management companies Shell Petroleum and Shell T&T and the new top-tier management company RDS. The reason for this approach was that Milieudefensie et al. attributed the environmental damage, in the words of the Court of Appeal of The Hague, 'to wrongful acts and negligence of (i) SPDC as operator of the pipeline, but also of (ii) RDS as head of the Shell Group and, via group companies, shareholder in SPDC, and of (iii) Shell Petroleum and Shell T&T, who formerly jointly played this role of parent company/indirect shareholder' (S-N1 paragraph 1.1, S-N2 paragraph 1.1, cf. S-N3 paragraph 1.3). Where possible, this text refers to SPDC, Shell Petroleum and Shell T&T and to RDS, by themselves or separately, as 'Shell'.

The court found that the litigating parties were in agreement about the legal regime under which the claims of Milieudefensie et al. including the claims against the former and current top-tier management companies should be considered substantively:

'in that the claims, including those against the parent company, must be assessed according to Nigerian law, being the law of the state where (i) the spill occurred, (ii) the ensuing damage occurred

and (iii) SPDC, whose acts and omissions were allegedly monitored insufficiently, has its registered office (cf. section 3 Dutch Conflict of Laws (Torts) Act 2001 (Wet conflictenrecht onrechtmatige daad) applicable here). Accordingly, this judgment assumes that Nigerian law is applicable' (S-N1 paragraph 1.3; see also S-N2 paragraph 1.3, S-N3 paragraph 1.5).

3 PROCEDURAL ASPECTS (STANDING, AUTHORITY AND DISCLOSURE)

Shell first disputed the 'right of action' of the Nigerian residents. Its argument revolved around the fact that the fishing ponds and/or farmlands were held in family use, and that therefore those residents did not satisfy the requirement of having 'exclusive ownership or exclusive possession' of those lands. Among other arguments, Shell based this position on a report by a Nigerian legal expert that defined the requirement of 'ownership or possession'. The Court of Appeal of The Hague inferred from Nigerian case law that 'possession' required nothing more than 'occupation or physical use'. In addition, Nigerian case law revealed that matters involving lands held in family use are concerned only with injury to the claimant's interests, which is the case if he or she uses the lands. The fact that the Nigerian residents had in fact made use of the fishing ponds and/or farmlands was evidenced by statements from Chiefs of the communities to which those residents belonged (cf. S-N1 paragraph 4.2, S-N2 paragraph 5.6, S-N3 paragraph 4.2).

Shell disputed Milieudefensie's standing on a number of grounds.

Based on Article 305a Book 3 Dutch Civil Code, Milieudefensie claimed that foundations and associations possessing full legal capacity are permitted to bring a class action 'intended to protect similar interests of other persons to the extent that its articles promotes such interests'. It was Shell's opinion that the assessment of Milieudefensie's standing should be considered based on *lex causae*: the question of 'whether a material claim exists in the event of the environmental or other interests advocated by the foundation/association, for example based on a claim for a tort' (the Court of Appeal's summary of Shell's argument in S-N1 paragraph 3.2, S-N2 paragraph 4.2, S-N3 paragraph 3.2). This would mean that a foundation or association bringing a class action that cannot be awarded on material grounds also has no standing for the reason that the claim itself also fails. The Court of Appeal rejected this argument on the following grounds: 'However, under Dutch private international law the question of whether this right of action can be enforced in a class action [...] – and if so, to what extent and how –

⁵ Cf. C.E. Honée, 'De Koninklijke is niet meer: lang leve Royal Dutch!(!)', *Ondernemingsrecht* 2015/13, pp. 440–445 (no. 153).

must be characterised as a procedural matter, to which the *lex fori* processus – i.e. Dutch law – applies’ (S-N1 paragraph 3.2, S-N3 paragraph 3.2, cf. S-N2 paragraph 4.2). Only ‘[a] negative answer to this question of procedural law means that the case would evade the court’s assessment’ (S-N1 paragraph 3.2, S-N2 paragraph 4.2, S-N3 paragraph 3.2). The court added that Article 305a Book 3 Dutch Civil Code simply makes provision for the possibility of a class action.

Among other findings, the court considered as follows for purposes of assessing other arguments put forward by Shell in connection with Milieudefensie’s standing:

‘Nor is the group of persons for whose benefit the action has been instituted so small and clearly defined that it was easy to realise litigation in the names of the interested parties’ and ‘Shell’s suggestion that Milieudefensie does not possess sufficient knowledge and skills for the present environmental action lacks proper substantiation; it is not sufficient to argue that Milieudefensie neither works nor is established in the area’ (S-N1 paragraph 3.4, S-N2 paragraph 4.4, S-N3 paragraph 3.4).

When considering the argument that Shell derived from Article 305a(2) Book 3 Dutch Civil Code, i.e., that Milieudefensie had no standing as its claim did not sufficiently safeguard the interests of the persons on whose behalf the claim had been brought, the court found that this provision does not reflect a representativeness requirement, but rather is meant to prevent class actions by foundations and associations seeking to use the right to class action for ‘their own commercial motives’. In the specific case of Milieudefensie, the court held, ‘[n]or is there any reason to doubt the ultimate object of Milieudefensie to realise a cleaner environment *in situ*’. Shell had also argued that Dutch claims foundations and claims associations may not use Article 305a Book 3 Dutch Civil Code for advocating purely non-Dutch interests. The court also rejected this argument: ‘No valid grounds exist to restrict the scope of application of article 305(a) Book 3 Dutch Civil Code as proposed by Shell’ (S-N1 paragraph 3.4, cf. S-N2 paragraph 4.4, S-N3 paragraph 3.4).

4 JURISDICTION OF THE DUTCH JUDICIARY IN THE PROCEEDINGS AGAINST RDS, SHELL PETROLEUM AND SHELL T&T

The Court of Appeal of The Hague included a brief paragraph confirming the jurisdiction (including at the international level) of the Dutch judiciary in the proceedings brought against RDS, Shell Petroleum and Shell T&T:

Shell Petroleum is a company with its registered office in this country, for which reason the Dutch judiciary has jurisdiction (under article 2(1) of the Brussels I Regulation) to hear any claim brought against that company. With regard to RDS, which does not have its registered office in this country, this jurisdiction is based on article 2(1) in conjunction with article 60(1) Brussels I Regulation; and with regard to Shell T&T, which similarly does not have its registered office in the Netherlands, this jurisdiction is based if not on article 6(1), then on article 24 Brussels I Regulation (S-N1 paragraph 2.9, S-N2 paragraph 3.9).

The Brussels I Regulation is the European Regulation on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. The court referred to the Regulation that entered into force on 1 March 2002 (Council Regulation (EC) no. 44/2001);⁶ on 10 January 2015 a ‘recast’ of the Regulation came into effect (Regulation (EU) no. 1215/2012).⁷ The Regulation is sometimes referred to as the Brussels I Regulation. Among other things, the Regulation makes provision for ‘common rules on jurisdiction’ that apply in the Member States ‘when the defendant is domiciled in one of those Member States’. Its purpose includes, in principle, to bring ‘all the main civil and commercial matters’ within the Regulation’s scope of operation (recital to Council Regulation (EC) no. 44/2001, paragraphs 8 and 7, cf. recital to Regulation (EU) no. 1215/2012, paragraphs 13 and 10).

The court based the jurisdiction of the Dutch judiciary in respect of the Dutch legal entity Shell Petroleum on Article 2(1) Council Regulation (EC) no. 44/2001. According to Article 2(1) ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’ (cf. Article 4(1) Regulation (EU) no. 1215/2012). The court based the jurisdiction of the Dutch judiciary in respect of RDS, which is domiciled in London but has its head office in The Hague, on Article 2(1) in conjunction with Article 60(1) Council Regulation (EC) no. 44/2001. Article 60(1) states:

For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

- (a) statutory seat, or
- (b) central administration, or
- (c) principal place of business (cf. Article 63(1) Regulation (EU) no. 1215/2012).

Since the three categories listed in Article 60(1) represent alternatives that exist side by side,⁸ it is sufficient for jurisdiction to

6 Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC 2001 L 12/1-23.

7 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ EU L 351/1-32.

8 M. George, J. Fitchen & M.-E. Ancel, Chapter 15: General Provisions, in *The Brussels I Regulation Recast* 541–555 (547) (A. Dickinson & E. Lein eds, Oxford University Press 2015).

accrue to the Dutch judiciary that RDS has its head office in the Netherlands. For Shell T&T, which is domiciled in London, the court stated that the jurisdiction of the Dutch judiciary could be derived either from Article 6(1) or from Article 24 Council Regulation (EC) no. 44/2001. Article 6(1) states that ‘*[a] person domiciled in a Member State may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate*’ (cf. Article 8(1) Regulation (EU) no. 1215/2012). In cases involving multiple defendants, this provision awards the judiciary in a Member State jurisdiction (specifically international jurisdiction) in respect of all defendants, including defendants that could otherwise not be included in the proceedings, if the claims against the defendants are so closely connected that they should be handled together. The claim against the defendant in respect of whom the court already has jurisdiction is the ‘anchor claim’ that, if the requirement of a ‘close connection’ is satisfied, also grants jurisdiction over the other defendants. Article 24 also awards jurisdiction to ‘*a court of a Member State before which a defendant enters an appearance*’ (i.e., voluntarily; cf. Article 26(1) Regulation (EU) no. 1215/2012).

5 JURISDICTION OF THE DUTCH JUDICIARY IN THE PROCEEDINGS AGAINST SPDC

In the proceedings against SPDC, the subsidiary domiciled in Nigeria, the Court of Appeal of The Hague followed the district court by deriving the jurisdiction (and specifically the international jurisdiction) of the Dutch courts not only from Article 6(1) Council Regulation (EC) no. 44/2001 but also and primarily on the related Article 7(1) Dutch Code of Civil Procedure considered in conjunction with Article 6(1) Council Regulation (EC) no. 44/2001. The claim against RDS was the anchor claim. Article 7(1) Dutch Code of Civil Procedure also gives the Dutch judiciary jurisdiction in respect of multiple defendants where an anchor claim exists and where the requirement of a ‘close connection’ and the requirement of ‘expediency of joint consideration’ have been satisfied:

If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency.

SPDC put forward various arguments against basing the international jurisdiction of the Dutch courts on Article 7(1) Dutch Code of Civil Procedure. Those arguments concerned, on

the one hand, the possibility of using the claim against RDS as an anchor claim, and on the other the requirements of a ‘close connection’ and ‘expediency of joint consideration’. On the subject of the claim against RDS as the anchor claim, SPDC noted that the environmental damage had occurred before RDS took charge of the Shell Group. The court rejected this argument based on the following reasoning: ‘*However, this circumstance does not mean that RDS’s liability for the consequences of a failure of previous group management and/or its obligation to prevent new spills and clean up the existing pollution must necessarily be excluded*’ (S-N1 paragraph 2.2, S-N2 paragraph 3.2). SPDC also noted that the claim against RDS could not serve as an anchor claim on the grounds that, as it felt, the claim against RDS manifestly stood no possibility of succeeding. In this connection, the court found, ‘*[n]o “manifest certainty of failure” is involved here, however, as it cannot be ruled out in advance that a parent company may, in certain circumstances, have liability for loss or damage resulting from acts or omissions of a subsidiary or a subsubsidiary*’ (S-N1 paragraph 2.2, S-N2 paragraph 3.2, S-N3 paragraph 2.2). The court then added:

Considering the foreseeably serious consequences, including for the local environment, of oil spills from a potential spill source, it must not necessarily be ruled out that in such a case the parent company may be expected to take an interest in preventing spills (in other words, that a duty of care exists [. . .]), the more so if it has made prevention of environmental damage by its group companies’ activities a spearhead and has a degree of active involvement in and control over the operations of those companies. This does not mean, however, that it is impossible for the duty of care to be breached without this interest and involvement and that culpable negligence with regard to the interests in question cannot in any instance result in liability. This is not altered by the fact that, as Shell argues, no judgments have been rendered by Nigerian courts that accept group liability on these grounds (S-N1 paragraph 2.2, cf. S-N2 paragraph 3.2, S-N3 paragraph 2.2).

The court then went on to address the requirements of a ‘close connection’ and of ‘expediency of joint consideration’:

Considering: (i) that a corporate group relationship exists between the defendants who are being held liable as the joint and several co-debtors, in which the acts, omissions and negligence of SPDC as a group company play an important role for purposes of determining the liability/obligation, if any, of RDS as the top holding; (ii) that the claim brought against them is identical and (iii) has the same factual basis, in that it concerns the same spill, while (iv) the discussion of the facts largely focuses on questions such as what caused the spill and whether enough was done to prevent it and to remedy the consequences, in which connection (v) possibly further investigation is required, (vi) which

investigation should preferably be carried out by a single court to avoid divergent findings and assessments, the conclusion must be that the claims against RDS and those against SPDC are connected to the extent that reasons of expediency justify a joint hearing within the meaning of article 7(1) Dutch Code of Civil Procedure (S-N1 paragraph 2.4, S-N2, paragraph 3.4, see also S-N3 paragraph 2.4)

6 THE CLAIM FOR DISCLOSURE

Milieudefensie et al. sought an injunction, based on Article 843a Dutch Code of Civil Procedure, ordering Shell to provide access to internal paperwork in Shell's possession (a claim for disclosure). The Court of Appeal of The Hague awarded this claim in part. According to Milieudefensie et al. it was very important to establish – based in part on that internal paperwork – what the cause was of the various oil spills. Their reasoning was that under the Nigerian Oil Pipelines Act 'SPDC is strictly liable if the spill resulted from corrosion/insufficient maintenance, whereas if sabotage caused the spill this provision will provide an argument absolving it from liability. However, it is SPDC's responsibility to prove the correctness of that argument' (court's summary of Milieudefensie's argument in S-N1 paragraph 5.1, S-N2 paragraph 6.1, cf. S-N3 paragraph 5.1). The court found as follows:

On the occasion of the pleadings in Phase 1 of the appeal the question was raised of whether an investigation by experts might as yet yield a clearer understanding of the cause of the damage, for which purpose – insofar as this would still helpful and (for safety reasons) sensible some 10 years after the incident – the relevant hole in the pipeline should be subjected to physical inspection. In response, Shell stated that such an inspection is still possible and would be a much more obvious manner of gathering evidence about the cause of the spill, if that course of action were chosen, than submitting paperwork. The Court therefore asks the parties to consider that, if they decide in mutual consultation that it is expedient to have an investigation carried out by experts (preferably three, and at the beginning of Phase 2), the Court will in principle render assistance by delivering an interim judgment (S-N1 paragraph 5.3, cf. S-N2 paragraph 6.3).

The court then added, 'If it is then established that sabotage was the cause of the damage, a decision is still needed in the main actions on the accusation that Shell was negligent in preventing it', and 'The number of times such sabotage had previously occurred to this and possibly other subterranean pipelines [...] might have bearing on this matter' (S-N1 paragraph 5.5, cf. S-N2 paragraph 6.5).

One of the arguments put forward by Shell was that Group management was unaware of the oil spills 'and that the requested

document do not concern those oil spills' (court's summary of Shell's argument in S-N1 paragraph 5.8, S-N2 paragraph 6.8, S-N3 paragraph 5.4): Shell disputed the relevance of the claim for disclosure and Milieudefensie's interest in that claim. The court rejected this defence, reasoning as follows:

The assertion by Shell that the parent company did not know about the spillage and the condition and maintenance of the pipeline locally does not seem to be an adequate defence in all cases, particularly not if sabotage is ruled out as a cause of damage. Considering, among other things, (i) that Shell sets itself goals and ambitions with regard to such matters as the environment, and has defined a Group policy to achieve these goals and ambitions in a coordinated and uniform manner, and (ii) that RDS (just as the former parent company) monitors compliance with these Group standards and this Group policy, such questions arise as: (a) what maintenance and other standards applied to old pipelines such as the one in question; (b) were these maintenance and other standards satisfied; (c) if so, where is this evidenced, and if not, should this not have been noted within the context of the supervision exercised by the parent company (the audits); (d) if an adequate reporting system was in place and (e) why not? Another question is (f) whether the parent company – given the autonomy and individual responsibility of SPDC and its directors – was sufficiently equipped (in terms of expertise, opportunities and means) to intervene adequately in the event that any negligence became apparent on the part of SPDC (S-N1 paragraph 5.9, cf. S-N2 paragraph 6.9, S-N3 paragraph 5.5).

The court awarded Milieudefensie et al.'s claim in respect of some of the documents. The reasoning here included that these were documents that 'may [...] be material in assessing how the supervision was given shape and relevant information was shared with the parent company', and that 'that inspection [...] may be important within the context of the alleged violation of a duty of care' (S-N1 paragraph 5.10, S-N2 paragraph 6.10, S-N3 paragraph 5.6).

7 MATERIAL GROUNDS FOR THE CLAIMS (TORT AND DUTY OF CARE)

Phase 2 of the proceedings in the 'Shell Nigeria issue' is the substantive phase, to establish the extent to which the claims brought against the top-tier management companies RDS, Shell Petroleum and Shell T&T and against SPDC, the Nigerian subsidiary, by Milieudefensie et al. have merit. An important element in that phase will be the question of whether it will as yet be possible to ascertain what the cause was of the various oil spills. If the cause is established to be sabotage, SPDC will have a strong

argument, though not necessarily a decisive one, for being absolved from liability. If the cause is found to lie in poor maintenance, it will become difficult for SPDC to avoid liability. In either instance, if the claim against SPDC is awarded, the question arises of whether the top-tier management companies RDS, Shell Petroleum and Shell T&T may also be held liable. That question goes to the scope of the duty of care of a group's top-tier management company (or companies) – in the present matter, what duty of care RDS, Shell Petroleum and Shell T&T have in respect of the Nigerian residents who in these proceedings have asserted environmental damage, and more generally in respect of the Nigerian residents whom Milieudefensie represents in the proceedings. In this connection, the Court of Appeal of The Hague considered the following general findings:

Given (i) the ongoing developments in the field of foreign direct liability claims (cf. for example the cases brought in the United States of America in the 1990s against Shell [...]), added to (ii) the many oil spills that occurred every year from the oil extraction in Nigeria, (iii) the associated legal actions going back many years (more than 60 years, according to Shell), (iv) the problems that these oil spills present to humans and the environment and (v) the increased focus on such problems, it must have been reasonably foreseeable for RDS as the parent company and SPDC as an operational division of the Shell Group that in time RDS could become a target, and that SPDC, which had already been involved in multiple court cases in Nigeria, could then also be summoned before a court that had jurisdiction in respect of RDS (S-N1 paragraph 2.6, S-N2 paragraph 3.6, S-N3 paragraph 2.6).

In more concrete terms, on the subject of the points of reference that are important for determining whether a parent company has a duty of care to prevent its subsidiary from causing injury to third parties (group liability), the court held that 'Nigerian law, being a common law system, is based on English law, and common law and English case law are important sources of knowledge in the Nigerian legal system' (S-N1 paragraph 2.2, S-N2 paragraph 3.2, S-N3 paragraph 2.2). The court then referred to various judgments under English law, including in *Chandler v. Cape Plc* [2012] EWCA Civ 525 and *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635. In the court's interpretation of the latter judgment, assuming group liability under common law requires 'a clear correlation [...] between the loss or damage incurred and the role that the parent company played within the group; the crux being that a situation exists in which the parent company, given "its superior knowledge or expertise" "is better placed" to intervene' (S-N1 paragraph 2.2, S-N2 paragraph 3.2, S-N3 paragraph 2.2). In this connection, the court also considered as follows:

One of the points of departure in the application of Nigerian law will then be that it is not the place of a Dutch court to initiate an entirely new legal development in Nigerian law (S-N1 paragraph 2.2, S-N2, paragraph 3.2, S-N3 paragraph 2.2).

An important argument that Shell had raised was the 'degree of discretion of the operating company' that applies within the Shell Group (S-N1 paragraph 2.2, S-N2, paragraph 3.2, S-N3 paragraph 2.2), which would stand in the way of assuming group liability. To place this argument within the context of a consideration of the proceedings under common law, it is important to consider the judgments in *Chandler v. Cape* and *Thompson v. The Renwick Group Plc*.

Chandler v. Cape [2012] EWCA Civ 525 revolved around a dispute between D.B. Chandler and Cape Plc.⁹ A former employee of a subsidiary of Cape (Cape Building Products Ltd), Chandler, brought proceedings against the parent company, alleging injury through exposure to asbestos. The court in the lower instance found in favour of Chandler on 14 April 2011, upon which Cape appealed. The English Court of Appeal pronounced judgment on 25 April 2012 and rejected that appeal. One of the important findings by that Court of Appeal that has bearing on the 'degree of discretion of the operating company' as put forward by Shell was the following:

There is nothing in [...] the general law to support the submission [...] that the duty of care can only exist in these cases if the parent company has absolute control of the subsidiary (paragraph 66).

The English Court of Appeal then proceeded to analyse the dispute that had been brought before it. The following finding in particular is interesting in that analysis:

[T]his case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that

⁹ The judgment can be found on www.bailii.org, the website of the British and Irish Legal Information Institute (full URL: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html>).

element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues (paragraph 80).

Thompson v. The Renwick Group Plc [2014] EWCA Civ 635 concerned a dispute between D. Thompson and The Renwick Group Plc.¹⁰ A former employee of a subsidiary of The Renwick Group, Thompson, brought action against the parent company, again alleging injury through exposure to asbestos. The court in the lower instance found in favour of Thompson on 24 April 2013, upon which The Renwick Group appealed. The English Court of Appeal rendered judgment on 13 May 2014 and rejected Thompson's claim. That Court of Appeal held that the relevant question in that dispute was 'whether the totality of evidence as found by the trial judge is nevertheless sufficient to justify the imposition of a duty of care on the parent company to protect the subsidiary company's employees from the risk of injury arising out of exposure to asbestos at work' (paragraph 27). Two of the considerations that followed are of particular relevance here:

[W]hat one is looking for here is a situation in which the parent company is better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary companies against the risk of injury and moreover where, because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge in order to protect its employees from risk of injury (paragraph 37),

and:

[T]here is no basis upon which it can be asserted that the Renwick Group Limited either did have or should have had any knowledge of that risk superior to that which the subsidiaries could be expected to have (paragraph 38).

The picture painted in *Chandler v. Cape Plc* and *Thompson v. The Renwick Group Plc* is that to assume a duty of care on the part of a parent company of a group it is important primarily to establish whether, given all the circumstances of the case, both the subsidiary and the persons who suffered injury could legitimately expect that the parent company would (and therefore should) be concerned with the interests of the persons asserting the injury. The circumstances that are relevant for determining this include:

- whether the parent company and the subsidiary operate in the same industry, meaning that the parent company possesses a greater understanding of the risks of the subsidiary's operations than that subsidiary itself does; and

- whether the parent company knew, or should have known, that the subsidiary's operations presented risks.

It will further the claimant's case if he can demonstrate that the parent company was actively involved in the subsidiary's operations:

In the present case, Cape was clearly in the practice of issuing instructions about the products of the company, for instance, about product mixes. We know that Cape Products could not incur capital expenditure without parent company approval. [...] There is nothing wrong in 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 (*Chandler v Cape Plc*, paragraph 73).

Ultimately, the reason why the English Court of Appeal dismissed the claim in *Thompson v. The Renwick Group Plc* was that the parent company – despite being a shareholder in the subsidiary – had no involvement in asbestos-related work (and that therefore it could not be said to possess a greater understanding of the risks of the subsidiary's operations than that subsidiary itself did):

There is no evidence that the Renwick Group Limited at any time carried on any business at all apart from that of holding shares in other companies, let alone that it carried on [...] a business an integral part of which was the warehousing or handling of asbestos or indeed any potentially hazardous substance (paragraph 37).

8 CONCLUSION

In the Shell Nigeria issue it will be difficult to maintain that the top-tier management companies RDS, Shell Petroleum and Shell T&T were *not* aware of the environmental risks that resulted from the Shell Group's operations in Nigeria, even if those top-tier management companies themselves are or were not active in the oil industry with their own factories and own installations. This leads to the conclusion, albeit one with reservations, that the chance that Milieudefensie et al.'s claims would succeed under the applicable Nigerian common law should certainly not be dismissed. Piercing the corporate veil for environmental reasons: an issue that is evolving rapidly. To be continued!

¹⁰ The judgment can be found on [www.bailii.org](http://www.bailii.org/ew/cases/EWCA/Civ/2014/635.html) (full URL: <http://www.bailii.org/ew/cases/EWCA/Civ/2014/635.html>).