

Okpabi v. Shell: The Future of Claims Against Parent Companies for Actions of Their Subsidiaries

Multinational organizations often adopt corporate structures that are calculated to insulate the group parent company from the wrongful acts of its subsidiaries. The recent jurisprudence of the UK Supreme Court demonstrates that such structures may not provide the expected protection against claims.

In *Okpabi and Ors v. Royal Dutch Shell & Anor* [2021] UKSC 3 (“**Okpabi**”) the Supreme Court found that the English courts could take jurisdiction over claims for tortious wrongdoing brought against Royal Dutch Shell Plc (“**RDS**”), a UK domiciled company, in relation to the actions of its Nigerian subsidiary. In reaching that conclusion the Court accepted that the claimants had a real prospect of establishing at trial that RDS was liable. This decision affirms the Supreme Court’s previous confirmation in *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 (“**Vedanta**”) that parent companies could be so exposed to liability.

The Background

The proceedings in Okpabi were brought by a group of claimants (comprising over 40,000 individuals) from the Ogale and Bille farming and fishing communities in the Niger Delta. The claims concerned allegations of un-remedied environmental damage spoiling the safe usage of water sources used by the communities for daily life as well as for fishing and agricultural purposes. The damage was alleged to be caused by the negligence of the pipeline operator, a joint venture between: Shell Petroleum Development Company of Nigeria Ltd (“**SPDC**”), a Nigerian company and a subsidiary of RDS (and which held 55% interest), the state-owned Nigerian National Petroleum Corporation (which held the majority interest) and two other companies. The English claims were brought against both SPDC and RDS.

To establish the jurisdiction of the English courts, the claimants had to fall within the jurisdictional gateway in paragraph 3.1(3) of Practice Direction 6B of the CPR by showing that:

1. The foreign defendant, SPDC, was a “necessary and proper party” to the claims against the UK-domiciled “anchor” defendant, RDS. This requirement was not in issue before the Supreme Court.
2. The claims against the anchor defendant raise a real issue to be tried (i.e. that there was a real prospect of success), on the basis of the pleadings.

3. In respect of SPDC, England and Wales is the proper place in which to bring the claim.¹ This was not in issue before the Supreme Court.

As a result, the main issue before the Supreme Court was whether there was a real prospect of a claim against RDS succeeding.

Both the High Court and Court of Appeal (by a majority) had concluded that there was no real prospect of the claim succeeding. The Supreme Court disagreed.

Clarification of the Principles On Parent Company Liability

In reaching its conclusion the Supreme Court drew on its previous decision in *Vedanta* – where Zambian claimants sought to sue for pollution allegedly caused by Vedanta’s Zambian subsidiary, in which Vedanta held an 80% interest. In that case, the Supreme Court held that there was a real prospect of such a claim succeeding. It observed that a parent company could owe a duty of care in relation to the activities of its subsidiaries depending “*on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary*”.²

Notably, the Supreme Court in *Vedanta* opined that even the imposition of group-wide policies/guidelines in respect of minimising environmental harm in inherently dangerous activities can impose a duty of care (i) when such policies/guidelines contain systematic errors which when implemented cause harm to third parties, or (ii) where the parent takes active steps by training, monitoring and enforcement to see that those policies/guidelines are implemented.³

In *Okpabi* the Claimants identified the following “routes” under *Vedanta* that they asserted on the facts of their case established the existence of a real issue to be tried:

1. RDS taking over the management or joint management of the relevant activity of SPDC;

¹ Because RDS is domiciled in England, the question of whether England and Wales is a proper place to bring proceedings is not relevant to the claims against it. This is as a result of the decision of the European Court of Justice in *Owusu v. Jackson* (Case C-281/02) [2005] QB 801 that Article 2 of the Brussels Convention (now Article 4 of the Brussels (Recast) Regulation) establishes that (with exceptions) courts have jurisdiction over claims brought against entities domiciled in their jurisdiction and cannot refuse to exercise their jurisdiction on forum conveniens grounds. The status of this rule following the revocation of the Brussels (Recast) Regulation as part of UK law is now unclear.

² *Vedanta*, Para 49.

³ *Vedanta*, Paras 52-62.

2. RDS providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by SPDC;
3. RDS promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by SPDC; and
4. RDS holding out that it exercises a particular degree of supervision and control of SPDC.

Applying the principles identified in *Vedanta* the Supreme Court in *Okpabi* found that⁴:

1. Given the interlocutory nature of the jurisdiction application, the court should not be drawn into a mini-trial on contested evidence.
2. The Court of Appeal's finding that the promulgation by a parent company of group-wide policies or standards can never of itself give rise to a duty of care was inconsistent with *Vedanta*.
3. The relevant issue was not just control but the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here, the pipeline operation). That may or may not be demonstrated by the parent controlling the subsidiary.
4. The parent/subsidiary relationship did not represent a specific new category for the purposes of ascertaining whether there was a legal duty under the law of tort. So it was wrong in law to analyse issues of parent/subsidiary responsibility by reference to the three-stage test in *Caparo v. Dickman* [1990] 2 AC 605.
5. Consequently, the "Vedanta routes" identified by the Claimants were convenient headings but did not establish a special or separate parent/subsidiary duty of care tests.
6. On the facts of the case, there was a real issue to be tried as there was evidence (based on the specific control frameworks promulgated by RDS) that (i) RDS took over the management or joint management of the relevant activity of SPDC, and (ii) RDS promulgated group-wide safety/environmental policies and took active steps to ensure their implementation by SPDC.
7. It was relevant that the Shell group is organised along Business and Functional lines rather than simply according to corporate status. It appeared that formal binding decisions were taken on the basis of prior advice and consent from the vertical Business or Functional line and organisational authority. How this organisational structure worked in practice, and the extent to which the

⁴ *Okpabi*, Paras 101-159.

delegated authority of RDS, the CEO and the RDS ExCo was involved and exercised in relation to the decisions made by SPDC, were live issues to be determined at trial.

8. The court also held that there were reasonable grounds for believing that disclosure before trial would materially add to the evidence relevant to making a decision. The Claimants could identify specific internal documents that were likely to be material to the claims made – they were not hoping that evidence would just turn up.

Implications for Future Claims

Corporate structure does not provide an outright bar on the liability of a parent company for harms directly committed by its subsidiaries. The relevant question is whether the parent company has assumed responsibility for the management of the subsidiary in relation to the relevant alleged acts. Importantly, neither *Vedanta* nor *Okpabi* represent final determinations that the parent companies **were** liable for the acts or omissions of their subsidiaries. Guidance on establishing a duty in a multinational corporate group (as well as the subsequent assessment of the standard for breach, and proof of causation for loss suffered) will likely be developed if the *Okpabi* case goes to full trial.⁵

One particularly important area for consideration will be whether the duty of care (and the applicable standard for breach) is the same for the parent company as its subsidiary. However, the recent jurisprudence of the Supreme Court does open a potential route for redress against parent companies in tort. It adds to a developing discourse on the accountability of multi-national corporate groups.⁶ Moreover, it will give rise to new pragmatic considerations for multilateral businesses (both corporates, but also associations and Verein structures) about how the management of business lines and enforcement of common “company standards” might add to the exposure of UK incorporated parent entities.

Any future claims must also be considered in context:

1. As the recent decision in *Município de Mariana & Ors v. BHP Group plc, BHP Billiton plc and BHP Group Ltd* [2020] EWHC 2930 (TCC) illustrates, the English courts remain unwilling to hear claims

⁵ On 18 January 2021, a joint statement issued by the claimants and Vedanta Resources indicated that the parties had reached a settlement of all claims.

⁶ For example, on 1 December 2020, the U.S. Supreme Court heard oral argument in *Cargill, Inc v. Doe I* and *Nestlé USA Inc., v. Doe I*, two related cases brought by victims of child slavery in Ivory Coast cocoa plantations who seek relief under the Alien Torts Statute. The claim tests the legal position on whether the Alien Tort Statute can be asserted in claims against domestic corporations, the Supreme Court having already found that there is no federal jurisdiction over claims asserted against foreign corporations. Shell’s Dutch parent company has also recently been found to be liable by The Hague Court of Appeal for oil spills in the Niger Delta in the court’s 29 January 2021 judgment in *Nigerian Farmers and Milieudefensie v. Shell*.

against UK companies where those claims represent an abusive attempt to invoke the jurisdiction of the English courts.

2. It also remains to be seen how the English courts will approach the question of the proper place for hearing the dispute (the *forum non conveniens* test) now that the UK is no longer bound post-Brexit by ECJ authority including the decision in *Owusu v. Jackson* (Case C-281/02) [2005] QB 801, which could re-open the possibility of staying proceedings in England in favour of the more connected forum, even in proceedings against a UK-domiciled defendant.
3. Given the multi-party nature of the actions, claimants will be alive to a possible challenge to the constitution of the group. For instance, whether the claimants all have “*the same interest*” as required under CPR 19.6 for the purpose of representative proceedings. The decision in *Jalla v. Shell* [2020] EWHC 221 (TCC) illustrates a situation where despite common issues of law and fact, the judge found that each claimant needed to prove that the relevant oil spill caused them damage, leading to individualised claims unsuitable for a represented action.

The Supreme Court’s judgment in *Okpabi* can be accessed [here](#).

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