

decision

DISTRICT COURT OF AMSTERDAM

Private Law section

case number / cause list number: C/13/561110 / HA RK 14-69

Decision of 10 July 2014

in the case of the foundation

STICHTING UNION DES VICTIMES DES DÉCHETS TOXIQUES D'ABIDJAN ET BANLIEUES,

having its registered office
in Nijmegen, applicant,

attorney: *mr.* M.C. Danel,

versus

1. the private limited liability company **TRAFIGURA BEHEER B.V.**,
having its registered office in
Amsterdam,
defendant,

attorney: *mr.* A. Knigge,

2. the private limited liability company **AMSTERDAM PORT SERVICES B.V.**,
having its registered office in
Amsterdam,
interested party,
not appearing,

3. the public-law legal entity
MUNICIPALITY OF AMSTERDAM,
having its seat in Amsterdam,
defendant,

attorney: *prof. mr.* A.I.M. van Mierlo.

Parties will hereinafter be referred to as the Foundation, Trafigura, APS and the Municipality.
Insofar as defendants are jointly referred to, they will be referred to as Trafigura et al.

1. The proceedings

The course of the proceedings is evidenced by:

- the application for sub-proceedings pursuant to article 1019w ff of the Dutch Code of Civil Procedure (hereinafter: DCCP), with exhibits,
- the decision of 17 April 2014, in which a hearing was scheduled at where discussion will take place on whether or the case can be settled in the sub-proceedings,
- the statement of defence pursuant to article 282 DCCP of Trafigura, with exhibits,
- the statement of defence pursuant to article 282 DCCP of the Municipality, with exhibits,

- the record of the hearing of an application held on 22 May 2014, with the documents stated therein.

2. The facts

2.1. The District Court relies on the following facts and circumstances which are argued by one party and insufficiently disputed by the other party.

2.2. The Probo Koala is a vessel specialised in the transportation of solid and liquid substances and has been equipped for the transportation of oil products. In 2006 Trafigura was the charterer of the vessel. By order of Trafigura the Probo Koala carried out a procedure for caustic washing on 'coker naphtha' which was processed into 'gasoline blendstock'. During this procedure an amount residual waste is released, so-called 'slops'. These were stored in the slop tanks on board the Probo Koala.

2.3. On 2 July 2006 the Probo Koala moored in Amsterdam with amongst other the intention (if possible) to submit the waste products contained by the slop tanks and have them processed. On the same day APS unloaded part of the slops by order of Trafigura. The next day APS with the consent of Trafigura pumped the waste products back on board of the Probo Koala, which subsequently left the port of Amsterdam.

2.4. On 19 August 2006 the Probo Koala moored in Abidjan (Ivory Coast). Trafigura entered into an agreement with Compagnie Tommy, a local company active in the field of waste processing, to process the slops. The slops were transferred to trucks by Compagnie Tommy under the supervision of the port authorities and the customs. The slops were then not processed by Compagnie Tommy in the prescribed manner but dumped on various locations in and around Abidjan, including public waste sites.

2.5. By judgment of 23 December 2011 the Amsterdam Court of Appeal deemed it proved that (in summary):

- Trafigura deliberately transferred waste products from the Netherlands to a so-called ACS-state, Ivory Coast, thereby acting contrary to article 18 paragraph 1 of the Council Regulation (EEC) No. 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community,
- Trafigura, in conjunction with another party, submitted waste products originating from cleaning of fuel as tank washing water to APS, knowing that those waste products would harm the environment and/or public health and that they concealed the harmful nature when delivering the waste products.

On account of these facts Trafigura was ordered to pay a fine of € 1,000,000.

2.6. In 2007 Trafigura reached a settlement with the authorities of Ivory Coast in the amount of approximately € 145 million, whereby the authorities of Ivory Coast (also) acted for the benefit of people who claimed to have become a victim of the waste disposals by Compagnie Tommy. In the United Kingdom approximately 30,000 alleged victims of the disposals initiated proceedings against Trafigura. This resulted in a settlement of £ 950 per person, which is £ 28,500,000 in total. In none of these settlements Trafigura accepted liability.

3. The sub-proceedings

3.1. The Foundation asked the District Court by judgment provisionally enforceable as far as possible:

1. to declare the Foundation and the individuals it represents admissible and their claims well-founded;

to issue a judicial declaration that Trafigura et al. is liable for unloading the products on board of the ship Probo Koala, for the pollution and for all sorts of damage caused in consequence thereof;

to issue a judicial declaration that Trafigura et al. is jointly and severally liable for the full compensation of the financial loss suffered and particularly the personal injury suffered by the individual victims and for the costs of decontaminating the contaminated areas,

2. to order a medical, epidemiological and financial expert's assessment, under the supervision of a board of experts, with the objective to map out and assess the damage suffered by the individuals as a result of the exposure to the waste products and the products originating from the Probo Koala;

to order an expert's assessment with the objective to establish the scope, the approach and the costs of the decontamination of the areas listed in the application, necessary for the requesting of offers from specialised companies;

to assess the costs of the expert's assessment and the proceedings and order Trafigura et al. severally to pay these costs;

3. to order Trafigura et al. severally to pay the costs of these proceedings.

3.2. Trafigura and the Municipality carried a defence against the claim and put forward (among other things) that a hearing in sub-proceedings is not appropriate for this request. They also requested that the order for costs be rejected.

4. The assessment

4.1. The District Court will first assess whether the Foundation's application is admissible. Trafigura and the Municipality contended that the Foundation has no cause of action to file the application, or at least that it lacks the necessary interest in its application. According to them it is not clear on whose behalf the Foundation acts exactly and if it has a power attorney to represent each of those people.

4.2. At the hearing the Foundation stated that it meanwhile has the definitive list of people it represents, as well as the powers of attorney and the medical files of those people and if offered to submit those documents. Trafigura and the Municipality rightly pointed out that the Foundation has made inconsistent statements about the size of the group it claims to represent. However, this does not alter the fact that it is sufficiently plausible that the Foundation acts on behalf of a sizeable group of people who claim that they have become a victim of the disposal of poisonous waste products in Abidjan. That the size and composition of this group has not been established exactly at present cannot lead to the conclusion that the Foundation has no interest at all in the application filed by it. The argument of Trafigura and the Municipality that the Foundation should be declared to have no cause of action with its application for this reason is therefore rejected.

4.3. The District Court will assess hereinafter if the application is suitable for sub-proceedings.

4.4. Trafigura and the Municipality contended that the application of the Foundation is not suitable for sub-proceedings. In summary, their argument implies that the sub-proceedings are not

intended for assessing the entire dispute existing between parties, that the settlement of the sub-proceedings will not lead to a continuation of the negotiations, that the nature of the dispute and the demands is unsuitable for sub-proceedings (the number of points of dispute between parties is so high that the handling of the application will take a considerable investment in time, money and effort), that the sub-proceedings are not intended for ordering expert opinions and that the compensation demanded cannot be awarded in sub-proceedings.

4.5. According to the Foundation the application is suitable for sub-proceedings. To this end it advanced that a decision in sub-proceedings can contribute to the formation of a settlement agreement. There is no question of instituting these proceedings without previous notice; indeed, prior to these proceedings all parties were invited to enter into consultation in order to reach a settlement. It is also incorrect that the entire dispute is submitted, for only the liability issue is submitted.

4.6. The District Court rules as follows. The objective of the sub-proceedings is the simplification and acceleration of the extrajudicial settlement of personal injury and loss of dependency. The sub-proceedings offers the people involved in a dispute about personal injury and loss of dependency the possibility to engage the court in the extrajudicial negotiation phase, giving parties an additional instrument to break a deadlock in the extrajudicial negotiations. In the sub-proceedings disputes can be addressed regarding or in connection with part of what is applicable at law between parties in respect of loss of dependency or personal injury. Pursuant to article 1019z DCCP the decision on this matter should be able to contribute to the formation of a settlement agreement about the claim as it would be if proceedings on the main issue had been instituted. Given the ratio of the sub-proceedings - the promotion of the extrajudicial negotiations - the court also reviews pursuant to article 1019z DCCP if the requested decision can sufficiently contribute to the formation of a settlement agreement. The investment in time, money and effort must be weighed against the interest of the application and the contribution that a decision can make to the formation of an amicable settlement.

4.7. With due observance of the above the District Court deems that the application is not suitable for sub-proceedings.

4.8. The Court did not establish any deadlock in the extrajudicial negotiations. The Foundation only argued that all parties were invited prior to these proceedings to enter into consultation in order to reach a settlement, but it was not established that those talks indeed took place. Trafigura repeatedly stated that it is not willing to enter into talks about the claims of the Foundation. Therefore there is no question of a deadlock in negotiations, and consequently the situation cannot arise that the decision on the application can contribute to the breaking of that deadlock.

4.9. Nor has it been established that the application that has currently been filed to the District Court merely concerns part of the dispute between parties. On being asked, the Foundation insists that the application filed to the Court only addresses the liability issue. However, it turns out from the defence carried by Trafigura and the Municipality that parties disagree on all key aspects of a claim for compensation (finding of fact, liability, existence and extent of the damage, causality between the imputed act and damage). Thus it concerns a settlement of the entire dispute between parties and not a limited number of isolated factual or legal points of dispute. These sub-proceedings thereby obtain the character of proceedings on the merits of the case, which is contrary to the aim of the sub-proceedings.

4.10. Moreover, the handling of the application will require a considerable investment in time, money and effort. According to the Foundation the liability of Trafigura is an established fact, given the criminal conviction of Trafigura. However, the damage claimed by the alleged victims is not the (direct) result of the acts for which Trafigura was convicted in the criminal proceedings. The criminal conviction pertained to the delivery of harmful waste products to APS and the transportation thereof to Abidjan, whereas the basis of the present proceedings is not the ensuing damage, but the damage caused by dumping the waste products in Abidjan. The assessment of the

question if Trafigura is liable for that damage will require a considerable investment in time, money and effort because Trafigura, as stated, not only disputes the liability for dumping the waste products, but also the existence and extent of the damage and the causal connection between the imputed acts and the damage. Furthermore, Trafigura carried a prescription and admissibility defence.

With respect to the Municipality and APS they were not convicted in criminal proceedings. Since the Municipality not only disputes its liability, but also the damage and the causal connection, the assessment of the application will require a considerable investment in time, money and effort in respect of the Municipality as well.

4.11. Also having an assessment performed by experts would mean that a considerable investment in time, money and effort is to be made. Indeed the expert opinions demanded not only pertain to the assessment of the consequences of the slops for the public health of the people represented by the foundation, but also to the assessment of the physical injury and financial loss suffered by those people in consequence thereof, the preparation of an 'environmental diagnosis' and the conducting of a survey into finding an adjusted technical solution for the decontaminating the sites where the slops were dumped. The sub-proceedings are not appropriate for ordering such, extremely time-consuming, surveys by experts.

4.12. Finally, the Court establishes that the damage demanded by the Foundation not merely pertains to personal injury and loss of dependency, but also to (financial) loss as a result of the decontamination of the areas where the slops were dumped. The latter loss cannot be demanded in sub-proceedings, for pursuant to article 1019w DCCP only personal injury and loss of dependency can be demanded in sub-proceedings.

4.13. Since the application is not suitable for being handled in sub-proceedings it will be dismissed.

4.14. Trafigura and the Municipality requested that the order for costs demanded by the Foundation be rejected. They pointed out that the Foundation had instituted the proceedings completely unnecessarily and wrongfully. According to Trafigura, it would appear that the proceedings were only instituted in order to force parties to the negotiating table.

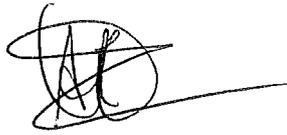
4.15. Also if the application for a decision in sub-proceedings were dismissed, the Court must assess the costs of the proceedings, unless the sub-proceedings were instituted completely unnecessarily and wrongfully. The Court deems that this is the case here. The application completely disregards the aim and ratio of the sub-proceedings, which, after all, is intended as brief proceedings about part of a dispute existing between parties about personal injury and loss of dependency so that they can break a deadlock in the negotiations. Not only was there no question of a deadlock in negotiations, the Foundation had not submitted just a part, but the dispute as a whole, to the Court, the assessment of that dispute cannot take place in such a brief time frame, but a considerable investment in time, money and effort is required, and the dispute, in addition to personal injury and loss of dependency, also pertains to financial loss. What is more, it was requested to order expert's assessments, while sub-proceedings are not appropriate for it. Therefore the Court rejects the order for costs demanded.

4.16. The Municipality requested that the Foundation be ordered to compensate the costs of the Municipality. That request is declined. It follows from article 1019aa paragraph 3 DCCP that article 289 DCCP, which forms the basis for ordering the unsuccessful party to pay the costs of the application proceedings, is not applicable to the sub-proceedings.

5. The decision

The District Court rejects the application.

This decision was given by *mr.* H.J. Fehmers and pronounced in open court on 10 July 2014.



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