UK Supreme Court reinforces England as an attractive forum for ESG claims against parent companies or others that exercise control over an entity's actions

On 12 February, in a case that has been closely watched by companies facing global ESG risk, the United Kingdom Supreme Court (**UKSC**) released its much anticipated judgment in *Okpabi v Royal Dutch Shell Plc*, unanimously overturning the Court of Appeal's previous finding that the English courts did not have jurisdiction over a claim against Royal Dutch Shell Plc (**Shell**) and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd (**SPDC**).

Relying heavily on its decision in *Vedanta Resources v Lungowe* in 2019, the UKSC considered that the courts below erred in law and established that there was a real issue to be tried, thus paving the way for the claim to proceed in the lower courts.

Factual and Procedural Background

The claimants are Nigerian citizens seeking damages allegedly caused to their environment by oil leaks from pipelines and other infrastructure associated with oil extraction in the Niger Delta. They allege that Shell owed a duty of care to them as a result of Shell's purported knowledge and control over SPDC's operations. Shell sought to strike out these claims arguing that the English Court had no jurisdiction to hear the case because the particular relationship between Shell and SPDC did not allow for a duty of care to arise. This was accepted by the High Court, and then by the Court of Appeal.

The Court of Appeal, prior to handing down its decision in *Okpabi,* had previously held in *Vedanta* that it was conceptually possible for a UK-domiciled parent company to owe a duty to overseas claimants, including for environmental damage caused by the foreign subsidiary. The decision in *Okpabi* therefore turned on the specific facts of the case against Shell.

In the interim, the *Vedanta* decision was appealed to the UKSC. In a landmark judgment, the Supreme Court upheld the Court of Appeal's decision and emphasised that the law of negligence did not recognise a distinct category of parent company liability for its subsidiaries. Rather, the question of whether a duty of care arose depended on the extent and way in which a parent availed itself of the opportunity to take over, intervene, control, supervise or advise the management of a subsidiary. Following the UKSC's clarification of the law in this area, the claimants in *Okpabi v Shell* were granted permission to appeal. The hearing was held in June 2020.

Supreme Court Decision

The Supreme Court emphasised that the proceedings were jurisdictional and the claim was still at an interlocutory stage. The UKSC rules that the High Court judge and the Court of Appeal erred by being drawn into making findings on factual matters, and in effect conducting a mini-trial, rather than applying the relevant legal test to dispose of the jurisdictional challenge. The UKSC observed that the factual disputes between the parties should have been appropriately dealt with at trial, and there was no need for the courts below to weigh in on these issues, particularly in the absence of cross-examination.

In particular, the UKSC found the Court of Appeal had erred by not considering the potential importance of future disclosure of internal company documents, which were likely to be material. Indeed the Supreme Court considered such documents to be of "obvious importance" to these sorts of claims, underscoring the importance of a company's internal policies and procedures may play in proceedings of this nature and the need for early consideration of ESG risks.

Although this ground alone was a sufficient error of law to determine the appeal, the UKSC also commented on other errors of law made by the lower courts, finding that:

(a) it was inconsistent with *Vedanta* to suggest that a duty of care could not arise through a parent company issuing group-wide policies or standards;

(b) the exercise of "control" by a parent company over a subsidiary is merely a starting point when applying the *Vedanta* test and not an overriding factor;

(c) the "parent-subsidiary" relationship does not fall within a special category of liability in the law of tort; and

(d) in that regard, there is no need to apply the traditional tripartite *Caparo* test to establish negligence, as the liability of parent companies to their subsidiaries is not a "novel" category of liability in common law negligence.

The Court reiterated its statement in *Vedanta* that there was no "*special or separate parent/subsidiary duty of care tests"* but referred to four possible '*Vedanta routes'* to parent company liability:

(1) Shell taking over the management or joint management of the relevant activity of SPDC;

(2) Shell providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by SPDC;

(3) Shell promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by SPDC; and

(4) Shell holding out that it exercises a particular degree of supervision and control of SPDC.

The Court noted that these categories should not be definitive, but applied them in this case. The UKSC then held that there was a real issue to be tried in respect of categories (1) and (3), and declined to make a finding in respect of the other categories. In that regard the Court preferred the dissenting conclusions of Sales LJ, who had been in the minority in the Court of Appeal, who had observed that the vertical business structure of Shell (which the claimants contended showed the businesses were managed as a single commercial undertaking) could establish a duty of care.

The *Okpabi* decision may well reinforce the perception of England as an attractive forum for bringing claims against parent companies or similar entities. It should be noted that the principles the Supreme Court first established in *Vedanta* are wide-ranging. An "equity relationship" is not necessary for liability to arise. Beyond the parent-subsidiary relationship, in principle it is possible that policies or public statements in non-equity business relationships, for instance in the context of a supply chain, could give rise to a duty of care for a business to take measures to prevent human rights impacts in the context of that business relationship. However, prospective claimants should be cognisant of the long-drawn nature of such claims before the English courts - the Court in *Okpabi* hints that possible further jurisdictional challenges may still be forthcoming in the lower court, and even in the seminal case of *Vedanta*, the claimants have opted to reach a settlement in lieu of continuing with what would likely have been lengthy substantive proceedings in the English courts.

The UKSC's approach in this area re-emphasises the need for business to proactively comply with the UN Guiding Principles on Business and Human Rights and other international ESG standards. Alongside the recent decisions in the Netherlands relying on *Vedanta* to make similar findings of parent company liability against Shell's Dutch arm, and with the prospect of mandatory human rights due diligence laws coming into force in Europe and elsewhere, similar claims look set to continue.

Quinn Emanuel's ESG Practice

Quinn Emanuel has one of the most pre-eminent ESG practices in the world. Our expertise is truly international and cuts across sectors – from telecommunications, technology and artificial intelligence to construction and engineering and the extractive sector.

Led by Chambers ranked London partner Julianne Hughes-Jennett, the team has acted in some of the most important disputes in the field: in prosecutions for corporate complicity in crimes under international law brought by several European states; in "parent company liability" and duty of care cases in the English Courts; in class actions brought under the Alien Tort Statute in the US; and in National Contact Point Communications in several States. Our team has world-class expertise in issues of extra-territorial jurisdiction and conflict of laws - critical to cases which involve the responsibility of multinationals headquartered in North America or Europe for impacts which occur overseas. And we have deep knowledge of the legal issues that can arise when businesses operate in conflict zones.

Crucially, we understand how these disputes play out in the public domain. Our experience allows us to tailor a litigation strategy to your specific context and to ensure that it complements your public relations and wider stakeholder engagement strategies. Where appropriate, we can advise on operational grievance mechanisms which are consistent with international human rights standards and which protect your legal rights.

We have run internal investigations which span multiple jurisdictions, conflict zones and complex corporate structures. Drawing on our deep knowledge of how human rights risk to a business's stakeholders can create legal risk for the business, our advisory practice helps businesses to identify human rights issues in their operations and supply chains and implement practical and effective systems to prevent them from materialising. We carry out human rights impact assessments and human rights due diligence. We support businesses to comply with the growing web of legislation in the field, from the Modern Slavery Act in the UK and Australia to the Duty of Vigilance Law in France. And we guide businesses to anticipate changes in the legislative landscape so that they can plan accordingly. Unlike many law firms, we can go beyond legal compliance and support businesses to substantively engage with human rights issues – thus reducing the human rights risk to rights holders and the legal and reputational risk to the business.

Chambers Global recognises us for our unique mix of disputes and advisory work, describing Julianne Hughes-Jennett as a *"passionate and driven practitioner"* known for her *"great deal of work in dispute resolution and human rights due diligence"* and acknowledges her as a *"very steady hand in guiding clients"* on international human rights issues and liabilities.

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us:

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