

COURT OF THE HAGUE

Civil law section

Case number / docket number: 330891 / HA ZA 09-579

Judgment in motion contesting jurisdiction of 30 December 2009

in the matter of

1. [plaintiff 1],  
residing in Oruma, Bayelsa State, Nigeria,  
2. [plaintiff 2],  
residing in Oruma, Bayelsa State, Nigeria,  
3. the association with corporate personality  
VERENIGING MILIEUDEFENSIE,  
established in Amsterdam,  
plaintiffs in the main action,  
defendants in the motion contesting jurisdiction,  
attorney: W.P. den Hertog,

versus

1. the legal entity organized under foreign law  
ROYAL DUTCH SHELL PLC,  
established in London, United Kingdom, with office in The Hague,  
defendant in the main action,  
2. the legal entity organized under foreign law  
SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD.,  
established in Port Harcourt, Rivers State, Nigeria,  
defendant in the main action,  
plaintiff in the motion contesting jurisdiction,  
attorney: J. de Bie Leuveling Tjeenk.

In the following, the plaintiffs will be collectively referred to as [the plaintiffs] and individually as [plaintiff 1], [plaintiff 2] and Milieudefensie; the defendants will be referred to as RDS and SPDC.

1. The proceedings

1.1. The course of the proceedings appears from:

- the writ of summons dated 7 November 2008, with exhibits;
- the motion for the court to decline jurisdiction and transfer the case, also conditional statement of defense in the main action, with exhibits;
- the statement of defense in the motion contesting jurisdiction;
- counsels' pleas and the pleading notes submitted on this occasion.

1.2. Finally, the judgment in the motion was scheduled for today.

2. The dispute

in the main action

2.1. [the plaintiffs] demand that the court, in a judgment that is declared provisionally enforceable:

I. issues a declaratory judgment to the effect that RDS and SPDC committed tort against [plaintiff 1] and/or [plaintiff 2] based on the arguments set out in the writ of summons and are jointly and severally liable towards them for the damage that [plaintiff 1] and/or [plaintiff 2] suffered and will suffer in the future as a result of these torts on the part of RDS and SPDC, which damage is to be assessed by the court and to be settled in conformance with the law, all this plus the statutory interest from the date of the writ of summons until the date of payment in full;

II. issues a declaratory judgment to the effect that RDS and SPDC committed tort against Milieudefensie based on the arguments set out in the writ of summons and are jointly and separately liable for the damage to the environment near Oruma as a result of these torts on the part of RDS and SPDC;

III orders RDS and SPDC to commence the replacement of the old (sections of) the oil pipeline near Oruma within two months after the judgment has been served, or at least within a term to be determined by the court, and to complete this replacement within three months after commencement, or at least within a term to be determined by the court;

IV orders RDS and SPDC to commence the clean-up of the soil around the oil spill so that this will comply with the international and local environmental standards within two weeks after the judgment has been served, and to complete this clean-up within one month after commencement, as evidence of which RDS and SPDC will present [the plaintiffs] with a unanimous clean-up declaration – within one month after completion of the clean-up – to be prepared by a panel of three experts, who will be appointed within two weeks after the judgment and in which one expert will be appointed by RDS and SPDC jointly, one expert will be appointed by Milieudefensie and one expert will be appointed by the two experts appointed in this way, or at least within the terms to be set by the court and providing evidence of the clean-up in a manner to be determined by the court;

V orders RDS and SPDC to commence purification of the water sources in and near Oruma within two weeks after the judgment has been served, and to complete this purification within one month after commencement, as evidence of which RDS and SPDC will present [the plaintiffs] with a unanimous purification declaration – within one month after completion of the purification – to be prepared by a panel of three experts, who will be appointed within two weeks after the judgment and in which one expert will be appointed by RDS and SPDC jointly, one expert will be appointed by Milieudefensie and one expert will be appointed by the two experts appointed in this way, or at least within terms to be set by the court and providing evidence of the purification in a manner to be determined by the court;

VI orders RDS and SPDC to maintain the oil pipeline near Oruma in good condition after replacement, in accordance with “good oil field practices”, including at a minimum complying with the compulsory inspections of the pipelines, preparing or maintaining an adequate system of pipeline inspection and to act responsibly in conformance with this system; orders RDS and SPDC to present [the plaintiffs] with a written report of these inspections, in each instance within two weeks after the inspection was conducted;

VII orders RDS and SPDC to implement an adequate oil spill contingency plan in Nigeria and to ensure that all the conditions have been met for a timely and adequate response in the event that an oil spill near Oruma occurs again; [the plaintiffs] in any case consider this to include making sufficient material and resources available in order to limit the damage of a potential oil spill to the extent possible – as evidence of this RDS and SPDC

will provide overviews to [the plaintiffs];

VIII orders RDS and SPDC to pay [the plaintiffs] a penalty of EUR 100,000.00 (or another amount to be determined by the judge in good justice) for each time RDS and SPDC, individually or jointly, act in breach of the orders referred to in paragraphs III, IV, V and/or VI above;

IX orders RDS and SPDC jointly and severally to compensate the extrajudicial costs;

X orders RDS and SPDC to pay the costs of these proceedings, or at least to order each party to pay its own costs.

2.2. In brief, [the plaintiffs] base these claims on the following. In June of 2005 an oil spill occurred from an oil pipeline near Oruma, Nigeria; as a result of this oil spill [plaintiff 1] and [plaintiff 2] suffered (material and nonmaterial) damage. Their fish ponds can no longer be used, the trees and plants they had planted have been destroyed and their health may be damaged as a result of the pollution of the soil and the drinking water. The oil spill affected the environment in a large area near Oruma. As 'operator' of the oil pipeline, SPDC is liable to pay compensation to [the plaintiffs]. SPDC breached its duty to exercise due care because it failed to prevent the oil spill, commenced the clean-up too late and conducted an incomplete clean-up. In addition to SPDC, RDS is jointly and severally liable to pay [the plaintiffs] compensation. As SPDC's parent company, RDS should have exercised its influence on and control over SPDC's (environmental) policy to prevent SPDC from inflicting the damage at issue on people and the environment to the extent possible. According to [the plaintiffs], RDS breached this duty to exercise due care.

2.3. RDS and SPDC have conducted a substantiated defense.

in the motion

2.4. SPDC demands that the court declares that it has no jurisdiction over the claims against SPDC. To this end, SPDC – in brief – submits the following.

Section 7 of the Dutch Code of Civil Procedure does not offer sufficient basis for assuming that the Dutch court has international jurisdiction over the claims against SPDC. After all, the requirement that the claims against RDS on the one hand and those against SPDC on the other are connected to such an extent that a joint hearing is justified by reasons of efficiency has not been complied with. In addition, [the plaintiffs] are abusing procedural law by initiating claims against RDS on a patently inadequate basis for the sole purpose of creating jurisdiction with regard to SPDC, according to SPDC.

2.5. [the plaintiffs] have conducted a substantiated defense. The arguments and defenses of the parties will be discussed below in as far as necessary.

3. The assessment

in the motion

3.1. RDS has its headquarters in the Netherlands. For this reason, the court can derive international jurisdiction in respect of this defendant from Article 2(1) in conjunction with Article 60(1) of Council Regulation (EC) no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: the Brussels Regulation). It is pointed out that this jurisdiction is not in dispute.

3.2. With respect to SPDC's claim of abuse of procedural law, the court finds as follows. First of all, abuse of procedural law can only be assumed very rarely, in particular if a claim is based on facts and circumstances which the plaintiffs knew or should have known were (obviously) incorrect or based on arguments which the plaintiffs should have realized beforehand had no chance of success (whatsoever) and thus were completely unsound (compare Netherlands Supreme Court 29 June 2007, NJ 2007 no. 353).

3.3. The court is of the opinion that the arguments of [the plaintiffs] regarding RDS cannot be designated as fully unsound or certain to fail in the sense mentioned above. In this context, the court *inter alia* takes into account the fact that according to SPDC, as well, the corporate veil in group relationships may be directly or indirectly pierced, albeit under exceptional circumstances. It has not been sufficiently advanced or demonstrated that facts and circumstances are involved which [the plaintiffs] knew or should have known were obviously incorrect. For this reason, the court dismisses the claim of abuse of procedural law.

3.4. SPDC is not domiciled in a Member State as referred to in the Brussels Regulation. The case at issue does not deal with a dispute as referred to in Article 22 of the Brussels Regulation or with an agreement conferring jurisdiction as referred to in Article 23 of the Brussels Regulation. In part in view of Article 4(1) of the Brussels Regulation, this means that the question regarding whether the court has international jurisdiction in respect of SPDC should be answered based on the Dutch Code of Civil Procedure (hereinafter: DCCP). The parties do not agree whether the court can derive jurisdiction from Section 7(1) DCCP, which reads as follows:

"In the event that the Dutch court has jurisdiction over one of the defendants in matters that must be initiated by a writ of summons, the Dutch court also has jurisdiction over other defendants involved in the same proceedings, provided the claims against the various defendants are connected to such an extent that reasons of efficiency justify a joint hearing."

3.5. In view of this statutory stipulation, the issue is whether the claims against RDS on the one hand and those against SPDC on the other are connected to such an extent that reasons of efficiency justify a joint hearing.

3.6. In the main action, [the plaintiffs] hold RDS and SPDC liable for the same damage, which also follows from the claim for a joint and several order for RDS and SPDC. This means that the same complex of facts in Nigeria must be assessed in respect of the claims against both RDS and SPDC. The court finds that this fact alone demonstrates a connection to such an extent that reasons of efficiency justify a joint hearing of the claims against RDS and SPDC. That all or part of these facts and circumstances did not occur in the Netherlands is not exceptional in Dutch case law and does not lead to a different opinion on sufficient connection and efficiency in the sense of Section 7 DCCP.

3.7. The court finds that whether or not a "more stringent" efficiency criterion applies in the application of Section 7 DCCP than in internal procedural law in assessing whether subjective cumulation or consolidation of cases is allowed is not decisive, so that the court disregards SPDC's argument on this point. Nor does the ECJ case law dealing with Article 6(1) of the Brussels Regulation cited by the parties carry decisive weight, given that this case law does not directly apply regarding Section 7 DCCP. Moreover, it can certainly

not be ruled out that application of this case law would lead to the same opinion.

3.8. Taking all arguments into account, the court concludes that it has international jurisdiction over SPDC, so that the claim in the motion contesting jurisdiction must be dismissed. As the party ruled against, SPDC will be ordered to pay the costs of this motion contesting jurisdiction.

3.9. When asked and after consulting their clients, both attorneys replied during the pleas that they do not have to be given the opportunity to lodge an interim appeal against this judgment. The court will follow the parties in this.

in the main action

3.10. In part in view of the replies that both attorneys gave to the question concerned during the pleas, the court believes that this case is not suitable for ordering a personal appearance following the defense as referred to in Section 131 DCCP. For this reason, the case will be referred to the docket session of Wednesday 10 February 2010 for filing the statement of reply.

#### 4. The decisions

The court:

in the motion

4.1. dismisses the claim;

4.2. orders SPDC to pay the costs of the proceedings, to date on the part of [the plaintiffs] estimated at nil for disbursements and EUR 904.00 for the attorney's salary;

in the main action

4.3. refers the case to the docket session of 10 February 2010 for filing the statement of reply;

4.4. defers all further decisions.

This judgment was rendered by H. Wien, P.A. Koppen and M.A. van der Ham and declared in public on 30 December 2009 in the presence of the court clerk.