

The Supreme Court revisits corporate responsibility for environmental damage: *Okpabi v Royal Dutch Shell*

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16 February 2021

It was only in 2019 that the Supreme Court last provided authoritative guidance on the circumstances in which an English parent company might owe a duty of care in respect of the negligence of its foreign subsidiaries so as to found jurisdiction in England under the “necessary or proper party” jurisdictional ‘gateway’ in para. 3.1(3) of PD 3B to the CPR: see *Lungowe v Vedanta Resources plc* [2020] AC 1045. Whilst the Supreme Court had hoped that this might dispose of another appeal raising the same issue, that proved not to be the case and judgment was handed down in *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3 on 12 February 2021.

Okpabi provides important further guidance on how the English Court should address the parent’s potential liability at the stage when it usually first arises, on an interlocutory challenge to the English Court’s jurisdiction. The decisions in *Vedanta* and *Okpabi* also provide an interesting counterpoint to the recent decisions of Turner J in the *Fundão Dam Disaster case* [2020] EWHC 2930 and [2021] EWHC 146 (TCC).

The decision in *Okpabi*

The claimants in *Okpabi* are a group of over 40,000 Nigerian citizens who live in the Niger Delta region. They allege damage resulting from numerous oil spills allegedly caused by the negligence of the Shell Petroleum Development Company of Nigeria Ltd (“SPDC”), a Nigerian company. They also allege that SPDC’s English parent company, Royal Dutch Shell plc (“RDS”), breached a duty of care owed to them because it exercised significant control over SPDC’s operations. As indicated above, the claim against RDS was used to establish the jurisdiction of the English Court in respect of the claims against RDS and SPDC under para. 3.1(3) of PD 3B.

RDS and SPDC challenged the jurisdiction of the English Court on the basis that there was no real issue to be tried as between the claimants and RDS, the ‘anchor’ defendant in England. The defendants were successful before Fraser J and a majority of the Court of Appeal. Lord Hamblen JSC, giving the only reasoned judgment of the Supreme Court, disagreed with the Courts below and preferred the dissenting view of Sales LJ in the Court of Appeal.

Like the parties in *Vedanta* before them, the parties in *Okpabi* adduced vast quantities of evidence directed to the question of whether the parent controlled or supervised the subsidiary’s operations. Over 2,000 pages of witness statements were filed, along with 6 bundles of exhibits, comparable to the 9,000 pages of evidence in *Vedanta*. From the perspective of the parties, in circumstances where the jurisdictional fight is a key stage and bearing in mind the likely (enormous) costs of a substantive trial in litigation of this type, this approach may well be understandable. The Court in *Okpabi*, however, was unimpressed and reiterated the need for proportionality that had been emphasised in *Vedanta* (paras. 20-23). Given this firm steer, litigants can expect greater judicial resistance in future to large volumes of evidence being filed at this interlocutory stage.

In light of the Court’s decision in *Vedanta*, the claimants in *Okpabi* had recast their legal argument, contending that a duty of care on the part of the parent arose by reference to what they described as “*Vedanta routes (1) to (4)*”, namely: (1) taking over management or joint management of the relevant activity; (2) providing defective safety/environmental advice or policies which were implemented as a matter of course by the subsidiary; (3) promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation; (4) holding out that a particular degree of supervision and control is exercised over the subsidiary (para. 26).

Whilst Lord Hamblen considered these “*routes*” to represent convenient headings for the purposes of analysis, he emphasised that they should not be understood as supporting any special or separate parent/subsidiary duty of care tests (para. 27). As the Court made clear in *Vedanta*, there is no special test applicable to the tortious responsibility of a parent company for the activities of its subsidiary (see paras. 49 and 54) and nor is it appropriate “*to shoehorn all cases of the parent’s liability into specific categories*” (para. 51).

Ultimately, the claimants’ case in their pleadings was that RDS exercised a high degree of control, direction and oversight

in respect of SPDC's pollution and environmental compliance and the operation of its oil infrastructure. The claimants further contended that the exercise of such direction, control and intervention was borne out by RDS's promulgation of extensive and detailed mandatory policies, standards and technical requirements. Their case on appeal was that the Court of Appeal had materially erred in law when assessing that case. In particular, the claimants contended that the Court of Appeal had erred in its analysis of the procedure for determining the arguability of the claim at an interlocutory stage, and by its approach to both contested factual issues and to the relevance and significance of likely future disclosure.

The Supreme Court considered it clear that that error had been made out. The nature of the issue before the court in such cases is such that there is an obvious risk of a court embarking upon a mini-trial based on the evidence before it. In Lord Hamblen's judgment, both the judge at first instance and the majority of the Court of Appeal failed to appreciate this risk and were drawn into conducting a mini-trial, thereby deciding issues that were not suitable for determination on a jurisdiction challenge (para. 102).

The proper approach was instead to consider whether there was a triable issue by reference to the claimant's pleaded case (para. 103). In a key passage at para. 107, Lord Hamblen expressed the view that *"the factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupported"*. The Court should not make *"determinations in relation to contested factual evidence that [are] not appropriate on an interlocutory application"* (para. 120), principally because there was no opportunity for cross-examination (para. 121), the defendants' disclosure was incomplete and likely to be relevant to operational matters (para. 134) and it was disproportionate to do so at this stage (para. 20).

The Supreme Court went on to provide further guidance on when a duty of care might arise. Whereas the majority of the Court of Appeal appeared to have regarded proof of the exercise of control by the parent company as being critical, the question of control is "just a starting point" of an enquiry (identified by Lord Briggs in **Vedanta**) into whether the parent company *"availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations"* (paras. 146-147). There is no generalised assumption or presumption one way or another as to a parent company's duty of care (para. 150), and the majority of the Court of Appeal had also erred in suggesting that, as a matter of general principle, group-wide policies could not in and of themselves, found a duty of care (para. 145).

Having identified these errors of law, the Supreme Court briefly considered the question whether there was a triable issue that RDS owed a duty of care to the claimants. Lord Hamblen adopted the analysis of the claimants' pleaded case provided by Sales LJ below in holding that the claimants had established a triable issue and thus jurisdiction over RDS and SPDC. Particularly relevant were internal RDS documents which showed that the company was organised along 'Business' and 'Function' lines that cut across company lines (paras. 154-156), and witness evidence suggesting the potential for further disclosure supporting **Vedanta** routes (1) and (3), i.e. taking over management of the relevant activity and/or promulgating and ensuring the implementation of group-wide policies.

Finally, it is worth noting that the claimants were criticised for their *"laissez-faire"* attitude to the pleadings, which they chose not to update following the exchange of evidence and which Lord Hamblen identified as contributing to the lower courts' error (paras. 105-107).

The wider picture

As with **Vedanta** before it, the Supreme Court's judgment in **Okpabi** will likely result in an increase in the number of overseas claimants seeking redress before the English Court from a parent company in respect of loss and damage occasioned overseas by the acts or omissions of its foreign subsidiary.

It was very clear before **Okpabi** that, whilst the legal separation of companies is not itself sufficient to avoid parent company liability, it is equally the case that the parent/subsidiary relationship is insufficient in and of itself to impose tortious liability. The key question is whether, and the extent to which, the parent company has actually taken over, intervened in, controlled, supervised or advised the management of the relevant operations. That can be demonstrated

in any number of ways, there being no bright-line rules.

Okpabi is significant for the Supreme Court's criticism of the approach of the lower courts, warning against the conduct of "mini-trials" and the consideration, and weighing, of extensive (and contested) factual evidence at the jurisdictional stage. Whilst undoubtedly correct as a matter of principle, the practical effect will surely be to make it easier for claimants to cross the threshold stage, with the arguability of their case to be determined with reference to the pleadings (unless what is pleaded can be shown to be demonstrably untrue or unsupported). One can therefore expect that many more such cases are likely to reach the stage of a substantive trial (with the very significant concomitant time and cost implications).

It is also important not to lose sight of the fact that jurisdictional challenges in the context of parent company liability raise issues not only as to the 'merits' (i.e. does the parent owe a duty of care), but also other jurisdictional issues, such as whether or not England is the proper place in which to bring the claim, as required by CPR rule 6.37(3).

The 'proper place' question was not addressed by the Court in **Okpabi**, but featured prominently in **Vedanta**. The Supreme Court considered that, notwithstanding its conclusion there was a triable issue, Zambia, and not England, would have been the proper place for the proceedings in the ordinary course of events, given the location of the claimants, the alleged damage, the evidence and the subsidiary's personnel, and the fact that the Zambian courts were well-equipped to interpret the Zambian laws which would be applied.

Following the lower courts, however, there were two factors which persuaded the Supreme Court that the claimants in **Vedanta** would be denied access to justice if they were not permitted to serve the English proceedings on the subsidiary out of the jurisdiction, with the consequence that it was a proper case for service out. First, there was the fact that the claimants were living in poverty, could not obtain legal aid and would be prohibited from entering into conditional fee agreements under Zambian law. The second factor was the finding that the claimants would be unable to procure the services of a legal team in Zambia with sufficient experience to effectively manage litigation of the required scale and complexity.

The Supreme Court's decision in **Vedanta** may be contrasted with the recent decisions of Turner J in the **Fundão Dam Disaster** case arising out of the collapse of the Fundão Dam in Brazil in 2015 and in which claims were brought by multiple Brazilian claimants against two companies in the BHP Group (domiciled in England and Australia respectively).

Turner J struck out those claims as an abuse of process (and, in a judgment handed down on 29 January 2021, refused permission to appeal from his decision) in light of active concurrent proceedings in Brazil (to which the English-domiciled defendant had agreed to submit) and, significantly, the establishment of a compensation scheme in Brazil. Factually, therefore, the case was very different to **Vedanta**, in that the claimants fell far short of being able to establish that they would not be able to obtain substantial justice in Brazil (on the contrary, they had access to multiple routes of redress and many had in fact already received compensation in Brazil). That, together with the acute risk of irreconcilable decisions and the chaos that would result from a case management perspective, led Turner J to strike the claims out as an abuse of process.

It would therefore seem that, as well as a lowering of the 'merits' threshold in light of the decisions in **Vedanta** and **Okpabi**, one might also expect there to be an increase in claims by overseas claimants fighting against jurisdictional challenges on the basis that there is a real risk that substantial justice will not be obtained in the foreign jurisdiction. It is, of course, not at all unusual for foreign subsidiaries to be based in emerging markets in countries with less-developed or under-resourced judicial systems. **Vedanta** arguably already set a precedent in favour of claimants from such countries successfully resisting jurisdictional challenges on the grounds of substantial access to justice. Add to that the decision in **Okpabi** in terms of the proper approach to whether or not there is a triable issue, and an increase in potential claims would appear to be inevitable.

The challenge this poses for energy companies, in terms of how they structure the relationship between the parent and its subsidiaries, and how they conduct themselves both internally and externally, is clear (especially bearing in mind the emphasis placed in **Okpabi** on the importance of disclosure of internal company documentation). What is less clear is how those challenges are to be resolved and, in particular, how they are to be balanced with the myriad of other legal, financial, ethical, social and environmental duties and responsibilities to which such companies are subject. What can be said, however, is that with ever-increasing 'compliance' based regulation, and ever-increasing social, ethical and environmental

pressure on energy companies, especially those whose subsidiaries operate in poorer, less-developed countries, the risk of a claim being brought against the parent in respect of the acts or omissions of its foreign subsidiary is substantial and needs to be taken very seriously.

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Ben has a busy commercial practice, focussing on commodities and international trade, energy, shipping, insurance and conflict of laws. Ben has a busy energy practice encompassing a wide range of upstream, downstream and offshore construction disputes. He is recognised for his Energy work in the Legal 500 and is ranked as a leading junior by Chambers UK, Chambers Global and the Legal 500 for shipping and commodities.

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