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Article

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Extraterritorial liability of parent company for the torts of its subsidiary

Okpabi and others v Royal Dutch Shell [2021] UKSC 3
UK Supreme Court
Lord Hodge (Deputy President), Lady Black, Lord Briggs, Lord Kitchin, Lord Hamblen

Oil pollution damage – extraterritorial liability – jurisdiction

Introduction

This important new case, on the liability of parent companies in multinational groupings for the torts of their subsidiaries, stems from long running disputes regarding oil spillages and pollution arising from Shell's oil exploration and abstraction activities in the Niger Delta region of Nigeria. Shell has a long history of oil exploration in the area dating back to 1958, and the manner in which it has operated has been a major cause for concern over many years.[1] As if causing pollution were not enough, it has even been alleged that the company was implicated in human rights abuses due to complicity with the Nigerian authorities in suppressing the activities of environmental campaigners.[2]

Shell is a multinational company (MNC) meaning that it comprises a parent company (Royal Dutch Shell (RDS)) which oversees subsidiaries in various countries around the globe. It is axiomatic that a subsidiary is a distinct legal entity from its parent, with the result that the torts of the subsidiary cannot automatically be attributed to the parent. In Nigeria, operations are conducted by the subsidiary company, the Shell Petroleum Development Corporation of Nigeria (SPDC). Having failed to bring about major change through actions brought against SPDC in the Nigerian courts, in recent years the victims of oil pollution have sought to engage the jurisdiction of the courts in which RDS is domiciled. The Supreme Court judgment in *Okpabi* is one of the most significant judgments to date in this respect in that it establishes beyond doubt that, where the parent plays a significant role in the operations of the subsidiary, it may incur liability. Moreover, the case aligns English law with the position adopted by the Dutch Court of Appeal of the Hague which found that RDS could be held liable for the spillages under Dutch law due to the degree of control which it exercised over the subsidiary.[3]

Factual background

The claims in question had been brought by villagers from two communities, Ogale and Bille respectively, regarding oil spillages from pipelines and other infrastructure in the localities. The spillages caused serious water and ground contamination, adversely impacting the environment in addition to the health, wellbeing, way of life and livelihoods of the claimants. For the purpose of the present proceedings, the appeals had been joined and over 40,000 claimants were involved overall.

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[1] For background see Esther Hennchen, 'Royal Dutch Shell in Nigeria: Where do Responsibilities End?' (2015) 129(1) J Bus Ethics 1.

[2] This was the subject if an unsuccessful alien torts claim brought before the US Supreme Court. See *Kiobel v Royal Dutch Shell* 569 US 108 (2013). However, the Dutch courts have now accepted jurisdiction in the matter. See Hague District Court, *Various Claimants v Royal Dutch Shell and others* (1 May 2019) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670> accessed 14 May 2021.

[3] See Nicolas Bueno and Claire Bright, 'Implementing human rights due diligence through corporate civil liability' (2020) 69(4) ICLQ 789.

It was argued that the spillages arose from the negligence of the defendants under both Nigerian and English common law and various breaches of statutory duty under Nigerian legislation.

The infrastructure was operated by the second respondent in the proceedings, SPDC, as part of a joint venture with the first respondent, RDS – the parent company for the second respondent. Although SPDC was responsible for the day-to-day operation of the infrastructure, the claimants argued that RDS was influential in operational decisions and general matters of safety and environmental protection policy.

The strike-out application and jurisdictional matters

The respondents applied to the High Court in England to have the claims struck out on the ground that they did not have a real prospect of success.[4] The Court held that it had jurisdiction in relation to claims against RDS but agreed that they had no real prospect of success. This meant that it would be inappropriate to join SPDC as a defendant under the 'out of jurisdiction service' provisions of the Civil Procedure Rules and associated Practice Directions.[5] In short, the lack of a viable case against the 'anchor' company, which falls within the jurisdiction of the court, closes the 'jurisdictional gateway' which enables the claim form to be served overseas on a related defendant on the grounds that they are not a 'necessary of proper party' to the proceedings.[6] Having conducted what the Supreme Court would later describe as a 'mini-trial,' the majority of the Court of Appeal (Sales LJ dissenting) upheld most key aspects of the decision on the grounds that there was no arguable case that RDS owed the claimants a duty of care.[7] The corporate structure of the multinational entity as a whole was such that duties had been delegated to SPDC and any breaches thereof could not be attributed to the parent company.

The Supreme Court

The appellants appealed on the grounds that the Court of Appeal had made a number of errors of law pertaining to how the interlocutory proceedings were conducted and the conclusions reached thereon. Thus, it was argued that there were errors both in terms of process and the manner in which certain substantive legal arguments were presented.

The Supreme Court deferred judgment until it had delivered its judgment in the case of *Lungowe v Vedanta Resournces plc*,[8] which raised similar issues regarding the liability of a parent company for the torts of its subsidiaries; here environmental damage caused by a copper smelting company in Zambia owned by an English domiciled parent company. The Supreme Court held that there were circumstances in which, despite the distinct legal personalities of the companies in a multinational group, the parent could owe a duty of care in respect of the manner in which its subsidiary had conducted operations. As we shall see, this depends upon the management structure of the grouping as a whole and how this influences the behaviour of the subsidiary. *Okpabi* was, therefore, considered by the Supreme Court in the light of its ruling in *Vedanta*, which proved to have a significant impact on the outcome of the appeal. A single judgment, with which the other judges concurred, was delivered by Lord Hamblen JSC.[9]

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[4] [2017] EWHC 89 (TCC).
[5] Civil Procedure Rules, Pt 6; Practice Direction 6B.
[6] PD 6B, para 3.1(3).
[7] [2018] EWCA Civ 191 (Okpabi (CA)).
[8] [2019] UKSC 20 (Vedanta).
[9] [2021] UKSC 3 (Okpabi).

The Supreme Court prefaced its judgment by ruling that a proportionate response had to be adopted when approaching jurisdictional issues. It was well established[10] that the main focus needed to be upon clarifying the issues and ascertaining whether there was an arguable case. Thus, it was entirely inappropriate to weigh down proceedings with some 2000 pages of evidential material, as had occurred in this case.[11]

As regards the material errors of law, the Supreme Court turned first to how the interloctuary proceedings had been conducted. The Court of Appeal had allowed itself to be 'drawn into conducting a mini-trial'. [12] This was at odds with the guidance set out by the House of Lords in *Three Rivers District Council v Governor and Company of the Back of England*,[13] which had been reiterated by the Supreme Court in *Vedanta*. The Court of Appeal subjected the evidence to a detailed analysis when, for the purpose of interlocutory proceedings, it should have restricted itself to a much lighter touch approach and accepted assertions of fact at face value unless they were 'demonstrably untrue or unsupportable.'[14]

Moreover, the majority of the Court of Appeal attached much greater weight to the evidence offered by RDS than that which was submitted by the appellants. This was inappropriate given that there had been no opportunity for cross examination of RDS witnesses and at this point in the proceedings disclosure had not been completed.[15] The Supreme Court noted that, in *Vedanta*, Lord Briggs had emphasised the important role played by documentary evidence in unravelling the complex structures of multinational corporations and ascertaining chains of command, distribution of functions and so forth.[16] Thus, the majority in the Court of Appeal had erred in law by reaching firm conclusions on evidence which the appellants had not had the opportunity to test.

The Supreme Court then proceeded to consider the manner in which certain substantive points of law had been presented. In particular, it noted that the Court of Appeal seemed to accept a 'general principle' to the effect that the parent company can never assume a duty of care in respect of activities carried out by the subsidiary simply because it had adopted group wide guidelines, policies and procedures which the subsidiary was required to follow. This ran contrary to *Vedanta*, in which Lord Briggs held that there is no such 'reliable limiting principle' because such guidelines and policies could contain 'systematic errors.'[17]

In addition, the majority was wrong in their general approach to the issue of control of the subsidiary and how that affects the liability of the parent. The majority placed great emphasis upon the structure of the grouping and the protocols governing the relationship between each part. Having perused some of the documents pertaining to the 'control framework' in the corporate grouping, Simon LJ asserted that, 'I am very far from persuaded … that RDS exercised material control over SPDC's material operations.'[18] However, the Supreme Court held that the extent to which the group structure facilitates control of the subsidiary is only a starting point: 'The issue is the extent to which the parent *did* take over or share with the subsidiary the management of the

[10] See *Vedanta* and *VTB Capital plc v Nutriek International Corp* [2013] 2 AC 337.
[11] *Okpabi* at [20]-[23].
[12] *Okpabi* at [101]-[109].
[13] [2003] 2 AC 1.
[14] *Okpabi* at [107].
[15] *Okpabi* at [120]-[125].
[16] *Okpabi* at [126]-[132].
[17] *Okpabi* at [143]-[145].
[18] *Okpabi* (CA) at [122].

relevant activity (here the pipeline operation).'[19] In any event, focusing on the overall degree of control exercised by the parent would not necessarily shed any light on the extent to which the parent may have participated in the management of specific activities. The issue of control is a complex one and responsibility for (or at least involvement in) a particular task might not be readily apparent from the basic structure of the organization.

> 'In a sense, all parents control their subsidiaries. But control of a company and de facto management of part of its activities are two different things. A subsidiary may maintain de jure control of its activities, but nonetheless delegate de facto management of part of them to emissaries of its parent.'[20]

Thus, it would be necessary to ascertain what actually occurred in practice in respect of the management of the infrastructure and the decisions that were taken. If RDS actively participated in the management of the pipeline (or even exerted a less direct influence through its policies and procedures etc) proximity would be established between the parent company and at least a significant number of the claimants, thereby establishing a duty of care. The Supreme Court therefore rejected the Court of Appeal's finding that imposing liability on a parent company in respect of the activities of its subsidiaries constituted a novel duty of care requiring application of the threefold *Caparo*[21] approach.[22] In other words, the close involvement with the management of a potentially hazardous operation gives rise to well established duties and raises no novel issues of policy.

Finally, the Supreme Court rejected the majority finding in the Court of Appeal to the effect that there was 'no real issue to be tried.' The structure of the organization and the decision-making processes were such that there was plenty of scope for argument in terms of how this affected operational decisions relating to the pipeline in question. In particular, it was the appellant's case that various committees and management bodies transcended the formal separation between different companies within the group. Thus, it was arguable that the Shell organization could be equated with types of corporate groups which 'are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant.'[23]

Analysis

This is the latest in a series of cases involving the poor environmental record of Shell in the Niger Delta where many oil spillages have occurred over many years, some of which have been resolved and some of which are still ongoing. As such, the case must be viewed in the wider context of that litigation. In 2011, the Nigerian subsidiary of Shell (SPDC) admitted liability in respect of two major spillages caused by fractured pipelines in Bodo, Ogoniland. It was agreed that compensation would be determined under Nigerian law, but under the jurisdiction of the English Courts. Following some argument as to whether the matter had to be resolved exclusively under the terms of Nigerian legislation governing pipelines, or whether common law could also apply,[24] the case was eventually settled in 2014 for £55 million.

[19] *Okpabi* at [147].
[20] *Okpabi* at [147].
[21] *Caparo Industries v Dickman* [1990] 2 AC 605.
[22] *Okpabi* at [151].
[23] Okpabi at [157] quoting Lord Briggs JSC in *Vedanta* at [51].
[24] *Bodo v Shell Petroleum Development Company of Nigeria* [2014] EWHC 1973 (TCC) (Bodo).

The *Okpabi* decision is the first major case to be pursued directly against the parent company, RDS, and as such it offers important clarifications regarding both procedural and substantive legal issues relating to the extra-territorial liability of multi-national companies. On the narrow procedural aspects, the case provides a clear example of the extent to which interlocutory procedures, designed to save all parties time and money, can in fact become the source of additional complex litigation if not carefully managed. The High Court and Court of Appeal allowed the procedure to become over-burdened by documentary evidence and arguments relating to the substantive issues, as opposed to the more limited objective of deciding whether there was an arguable case. However, this analysis of the evidence occurred in a haphazard and unbalanced manner because the Courts found themselves 'drawn into a mini-trial' in the context of a procedure which is not designed for this purpose. Having said that, this is hardly a new problem and judges have to chart a difficult course between properly testing the arguments without slipping into a full trial of the facts. Interlocutory proceedings have often been a breeding ground for further litigation and many leading cases, on fundamental points of law, have stemmed from interlocutory proceedings without matters ever proceeding to a full trial of the facts.[25] Nevertheless, the Supreme Court offered important clarifications regarding the management of such proceedings and the intensity with which the arguments and evidence ought to be reviewed.

The case (alongside *Vedanta*) is also set to become a leading authority on important aspects of private international law relating to the global operations of multinational MDCs; in particular, the jurisdiction of the courts in which the parent company is domiciled, to hear claims arising from the activities of subsidiaries in other parts of the world. It has long been thought that the issue of control is at the heart of the matter but there has been scant authority on the issue. The Supreme Court has made it clear that the courts will look beyond the formal separation between the components of the grouping and will examine how the parent has actually acted in respect of individual operational decisions on the ground. This may have a profound effect upon how MDCs manage their operations in future and account for their activities. Hiding behind the 'corporate veil,' and asserting that the activities of the subsidiaries are nothing to do with the parent, may no longer suffice. It is highly significant that the Supreme Court (relying heavily upon the dissenting judgment of Sales LJ in the Court of Appeal) emphasised the complexity of the plumbing which links the entities in a corporate grouping. As noted above, there are additional layers of committees, boards and other decision-making bodies (together with policies, procedures and guidelines) which transcend the distinct legal identities of the parent and subsidiaries.

Conclusion

Those affected by oil pollution in the Niger Delta have spent many years trying to bring claims 'home' to the parent company so as to trigger the jurisdiction of the English and Welsh courts and, in some cases, the applicability of English and Welsh law. Taken together with the earlier *Bodo* litigation it would seem that these efforts are beginning to pay off.

However, it should be noted that there are many outstanding claims and, indeed, the litigants involved in *Okpabi* are still a long way from winning compensation. They must now show how RDS actually participated in the operation of the pipeline (or influenced its operation by way of policies and procedures) and whether they were culpable in this respect. As noted above, this will entail a detailed examination of the management structure and the extent to which this transcended the distinct identities of the relevant companies. One can think of this in terms of identifying a

[25] Not least of which is *Donoghue v Stevenson* [1932] AC 562.

management pathway from London to the Niger Delta which bypasses the formal legal separation between the different companies; this will not be an easy task. The interlocutory proceedings were weighed down by some 2000 documents, but the ones which the majority of the Court of Appeal somewhat selectively relied upon were found not to be especially enlightening in terms of the management of the group structure.

It is also important to note that other litigants, who have managed to pursue claims against Shell arising from oil pollution in Nigeria, have found that establishing jurisdiction is no guarantee of success. Claims may still be defeated by substantive points of law. In *Jalla v Shell International and Trading Co and another*[26] private nuisance claims arising from a leak from offshore oil storage and loading facilities were defeated as a result of certain doctrinal aspects of private nuisance and what constitutes an ongoing nuisance. In *Okpabi*, claimants now face the task of showing that policies and procedures were in fact defective and/or certain decisions were made, or actions taken, in a negligent manner. Although, in this respect they may take some heart from the Dutch Court of Appeal in the Hague, which ruled that the fact that at least some of the spillages were caused by sabotage or theft, would not of itself absolve Shell of liability. [27]

One can expect more significant claims arsing from Shell's activities in the Niger Delta to reach the higher courts in the UK for some years to come.

[26] [2021] EWCA Civ 63.

[27] Anjli Raval and Neil Munshi, 'Shell loses Dutch case over Nigeria oil spills' *Financial Times* (London, 29 January 2021) <https://www.ft.com/content/663c6261-338e-4f6a-8ae4-11416607db71> accessed 14 May 2021.