

IN THE HIGH COURT OF JUSTICE

CLAIM NO. HQ11X01280

QUEEN'S BENCH DIVISION

B E T W E E N:-

**The Bodo Community,
Gokana Local Government Area,
Rivers State, Nigeria**

Claimant

-and-

The Shell Petroleum Development Company of Nigeria Ltd

Defendant

PARTICULARS OF CLAIM

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I. SUMMARY OF CLAIM

1. The Claimant seeks damages arising out of two large oil spills which occurred in 2008 in Bodo, Gokana Local Government Area, Rivers State, Nigeria. It is averred that the spills have caused extensive and long lasting devastation to the Claimant's lands and fishing waters and have a profoundly detrimental impact on the life of the community.
2. This claim is brought in conjunction with claims by individual residents for the discrete pecuniary and non-pecuniary losses that they have sustained as a consequence of the spills. This claim seeks to recover the discreet and distinct losses caused to the Claimant and its inhabitants arising from the damage to community property and rights. Further, the Claimant seeks mandatory relief in the form of an order that the Defendant undertake reasonable and necessary remedial work, alternatively damages in lieu of the same.
3. The Claim proceeds on the basis of a material admission and a material submission by the Defendant namely:
 - 3.1. An admission of liability for both spills as confirmed in the Defendant's response to the letter of claim dated 1 July 2011;
 - 3.2. A submission to the jurisdiction of the High Court of England & Wales by the Nigerian domiciled Defendant as recorded in its Acknowledgement of Service dated 2 August 2011.
4. Notwithstanding the admission of liability, the Claimant sets out herewith the full factual background giving rise to the claim, including particulars of the fault of the Defendant, not least because this is relevant to the assessment of quantum, including aggravated and exemplary damages.

II. THE PARTIES

5. The Claimant is a Nigerian fishing and farming community known as the Bodo City community (“the Community”).

5.1 The said Community is comprised of the following 35 villages and fishing communities: 1) Teneol, 2) Obara, 3) Sivikpala, 4) Ketoi, 5) Deebon, 6) Botor, 7) Nweezor, 8) Ka-Nweezor, 9) Kaani, 10) Kpalator, 11) Kegborozor, 12) Sugi, 13) Kozo, 14) Bara-Ben, 15) Giogo-Bari, 16) Tengu, 17) Baravigo, 18) Bara-nweezor, 19) Baamu, 20) Gbogozor, 21) Bon-Zarakpege, 22) Kolgba, 23) Bon-Olzee, 24) Koltui, 25) Bon-Lebara, 26) Kolgboro, 27) Bon-Porobani, 28) Zerima, 29) Seato, 30) Sizorgei, 31) Bon-Berebon, 32) Popkol, 33) Olgio, 34) Baan, 35) Kah.

5.2 The Community is the legal owner of communal lands, creeks, rivers, mangroves and swamps in Bodo, Rivers State, Nigeria. The authorised leaders of the Community are the Paramount Ruler and the Council of Chiefs and Elders. The Community has capacity, as a matter of Nigerian law, to pursue claims for damage to its land. Further and alternatively, if, contrary to this averment, the Claimant does not have sufficient capacity then permission to make an amendment will be sought so as to proceed by way of representative action in the name of one or more members of the Community, pursuant to CPR 19.6.

6. The boundary of the Claimant’s communal land ownership is set out in a satellite map which is annexed to these Particulars of Claim (“Annex 1”). The accuracy of the said boundary is being verified and the Claimant reserves the right to file and serve an updated map and survey plan in due course. It is estimated that the total area of land owned by the Community is approximately 9,230 hectares.

7. The Defendant is a Nigerian registered exploration and production company incorporated in the Federal Republic of Nigeria. Its registered office is the Shell Industrial Area, Rumubiakani, PO Box 263, Port Harcourt, Rivers State, Nigeria. It is the largest exploration and production company which is operational in Nigeria and is the operator of a Joint Venture agreement between itself, the Nigeria National Petroleum Corporation, Total Exploration and Production (E&P) Nigeria Ltd and Nigeria Agip Oil Company Limited (“the Joint Venture”). Further, it is averred that the Defendant is the licensee for the oil pipeline license granted in relation to the 24” Trans Niger pipeline which runs through the Bodo creek.

III. FACTUAL BASIS OF THE CLAIM

8. The Bodo Community is located in the Gokana Local Government Area of Rivers State, Nigeria. The Community is situated on the north east edge of creeks and mangrove wetlands known as the Bodo creek which comprises of about 9,230 hectares of land, swampland and waterways (“the creek”). Bodo City and its surrounding villages have a population of about 49,000 people.
9. The majority of the population of Bodo have traditionally depended upon subsistence fishing and farming. It is averred that prior to August 2008 the Bodo creek served as a significant fishing source for the Gokana area of Rivers State and as a travelling route to neighbouring communities including Bonny, Andoni in Rivers State and to communities in Akwa Ibom State.
10. The Defendant suspended oil exploration and exploitation operations in the Bodo area in 1994. However, the area remains highly vulnerable to oil spills. The aforementioned Bodo creek is located in Ogoniland which is comprised of four local government areas and contains 96 oil wells connected to 5 flow stations which are operated by the Defendant. Two of the flow stations, Bomu and Bodo West, are situated in Gokana Local Government Area.

11. Oil pipelines operated by the Defendant traverse the Claimant's land, creek and waterways. The said pipelines transport oil to the Bonny Crude Oil Export Terminal on Bonny Island ("the Bonny terminal") which is operated by the Defendant. In particular, the 24" and 28" Bomu-Bonny pipeline, a twin Trans-Niger trunkline, crosses the Gokana Local Government Area ("the pipeline"). The said pipeline connects to the Bomu manifold at K-Dere and the Bodo West flow station which is located in the Bodo creek and further links to the Bonny terminal.

12. Prior to 28 August 2008 the Claimant avers that whilst the creek had suffered from a small number of minor oil spills from neighbouring communities, any resulting pollution was not significant and the creeks were environmentally sound. In particular, the Claimant relies upon ecological surveys which were conducted from 2005 to 2008 by Dr Onwugbuta, Dr Zabbey and Dr Erondu of the Department of Animal Science and Fisheries, University of Port Harcourt, Dr Wolff of the Department of Marine Benthic Ecology and Evolution, University of Groningen, the Netherlands and Dr Malaquias of the University of Bergen, Norway¹. The baseline data obtained by the said ecological studies demonstrated that the Bodo creek was rich in fauna and essentially free of hydrocarbons prior to the said oil spills. The studies findings included:
 - 12.1 The Bodo creek had not experienced any oil spills since 1986 other than a minor spill in 2003 from a neighbouring community;

 - 12.2 The Dor Nwezor channel had no physical trace of oil and did not show any detectable signs of chronic oil contamination;

¹ *Water quality of Bodo Creek in the lower Niger Delta basin*, American-Eurasian Network for Scientific Information [2008]; *Population structure, biomass and production of the West African lucinid Keletistes Rhioecus in Sivibilagbara swamp at Bodo Creek, Nigeria*, *Hydrobiologia* [2010] 654; *Epifauna diversity and ecology on intertidal flats in the tropical Niger Delta*, *Journal of Marine Biological Association of the United Kingdom* [2011]; *Community ecology of intertidal macrozoobenthos at Bodo Creek, Nigeria*, Department of Animal and Environmental Biology, University of Port Harcourt, Nigeria. Copies of these academic studies have been provided to the Defendant as part of pre-action disclosure.

- 12.3 The Kpador channel was considered “*near pristine*”;
- 12.4 The Bodo creek had diverse and abundant macrofauna in sediments and on mangrove trunks and prop roots;
- 12.5 The Bodo creek served as a strong livelihood support base for the people of Bodo, including capture fisheries and small scale aquaculture.
13. On or about 28 August 2008, a rupture occurred in the 24” Bomu-Bonny SPDC Trans-Niger Pipeline at Sivilbilagbara in the Bodo creek causing an extensive spill of crude oil into the creek (“the first oil spill”). The Claimant avers the said oil spill was the result of equipment failure. Local fishermen and contractors reported the oil spill to the Council of Chiefs and Elders and by telephone notified the Defendant during September 2008. No attempt was made by the Defendant to contain the spill, reduce the flow of oil or to cap the spill during this period.
14. On 10 October 2008 the Centre for Environment, Human Rights and Development (“CEHRD”) published a report entitled “*Persistent Oil Spillage at Bodo Creek: unprecedented impacts in ecosystem, biodiversity and food security of Ogoni communities*” in which they reported that the spill had started on 28 August 2008 and that:
- “Tidal regimes have caused wide-spread distribution of oil scum to the length and breadth of Bodo Creek and the network of adjoining Creeks. Toxicity of the oil has resulted in mortal damages to food species that support the protein needs of the people....These [mangroves] are tainted and have started showing signs of death and defoliation; some mangrove stands are dead already.”*
15. On 13 October 2008 CEHRD issued a press statement calling upon the Defendant to mobilise its counter spill personnel to the Bodo creek as a matter of urgency. The press release was reported in the Nigerian national media

including on radio stations and the national newspapers. However, the Defendant did not visit the site of the spill, reduce the flow of oil in the pipeline, contain the spread of oil or clamp the oil spill until 7 November 2008.

16. It is averred that crude oil spilt into the Bodo creek at an estimated rate of 3,900 barrels per day for a period of over two months. The said pipeline is situated below ground and the crude oil at first saturated the surrounding soil and waterways. As the water level rose, the crude oil was carried to the surface of the creek and was then spread by tidal waters across the Bodo creek and to neighbouring communities.
17. The Claimant has obtained i) video footage of the oil spill on 15 October 2008, before it was clamped and ii) video footage of the clamping of the rupture of the said pipeline on 7 November 2008. A Joint Investigation Team led by the Defendant visited the site on 7 November 2008 and determined that the cause of the oil spill was equipment failure.
18. The Claimant's lands, forests, waterways, and creeks were all extensively impacted by the crude oil during this period. The Claimant avers that the vast majority of the Bodo creek was impacted by the first oil spill including the Kpador and Dor Nwezor network of creeks and channels. It is also averred that the creeks belonging to the neighbouring communities of Lewe, Bomu, Goi, Mogho, Kpor and Gbe were all impacted by the said oil spill.
19. On or about 7 December 2008, a further oil spill occurred on the Trans-Niger pipeline at Bodo Bia Barima area in the Bodo creek ("the second oil spill"). The Claimant avers that this oil spill was also the result of equipment failure. The said spill was reported to the Defendant on 9 December 2008, however a Joint Investigation Team did not visit the site, reduce the flow of oil in the pipeline, attempt to contain or clamp the oil spill until 19 February 2009.

20. Upon visiting the site of the oil spill on 19 February 2009, the Joint Investigation Team concluded in Joint Investigation Report Incident No 2008-200261 that the oil spill had been caused by equipment failure. From 9 December 2009 to 19 February 2009, oil again spilled continuously into the creek. The Claimant estimates that the volume of the second spill was larger than the first spill. The Claimant further avers that the method of calculating the volume of oil spilt and the estimates contained in the two aforementioned Joint Investigation Reports are entirely inaccurate and erroneous.
21. Notwithstanding that the Defendant was provided with notice of the two spills, the Claimant avers that no or no adequate steps were taken to reduce the flow of oil, to clamp and to contain the oil spills between 28 August 2008 and 7 November 2008 and 7 December 2008 and 19 February 2008.

General Nature of the Environmental Damage Caused

22. As a result of the said oil spills, marine life has been devastated within the 9,230 hectares of the creek and the mangroves have been largely destroyed. The Claimant avers that the damage includes:

- 22.1 A severe reduction of the abundance of marine life throughout the Bodo creek. In particular, shellfish are no longer present in the Bodo creek and fish numbers have dramatically reduced;

- 22.2 A dramatic reduction in the mangrove population of the Bodo creek. It is estimated that 1,754 hectares of mangroves have been heavily impacted and 3,110 hectares have been moderately impacted. The majority of the mangroves which were heavily impacted have died as a result of their exposure to the oil;

- 22.3 Contamination of farmland along the coastal areas, in turn affecting farm production and yields due to the toxicity of the soil and groundwater;
- 22.4 High levels of hydrocarbons in water, sediment and tissue samples which exceed the Nigerian legal standards and international standards for hydrocarbon contamination rates by a significant margin.
23. In reliance on the forgoing averment the Claimant relies not least on the following materials:
- 23.1 In September 2009 a Post-Impact Ecological Assessment study of the oil spillages was carried out in the Bodo Creek in conjunction with the Centre for Environment, Human Rights and Development by Ecoland Resources Limited. The assessment found:
- 23.1.1 The ecosystem had suffered from a “*drastic reduction*” in plant species diversity at both peripheral shorelines and inter-tidal zones of the creek.
- 23.1.2 There was an immense reduction in the frequency, distribution and relative abundance of phytoplankton, periphyton, zooplankton and zoobenthos.
- 23.1.3 The said oil spills had “*a tremendous mortal and sub-lethal impact on the biota studied*”.
- 23.1.4 Virtually all the notable fisheries of the Bodo creek were no longer operational at the time the creek was assessed.
- 23.2 In addition to the scientific data as to the impact of the abovementioned oil spills upon the Bodo creek, the Claimant will rely upon a

substantial body of independent expert evidence which exists as to the environmental impact of the oil spills in the Niger Delta generally. In 2006, independent Nigerian, British and USA environmental experts conducted a preliminary Resource Damage Assessment in the Niger Delta for the Nigerian Federal Ministry of Environment. The independent assessment found that many of the oil facilities and operations are located within sensitive habitats, including areas vital to fish breeding, sea turtle nesting, mangroves and rainforests, which have often been severely damaged. The report states that the damage from oil and gas operations is “*chronic and cumulative and has compromised livelihoods...*”²

23.3 The Claimant further relies upon the United Nations Environment Programme’s (“UNEP”) Environmental Assessment of Ogoniland, 2011. As part of the said assessment, UNEP surveyed 122 kms of pipeline rights of way and visited all oil spill sites, oil wells and other oil-related facilities in Ogoniland, including the Bodo creek. UNEP identified 69 sites for detailed soil and groundwater investigations. The Claimant relies upon the findings of the UNEP report, in particular:

23.3.1 Total Petroleum Hydrocarbon (“TPH”) concentrations in sediments were found to exceed Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (“EGASPIN”) values in samples taken in the Ejama, Biara, Ataba, Bodo West, Kpadpr-Bodo, Bodo, Sugi-Bodo, B-Dere, K-Dere and Kolgba communities.

23.3.2 TPH levels for the surface water at Atab-Otokroma 2, Ataba, Kwawa, Kozo, Bodo and Kolgba were particularly high,

² Niger Delta Natural Resource Damage Assessment and Restoration Project. Federal Ministry of Environment, Abuja. 31 May 2006.

suggesting that the incidents that occurred in these communities were more severe than those that affected the other communities.

23.3.3 In two thirds of the contaminated land sites close to oil industry facilities the soil contamination exceeded Nigerian national standards.

23.3.4 In 41 sites the hydrocarbon levels in the groundwater were in excess of international standards.

23.3.5 Hydrocarbon contamination was found in water taken from 28 wells at 10 communities adjacent to contaminated sites. 7 wells showed 1,000 times higher concentrations than permitted under Nigerian drinking water standards.

Clean Up and Remediation

24. The Claimant avers that following the eventual inspections and clamping of the oil spills by the Defendant, no clean up or remediation has been undertaken by the Defendant to restore the impacted creeks, waterways and land to their pre-spill state or to the condition as required by Nigerian law.
25. After both oil spills had been capped, the Ministry of the Environment of Rivers State wrote to the Defendant on 15 January 2009 and 11 February 2009 requesting a meeting to take place between the Claimant and the Defendant with regard to the said oil spills.³ The Defendant failed to respond to the said letters.
26. The National Oil Spill Detection and Response Agency (“NOSDRA”), an agency of the Federal Government of Nigeria, conducted an investigation into the causes of the said oil spills in 2009. The Defendant failed to respond to the

³ Annex 2

efforts of NOSDRA to ensure that a damage assessment was carried out expeditiously. In a letter addressed to the Defendant, dated 9 June 2009, the Director General of NOSDRA stated:

“It is however regrettable that SPDC has not deemed it fit to respond to the various efforts of the Agency in ensuring that the damage assessment exercise is carried out promptly. This impasse has resulted to the impacted sites not being attended to and consequently, the continuous devastation of the environment.

In view of the foregoing, the Agency considers as unacceptable the continuous delay in the conduct of damage assessment. Consequently, I am directed to request you as follows:

*(i) That SPDC should as a matter of urgency draw up a programme for the damage assessment and inform the Zonal office of the Agency accordingly.
(ii) That the necessary logistic arrangements for the exercise be made by SPDC for the smooth conduct of the exercise.”⁴*

27. The Defendant failed to conduct any clean up or remediation of the said oil spills despite the letters sent by the Ministry of the Environment of Rivers State and NOSDRA.
28. Further, the Claimant avers that the Defendant provided limited relief materials on 2 May 2009 consisting of 50 bags of rice, 50 bags of beans, 50 bags of garri, 50 cartons of sugar, 50 cartons of powder peak milk, 50 cartons of milo tea, 50 cartons of tomatoes and 50 tins of groundnut oil which were rejected by the Council of Chiefs and Elders as being entirely inadequate for a community of 49,000. In June 2009 the Defendant provided double the amount of relief materials as previously offered which were accepted by the Community given their need. However, the Claimant avers that the relief provided was entirely inadequate for a community of their size.
29. Accordingly, in respect of the said oil spills it is averred that:
 - 29.1. The two oil spills resulted from erosion and rupture (“equipment failure”) to oil pipelines operated by the Defendant;

⁴ Annex 3

- 29.2. The Defendant was provided with prompt notice of the said oil spills and failed to repair the said ruptures expeditiously, to take any/any adequate measures to reduce the flow of the oil and to take any/any adequate measures to contain the spread of oil;
- 29.3. The rate of flow of oil from the first spill was in the region of 3,900 barrels of oil for at least 72 days totalling approximately 280,000 barrels of oil. The rate of oil flow from the second spill was at least as large as the first spill and continued for 75 days.
- 29.4. The Bodo creek was environmentally sound prior to the said oil spills. The first oil spill extended to most areas within the Bodo creek and to neighbouring communities. The second oil spill added to and compounded the environmental damage which had already been caused by the first oil spill.
- 29.5. Once the Defendant had capped the ruptures to the said oil pipelines, it failed to carry out any/any adequate clean up and remediation to restore the impacted land, creeks and waterways to their pre-spill condition as required under Nigerian law.

IV. LEGAL LIABILITY

A. Applicable Law

30. As to the law governing the determination of this claim it is averred that:

- 30.1. The liability of the Defendant falls to be governed by the law of Nigeria pursuant to section 11, alternatively section 12 of the Private International Law (Miscellaneous Provisions) Act 1995.

30.2. Whilst the liability of a company registered in Nigeria would ordinarily fall to be determined by the law of that country, the applicable law relating to procedure, including the measure of damages, is that of England and Wales.

B. Basis of Liability of the Defendant in Nigerian Law

31. The principles and provisions of Nigerian law upon which the Claimant will rely are, in particular:

31.1. The Defendant is strictly liable to compensate the Claimant by virtue of the Oil Pipelines Act 1990:

“11(5) The holder of a licence shall pay compensation –

(c) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.”

31.2. Moreover, the Defendant, as an operator of an oil pipeline, is required by law to comply with the Petroleum Drilling and Production Regulations of 1969. Regulation 25 requires companies to:

“..adopt all practicable precautions including the provision of up-to-date equipment approved by the Director of Petroleum Resources to prevent the pollution of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it”.

31.3. Further, the operators of oil pipelines are also required by Regulation 37:

“to maintain all apparatus and appliances in use in his operations...in good repair and condition, and shall carry out his operations in a proper and workmanlike manner in accordance with these and other relevant regulations and....take all necessary steps practicable –

- a) to control the flow and prevent the escape or avoidable waste of petroleum discovered in or obtained from the relevant area;*
- b) to prevent the escape of any petroleum into any water, well, spring, stream, river lake, reservoir, estuary or harbour; and*
- c) cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures, and other property thereon”.*

31.4. Nigerian statutory law further requires operators of oil pipelines to comply with “good oil field practice” and explicitly adopts international standards of best practice. The Mineral Oils (Safety) Regulations 1962 provide by Regulation 7:

“Where no specific provision is made by these Regulations in respect thereof, all drilling, production, and other operations necessary for the production and subsequent handling of crude oil and natural gas shall conform with good oil field practice which for the purpose of these Regulations shall be construed to be adequately covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes or the American Society of Mechanical Engineers Codes.”

31.5. The Defendant is further required to comply with the *Environmental Guidelines and Standards for the Petroleum Industry* (2002) (“the Guidelines”) with regard to the clean up operation following an oil spill. The Guidelines require the operator of an oil pipeline to promptly clean up an oil spill irrespective of its cause. Section VIII B.4.1 states:

“An operator shall be responsible for the containment and recovery of any spill discovered within his operational area, whether or not its source is known. The operator shall take prompt and adequate steps to contain, remove and dispose of the spill”.

31.6. Pursuant to Section VIII B.2.6.3 of the Guidelines the clean up must commence within 24 hours of the occurrence of the oil spill. The

Guidelines further require the operator to keep a daily log of all spills until the cleanup is complete. Within 24 hours of a spill the operator must submit an “oil spill notification report” to the director of the Department of Petroleum Resources of Nigeria. A follow up report should be submitted 14 days after the spill and a clean up report should be submitted four weeks after the spill.

31.7. Pursuant to Section VIII B.2.11.1 of the Guidelines, it is the responsibility of the operator to restore the environment in so far as it is possible to do so to its original state. Section VIII B.2.11.3 of the Guidelines stipulates that:

i) For all waters there shall be no visible sheen after the first 30 days of the occurrence of the spill no matter the extent of the spill;

ii) For swamp areas, there shall not be any sign of oil within the first 60 days of occurrence of the incident;

31.8. The Guidelines further provide that oil contamination of soil, sediment and surface water may not exceed specified levels that are consistent with internationally recognized standards for maximum levels of oil pollution. Section VIII B.2.11.3 (iii) of the Guidelines stipulates that:

“For land/sediment, the quality levels ultimately aimed for (target value), is 50mg/kg of oil content.”

31.9. Once the clean-up report is submitted, the operator is required to conduct an Environmental Evaluation (Post Impact) Study of the adversely impacted environment pursuant to Section VIII B.7.1 and Article 2 of the *Environmental Impact Assessment Process Guidelines*.

Breaches of Nigerian Statutory Law

32. The Defendant is strictly liable to compensate the Claimant by virtue of s.11(5) of the Oil Pipelines Act 1990. Further, the Claimant relies upon the following admission by the Defendant in open correspondence with the Claimant's representatives, dated 1 July 2011:

“SPDC states for the record that, as licensee for the oil pipeline license granted in relation to the 24” Trans Niger pipeline, it accepts responsibility under the Oil Pipelines Act for the two oil spills, both of which were due to equipment failure.

SPDC acknowledges that it is liable to pay compensation in accordance with its obligations under the Oil Pipelines Act to those that are entitled to receive such compensation.”

33. Further, in breach of their duties under Nigerian statutory law, as set out in paragraph 31 above, the Defendant:

- 33.1. Failed to take any or any adequate precautions to prevent pollution and/or to take prompt steps to control the pollution contrary to regulation 25 of the Petroleum Drilling and Production Regulations of 1969;
- 33.2. Failed to maintain the relevant installations in good repair contrary to regulation 37 of the Petroleum Drilling and Production Regulations of 1969;
- 33.3. Failed to ensure that its pipeline integrity management and leak detection systems conformed with good oil field practice as set out in the *American Petroleum Institute Codes or the American Society of Mechanical Engineers Codes* contrary to Regulation 7 of the Mineral Oils (Safety) Regulations 1962;

- 33.4. Failed to take prompt and adequate steps to contain, remove and dispose of the oil spills contrary to Section VII B.4.1 of the *Environmental Guidelines and Standards for the Petroleum Industry* (2002);
- 33.5. Failed to take any or any adequate steps to clean up the oil spills within 24 hours of their occurrence or at all and/or to submit an “*oil spill notification report*” to the director of the Department of Petroleum Resources of Nigeria contrary to Section VII B.2.6.3 of the Guidelines;
- 33.6. Failed to restore the area damaged by the oil spills to a condition in accordance with Section VII B 2.11 of the Guidelines;
- 33.7. Failed to conduct an Environmental Evaluation (Post Impact) Study of the adversely impacted environment contrary to section Section VII 7.1 of the Guidelines.

The rule in Rylands v. Fletcher

34. Further or alternatively, the Defendant is also liable under the Nigerian law of tort.
35. The Claimant avers that the Defendant is strictly liable for the damage caused under the rule in *Rylands v. Fletcher* (1868) LR 3 HL 330 because the transportation of substantial quantities of crude oil in the said pipelines was:
 - 35.1. Hazardous in that such products were likely to cause harm to property in the surrounding area in the event of any escape of oil from the pipelines;
 - 35.2. A non natural use of the land.

Negligence and Nuisance

36. Further, the Defendant is liable in negligence and in nuisance (both private and public nuisance) for the reasons set out herein. The Defendant owed the Claimant a duty of care to properly and carefully maintain the Trans-Niger Pipeline and/or to take reasonable steps to avoid foreseeable damage to their lands and waterways. In particular, the Defendant is under a duty of care to take adequate steps to prevent, contain and clean up any oil spills from oil pipelines over which they have operational control and to clean up and remediate any impacted land and waterways.
37. The Defendant's liability arises not least in the context of its knowledge as to the risk and effect of oil spills in the Niger Delta region. In construing the Defendant's knowledge as to the serious risk of oil spills and the environmental damage which ensues the Claimant relies not least upon the following facts and matters:

PARTICULARS OF KNOWLEDGE

37.1. The scale and prevalence of oil spills in the Niger Delta. Between 1998 and 2007 the Defendant reported that a total of 284,000 barrels of oil were spilled in the Niger Delta. In 2006 a team of international experts estimated that between 9 million and 13 million barrels of oil (1.5 millions tons) had split into the Niger Delta over the past 50 years.⁵ Overall, it is estimated that the inhabitants of the Niger Delta have experienced oil spills on a par with the 1989 Exxon Valdez disaster every year for the past 50 years.

37.2. Reports from local and international organisations and experts have regularly raised serious concerns as to the effect of oil spills on the

⁵ Niger Delta Natural Resource Damage Assessment and Restoration Project. Federal Ministry of Environment, Abuja. 31 May 2006.

environment and inhabitants of the Niger Delta and the fact that oil companies are not adhering to international standards in the Niger Delta. In 1994, *the Eteibet Report*, Inter-Ministerial Fact-Finding team of the Nigerian Government, in 1994 found that: “*The degradation of the environment has destroyed farmlands and aquatic life and affected the economic life of all....There was a high incidence of pollution caused by oil spillages, leakages, and other discharges into the environment. And the oil companies have not taken action in line with international environmental standards to control and ameliorate the environmental impacts in their operations*”.⁶

37.3. In 1995, the Defendant conceded that its own operations were causing pollution in the Niger Delta: “*The Company recognises the gap between its intentions and its current performance. It is working hard to renew ageing facilities, reduce the number of oil spills in the course of operations, the amount of gas that is flared, and to reduce waste products.*”⁷

37.4. The Conflict Expert Group Baseline Report, *Peace and Security in the Niger Delta*, December 2003 was a leaked report commissioned by the Defendant. The section on ‘Compensation for oil spills’ includes claims that Shell Companies in Nigeria prematurely determine the causes of an oil spill, responds poorly to oil spills and investigations into spills are often compromised by corruption. The report states: “*Regardless of the real causes of oil spills, affected communities are also angered by the destruction of their livelihoods. They have to seek other fishing ground (that are sometimes claimed by other communities) and their income drops. Such resentment can have long-term implications given that communities face the consequences of oil spills on a daily basis.*”

⁶ Don Etiebet Report, Report of the Ministerial Fact-Finding Team to Oil Producing Communities in Nigeria, 1994.

⁷ SPDC, Nigeria Brief, *The Environment*, 1995.

- 37.5. The *Niger Delta Natural Resource Damage Assessment and Restoration Project* was published in May 2006 by the Federal Ministry of Environment of Nigeria. The report concluded that oil companies operating in the Delta had not employed the best available technology and practices that they use elsewhere in the world which they labelled “*a double standard*”. It recommended that old leaking pipelines and installations must be replaced immediately and dumping of waste must stop.
- 37.6. In 2007, an admission was made publicly by the Country Chair for the Defendant, some 12 years after a similar concession from the Defendant: “*We do, however, have a substantial backlog of asset integrity work to reduce spills and flaring. This backlog is caused by under-funding by partners over many years, operational problems and, more recently, the lack of safe access to the facilities.*”⁸
38. The aforesaid oil spills and the resulting damage to the Claimant’s property was caused by the Defendant’s negligence and/or constituted a nuisance caused or permitted by the Defendant in that it:

PARTICULARS OF FAULT

- 38.1. Failed to take adequate steps to maintain oil pipeline and equipment;
- 38.2. Caused and/or permitted the operation of faulty equipment to transport oil;
- 38.3. Failed to take adequate steps to promptly reduce the flow of oil from the pipeline after each rupture;
- 38.4. Failed to take adequate steps to promptly cap and stop the flow of oil;

⁸ Shell Sustainability Report, 2006

- 38.5. Failed to take adequate steps to limit and contain the extent of the oil spills;
 - 38.6. Failed to take any/any adequate steps to clean up and remediate /adequately clean up and remediate the contaminated waterways and land;
 - 38.7. Failed to provide adequate supervision to its employees and agents.
39. Further, in so far as the Defendant seeks to aver that any of the damage to the Claimant's property and rights is attributable to the acts of third parties (specifically spillages caused by criminal attempts to siphon off oil from the pipeline known as "bunkering" and thereafter seek to refine the oil in the vicinity) then the Claimant will aver as follows:
- 39.1. The environmental impact of any spills from bunkering has been marginal in comparison to the damage caused by the two material spills which are subject to this claim;
 - 39.2. The existence of the practice of bunkering represents an actionable failure herein of the Defendant to take any or any adequate steps to prevent the practice or reduce the incidence of the practice;
 - 39.3. The practice of bunkering has only emerged subsequent to the two oil spills and the devastation of the local economy and is consequent on the socio-economic impact of the two material spills which are subject to this claim.
 - 39.4. The Defendant has failed to take any, or any adequate steps to clean up such spill as have been caused by bunkering and consequential refining.

V. LOSS AND DAMAGE

40. By reason of the matters aforesaid the Claimant has suffered loss and damage.
41. It is estimated that approximately 8,106 hectares of mangrove swampland and waterways belonging to the Community have been impacted by the said oil spills. The Claimant avers that the damage includes:
- 41.1. *Mangroves.* The wood from mangroves supports the domestic energy needs of the individual members of the Community. Further, mangroves are productive ecosystems and support large populations of shellfish and fish. It is estimated that approximately 2,923 hectares of mangrove swampland belonging to the Community have been heavily impacted and a further 5,183 hectares have been moderately impacted by the said oil spills. It is averred that damage to mangroves has hampered the long term viability of the Community's economic activities.
- 41.2. *Fishing.* A dramatic reduction of species abundance and diversity in the macrobenthos at Bodo. Pre-spill samples reported a total of over 6,000 individual organisms of 49 species whereas post-spill samples report a total of only 167 individual organisms from just 4 species. In total numbers, the macrobenthic fauna was reduced by 97% as a result of the said oil spills. As a result, the Claimant avers that fishing and shellfish harvesting is no longer viable in the Bodo creek. To the extent that any fish or shellfish have survived they are polluted by crude oil and toxic to human consumption.
- 41.3. *Aquaculture.* Further, the Community engaged in aquaculture, consisting of fish farming in small ponds for sustenance and sale. Without exception, the fish ponds within the Community are no longer functioning and remain polluted.

41.4. *Farm land.* In is further contended that farm land in the Community has either been directly impacted by the said oil spills or the crops which are being farmed suffer from lower yields due to i) the toxicity of the soil and ii) the toxicity of the rainfall in Bodo as a result of the said oil spills.

41.5. *Drinking Water.* The said oil spills have caused pollution to the drinking water and groundwater used by the community causing members of the Community to find alternative sources of water. The 2011 UNEP Assessment conducted a site specific sample test at SIVIBIRAGBARA-BODO, the site of the first spill. It found that one of its groundwater samples had a total petroleum hydrocarbon of 277,000 µg/l, which was significantly in excess of the EGASPIN intervention value 600 µg/l and target value 50 µg/l.

41.6. *Shrines.* Fourteen shrines and objects of traditional religious veneration have been destroyed by the said oil spills. Further, members of the Community have suffered from inconvenience, discomfort, distress, shock and fear.

42. The Claimant reserves the right to provide further particulars of loss and damage upon completion of their expert analysis.

VI. REMEDIES SOUGHT

43. The Claimant seeks general/basic damages and/or compensation for the damage to the land and rights and the consequential losses therefrom as set out above. A schedule of loss will be provided in due course.

44. Further the Claimant seeks aggravated and exemplary damages which are recoverable in respect of the claims for the causes of action set out above under

Nigerian law. Alternatively, if the Court were to conclude that the availability of aggravated/exemplary damages is to be determined in accordance with English law the Claimant avers that aggravated damages are recoverable for the tort of nuisance and in respect of exemplary damages the same are payable by any party where it can be shown that their conduct was calculated to make a profit, in particular where a decision is taken not to replace or expeditiously repair or shut down a leaking oil pipeline because the same would be more expensive than any likely compensation payable as a result of their failure. The Claimant relies specifically on the following:

- 44.1 The failure of the Defendant to either reduce the oil flow/shut down or expeditiously cap and contain the spill from the pipeline for over two months on each occasion despite being aware of the existence of the oil spillage. The inference to be drawn is that the Defendant's failures were motivated by profit;
- 44.2 The failure of the Defendant to maintain the pipeline in good repair since oil exploration was suspended in Ogoniland in 1994 contrary to Nigerian statutory law;
- 44.3 The Defendant's failure to clean up and remediate the impacted land over three years after the said oil spills;
- 44.4 The Defendant's history of disregard for safety and the rights of local inhabitants of the Niger Delta which is a matter of public record. In particular the Claimant relies upon the following facts:
 - 44.4.1 According to the United Nations Development Programme more than 6,800 oil spills were recorded in the Niger Delta

between 1976 and 2001, approximately 3 million barrels of oil;⁹

44.4.2 According to the National Oil Spill Detection and Response Agency in March 2008 there were at least 2,000 sites in the Niger Delta that required remediation because of oil related pollution. The majority of those locations were SPDC sites;

44.4.3 By SPDC's own admission the majority of the spills between 1989 and 1994 were caused by corrosion and operational problems;¹⁰

44.4.4 In 1996, Bopp van Dessel, the Defendant's former Head of Environmental Studies in Nigeria, stated in a television programme, *World in Action*, that the Defendant had ignored repeated warnings that its oil production operations in Nigeria were causing widespread environmental damage. He stated "*They were not meeting their own standards; they were not meeting international standards. Any Shell site that I saw was polluted. Any terminal that I saw was polluted. It was clear to me that Shell was devastating the area.*"

44.4.5 The UNEP Assessment 2011 was highly critical of the Defendant's clean up and remediation procedures and compliance with Nigerian statutory law and international best practice as set out above.

⁹ UNDP, *Niger Delta Human Development Report, 2006*

¹⁰ SPDC, *Nigeria Brief, The Environment, 1995*

Clean up and Remediation

45. In order to put the Community into its position prior to the spill extensive clean up and remediation is required in general terms this would require:
 - 45.1. An intensive cleanup of oil spilled into the Bodo creek, including the collection of free-floating, cleaning of oiled intertidal sediments, and cleaning of mangroves;
 - 45.2. An environmental remediation programme, including mangrove restoration and replanting in impacted areas;
 - 45.3. Fisheries rehabilitation, including restocking native fish populations through aquaculture production;
 - 45.4. Re-establishment and management of protected areas, including the designation of new mangrove protected areas.

46. It is averred in light of Defendant's history of poor clean up and remediation practice that the Court should award damages in lieu of the Defendant itself undertaking clean up and remediation. The Claimant relies not least upon the finding of the United Nations Environment Programme Assessment 2011 summarised at paragraph 23.3 and the following additional findings:
 - 46.1. The study concludes that the control, maintenance and decommissioning of oilfield infrastructure and in Ogoniland are inadequate. Industry best practices and SPDC's own procedures have not be applied, creating public safety issues;
 - 46.2. Remediation by enhanced natural attenuation ("RENA"), the only remediation method observed in Ogoniland has not proven to be effective. The assumptions behind RENA are not sustainable and

UNEP found contamination has reached groundwater in many locations;

46.3. 10 out of 15 investigated sites which SPDC records show as having completed remediation still have pollution exceeding the SPDC and Nigerian Government target values. In 8 of these sites pollution had migrated to the groundwater;

46.4. In January 2010 a new Remediation Management System was adopted by Shell Exploration and Production Companies in Nigeria. The studies found that while the new system still does not meet local regulatory requirements or international best practice.

47. Alternatively the Claimant seeks a mandatory order that the Defendant carry out an appropriate clean up and remediation of the impacted land and waterways.

Reservation

48. The Claimant reserves the right to amend these particulars upon completion of disclosure herein, including but not limited to the issues of aggravated and exemplary damages as set out above.

49. Further the Claimant seeks interest pursuant to section 35A of the Senior Courts Act 1981 at such a rate and for such a period as the Court thinks fit.

ALEXANDER LAYTON QC

RICHARD HERMER QC

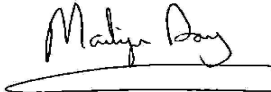
DANIEL LEADER

CLAIRE MCGREGOR

23rd March 2012

STATEMENT OF TRUTH

This Claimant believes that the facts stated in these Particulars of Claim are true. I am duly authorised by the Claimant to sign this statement.

Signed 

Name: **MARTYN JEREMY DAY**

Position: Senior Partner, Leigh, Day & Co Solicitors

Date:

Dated ...23rd March 2012.....