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Court	Amsterdam District Court
Date of judgment	9 June 2011
Date of publication	10 June 2011
Case number	491901 / KG ZA 11-870 Pee/PV
Areas of law	Civil law
Type of proceeding	Interim injunction proceedings
Nature of decision	Interim injunction proceedings. The plaintiffs are the operators and owners of two drilling rigs currently located in the exclusive economic zone of Greenland. Greenpeace International is protesting against the drilling activities on account of the associated dangers. In the course of its protests, Greenpeace International staff suspended a 'pod' from one of the drilling rigs, and 18 individuals also boarded the same rig. The plaintiffs applied for an injunction prohibiting further protests. The applications were granted in part. Greenpeace International is forbidden for the next six months from going within a radius of 500 metres of the drilling rigs.
Sources	Rechtspraak.nl

Decision

judgment

AMSTERDAM DISTRICT COURT

Civil law sector, interim relief judge,

case number: 491901 / KG ZA 11-870 Pee/PV

Judgment in interim injunction proceedings of 9 June 2011

in the case of

1. the company incorporated under Scots law
CAPRICORN GREENLAND EXPLORATION 1 LIMITED,
having its corporate seat in Edinburgh, Scotland, United Kingdom,
2. the company incorporated under the laws of the Republic of the Marshall Islands:
OCEAN RIG 1 GREENLAND OPERATIONS INC,
having its corporate seat on the Ajeltake Islands, Majuro, Republic of the Marshall Islands,
3. the company incorporated under the laws of the Republic of the Marshall Islands:
OCEAN RIG CORCOVADO GREENLAND OPERATIONS INC,
having its corporate seat on the Ajeltake Islands, Majuro, Republic of the Marshall Islands,
4. the company incorporated under the laws of the Republic of the Marshall Islands:
DRILLSHIP HYDRA OWNERS INC,
having its corporate seat in the Republic of the Marshall Islands,
5. the company incorporated under the laws of the Republic of the Marshall Islands:
OCEAN RIG 1 INC,
having its corporate seat in the Republic of the Marshall Islands,
plaintiffs in identically worded writs of summons of 1 June 2011,
attorney-at-law: J.W.L.M. ten Braak, practising in Amsterdam,

v.

1. the foundation
STICHTING PHOENIX,
having its seat at Broek in Waterland,
2. the foundation
STICHTING GREENPEACE NEDERLAND,
having its seat in Amsterdam,
3. the foundation
STICHTING GREENPEACE COUNCIL,
having its seat in Amsterdam,
defendants,
attorney-at-law: A.H.J. van den Biesen, practising in Amsterdam.

1. The proceedings

At the court hearing of 6 June 2011, the plaintiffs, hereinafter referred to jointly as Capricorn *et al.* or individually as Capricorn, Ocean Rig 1, Corcovado, Hydra and Rig 1, presented arguments and applications in accordance with the writ of summons, a photocopy of which is appended to this judgment, although Capricorn *et al.* amended their applications at the hearing as set out below. The defendants, hereinafter referred to jointly as Greenpeace *et al.* and individually as Phoenix, Greenpeace Nederland and Greenpeace International, presented a defence concluding that the application for relief should be denied. Both parties submitted exhibits and memoranda of oral pleading. On the side of Capricorn *et al.*, the hearing was attended, in so far as relevant, by: [person 1], [person 2], [person 3], N.J. Margetson and Mr Ten Braak. On behalf of Greenpeace *et al.*, the hearing was attended, in so far as relevant, by: [person 4] (member of Phoenix management board), [person 5] (member of Phoenix management board), [person 6] (on behalf of Greenpeace International), [person 7] (on behalf of Greenpeace International) and [person 8] (Greenpeace Nederland). Following the debate, the parties requested that judgment be given.

2. The facts

2.1. Capricorn charters the seagoing drilling rig *Leiv Eiriksson* from Ocean Rig 1 for use in exploratory drilling close to Greenland. Its current location is the drilling site 'Atammik 7-1 Well', approximately 100 miles off the coast of Greenland and within Greenland's exclusive economic zone (EEZ).

2.2. Capricorn also charters the seagoing drilling rig *Ocean Rig Corcovado* from Corcovado for use in exploratory drilling close to Greenland. Its current location is the drilling site 'Lady Franklin LF7-1 Well', approximately 100 miles off the coast of Greenland and within Greenland's exclusive economic zone (EEZ).

2.3. Hydra is the owner of the drilling rig *Ocean Rig Corcovado*. Rig 1 is the owner of the drilling rig *Leiv Eiriksson*.

2.4. Phoenix is the owner of the vessels *Esperanza* and *Arctic Sunrise*. Greenpeace International charters these two vessels.

2.5. Greenpeace International started a campaign against Capricorn's drilling activities close to the coast of Greenland and close to the northern polar ice cap.

2.6. On 23 May 2011, individuals set to sea in inflatable motorboats launched from the vessel *Esperanza* and moved into the path of the *Leiv Eiriksson* in order to block its passage.

2.7. On or around 29 May 2011 individuals from the vessel *Esperanza* approached the *Leiv Eiriksson* and attached a survival pod to it. These individuals were removed and arrested by the Danish navy on 2 June 2011.

2.8. On 2 June 2011, the following message was posted on the website www.greenpeace.org, cited here in so far as is relevant:

'Since we started our occupation Cairn has hid behind the Greenland government and the Danish Navy, and now it's trying to use the Dutch courts to stop us exposing the huge risks it's taking with this beautiful and fragile environment, or cover up the threat to the economy of Greenland, which is so reliant on fishing. It can hire all the lawyers it likes, but they won't shut down our campaign to kick the oil companies out of the Arctic. We'll challenge Cairn and its expensively suited lawyers every step of way.'

2.9. On 4 June 2011, 18 individuals from the vessel *Esperanza* climbed on board the *Leiv Eiriksson*. These individuals were also arrested by the Danish navy.

3. The dispute

3.1. Having amended their application, *Capricorn et al.* are seeking the following:

I. that *Greenpeace et al.* be ordered, on pain of a penalty payment, to cease all tortious activities in respect of the drilling rigs within an hour after service of this judgment;

II. that *Greenpeace et al.* be forbidden, on pain of a penalty payment, from restricting, obstructing or rendering impossible the free and unhindered navigation and operation of the drilling rigs by *Capricorn et al.* for a period of six months after service of this judgment;

III. that *Greenpeace et al.* be ordered, on pain of a penalty payment, within an hour after service of this judgment to instruct those on board the vessels provisioned by *Greenpeace* to refrain, for a period of six months after service of this judgment, from any activity that renders the free and unhindered navigation and operation of the drilling rigs impossible;

IV. that *Capricorn et al.* be authorised to enforce the orders it is seeking as set out under I and II above with the aid of the police and judicial authorities if necessary, for the account of *Greenpeace et al.*;

V. principally, that this judgment be ruled applicable on the high seas and in the territorial waters and on the continental shelves of other coastal states through which the rigs pass or in which the rigs remain;

or in the alternative, that this judgment be ruled applicable on the high seas;

or as a second alternative that the judgment be ruled applicable in areas in which the Dutch courts have jurisdiction.

All of this while ordering Greenpeace *et al.* to bear the costs of these proceedings jointly and severally.

3.2. To this end Capricorn *et al.* argue, in summary, that on 8 October 2002 the government of Greenland granted a licence for the exploration and operation of the drilling site 'Antammik'. In addition, they argue that on 2 January 2005 the government of Greenland granted an exclusive licence for the exploration and operation of the drilling site 'Lady Franklin'. These licences were originally issued to companies connected with the state of Greenland, but Capricorn claims to be the 'operator' of these licences now pursuant to agreements concluded on 10 December 2007 and 31 December 2010. Capricorn plans to drill deep-water exploration wells in the Antammik and Lady Franklin fields. However, Greenpeace *et al.* are attempting to obstruct the exploration and operation of these fields. For instance, on 21 April 2011, Greenpeace activists in Istanbul attached themselves to the *Leiv Eiriksson* in an attempt to prevent its departure. After the *Leiv Eiriksson* had nevertheless managed to leave, Greenpeace *et al.* were unable to find it for a period of time until on or around 23 May 2011, when the vessels *Esperanza* and *Arctic Sunrise* managed to locate it. Attempts were made to block the *Leiv Eiriksson's* passage using motorboats. Six days later, Greenpeace activists from the *Esperanza* suspended a survival pod from the *Leiv Eiriksson*. On 2 June 2011 this protest was ended by the Danish navy. On 4 June 2011, 18 Greenpeace activists then climbed on board the *Leiv Eiriksson*. They searched the drilling rig and obstructed its work for eight hours. Capricorn *et al.* argue that it is to be expected that Greenpeace *et al.* will continue their protests. In this connection they note that the vessel *Arctic Sunrise*, with 30 Greenpeace activists on board, is currently following the drilling rig *Ocean Rig Corcovado*. Capricorn *et al.* argue that the protests by Greenpeace *et al.* constitute tortious acts against them. With their protests, Greenpeace *et al.* are obstructing the lawful operation and safe navigation of the drilling rigs. Capricorn *et al.* claim that they incur a loss of USD 1.8 million per rig for each day that they are unable to operate a drilling rig. Greenpeace *et al.* are therefore acting wrongfully vis-à-vis Capricorn *et al.* Capricorn *et al.* therefore argue that the applications should be granted in order to prevent any further damage.

3.3. Greenpeace *et al.* presented a defence, which is addressed below in so far as is relevant.

4. Assessment

4.1. Since these proceedings concern an application for interim relief, the interim relief judge will disregard article 127a, paragraphs 1 and 2 of the Code of Civil Procedure, which provide that consequences are attached to failure to pay court fees on time; given the interests of one or

both parties in having access to the courts, applying this provision in this case would result in extreme unfairness.

4.2. Since Capricorn *et al.* were incorporated abroad, it must be determined *ex proprio motu* whether the Dutch courts and interim relief judge have the jurisdiction to take cognizance of the applications. Since one of the plaintiffs – Capricorn – was incorporated in the United Kingdom and Regulation (EC) no. 44/2001 (the ‘Brussels I’ Regulation) applies both in the Netherlands and in the United Kingdom, jurisdiction must be determined pursuant to the Brussels I Regulation. On the basis of article 2 of that Regulation, the courts of the defendant’s domicile are the primary forum for proceedings and the Dutch courts therefore have jurisdiction over the present dispute.

4.3. The question also arises of which law the application ought to be assessed under. The basis for the application is a tort or a likely tort by Greenpeace *et al.* alleged by Capricorn *et al.* On the basis of article 4 (1) of Regulation (EC) no. 864/2007 (‘Rome II’) the law applicable to a tort is that of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred. Pursuant to article 2 (3) (b) of the Rome II Regulation, damage includes damage that is likely to occur.

4.4. The present case concerns the damage or likely damage arising from the obstruction of the activities and the boarding of the drilling rigs located in Greenland’s EEZ. The alleged damage therefore occurs on the drilling rigs. With respect to the question of which law is applicable on the drilling rigs, it is observed that on 7 December 2009 the parliament of Greenland adopted the Mineral Resources Act. According to the unofficial English translation, the Mineral Resources Act, quoted below in so far as is relevant, provides as follows:

‘2.

(1) The Greenland Self-Government has the right of use of and the right to exploit mineral resources in the subsoil in Greenland.

(2) The following activities may be performed only under a licence granted by the Greenland Government under the rules of the Greenland Parliament Act; (...):

(i) Prospecting, exploration and exploitation of mineral resources in Greenland and export of mineral resources from Greenland.

(...)

6.

(1) In this Greenland Parliament Act offshore facilities means:

(i) Rigs or other installations:

(a) From which prospecting, exploration or exploitation (production) of hydrocarbons from the subsoil under the sea floor is carried out.

(...)

(2) Ships are not covered by the definition in subsection (1) above except drillships and floating processing, storage and shipping units.

(...)

9.

(1) The Greenland Parliament Act extends to the territorial land and territorial sea off Greenland and in the continental shelf area and the exclusive economic zone off Greenland.

(...)

10. The Greenland Parliament Act applies to:

(i) Prospecting, exploration and exploitation of mineral resources as well as other activities related thereto.

(...)

14.

(1) The Greenland Parliament Act applies in the safety zones around offshore facilities and accommodation vessels.

(...)

(3) Offshore facilities and accommodation vessels are surrounded by safety zones, unless the facilities or vessels are sailing or being towed.

(4) The safety zones extend 500 metres around the facilities or vessels, measured from any point on their outer edge or from any other marking used. In the vertical plane, the safety zone extends from the sea floor to 500 metres above the highest point of the facility or vessel. In the horizontal plane, the safety zone extends 500 metres from each point of the outer edge of the facility or vessel, at the position where such edge is located at any time.

98.

(1) This Greenland Parliament Act takes effect on 1 January 2010.

(...).

(3) In respect of Greenland, the following amendments are also made in the Act on the Continental Shelf, see Consolidation Act no. 1101 of 18 November 2005 as amended:

(...)

3. Section 6 will have the following wording:

"6. Facilities and safety zones, see section 3, that are located in or have been established within the Greenland part of the continental shelf are subject to the law otherwise applying to

Greenland. The Greenland Government exercises the powers laid down in section 4 in compliance with the rules of the Greenland Parliament Act on mineral resources and mineral resource activities (the Mineral Resources Act).¹

4.5. Provisionally, it can be concluded that it follows from the Mineral Resources Act, and more specifically section 98 (3) (3) of that Act, that the law of Greenland is currently applicable to the drilling rigs involved in this dispute, which means that the tort or likely tort arises in an area governed by the law of Greenland. In view of this, the applications by Capricorn *et al.* must therefore provisionally be assessed under the law of Greenland.

4.6. The question also arises of whether the protests or likely protests against the drilling rigs constitute a tort under the law of Greenland. The law of Greenland follows the law of Denmark with respect to tort. Danish civil law is founded on *almindelige principper* (general principles of law) developed over time in the case law of the courts, in particular the *Højesteret*, a Danish judicial body comparable to the Dutch Supreme Court. According to the settled case law of the *Højesteret*, one of the *almindelige principper* is that the property rights or other rights of another party must not be infringed. Such an infringement constitutes a tort under Danish law. The Danish *Højesteret* is also the *Højesteret* of Greenland in civil cases, which means that this *almindelige principper* also has legal force in Greenland.

4.7. Only Greenpeace International has acknowledged that it was the initiative taker behind the protests targeted against the drilling rigs, and Phoenix and Greenpeace Nederland deny any involvement with the protests, other than sympathising with them. In the face of this denial, Capricorn *et al.* have not demonstrated or established satisfactorily that Phoenix and Greenpeace Nederland have been directly involved in any way with the protests against the drilling rigs. The argument put forward by Capricorn *et al.* that Phoenix has strict liability as owner of the vessels *Esperanza* and *Arctic Sunrise* does not detract from this. The existence of that alleged strict liability is significant only in respect of the recovery of any damage. This does not mean that if charterer Greenpeace International acts wrongfully, Phoenix therefore also acts wrongfully. The mere conclusion of a charter agreement with an organisation such as Greenpeace International does not constitute a tort. No evidence has been submitted or has emerged of circumstances that could justify a different conclusion. The applications against Phoenix and Greenpeace Nederland will therefore be denied.

4.8. With respect to Greenpeace International, by suspending the pod from the drilling rig *Leiv Eiriksson* and by 18 of its staff or agents boarding the drilling rig against the will of Capricorn *et al.*, Greenpeace International infringed the property rights of the owners of the drilling rigs and

thereby also obstructed Capricorn from making use of its licence. The court does not accept Greenpeace International's unsubstantiated denial that the licences exist, simply because it is unlikely that Greenland would permit a foreign company like Capricorn to conduct drilling activities in its EEZ without licences. In this connection, the fact that the Danish navy acted to remove the protestors from the drilling rig also indicates that the licences exist.

4.9. Given the high safety risks associated with Capricorn's drilling activities – and which Greenpeace International uses to justify its protests – it is likely that Capricorn had to halt its operations for as long as Greenpeace International staff or agents were on board the rig. This is because Capricorn could not expect such individuals to comply with its instructions regarding safety or any other matters, as evidenced by the fact that these Greenpeace International staff or agents did not leave the drilling rig voluntarily but had to be removed by the Danish navy. It is therefore satisfactorily established that Greenpeace International acted wrongfully vis-à-vis Capricorn *et al.* under the law of Greenland and will continue to do so if similar protests in Greenland's waters and EEZ persist. The interests that Greenpeace International claims underpin its protests do not detract from this. However, it must be conceded to Greenpeace International that the oil disaster that occurred in the Gulf of Mexico shows once again the great risks associated with deep-water drilling. Capricorn has not denied that if a similar scenario were to unfold at the drilling locations in question, the climatological conditions – in which ice formation means that it is only possible to sail for a couple of months per year – would make it extremely difficult to plug an oil leak. Such a leak could have major repercussions for the population, wildlife and environment across a sizeable region. It is therefore obvious that it is in the interests of many parties not directly involved in the drilling that the drilling activities take place in compliance with maximum safety standards, which include having plans in place to tackle any such incident and having the capacity to implement them. In this sense Greenpeace International is serving a general public interest by seeking to draw attention to the risks associated with the drilling activities. The interim relief judge notes that Capricorn is unwilling to publish its oil spill plan. However, given that Greenpeace International has been able to draw ample attention to the risks associated with Capricorn's drilling activities through the protests it has carried out thus far, and also taking into account the fact that Capricorn is making lawful use of licences issued by the government of Greenland as well as Capricorn's interest in ensuring safety in the vicinity while conducting its high-risk activities and the likely high costs of a delay to those activities – in which connection the limited time available to conduct drilling activities safely owing to climatological conditions must also be taken into consideration – the interests of Capricorn *et al.* in the uninterrupted continuation of the drilling activities outweigh those

justifying Greenpeace International's protests. Furthermore, from the documents in the action, including the email referred to in paragraph 2.8 and from what was discussed during the hearing, it has also been sufficiently established that, despite the removal of the pod as compelled by the Danish navy and the forced departure of its 18 staff or agents, Greenpeace International has not yet ended its protests against the drilling rigs and that attempts to obstruct the drilling activities will continue. It has been satisfactorily established that Capricorn *et al.* still have an (urgent) interest in their applications.

4.10. From the foregoing it follows that the application to order Greenpeace International to cease its wrongful actions against the drilling rigs must be granted, prohibiting Greenpeace International for a period of six months from going within a 500-metre radius of the drilling rigs, as long as the drilling rigs are in Greenland's EEZ. The penalty payment will be mitigated and capped.

4.11. The application referred to under II will, however, be denied since it is framed too generally, which means that there is an excessive risk that granting it would lead to disputes concerning its enforcement. The same applies to the application set out under III, which will therefore be denied. The application set out under IV will also be denied. In the first place, ordering penalty payments means that Capricorn *et al.* have the assurance that there is a sufficient incentive to comply. Furthermore the jurisdiction of the Dutch courts does not extend to being able to authorise Capricorn *et al.* to enforce the present judgment with the assistance of the police and judicial authorities of Greenland and Denmark. The application set out under V will therefore also be denied.

4.12. As the losing party, Greenpeace International will be ordered to bear the litigation costs. On the side of Capricorn *et al.* these costs are assessed as follows:

- writ of summons: EUR 90.81
- court fees: 568.00
- attorney fees: 816.00

Total: EUR 1,474.81.

4.13. In addition, as the losing party in relation to Phoenix and Greenpeace Nederland, Capricorn *et al.* will be ordered to bear these parties' litigation costs. However, since these parties shared an attorney-at-law with Greenpeace International and presented the same defence as Greenpeace International, those costs are assessed thus far at zero.

5. The decision

The interim relief judge

- 5.1. forbids Greenpeace International for a period of six months after service of this judgment from going within a 500-metre radius of the drilling rigs *Leiv Eiriksson* and *Ocean Rig Corcovado*, as long as these drilling rigs are in Greenland's exclusive economic zone;
- 5.2. orders Greenpeace International to make a penalty payment to Capricorn *et al.* of EUR 50,000.00 for each day or part of a day that it does not comply with the prohibition set out in paragraph 5.1, up to a maximum of EUR 1,000,000.00;
- 5.3. orders Greenpeace International to bear the litigation costs of Capricorn *et al.*, assessed thus far at EUR 1,474.81;
- 5.4. orders Capricorn *et al.* to bear the litigation costs of Phoenix and Greenpeace Nederland, assessed thus far at zero;
- 5.5. declares this judgment thus far immediately enforceable;
- 5.6. denies any other or further application that has been made.

This judgment was given by J.A.J. Peeters, interim relief judge, assisted by clerk of the court P.J. van Vliet and pronounced in open court on 9 June 2011.