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DE BRAUW BLACKSTONE WESTBROEK

District Court of The Hague
Hearings on 1, 3, 15 and 17 December 2020
Case number: C/09/571932 19/379

PLEADING NOTES PART II:
ADMISSIBILITY
1 DECEMBER 2020
of *mr.* J. de Bie Leuveling Tjeenk, *mr.* N.H. van den Biggelaar and *mr.* D. Horeman

in the case of:

MILIEUDEFENSIE ET AL. versus
ROYAL DUTCH SHELL PLC

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1 THE CLASS ACTION BY THE NGOS IS INADMISSIBLE

1.1 Introduction

1. Milieudefensie et al.'s claims are inadmissible for various reasons.[1] Firstly, the interest required on the basis of Article 3:303 DCC is lacking because awarding the claims will have no effect.[2] As RDS already mentioned in the opening arguments, Professor Mulder's report shows, among other things, that awarding the claims against RDS will have no impact on the global level of CO_2 emissions.[3] We will return to this point when we explain why the claims are not eligible for award on substantive grounds.

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1 Section 4 Statement of Defence.

2 Margin number 344 and part 2.2.4 Statement of Defence. With regard to the individual claimants, see also margin numbers 366-369 of the Statement of Defence.

3 **Exhibit RK-35**, the Mulder Report, paragraphs 9-10.

2. Secondly, the NGOs' class action does not meet the requirements of Article 3:305a DCC.[4] This is because there is no situation of similar interests as required by Article 3:305a DCC.[5] The NGOs' class action does not offer efficient and effective legal protection, therefore. That is because in these proceedings, the NGOs are standing up for the interests of essentially everyone on earth.[6] Whether RDS is acting unlawfully towards those represented, the entire world population, and whether RDS can be ordered to ensure the reduction in CO_2 emissions sought cannot be assessed. The circumstances of the people living on different continents, in different countries, in different regions within those countries and even at the local level differ from one another too much for that to be possible. What also plays a role here is the fact that this is a class action against one private party, RDS, which, moreover, pertains to the worldwide activities of the group in which the party is the holding company, the Royal Dutch Shell group. The latter aspect means that the differences between the people, depending on where they live, are so relevant for the assessment of the claims lodged that those claims cannot be assessed in a class action. RDS will explain this point in more detail today.

3. Before RDS proceeds to do so, it notes for the sake of completeness that if the District Court were to nonetheless consider the NGOs' claims admissible, this would mean that the private claimants' claims would be inadmissible. After all, RDS's admissibility defence means that the interests and circumstances of those represented by the NGOs - the world population - are too different to be assessed in a class action. If the District Court were to rule otherwise, the claims of the private claimants would have no added value with respect to the

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4 Section 4.2 Statement of Defence.

5 This article was amended with the entry into force of the Settlement of Large-scale Losses or Damage (Class Actions) Act (WAMCA). However, under transitional law, the WAMCA does not apply to these proceedings. The references below are therefore to Article 3:305a DCC (old).

6 See in relation to Milieudefensie, for example, margin number 155 of the Summons, in which it points out that its Articles of Association state that it promotes interests at the "global" level and that these "collective (legal) interests" are served by the claims. Greenpeace (margin numbers 165, 185-186), Both Ends (margin numbers 234, 2401-241, 255), Jongeren Milieu Actief (margin number 260) and Action Aid (margin number 268) also point to their international activities. The NGOs also assert that they are objecting to the worldwide consequences of RDS's actions; see, for example, margin number 62 of the Summons.

claims of the NGOs and for that reason the necessary interest would be lacking.[7]

1.2 Similarity of interests within the meaning of Article 3:305a DCC: assessment framework

4. Already from its enactment in 1994, Article 3:305a(1) DCC has required that the legal claim lodged be "for the protection of similar interests". This is satisfied if the interests that the legal action serves to protect lend themselves to being combined, thereby promoting efficient and/or effective legal protection for the interested parties. In essence, therefore, these are two aspects that are closely interrelated: (i) similar interests and (ii) more efficient and/or effective legal protection than is the case in litigation in the name of the individual interested parties.[8]

5. The Explanatory Memorandum to Article 3:305a DCC states:[9]

> "*If the individual interests involved in the proceedings are too diverse, there can be no combining. Only similar interests lend themselves for being combined*."

6. The Explanatory Memorandum also provides further insight into the question of when interests are sufficiently similar. According to the legislator, it is relevant in that respect whether the relevant factual and legal questions differ for the individuals involved, even if there is a common point of dispute:[10]

> *"It is, therefore, possible that, despite there being a common point of dispute, the questions of law and fact involved in this point of dispute must be answered for each individual separately. The question of whether the nature of the claim and the relevant interests enable combination is thus one of the*

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7 See also District Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda v Staat*), para. 4.109.

8 *Parliamentary Documents II* 1991-1992, 22 486, no. 3, p. 22-23.

9 *Parliamentary Documents II*, 1991-1992, 22 486, no. 3, p. 7.

10 *Parliamentary Documents II*, 1991-1992, 22 486, no. 3, p. 27.

> *criteria to be applied when assessing whether a class action is permissible."* (emphasis added, attorneys)

7. In the *Plazacasa* judgment, the Supreme Court fleshed out the test in more detail. According to the Supreme Court, the required similarity is there:[11]

> "[…] *if the interests that the legal action serves to protect can be combined, thereby promoting efficient and effective legal protection for the interested parties. This is because the points of dispute and claims raised by the legal action can then be adjudicated in a single action, without any need to involve the special circumstances on the part of the individual interested parties."*

8. These principles were again confirmed upon the enactment of the Settlement of Large-scale Losses or Damage (Class Actions) Act. In the Explanatory Memorandum to the legislative proposal, which ultimately resulted in the new law, the following was noted:[12]

> *"It must also concern similar questions of fact and law.* […] *What is important is whether the collective claims relate sufficiently to similar factual and legal questions for the same event, so that it is preferable to settle it as a single case* ."

9. In the memorandum in response to the report, the Minister also explained the following, that the court will:[13]

> *"*[...] *have to assess whether this claim meets the requirements of Article 3:305a(1) DCC that there be similar interests that lend themselves to being combined in a class action for damages. <u>This means that the questions must be sufficiently common. It must be possible to abstract from the particulars of individual cases such that the assessment could not turn out differently than in an individual case."</u>* (emphasis added, attorneys)

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11 Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Stichting Baas in Eigen Huis v Plazacasa*), para. 4.2.

12 *Parliamentary Documents II* 2016-2017, 34 608, no. 3, p. 4.

13 *Parliamentary Documents II* 2017-2018, 34 608, no. 6, p. 18.

10. This means that inadmissibility follows if (1) the interests involved are not sufficiently similar and (2) for the assessment of the claims, it is necessary to include the special circumstances on the part of the individual interested parties in the assessment.

1.3 Milieudefensie et al. must demonstrate that they meet the admissibility requirements

11. First and foremost, based on the main rule of Articles 149 and 150 DCCP, it is up to the claimant who institutes a claim on the basis of Article 3:305a DCC to assert that it meets the admissibility requirements referred to in Article 3:305a(1) DCC and, if challenged by the defendant, to prove this. This division of the obligation to furnish facts and the burden of proof also follows from the Explanatory Memorandum to the introduction of Article 3:305a(1) DCC:[14]

> "*The present legislative proposal sets out more clearly how the burden of proof should preferably be divided among the parties. As stated, an interest group that meets the requirements formulated in paragraph 1 of Article 305a is, in principle, authorised to bring legal action to protect the interests of others. In the event of a defence, the organisation* [the interest group, attorneys] *bears the burden of proof in this respect with regard to these requirements referred to in paragraph 1."*

12. See also the explanatory notes to the amendment of 27 October 1993, whereby the words 'the interests' in Article 3:305a(1) DCC were replaced with 'similar interests':[15]

> "*The proposed construction also expresses that it is up to the claimant to plausibly demonstrate that the specific conditions set here have been met. For the rest, the court determines the burden of proof on the basis of the general rules of the law of evidence."*

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14 *Parliamentary Documents II* 1991-1992, 22 486, no. 3, p. 28.

15 *Parliamentary Documents II*, 1993-1994, 22 486, no. 16.

13. In this respect, see also the judgment of the District Court of Oost-Brabant with regard to *Stichting Privacy Claim*:[16]

> "*Where disputed by the defendant, the obligation to furnish facts and the burden of proof with respect to these requirements* [the requirements of Article 3:305a(1) DCC, attorneys] *rest with the legal entity filing the class action*."

14. It is therefore up to the NGOs to assert (and prove) that their claims serve to protect similar interests in the sense that the relevant questions of law and fact are sufficiently common and lend themselves to joint assessment. It is also up to the NGOs to assert (and prove) that their class action leads to more efficient and/or effective legal protection than is the case in litigation in the name of the individual interested parties. In the summons, the NGOs failed to satisfy their obligation to furnish facts on these points.

15. Moreover, Milieudefensie et al. insufficiently substantiated the basis for their claims in the summons. Milieudefensie et al.'s claims are not only governed by Dutch law. Milieudefensie et al. have not asserted anything about the eligibility of their claims for award under the other applicable legal systems.[17] In addition, Milieudefensie et al. did not adequately substantiate their claims with the assertions that Milieudefensie et al. took in the summons.[18] This still applies for the amended relief sought. The lack of sufficient substantiation for Milieudefensie et al.'s claims also means that it cannot be established that the interests which the NGOs represent are sufficiently similar such that they can be combined.

16 Oost-Brabant District Court 20 July 2016, ECLI:NL:RBOBR:2016:3892, para. 4.3.

17 Section 3 Statement of Defence.

18 Section 5 Statement of Defence.

1.4 There is not a situation of similar interests that lend themselves for being combined on the basis of Article 3:305a DCC and make efficient and effective legal protection possible

16. With this class action, the NGOs essentially mean to stand up for the interests of the entire world population. It not only concerns the current world population, but also "future generations."[19]

(a) For example, Milieudefensie states: "*solving and preventing the climate problem and environmental problems in general and making society sustainable, all of this at global, national, regional and local levels and both for current and future generations, are interests that, as evidenced above, Milieudefensie takes up, both in its words (according to its articles of association) and in its deeds, and which it can therefore regard as its interests. With its legal claim against Shell, Milieudefensie is representing these collective (legal) interests described in its articles of association*",[20] (emphasis added, attorneys).

(b) Stichting Both Ends emphasises its object according to its articles of association: "*to contribute to and promote responsible nature and environmental management worldwide*", describes that its field of activity extends to calling parties "*at local, national and international level*" to account when it comes to "*policy and business activities that cause problems for people and the environment in developing countries in particular*". It therefore wants to present the claims "*to protect the social interests that Both ENDS intends to promote according to its articles of association*".[21]

(c) The object of Stichting ActionAid according to its articles of association is first to: "*contribute to combating poverty and injustice in the world. Africa receives special attention in this respect*"; it says it is helping "*people in developing countries to stand up for their rights*", and therefore wants to participate in

19 Summons, margin number 286.
20 Summons, margin number 155.
21 Margin numbers 234, 240 and 254 of the Summons.

these proceedings which "*aim to protect the social interests that ActionAid intends to promote according to its articles of association*."[22]

The class action is also directed against the worldwide activities of Shell.

17. As such, it is also a fact that the interests for which the NGOs are acting are not sufficiently similar to be able to combine them.

18. The NGOs' claims are aimed at having it established that RDS is acting unlawfully, briefly put because of the CO_2 emissions attributed to it now and in any event in 2030 if RDS does not ensure that those emissions have been reduced by 2030 in the manner demanded by the claimants. However, the question of whether RDS is acting unlawfully in connection with Shell's worldwide activities cannot be answered jointly for the entire world population.

19. After all, whether conduct is unlawful cannot be determined in general but only in the specific context in which it occurs and only in relation to one or more specific persons. This requires a weighing of all the circumstances involved in the case. The NGOs want to have it established that one private party - RDS - is acting unlawfully and is ordered to take the measures against climate change that the NGOs consider necessary. Whether those claims can be awarded cannot be assessed the same for the entire world population. The differences in circumstances among people are too great for that to be possible.

20. The factual circumstances of the persons represented which are relevant for the assessment will in any event differ from country to country, as well as regionally and locally. As RDS also explained in its opening arguments, numerous other interests play a role in whether the claims are eligible for award, alongside the interest of preventing climate change. These other interests must also be taken into account, but are not the same for everyone on earth. All those interests and the weighing that must be made between them differ from country to

22 Margin numbers 268, 272 and 284 of the Summons.

country and thus from person to person. All these circumstances are relevant for the assessment of the claims of the NGOs.

21. RDS will illustrate this with reference to the factors identified in the 'trapdoor' (*Kelderluik*) ruling which are invoked by the claimants in support of their claims. The 'trapdoor' factors comprise four elements: (1) the likelihood of damage, (2) the nature and severity of any damage, (3) the nature of the conduct, including the utility of the activity and (4) the onerousness and customariness of taking precautions. The 'trapdoor' test must take place with reference to the relevant circumstances of the case. Moreover, the 'trapdoor' factors do not exist in isolation and must be viewed in conjunction with each other. Generally speaking, taking precautionary measures is less likely to be expected if the risk of serious damage is small than if that likelihood is greater. However, the differences in the circumstances among persons belonging to the group represented by the NGOs are far too great to be able to make that assessment in the context of a single collective lawsuit.

22. Depending on the location and the persons involved, the nature of the conduct and the utility of the activity may, for example, carry more weight. In the Statement of Defence, RDS already mentioned a number of examples of the interests which are involved and which are relevant to the assessment. Take the situation of a developing country where there is still no access to energy, or where energy needs are increasing and the supply of energy contributes to raising the standard of living. Another example is the situation of people in developing countries who suffer severe health damage from burning materials such as wood, charcoal and manure for heat, while, for example, electricity and gas are considerably cleaner and thus better for health. As the IEA reports:[23]

> "*Around 850 million people in sub-Saharan Africa rely on the traditional use of biomass, cooking with inefficient stoves, while another 60 million rely on kerosene or coal to meet their daily energy needs. Cooking with polluting fuels and stoves has major health and environmental consequences, and was linked*

[23] **Exhibit RK-33**, IEA, World Energy Outlook 2019, p. 399 and p. 422 et seq.

> *to almost 500 000 premature deaths in 2018. Less than 200 million people in sub-Saharan Africa currently have access to cleaner options such as liquefied petroleum gas (LPG), natural gas, electricity or improved biomass stoves*."

23. When it comes to the supply of fossil fuels in those cases, the nature of the conduct and its utility are informed by those kinds of circumstances and that directly influences the answer to the question of whether there has been unlawful conduct. One could also think on the supply of fossil fuels to sectors that also serve an important and indispensable social utility but which will remain dependent on fossil fuels for the time being. RDS referred to these as the 'hard to abate' sectors during the opening arguments. These are sectors such as aviation and companies producing steel and concrete, where only fossil fuels are able to generate the high temperatures required for the production process.[24] Such a circumstance will also have to be taken into account in the assessment of the lawfulness of RDS's actions. And what about countries where a large part of the energy supply is still based on coal, such as in Poland and Indonesia? This morning, we already mentioned a scenario in which precisely getting rid of coal-fired plants without CCS plays an important role between now and 2030.[25] If those countries abandon coal because its CO_2 emissions are relatively high, how should the utility of the activity be weighed if they use oil and gas like Shell can supply?

24. Another example that illustrates why the individual circumstances are important is the likelihood of damage and the nature and extent of any damage resulting from climate change. The threat, nature and severity of the risk of climate change is not the same everywhere on earth. The risks in one country may differ from the risks in another country. The situation in the Netherlands, for example, is not the same as the situation in the United States, Ethiopia, Australia or Bangladesh, to name just a few examples. The risk of damage and its nature and severity again touches on one of the other 'trapdoor' factors, namely

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24 Margin number 349 Statement of Defence.

25 Margin number 24 Written Arguments Part I RDS.

the question of to what extent it is too onerous to expect the party being held liable to take precautions.

25. Relativity is another element that makes assuming similarity problematic. In the western world, much higher numbers of energy-guzzling SUVs have recently been sold, as we already mentioned this morning. RDS already mentioned similar examples in the Statement of Defence.[26] The claimants' exhibits also contain various examples of significant differences between countries. This morning, RDS mentioned the example of Brazil, which not only exploits parts of the Amazon as mentioned this morning, but also gives off significantly higher emissions than provided for in the *nationally determined contributions* under the Paris Agreement.[27] There are significant differences between individuals and countries, and that is relevant for the assessment of relativity.

26. These examples illustrate that in the summons, the claimants painted an abstract and one-dimensional picture of the climate issue and wrongly suggested that the impact of this is the same for everyone on earth and also that, in light of the interests of everyone on earth, the way it is tackled must be the same, specifically that RDS must ensure the reduction of CO_2 emissions that is being sought. That is not the case, and it ignores all the diversity and complexity at play worldwide when it comes to tackling climate change and, moreover, the differences between continents, countries and regions within countries.

27. The facts and legal questions involved in the claims therefore cannot be so generalised that the alleged unlawfulness of RDS's conduct worldwide can be assessed in one lawsuit. Whether RDS has acted unlawfully vis-à-vis the interested parties for whom the NGOs assert that they are acting cannot be assessed in abstracto and without taking into account the various individual circumstances.

28. That is indeed what the NGOs are essentially asking of the court by bringing up Shell's worldwide activities with a view to the interests of

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26 Margin number 568 et seq. Statement of Defence.

27 Exhibit MD-274, pp. 10 and 13.

the entire world population. The weighing of circumstances necessary for the assessment of the class action lodged in this case cannot be made in the context of proceedings initiated by Dutch parties before the Dutch court. This is not altered by the fact that Article 3:305a DCC offers, under certain circumstances, the possibility of bringing claims for diffuse interests and does not in itself impose a representativeness requirement. After all, the problem in this class action is that the circumstances of the individuals in the group represented by the NGOs are too different.Moreover, in this case, if the orders claimed were awarded, individual interested parties would not be able to escape the consequences of the judgment.[28]

29. In conclusion, RDS points out that the point of similarity of interests in the Urgenda case did not play a role in the same way as in this case. On the point of admissibility, the disagreement between the State and Urgenda was limited to the State's defence that the rights pursuant to Articles 2 and 8 ECHR did not lend themselves for being combined in the context of a class action. The Supreme Court ruled with reference to its opinion that the State was obliged on the basis of Articles 2 and 8 ECHR to take measures against climate change and that Urgenda could invoke that positive obligation of the State ensuing from Articles 2 and 8 ECHR. According to the Supreme Court, the interests at issue in that obligation were sufficiently similar. The Supreme Court found:[29]

> *"As an interest group standing up in these proceedings on the basis of Article 3:305a DCC for the interests of the residents of the Netherlands towards whom the obligation referred to in 5.9.1 above is owed, Urgenda can invoke this obligation. After all, the interests of those residents at issue here are sufficiently similar and therefore lend themselves to being combined, so that efficient and effective legal protection is promoted for their benefit*."

30. The Supreme Court's opinion on the similarity of the interests of the residents of the Netherlands must therefore be understood against the backdrop of its opinion that the State has an obligation arising from

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28 See margin numbers 351-356 Statement of Defence.

29 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 *(Urgenda),* para. 5.9.2.

Articles 2 and 8 ECHR vis-à-vis (most of) its residents to take appropriate measures against climate change. It follows from this that the interests involved in the Urgenda case were sufficiently similar.

31. The discussion in Urgenda about the questions of fact and law and the scope of the interests involved were therefore much narrower than the scope of the interests the NGOs wish to raise in these proceedings. After all, in its claims, Stichting Urgenda was standing up for the interests of the current generation of Dutch nationals, based on a positive obligation on the part of the State pursuant to Articles 2 and 8 ECHR, and limited to the conduct of the Dutch State in its own territory. What is being submitted to the court in these proceedings is materially different for the reasons already mentioned, because it is more complex and more extensive. After all, the NGOs are standing up for everyone in the world, and that means that the circumstances of the people they represent vary in all sorts of ways. The claims are directed against Shell's worldwide activities. As a result, the relevant interests of those represented by the NGOs are much more diverse than the interests of those represented by Urgenda, and the factual and legal considerations that would have to be made are much more diverse and do not have enough in common. That fact means that the interests in this class action are insufficiently similar and do not lead to efficient and effective legal protection, as required by Article 3:305a DCC.

1.5 Conclusion

32. RDS concludes that, due to the lack of similarity of interests involved in the NGOs' class action, the NGOs' action cannot be admissible. Should the District Court nevertheless consider the NGOs' claims admissible, the consequence is that the private claimants' claims cannot be admissible due to lack of interest.

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Attorneys

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