Some Comments to the Hague Judgment in Re Friends of the Earth Netherlands *V.* Shell

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On 29 January 2021, the Hague Court of Appeal ruled on a case that Mr Alali Efanga, a Nigerian farmer, together with *Milieudefensie*/Friends of the Earth Netherlands, had initiated against Shell in 2008.[1] After Efanga's death, the case was continued on his behalf by Mr Fidelis Ayoro Oguru. Defendants were the two companies that, until 20 July 2005, had jointly acted as the ultimate holding companies of the Shell group. Also summoned were Royal Dutch Shell Plc. (RDS), the current sole parent company, as well as Shell Petroleum Development Company of Nigeria Ltd., the Nigerian operating company. In the proceedings, the claimants sought recovery of the damage caused by a leak in the underground oil pipeline near the village of Oruma, Nigeria, on 26 June 2005, which had resulted in serious pollution of agricultural land and fishponds. The leak was not repaired by Shell until eleven days later.

In 2013, the District Court in first instance, although confirming jurisdiction of the Dutch judiciary, rejected all the claims on the merits.[2] This rejection was mainly based on the defence conducted by Shell that people in the neighbourhood of the site had sabotaged the pipeline by illegally tapping oil, thus causing the leak. The Court of Appeal does not concur, however. Although it finds sabotage the most likely explanation for the leak, the Court of Appeal does not agree that this has been proved beyond reasonable doubt, which is the applicable standard of proof according to Nigerian law. Therefore, the Court holds Shell Nigeria liable for the damage, not as the party causing the leak but as the licensee pursuant to the Nigerian Oil Pipelines Act (OPA), based on strict liability. Moreover, the Nigerian subsidiary acted wrongfully by failing to install a Leak Detection System (LDS) in time (i.e., before 2005), which could have mitigated the damage considerably. Such a system is still not functioning at Oruma to this day. According to the Court of Appeal, the fact that such system is still not in place is also the responsibility of RDS. Under application of Nigerian common law, i.e., English law, the Court of Appeal holds that RDS, too, has failed to perform its duty of care vis-à-vis Oguru in this respect as of 2010. After all, since then, RDS has *'concretely and rather intensively become involved'* in the question as to whether an LDS should be applied to the Oruma oil pipeline. The Court of Appeal has ordered RDS to arrange that such a system will be installed within one year from the date of its ruling based on a duty of care in accordance with Nigerian law.

From a legal point of view, the conviction of RDS, to the effect of an order to arrange such installation is interesting, although not particularly ground-breaking. After all, this order entails that a holding company, which is concretely and (rather) intensively involved in the affairs at subsidiary level, may also be held responsible for such course of affairs in court. The judgment thus creates a legally relevant link between parent and subsidiary, which is not uncommon under Dutch law either.[3] As early as 1990, the Supreme Court held (in the *OGEM* case) that the duties of the executive board of the parent company also extend to the course of affairs at subsidiary level. Intensive prior involvement in the management may even lead to liability on the part of the parent vis-à-vis creditors of its subsidiaries (*Albada Jelgersma*, 1988). To that extent, the Court of Appeal could presumably have reached the same

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1 ECLI:NL:GHDHA:2021:132 (*Oguru/Shell*).

2 Compare L. Enneking, *Zorgplichten van multinationals in Nederland, Nederlands Juristenblad 2013/12*, at 744. *See* about the jurisdiction issue in appeal Cees de Groot, *The 'Shell Nigeria Issue': Judgments by the Court of Appeal of The Hague, The Netherlands*, 13(3) ECL 98 (June 2016).

3 For a recent overview of cases *see* Steef M. Bartman, Adriaan F.M. Dorresteijn & Mieke Olaerts, *Van het concern* 265 (Wolters Kluwer 2020). *See also* Mieke Olaerts, *National Report on the Netherlands*, in *Groups of Companies: A Comparative Overview* 423 (Rafael Mariano Manóvil ed.).

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conclusion based on Dutch law. The standards of the UK and the Netherlands as developed in case law on piercing the corporate veil are not materially different.

The importance of the judgment should also be slightly put into perspective. The decision that the Nigerian subsidiary, as the licensee pursuant to local laws, is subject to strict liability could also have been made by the Nigerian court. Friends of the Earth Netherlands did not have to litigate in the Netherlands for as long as thirteen years to obtain that decision. Of course, Friends of the Earth Netherlands were mainly interested in obtaining an order holding RDS, in addition to Shell Nigeria, jointly and severally liable for the damage caused. After all, the parent company will usually have the deepest pockets to concretely recover the damage from. Sadly enough, Friends of the Earth Netherlands have not been successful in that respect. RDS has not been ordered jointly and severally to pay damages to Oguru or to any other Nigerian farmer or fisherman in similar cases.[4] That order has been imposed solely on the Nigerian subsidiary. And whether that subsidiary will actually be able to pay the full damages, after assessment of the scope thereof by the court in separate follow-up proceedings, remains to be seen. If its assets are inadequate for full recovery, Oguru will depend on the goodness of RDS' heart to help out. Although the RDS board might perhaps be inclined to so protect Shell's image, there is, however, no enforceable obligation for RDS of this nature. Given the dramatic fall of the company's profit in 2020 (USD 20 billion loss) and the uncertainty of the near future, shareholders will not be eager to pay a high price solely for image-purposes.[5] This touches the very core of the group law issue. Damage caused by one group company can, in principle, not be recovered from the other. In my view there is every justification to abandon this principle in environmental damage and personal injury cases, as has been advocated convincingly by inter alia Christian A. Witting.[6]

4 *See* ECLI:NL:GHDHA:2021:133 (*Dooh/Shell*) and ECLI:NL:GHDHA:2021:134 (*Akpan/Shell*).

5 https://www.theguardian.com/business/2021/feb/04/shell-makes-20bn-loss-as-covid-crisis-downgrades-assets.

6 Christian A. Witting, *Liability of Corporate Groups and Networks* 289 (Cambridge University Press 2018). *See* for some similar thoughts, suggesting enterprise liability in exceptional cases, Stephen M. Bainbridge & M. Todd Henderson, *Limited Liability: A Legal and Economic Analysis* 296 (Edward Elgar Publishing 2016).