

## Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case

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### 1. Introduction

01. Just before Christmas 2015, the Court of Appeal (*Gerechtshof*) in The Hague handed down its preliminary verdicts in the Dutch Shell Nigeria case.<sup>1</sup> Just like the District Court it holds that it is competent to hear the cases against Royal Dutch Shell and its Nigerian subsidiary, and that the claimants, including NGO Milieudefensie (Friends of the Earth), have standing. The Court of Appeal goes a step further than the District Court by honouring the claimants' request to order Shell to disclose documents regarding maintenance of the relevant oil pipelines.
02. Although the substantive liability questions will be subject of the second phase of the appeal proceedings, the Court of Appeal provides some interesting considerations on the possibilities of a duty of care for a parent company vis-à-vis its subsidiary. A substantive decision of the Court of Appeal may be expected late 2016 or early 2017.
03. In this paper I discuss the procedural history of the Dutch Shell Nigeria case (par. 2), the background of the dispute (par. 3), the jurisdiction of the Dutch court (par. 4), the Court of Appeal's considerations regarding duties of care for parents vis-à-vis subsidiaries (par. 5), the disclosure request (par. 6), the standing of NGO Milieudefensie (par. 7), and the standing of individual claimants (par. 8). I finish with some questions about Shell's procedural conduct in the light of existing soft law rules and the company's CSR policies (par. 9).

### 2. Case history

04. In November 2008, four Nigerian farmers filed claims against Royal Dutch Shell (RDS, parent) and SPDC (Shell Petroleum Development Company, its Nigerian subsidiary) before the District Court (*Rechtbank*) in The Hague. The claims concerned a number of oil spillages in villages in the Niger Delta in 2005 and 2006 as a consequence of which the farmers lost

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<sup>1</sup> Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3586 (Dooh/Shell); Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3587 (Shell/Akpan); Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell). See also the news coverage by The Guardian: <http://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-shell-oil-spills-nigeria>. There are currently no English translations of the Court of Appeal decisions.

their livelihood. Basically, the farmers sue subsidiary SPDC for negligently causing or not preventing the pollution, and parent RDS for not preventing the subsidiary from acting negligently. The farmers ask the District Court to hold both parent and subsidiary liable for the consequential damage, and to order them to clean up the polluted soil and waters as well as to take measures to prevent new leakages and other environmental harm.

05. In December 2009, the District Court decided it was competent to hear the cases, both against the parent and the subsidiary.<sup>2</sup> Almost two years later, in September 2011, the court held that the claimants had standing but dismissed request by the claimants to order Shell to disclose documents that could help them to prove their case.<sup>3</sup> In January 2013, the District Court rendered its final judgment, dismissing all four claims against RDS and three claims against SPDC.<sup>4</sup> It awarded one claim (by Mr Akpan) for lack of measures taken by Shell to prevent sabotage.<sup>5</sup>
06. It was the first time a western court held a multinational company liable for environmental damage caused in a non-western country. Indeed, on the basis of Nigerian law a Dutch court ordered a Nigerian legal entity (SPDC) to pay damages to a Nigerian claimant for damage suffered in Nigeria. This decision shows that legal borders become permeable, also when liability is at stake.<sup>6</sup>
07. Shell lodged an appeal against the Akpan-decision and the claimants lodged appeals against the other decisions. All appeals were subject of the Court of Appeal's December 2015 judgments mentioned in par. 1.

### 3. Background

08. The cases are about the possible liability of Shell (parent and subsidiary) for oil pollution in the Niger Delta: in Goi, Ogoniland, River State (Dooh), in Ikot Ada Udo, Akwa Ibom State (Akpan), and in Oruma, Bayelsa State (Oguru-Efanga). These cases are not to be confused with the case against Shell for oil pollution near Bodo, also in the Niger Delta. In the latter case, Shell had admitted liability but negotiations about the damages and remedies did not get anywhere and the claimants filed legal proceedings against Shell before the English

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<sup>2</sup> District Court The Hague 30 December 2009, ECLI:NL:RBSGR:2009:BK8616 (Dooh-Akpan-Oguru-Efanga-Milieudefensie/Shell).

<sup>3</sup> District Court The Hague 14 September 2011, ECLI:NL:RBSGR:2011:BU3535 (Oguru-Efanga/Shell); ECLI:NL:RBSGR:2011:BU3538 (Dooh/Shell); ECLI:NL:RBSGR:2011:BU3529 (Akpan/Shell).

<sup>4</sup> District Court The Hague 30 January 2013, ECLI:NL:RBSGR:2013:BY9850 (Oguru-Efanga/Shell); District Court The Hague 30 January 2013, ECLI:NL:RBSGR:2013:BY9854 (Dooh/Shell).

<sup>5</sup> District Court The Hague 30 January 2013, ECLI:NL:RBSGR:2013:BY9854 (Akpan/Shell).

<sup>6</sup> See about the District Court decisions Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria Case*', *Utrecht Law Review* 10 (2014) 1, p. 44-54, with further references (<https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.256>).

court.<sup>7</sup> A breakthrough and a successful settlement out of court about the cleaning up of the area were reached after mediation by former Dutch ambassador Ronhaar.

09. Two other cases against Shell were filed in the United States by next of kin of the victims of violence by the military regime of Nigeria, violence in which Shell was allegedly involved. The first one was the *Ken Saro-Wiwa* case that was settled out of court.<sup>8</sup> The second one was the (in)famous *Kiobel* case, which ended in the judgment of the US Supreme Court in which it considerably limited the jurisdictional scope of the Alien Tort Statute.<sup>9</sup>

#### 4. Jurisdiction of the Dutch court

10. Is the Dutch court competent to hear the cases against both parent RDS and subsidiary SPDC? The Court of Appeal upholds the affirmative judgment of the District Court by applying the same two-step reasoning. First, it considers that it is undisputed that the court has jurisdiction to hear the case against RDS on the basis of the Brussels I Regulation. Article 2 Brussels I states that persons domiciled in a Member State shall be sued in the court of that Member State and article 60 holds that a company is domiciled at the place where it has its statutory seat. RDS' seat is in The Hague.
11. Second, the Court of Appeal accepts jurisdiction to hear the cases against SPDC on article 7(1) Dutch Code of Civil Procedure (CPP) regarding plurality of defendants. This provision allows a court to hear a case against a defendant that is not within its jurisdiction provided the claim is in such a way related to the claim of the defendant over which the court does have jurisdiction (here: the claims against RDS) that reasons of efficiency justify a joint hearing.
12. The Court of Appeal reaches this conclusion by taking into account:
  - the defendants are part of the same business group ('concern'), whilst SPDC's conduct as a subsidiary plays an important role when assessing the possible liability of RDC as top-holding;
  - the claims against the defendants are the same;
  - the factual bases of the claims are the same in that they regard the same spillages;
  - the factual debate has focused on how the leakages have occurred and whether enough is done to prevent them or to reverse the consequences;
  - as factual research is needed, hearing the claims by the same court prevents varying conclusions;

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<sup>7</sup> *Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973.

<sup>8</sup> See <http://www.theguardian.com/world/2009/jun/08/nigeria-usa>.

<sup>9</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

- this interpretation of article 7(1) CPP is in line with the case law of the ECJ with respect to the corresponding article 6(1) Brussels I.
13. SPDC raised two counter arguments. The first is that the claims concern oil spillages that occurred before RDS became the parent company of the Shell Group. The Court of Appeal rejects this argument. It considers that RDS could be held liable for the consequences of the failings of the group's previous management and/or that it owes an obligation to prevent new spillages or to clean up existing ones. Moreover, so the court, the claimants have argued that the changes in the Shell group were mainly a paper transition, which is now being abused by RDS and SPDC to avoid liability. According to the Court of Appeal, these arguments require a substantive assessment, which is the subject of the second phase of the appeal proceedings.
  14. SPDC's second line of defence is that the claims against RDS are clearly unfounded. The Court of Appeal also dismisses this argument because it considers that it cannot be excluded that the parent company is liable for damage caused by an act or omission of a subsidiary. What follows is an interesting excursion into the muddy waters of parent company liability.

## **5. Court considerations regarding parental duties for subsidiaries**

15. Here is a more or less literal translation of the relevant paragraph of the Court of Appeal judgment:
16. 'Considering the foreseeable serious consequences of oil spillages, *inter alia* for the environment around the potential leakage, it cannot be excluded beforehand that in such a case the parent company may have to assume responsibility to prevent spillages (in other words: that a duty of care exists according to the requirements in the decision *Caparo v Dickman* [1990] UKHL 2, [1990] 1 *All ER* 56), the more so if the parent company has made a focal point of preventing environmental damage by activities of its subsidiaries and is to a certain extent actively involved in directing their operational management. This does not mean that without this attention and involvement a duty of care would not be conceivable and that a blameworthy negation of these interests could never lead to liability. This is not altered by the fact that, according to Shell, there are no decisions by Nigerian courts in which parent liability on this basis is accepted because it does not imply that Nigerian law as a rule does not provide clues to accept, under such circumstances, the breach of a duty of care of the parent company, neither with respect to the cleaning up nor the prevention of the pollution. Where Nigerian law as a common law system is based on English law and the common law, English case law respectively, is the main source of knowledge in the Nigerian legal system, these clues could also be found in decisions such as in the case of *Chandler v Cape* [2012] EWCA Civ 525. It cannot be said in advance that the latter case - in which it was not excluded that also other circumstances than the ones at stake in that case could lead to a duty of care of the parent company - cannot serve in any way as a precedent to the detriment of

RDS in the circumstances of this case. This neither follows from the later decision in *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635 in which a not exactly comparable set of facts was at stake: that case was *inter alia* about a ‘pure’ holding with subsidiaries with strongly varying business activities. Compare on one hand par. 33 of the latter decision (on the scope of *Chandler v Cape*): “*It is clear that Arden LJ intended this formulation to be descriptive of circumstances in which a duty might be imposed rather than exhaustive of the circumstances in which a duty may be imposed.*” and on the other hand par. 36 (regarding the exception): “*The mere recitation of these factors demonstrates how far removed from Chandler v Cape is this case.*” However, the decision in *Thompson v The Renwick Group Plc* does indicate that a clear connection is required between the suffered damage and the role the parent company has fulfilled in the group; what matters according to Tomlinson LJ is a situation in which the parent company because of ‘*its superior knowledge or expertise*’ ‘*is better placed*’ to interfere (par. 37). Whether such a situation is at stake - something Shell contests, *inter alia* by pointing at the margin of appreciation of the operating company when applying the standards not provided by the parent company - and whether also in other respects a sufficient connection can be established with for example the decision in *Chandler v Cape* will be assessed after the debate on this in phase 2 of the appeal procedure. The starting point when applying Nigerian law will be that it is not for the Dutch court to start a completely new development in Nigerian law. This point can be left for now.’<sup>10</sup>

17. This is a remarkable string of considerations that go beyond what is strictly necessary to assess that the claim of the farmers against RDS is not a clearly unfounded one. Even though the court does not anticipate the substantive debate about the duties that may rest on a parent company, it seems to indicate its willingness not being too reluctant when it comes to such duties, referring to recent English cases where the courts took cautious but considerable steps to accept a duty of care for parent companies.
18. The Court of Appeal also refers to the English common law as the source of Nigerian law. Although it is not entirely clear what the court aims to say, it seems to want to create some space for when it is going to apply Nigerian law (the parties have agreed that Nigerian law is the applicable law as the damage is suffered in Nigeria; this is no longer part of the debate). The problem in a new area like this with to a great extent uncharted legal ground is that it is hard for a court to apply foreign law in a dynamic way. When it applies national law it can take a step forward or backward but when applying foreign law it seems to be stuck with the monolithic state of the art of that foreign law. This is fair if there is a clear line of similar decisions for similar situations but it is unduly limiting when exploring new pastures of the law. And the liability of parent companies for acts and omissions by their subsidiaries is clearly one of those new pastures.

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<sup>10</sup> Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell), par. 2.2. Similar considerations can be found in Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3586 (Dooh/Shell), par. 3.2, and Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3587 (Shell/Akpan), par. 2.2.

19. The Court of Appeal's considerations may be an indication for the framework against which it will assess the substantive debate between the parties. The court is bound by many limitations (not the least to apply Nigerian law) but its considerations indicate a tendency to push the perceived limits of the duty of care for parent companies vis-à-vis their subsidiaries (or third parties generally).
20. The Court of Appeal's considerations are particularly interesting because the District Court dismissed the claims against parent RDS, as it considered that Nigerian law - put briefly - does not oblige a parent company to look after its subsidiary. The prelude of the appeal court indicates that it is open to a different conclusion.

## **6. Disclosure issues**

21. In 2013, the District Court dismissed all claims against parent RDS, holding that in Nigerian law no duty is owed by a parent company vis-à-vis its subsidiary's conduct. It also dismissed three out of four claims brought against subsidiary SPDC. It held that in all four cases the pollution was caused by sabotage and - under Nigerian law - a company is not liable for damage caused by sabotage.
22. In one of these four cases, however, the District Court awarded the claim against Shell for not taking sufficient measures to prevent the sabotage from happening. The case was about a well deserted by Shell and that was freely accessible. Sabotage was easy: the wells' valve could be opened with a monkey wrench. The court held that Shell Nigeria had seriously failed to safeguard the deserted well against sabotage. It had created a very dangerous situation against which it should have taken more and better precautionary measures. Already before 2006 and 2007 it could have considerably limited or excluded the sabotage risk against very low costs by closing the well with a concrete plug, which Shell in fact did in 2010, two years after the start of the litigation in the Netherlands.
23. The reason why the District Court dismissed the claims against SPDC was that the claimants had not managed to prove that the oil spillages were caused by poor maintenance of the oil pipes. For this evidence the claimants had to rely on public information only whilst Shell was sitting on relevant corporate information, on which they could not lay their hands.
24. Unlike common law systems, civil law systems like that of The Netherlands do not know discovery or disclosure obligations for the parties at the beginning of the trial. In fact, there is no such thing as a trial. Both the first instance and the appeal procedures are a mix of written and oral pleadings, whereas the appeal procedure also provides for a new assessment of (part of the) facts.
25. The only way for the claimants to gain access to information held by the defendant is to ask for a court order on the basis of article 22 CCP or article 843a CCP. Under the first provi-



sion the defendant may refuse to provide the required documents in which case the court is free to draw from this refusal the conclusions it deems appropriate. Under the second provision the court is usually very reluctant to order disclosure. In the Shell cases the District Court dismissed all claimants' requests for disclosure.

26. The key issue is the distinction between spillage caused by corrosion or lack of maintenance (for which SPDC is strictly liable) and spillage caused by sabotage (for which SPDC is in principle not liable). The burden of proof for corrosion or lack of maintenance is on the claimants but they have only limited information available. Indeed, reports of the Joint Investigation Team assess the cause of leakages and conclude in many situations that the cause is sabotage but the value and objectivity of these reports is strongly disputed.
27. For this reason, the claimants requested the Court of Appeal to order Shell to hand over company documents, which may help them to prove lack of maintenance. The court dismisses a number of requests by the claimants, particularly those with respect to the cause of the leakages. The court holds that these documents would not shine a brighter light on the causes and that it is expected that the cause of the leakages can be assessed with more certainty through a joint investigation on the spot.
28. The Court of Appeal shows less reluctance with respect to documents regarding parent RDS' involvement in the Nigerian oil spills. Shell's consistent defence against the disclosure (apart from that the documents contain confidential information) is that RDS did not have knowledge of the (condition of the pipeline at the location of the) leakage and that the required documents are unrelated to this. However, the court does not consider this an adequate defence.
29. More specifically, the court considers that Shell sets for itself goals and ambitions, *inter alia* with respect to the environment and has formulated group wide policies to achieve these goals and ambitions in a coordinated and uniform manner, and that RDS (just like the former parent company) exercises control over the compliance with the group standards and the group policy. Against this background questions arise like which (maintenance) standards applied to an old pipeline, were these (maintenance) standards complied with; if so, what is the evidence for this, and if not, should this not be observed in the framework of the supervision exercised by the parent (the audits). Another question is whether the parent company - taking into account the autonomy and own responsibility of (the board of) SPDC - was sufficiently equipped (re knowledge, possibilities and means) to adequately interfere in case of noted failures by SPDC.
30. On the basis of these considerations the Court of Appeal orders RDS to disclose specific audit reports, assurance letters, incident reports, and documents with respect to the relevant oil pipelines. The court also rules that these documents will not be handed to the claimants but that they will be available at the office of a notary for inspection by the claimants' legal

representatives and the members of the court. This (modest) disclosure order is the most significant difference between the decision of the District Court and the Court of Appeal.

## **7. Standing Milieudéfensie**

31. The initiator and sponsor of these court proceedings is the Dutch environmental NGO Milieudéfensie, a member of Friends of the Earth (and clearly not belonging to Shell's best friends). Milieudéfensie is also one of the claimants, next to the Nigerian farmers. Before the District Court, Shell had unsuccessfully disputed the standing of Milieudéfensie. In appeal they argue along the same lines but the Court of Appeal agrees with the lower court that the NGO complies with all the requirements for standing.
32. Standing is decided according to the law of the forum. Art. 3:305a of the Dutch Civil Code allows an association or a foundation to file a claim if this association or foundation aims to protect similar interests of others and provided it represents these interests according to its constitution. This group action serves procedural efficiency as it enables to decide in one procedure about issues all represented persons have in common, leaving aside personal peculiarities of the claimants, which can be taken into account at the stage of the damages. This group action Dutch style only allows for a court decision on liability and not on the damages to be paid by the liable person (art. 3:305a(3)).

## **8. Standing of the individual claimants**

33. Shell continued its fight at the procedural level by arguing that the standing of the individual claimants Oguru and Efanga requires that they are the exclusive owners of the affected grounds and fishing ponds and that they have not provided evidence for this. The Court of Appeal considers that this argument anticipates the substantive debate and holds that the claimants have sufficiently demonstrated that their relation with the polluted fishponds and grounds is of such a nature that they are entitled to file claims against the possible liable party. The court also considers that Shell's argument is at odds with its argument elsewhere that it has sufficiently cleaned up the pollution that affected the claimants Oguru and Efanga.
34. This issue of ownership is a sensitive one in business and human rights cases because in non-western countries ownership often has a different meaning or function. This is partly the case because of collective rather than individual ownership and partly because registration of land ownership is dire or non-existing.<sup>11</sup>

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<sup>11</sup> This is even the case in an EU country like Greece. This is also an important reason why it is often easy for companies to argue that their land grabbing activities did not violate the law.



35. Shell also disputed the standing of another claimant, Eric Dooh. He is the eldest son of one of the initial claimants, Barizaah Dooh, who passed away in January 2012. In addition to putting in doubt exclusive ownership of the affected grounds and ponds (like in the cases of Oguru and Efanga), Shell argued that Dooh had not demonstrated that he was his father's sole heir. Shell also argued that the father's claims became void when he died. These defences were presented at a fairly late stage of the proceedings.
36. The Court of Appeal dismisses Shell's arguments. In addition to the considerations with respect to the requirement of exclusive ownership (par. 33), it considers that according to Nigerian customary law Eric Dooh as the eldest son inherits the father's estate and was therefore entitled to lodge the appeal in his own name.

## 9. Concluding observations

37. Disputing the standing of the individual claimants, and the arguments Shell chose to use in this respect (par. 8), seem to contribute little to bringing this long running case (seven years and counting) forward. Many will see such procedural moves as an indication that Shell is not really interested in a substantive resolution of the dispute in the shortest possible term but rather aims to exploit all possible procedural means to give the claimants a hard time, depleting their financial means as much as possible.
38. The same applies to Shell's request, flatly dismissed, to allow it to appeal the Court of Appeal's preliminary judgement before the Dutch Supreme Court (*Hoge Raad*), rather than waiting for the decision of the Court of Appeal on the merits. It is hard to see what other interest Shell had with its request than to cause further delay to the procedure, increasing the time, efforts and costs for the claimants.
39. In my Rotterdam inaugural lecture I have indicated that the increasing body of soft law rules and corporate human rights policies have wide ranging consequences for the role of the company's legal department.<sup>12</sup> These consequences also regard the way a company litigates. The aim for a company in business and human rights litigation - if it inevitably has to get to that stage - should be to solve the substantive dispute at stake in the quickest way possible. Procedural conduct as indicated above is not only at odds with this aim but also with Shell's ambitious CSR policies, and with the soft law obligations regarding an effective remedy (a judicial procedure as a dispute resolution of last resort) for the people whose human rights have allegedly been affected by corporate conduct.

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<sup>12</sup> Cees van Dam, *Enhancing Human Rights Protection: a Company Lawyer's Business*, Inaugural Lecture, Rotterdam School of Management, 18 September 2015: <http://repub.eur.nl/pub/78743/Professor-Cees-van-Dam-Inaugural-Lecture-EN.pdf>. The Inaugural Lecture can also be watched on YouTube: <http://youtu.be/3VKHvY4ZTIE>.