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Case Commentary

Establishing Parent Company liability for extraterritorial environmental harm caused by a subsidiary

Okpabi and others v Royal Dutch Shell Plc and another [2021] UKSC 3

Supreme Court, Lord Hodge DP, Lady Black, Lord Briggs, Lord Kitchin & Lord Hamblen JJSC, February 2021

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Introduction

The liability of companies operating extra-territorially for environmental and/or human rights transgressions has long been the focus of NGOs and advocates for the communities affected. Many global brands and more publicity shy conglomerates have had their performance called into question over the years. Shell is no stranger to such attention and this case – with its genesis in a prospective claim in negligence brought in 2015 – has once more brought out of jurisdiction claims into the spotlight. At the heart of this judgment, determining the possibility of bringing a claim at all, are two basic questions: what are the legal conditions that enable an out of jurisdiction claim to be brought within the context of a parent/subsidiary company relationship; and how should the liability of a parent company for the acts/omissions of a subsidiary be framed? With reference to its recent previous decision in an earlier out of jurisdiction case, the Supreme Court answered both questions. In a unanimous verdict, it held that the majority of the Court of Appeal had been wrong in its assessment of contested evidence, which represented the factual basis to the claims made by the appellant. Indeed its entire approach to the process of examining that evidence was called into question. In addition, it held that the Court of Appeal had been wrong in its assessment that, as a result, there was no real issue to be tried. In addition, the Supreme Court confirmed its approach to questions relating to a duty of care owed by a parent company and its subsidiary, which were set out in the judgment in *Vedanta Resources PLC v Lungowe*.¹

Facts and Procedure

The appeal brought together two sets of proceedings, the Ogale proceedings and the Bille proceedings. In the former, the claimant appellants were a Nigerian farming and fishing community of approximately 40,000 individuals in Rivers State, located in the Niger Delta area of Nigeria. In the Bille proceedings, the claimant appellants

¹ *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20. NB - as a result of illness, following hearing but pre-judgment, the case was decided by four judges following a direction under 243(3) of the Constitutional reform Act 2005. Noted at para 161.

were 2,335 individuals living in the Bille Kingdom, a remote riverine community again in Rivers State.

The claims alleged that numerous oil spills had occurred from oil pipelines and their associated infrastructure operated in the vicinity of the respective communities. The spills had caused widespread and significant environmental damage, especially to natural water sources, compromising the appellants' ability to use it for a range of essential and other related amenity purposes. The impacts were compounded because the spills had not been adequately cleaned up or remediated. The basis of the appellants' case was that the oil spills had been caused as a result of the negligence of the second respondent, the Shell Petroleum Development Company of Nigeria Ltd (SPDC), which was the pipeline operator and a Nigerian registered company. SPDC operated the pipelines and ancillary infrastructure pursuant to a joint venture with the state-owned Nigerian National Petroleum Company and other national and multinational company partners via a complex corporate relationship. SPDC is a subsidiary of the first respondent, Royal Dutch Shell (RDS), which is a UK domiciled company and the parent company of the multinational Shell group of companies.²

The basis to the appellants' case against RDS is that it owed them a common law duty of care resulting from the extent of the significance of its control over material aspects of SPDC's operations; and/or it had assumed responsibility for SPDC's operations. A broad spectrum of control factors were identified including promulgation and imposition of mandatory health, safety and environmental policies, standards and manuals which the appellants alleged had failed to protect them against the risk of foreseeable harm arising from SPDC's operations.

The claims originated in late 2015: the Ogale proceedings were issued in October and the Bille in December of that year. The appellants applied for permission to serve the claim form on SPDC outside the jurisdiction on the basis that SPDC was a "necessary or proper party" to the claims against RDS for the purposes of maintaining a jurisdictional link, the basis to which is set out in paragraph 3.1(3) of Practice Direction 6B.³ Lord Hamblen noted that it was common ground between the parties that, in order for jurisdiction against SPDC to be established in this way, the appellants needed to establish that their claims against RDS, termed 'the anchor defendant', raised a real issue to be tried: a 'real issue' is co-existent with the idea of a real prospect of success. Permission was initially granted to serve SPDC out of jurisdiction. Application to have this set aside shortly followed with RDS having already moved to assert that the court lacked jurisdiction, or should not exercise it in respect of the claims against RDS.

A full hearing before the High Court determined in January 2017, that although it had jurisdiction to try the claims against RDS, the appellants' claims had no real prospect of success. That meant that the conditions for granting permission to serve the claim on SPDC as a "necessary or proper party" to the claims against RDS, in order to satisfy the jurisdictional link in the Practice Direction were not made out. Both the service of the claim forms on SPDC and the appellants' statements of case in

² Fuller details of the relationship are set out by Lord Hamblen at para 5.

³ The relevant direction is available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06b#3.1

respect of RDS were struck out. The appellants' appealed and the Court of Appeal was of the view that the judge in the High Court had erred in certain respects and that it would review the evidence, and subsequent evidence brought to the appeal, including witness statements and numerous reports, for itself.

In dismissing the appeal, the majority of the Court of Appeal was of the view that there was no arguable case that RDS owed the appellants a common law duty of care to protect against foreseeable harm caused by SPDC's activities. The appellants appealed to the Supreme Court.

The Supreme Court Judgment

Background issues

Before considering the basis of the appellants' case Lord Hamblen noted that there had been consideration in *Vedanta* in respect of the need to observe a proportionate approach to the litigation of issues relating to jurisdiction.⁴ He lamented that all of the comments made in that case bore repetition in this one. It had been emphasised that where, as in this case, the jurisdictional issue centres on there being a triable issue, it was important to 'observe judicial restraint and to avoid mini-trials'.⁵ By way of explanation, he cited guidance set out in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)*.⁶ In summary, to determine the question of the prospect of success at trial required an appreciation of the scope of such an inquiry. Usually parties would present evidence to that the trial judge could determine the truth of the issue. There were, though exceptions: such as for example where it was clear as a matter of law that the party could not succeed; or a claim was without substance. The rule it was explained, "is designed to deal with cases that are not fit for trial at all."⁷ Applied to his case Lord Hamblen stated that '...the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success'.⁸ It would only be in cases where the statement of claim contained allegations of fact that were demonstrably untrue or unsupportable, that it would be appropriate for a defendant to dispute the facts alleged through evidence of its own. He concluded the point note that '[d]oing so may well just show that there is a triable issue'.⁹

The appellant's case was originally pleaded on the basis of the three-stage test for establishing a duty of care in negligence in *Caparo Industries plc v Dickman*.¹⁰ That approach was no longer to be used in such cases following the decision in *Vedanta*, with Lord Hamblen, citing Lord Briggs' statement in that case that "the liability of

⁴ *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20, per Lord Briggs, paragraphs 6-14.

⁵ At para 21.

⁶ *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, per Lord Hope.

⁷ *Ibid*, paragraph 95, cited at para 21.

⁸ At para 22.

⁹ *Ibid*.

¹⁰ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence”.¹¹ There was nothing novel to be determined and the question was down to the extent of control exercised by a parent over the subsidiary. On that basis, the appellants’ case was reframed to reflect that requirement. Using ‘*Vedanta* (1) to (4)’ as headings, the duty was argued to arise because of:

‘(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.’¹²

The basis of the appellants’ claim in summary was that RDS exercised significant control, direction and oversight over SPDC in respect of pollution control, environmental compliance and operational matters. Lord Hamblen provided considerable detail in respect of the claims between paragraphs 29 and 73 of the judgment and the following represents only a high-level summary of the submissions and materials brought to the appeal by the appellants to further their case. RDS had a global policy for Health, Security, Safety and Environment (HSSE) containing mandatory standards, which is applied to all its subsidiaries and subject to compliance monitoring. Implementation of the HSSE standards and RDS’s Corporate Social Responsibility (CSR) scheme are the responsibility of the CEO and Executive Committee of RDS, with annual reporting to the CEO.

In addition, standard setting in respect of subsidiaries, plant and infrastructure and spill prevention are also overseen by RDS. Other matters more specifically focused towards SPDC included factors such as RDS’s executive remuneration being linked to SPDC’s sustainability metrics; the monthly reporting of performance KPIs and controls placed both globally and specifically in respect of SPDC in respect of spill response; and finally the fact that there was integration between key RDS personnel and SPDC’s management of its operations. Further allegations were made relating to RDS’s knowledge of the extent and scale of environmental damage being caused within the Niger Delta, which was caused by SPDC. Environmental harms in the region have long been the focus of global concern, and SPDCs failure in this respect – including failure to protect against criminal or other third party interventions - was systemic.

¹¹ *Vedanta*, per Lord Briggs, paragraph 49, cited at para 25.

¹² At para 26.

In terms of the degree of direction, control and oversight, two key documents were relied on by the appellants, which had become available to them following the initial pleadings: the RDS Control Framework and the HSSE Control Framework. The former relates to corporate structure and provides for organisational units termed 'Businesses' and 'Functions'. Both creations are in fact directly accountable to RDS. In addition, RDS it was argued exercises control over the entirety of the Shell Group, including the Business and Functions – in some cases delegating authority. In that respect the CEO and executive group of RDS, it was argued, held responsibility for '...the subsidiaries' safe operation of their facilities and assets'.¹³ Take together Lord Hamblen observed that in the appellant's contention 'these demonstrate that RDS has deliberately structured the Shell Group in a way that enables RDS to direct, control and intervene in the management of subsidiaries' operations'.¹⁴ The Control Frameworks both were the means by which RDS promulgated a range of standards, manuals to ensure their correct implementation and guidance on technical practices, thus ensuring a means to supervise and enforce compliance with overall group requirements. The latter HSSE Control Framework document only became available because the Court of Appeal had ordered that it be disclosed during the hearing before it. Again the appellants' contention was that the detailed and prescriptive technical specifications on design and engineering of pipelines and the oversight of centralised RDS Corporate Affairs Security department in the Netherlands was indicative of the degree of control and integration. A number of witness statements of ex-employees of both RDS and SPDC and third party experts also lent apparent weight to the appellants' submissions. The respondents disputed the appellant's case.

The Appeal issues

As far as the appeal was concerned, there were two principal issues. First, whether the majority of the Court of Appeal had materially erred in law; and second, if so, whether the majority was wrong to decide that there was no real issue to be tried.

Lord Hamblen then set out summary conclusions of the three judgments from Court of Appeal decision.¹⁵ The differences that became apparent between the majority and minority were essentially those relating to interpretations of the evidence put before the court. This then informed three sub-questions, on whether the Court of Appeal had materially erred in law, as contended by the appellants, in its analysis of:

'(1) the principles of parent company liability in its consideration of the factors and circumstances which may give rise to a duty of care; and/or

(2) the procedure for determining the arguability of the claim at an interlocutory stage, as shown by its treatment of the threshold for what constitutes an

¹³ At para 44.

¹⁴ At para 45.

¹⁵ At paras 77-100.

arguable case, and by its approach to both contested factual issues and to the relevance and significance of likely future disclosure; and/or

(3) the overall analytical framework for determining whether a duty of care exists in cases of this type and its reliance on the *Caparo* threefold test'.¹⁶

The Court of Appeal was of the view that the judge at first instance had conducted a mini-trial, going further than a critical analysis of the evidence as was seen by reference to the fact he had made 'findings' in respect of it. The appeal from his decision, was 'essentially based on his erroneous approach in evaluating the evidence'.¹⁷ However, according to Lord Hamblen, in order to determine the appeal the Court of Appeal had also fallen into undertaking an evidential inquiry, and offered judgment on the weight of the evidence it considered.

On the second sub-question, as the Court of Appeal had been drawn into such a mini-trial itself, it had made determinations in relation to contested factual evidence that were inappropriate at the interlocutory stage. One such example was noted by Lord Hamblen in respect of the acceptance of evidence of an RDS witness 'and doing so in circumstances where there had been no opportunity for cross-examination and no RDS disclosure'.¹⁸ He preferred the dissenting approach of Sales LJ on the treatment of witness evidence that suggested that there could be documentation released through discovery that would have been useful to the claimant's case – in the sense that it did offer at least the prospect of supporting a contested point. In respect of the documentary evidence, the mini-trial approach had also led the Court of Appeal to make inappropriate determinations. Lord Hamblen illustrated the point observing that 'since the court had been making a decision on the evidence, it effectively had needed to conclude that the prospect of there being further relevant evidence on disclosure could and should be discounted'.¹⁹ He concluded that the relevance of future disclosure seemed to have been dismissed because of the mistaken view that an arguable case had to be demonstrated by virtue of the material currently available.²⁰

In addition, it was observed that the importance of internal corporate documents was well recognised and understood in cases that centred on negligence liability of a parent company for the acts of a subsidiary. The majority of the Court of Appeal had not referred to the importance of such documents and had not considered the authorities predating *Vedanta* on the point. The majority, it was determined, had fallen into error by appearing to have made an assumption that because their consideration of the high-level documentation did not provide evidence of RDS's control over SPDC's operations, other documents provided on disclosure would not be likely to do so either. That was not the correct approach, with Lord Hamblen stating that '[o]perational control is most likely to be revealed by documentation

¹⁶ At para 101.

¹⁷ At para 111.

¹⁸ At para 121.

¹⁹ At para 126.

²⁰ At para 127.

relating to operational matters. The appellants had no such documents and there had been no disclosure relating to such matters.²¹ As it was there had been limited disclosure by RDS, with documents, as noted above, only made available following instruction from the Court of Appeal. The production of those documents in the appeal illustrated the danger of seeking to determine issues in cases such as this without disclosure, seeing as both were of material significance. The point was concluded by Lord Hamblen noting that if ‘there been no appeal, the appellants’ claim would have been dismissed without consideration of either of them’.²²

Numerous other documents had been identified, which would arguably be material to the appellants case’, whereas the Court of Appeal had determined the issue summarily with the appellants only having had access to two of the internal corporate documents. On that basis, Lord Hamblen was of the view that the appellants had established the second sub-question on the material error of law.²³ He made limited reference to the third issue – that of the application of the *Caparo* test and the principles of parent company liability – and determined that there were errors made.²⁴

The second substantive appeal question, on establishing whether there was a real issue to be tried, was also upheld. Lord Hamblen did not consider that it had been established that ‘the averments of fact made in the particulars of claim should be rejected as being demonstrably untrue or unsupportable’.²⁵ Expressing his approval for the dissenting judgment of Sales LJ, he stated that both documentary (especially the RDS Control Framework and the RDS HSSE Control Framework) and witness evidence, combined with the probability of further disclosure meant that there was a real issue to be tried under the *Vedanta* routes 1 and 3. The very clear divergence of views in respect of the functional structure of RDS’s arrangements ‘clearly’ raised triable issues.²⁶ Thus, in conclusion, the Court of Appeal had been wrong to decide that there was no real issue to be tried.

Commentary

The Supreme Court’s *Vedanta* judgment in 2019 and the more recent Court of Appeal case concerning ship-breaking in March of this year have provided valuable insight into the English courts’ approach to such striking out attempts on the basis of jurisdiction.²⁷ The judgments have provided unequivocal statements of the conditions precedent to fulfilling the procedural aspects to pursue an out of jurisdiction claim. The clear statement of the interpretation of the civil procedure rules is helpful, as is the cautionary message about the courts avoiding being drawn into an assessment into the evidence, as opposed to confining themselves to a determination as to whether the threshold for a triable case has been reached.

In addition, the confirmation that the parent/subsidiary relationship, in the context of

²¹ At para 134.

²² At para 136.

²³ At para 140.

²⁴ At para 152.

²⁵ At para 153.

²⁶ At para 156.

²⁷ *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20; and *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 respectively.

imposing a duty of care on the former in respect of the activities of the latter, is not 'novel' and thus does not require a *Caparo* style approach seems unarguable. The affirmation of this, seemingly intuitive, position in the context of transnational corporations is significant however, and removes one further hurdle for a claimant, with the acknowledgement that such cases are just another common category where a duty of care will exist.

Shell's activities in the Niger Delta have been the focus of critical attention for decades, and some, but by no means all, of the many organisations that have sought to draw attention to the problems were noted by Lord Hamblen at paragraph 73 of the judgment. Activism, both local and global, has sought to bring the lived experience of the Delta's inhabitants, to a wider audience. Sometimes, this has succeeded; in other circumstances the publicity brought with it a very heavy and poignant cost, as with the state execution of a number of activists from the Ogoni nation in the 1990s.²⁸ It might be trite to note, at least to readers of this journal, that issues of poor environmental management and questionable attention paid to indigenous rights are a depressingly familiar corollary to the business of primary resource extraction by industrial heavyweights operating in less developed countries. It is a familiar path. Regardless, that familiarity does not provide relief, to those affected, or remediation of their degraded environment upon which they depend.

Of course, the instant case does not make any determination on any allegation of a breach of RDS' or SPDC's duty of care owed to the appellants. It does however offer the opportunity for that to be litigated. In that regard it is notable that earlier in the year, the substance, as opposed to procedural issues at issue before the Supreme Court in this case, was heard in the Netherlands. The Hague Court of Appeal held in favour of a group of Nigerian claimants against RDS and SPDC.²⁹ Shell and its subsidiary were held to be in breach of their duty of care in respect of a number of claimants. While the final settlement to be imposed by the Dutch court is awaited, it will potentially provide an interesting point of comparison for when the issues are inevitably, following the outcome of the instant case, tried in the English courts.

²⁸ The most publicised example being that of the writer and activist Ken Saro-Wiwa and eight other Ogoni advocates – a good account from Amnesty International is available here <https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/>

²⁹ The case is reported as *Four Nigerian Farmers and Milieudefensie v. Shell* ECLI:NL:GHDHA:2021:134, 29 January 2021, and has been informatively reported on by Lucas Roorda, on the Rights as Usual Blog <https://rightsasusual.com/?p=1388>