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OKPABI V SHELL: CLARIFICATION FROM THE ENGLISH SUPREME COURT ON JURISDICTION AND PARENT COMPANY LIABILITY

To Our Clients and Friends:

The English Supreme Court's February 12, 2021 judgment in *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 is a landmark decision in the field of human rights and environmental protection. In a unanimous ruling,[1] the Court allowed the claimants to continue with a claim that the UK-domiciled parent of a multinational group owed a duty of care to those allegedly harmed by the acts of a foreign subsidiary.

The judgment raises important issues regarding the proper approach to jurisdictional challenges and provides insight into the criteria that English courts will consider when determining questions of liability in respect of harm caused by foreign subsidiaries.

Background

In 2015, inhabitants of the Bille and Ogale communities in Nigeria brought parallel claims in negligence in England against UK company Royal Dutch Shell plc ('**RDS'**) and its Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria Limited ('**SPDC'**). Both claims sought damages for allegedly serious pollution and environmental damage caused by oil leaks from pipelines that SPDC operated on behalf of an unincorporated joint venture. The claimants argued that RDS, the UK parent, owed them a duty of care because it exercised significant control over material aspects of SPDC's operations and/or assumed responsibility for SPDC's operations.

The defendants challenged the English court's jurisdiction and sought to set aside service out of the jurisdiction on SPDC. Following a three-day hearing in November 2016, Mr Justice Fraser held that while the court had jurisdiction to try the claims against RDS, it was "*not reasonably arguable that there [was] any duty of care upon RDS*." As a result, the conditions for granting permission to serve the claim on SPDC were not made out, and the Claimants' case against RDS was struck out. The Claimants appealed.

The Court of Appeal hearing took place in November 2017. The Court considered that Fraser J had erred in his approach to the evidence, and decided that it was entitled to review the evidence for itself, including fresh evidence adduced on appeal. By that stage, some 43 witness statements and expert reports had been filed. In fact, the parties chose to "*swamp*" the Court of Appeal with evidence, with the witness statements running to more than 2,000 pages of material and eight files of exhibits.[2] Nevertheless, the

Court of Appeal undertook a detailed review of the facts and, in February 2018, the majority upheld the judgment of Fraser J (Sales LJ dissenting).

The Claimants' application for permission to appeal to the Supreme Court was stayed pending judgment in *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20, a case which the Supreme Court Justices acknowledged was "*very relevant to both the procedural and the substantive issues raised on this appeal.*"

The Supreme Court judgment in *Vedanta*

In the *Vedanta* litigation, a similar question arose as to whether a parent company, Vedanta Resources Plc, could be held liable for alleged acts of environmental damage in Zambia associated with the Nchanga copper mine and caused by its subsidiary, Konkola Copper Mines plc ("**KCM**").

The Supreme Court was asked to decide whether the courts of England and Wales had jurisdiction to hear claims of common law negligence and breach of statutory duty against the parent and subsidiary. Among other things, the defendants asserted that the claimants' pleaded case and supporting evidence disclosed no real triable issue: Vedanta could not be shown to have done anything in relation to the operation of the mine sufficient to give rise to a common law duty of care, or statutory liability under Zambian environmental protection, mining and public health legislation. Vedanta was, it was said, merely an indirect owner of KCM, and no more than that.

The Supreme Court rendered its decision in April 2019. In delivering the Supreme Court's unanimous judgment, Lord Briggs confirmed that the appropriate test of whether there is a real issue to be tried replicates the summary judgment test; i.e. the question is whether the claim has a real prospect of success at trial.

Lord Briggs also made clear that the liability of parent companies in relation to activities of their subsidiaries is not, of itself, a distinct category of liability in negligence. Ordinary principles of the law of tort regarding the imposition of a duty of care should apply. On the facts, whether a duty of care arises "*depends 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"* (para 49). The Supreme Court held, among other things, that it was "*well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may well be demonstrable at trial, after full disclosure of the relevant internal documents […].*" (para 61). The question whether Vedanta owed a duty of care was, therefore, a real triable issue and for this, and other reasons, the English court had jurisdiction to hear the claim.

***Okpabi*: the arguments**

The claimants

The claimants in *Okpabi* amended their case in light of the *Vedanta* ruling, and argued that there were four **"***routes***"** by which RDS could be shown to owe the claimants a duty of care:

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

The above routes are, therefore, guides to the sorts of issues that claimants will explore in seeking to demonstrate that a parent company has intervened in the business of the subsidiary to such a degree that it owes a duty of care to individuals harmed by the activities of that subsidiary.

With regard to the evidence, the claimants relied, among other things, on the fact that RDS had enforced mandatory group-wide health and safety policies, had centralised expertise and exercised top-down control of the health, safety, security and environmental areas of the business, and/or had joint management of the response to the oil spills. The claimants also relied on public Shell documents such as sustainability reports, and on material said to show that RDS had detailed knowledge of the environmental damage caused by SPDC. They relied on two documents in particular; the RDS Control Framework and the RDS HSSE Control Framework (the Health, Security, Safety and Environment framework). The former allegedly showed that the Shell Group was organised along "Business" and "Function" lines directly accountable to RDS and the RDS HSSE Control Framework was said to show the extent of control that the RDS Board exercised over the health, safety and environmental practices of its subsidiaries.

The defendants

The defendants argued that RDS could not be responsible for environmental pollution caused by third-party acts of theft, sabotage and pipeline interference; while RDS has mandatory policies and guidelines in place, it leaves their enforcement and implementation to subsidiaries; and although it requires subsidiaries to have health and safety audits, it leaves overall control over pipelines and related infrastructure to subsidiaries.

The Supreme Court judgment in *Okpabi*

The jurisdiction question

- When determining jurisdiction at an interlocutory stage and whether there is a "*real issue to be tried*", the Court should **not conduct a mini-trial**. Faced with significant volumes of evidence, the Court of Appeal had erred by conducting a detailed factual enquiry.
- The test for whether there is a real issue to be tried replicates the summary judgment test; i.e. the question is whether the claim has **a real prospect of success**. In determining that issue, the analytical focus **should be on the facts alleged in the particulars of claim**.
- The facts alleged in the particulars of claim should be accepted **unless** they are **demonstrably untrue or unsupportable**.
- Whether there is a real issue to be tried may depend on whether, on disclosure, **further relevant materials will come to light**. The Court of Appeal had wrongly assumed that any further documentation would be unlikely to assist.

The factual questions

- There is **no special test for a parent company's liability in tort for the activities of a subsidiary**.
- Nevertheless, the four *Vedanta* "routes" are **a convenient guide** to the factual areas that claimants will explore in seeking to establish that the parent owes a duty of care.
- The **documents at issue** will include policies, guidelines, public documents and corporate and governance structure documents showing decision-making at the level of the parent, reporting to parent-level committees, centralised expertise, as well as control, direction and oversight at parent level for the relevant operations of the subsidiary and (in a case like this) for pollution, security, health and environmental compliance.
- **Other facts at issue** may include witness evidence on the extent to which the parent exercised control on a day-to-day basis, perhaps through the dissemination of manuals and guidance, training, intervention in particular areas, as well as management's awareness of the particular risks at issue in the case.

Comment

The decision in *Okpabi* concludes an extremely important chapter on the court's approach to claims alleging a duty of care on the part of the parent for harm said to be caused by a foreign subsidiary. On jurisdiction, and on the question whether there is a real issue to be tried, the court will not conduct a mini-trial. Defendants need to be aware that the vast reams of evidence in *Okpabi* were not enough to

stop the claim: at this interlocutory stage the court will remain focussed on the facts alleged in the particulars of claim, and accept them unless they are demonstrably untrue or unsupportable. Alternative routes are available, however, by which cases may be resisted on the right facts, such as limitation challenges, and/or an application that the case be struck out as an abuse of process.

Further, parent companies should not take false comfort in the local implementation of global policies, and should consider carefully how management, supervision, advice and policy are handled. Ultimately, each case will turn on its own facts.

While the decision may bring clarity to the legal and factual questions at issue, like *Vedanta*, it also highlights the enduring difficulty for corporates trying to establish good governance, particularly in group structures where subsidiaries operate independently with local oversight and implementation of policy. As discussed in our separate client alert, European legislation may be in the pipeline, requiring parent companies to conduct human rights, environmental and good governance due diligence throughout their value chain. Importantly, the current draft of that legislation expressly includes subsidiaries in the definition of value chain. With many UK parent companies having a European commercial footprint (and therefore falling within scope of the European initiative), litigation of this nature is likely only to increase.

In the meantime, the *Okpabi* matter will return to the High Court to proceed on the merits, with scrutiny of liability, quantum and potential additional jurisdictional challenges yet to come.

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[1] For the purposes of the Judgment, the Court was deemed constituted without Lord Kitchin, who was absent due to illness.

[2] See paragraph 105 of Lord Hamblen's judgment in the Supreme Court and paragraphs 17 and 18 of Simon LJ's judgment in the Court of Appeal.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Environmental, Social and Governance (ESG) Practice, or the following authors in London:

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