ALLEN & OVERY

Okpabi: Supreme Court rules that Nigerian communities can sue Shell and its Nigerian subsidiary in England

Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC 3, 12 February 2021

The UK Supreme Court has ruled that the English courts have jurisdiction to hear a claim by over 40,000 Nigerian individuals against a UK-domiciled parent company and its Nigerian subsidiary in relation to adverse environmental and human rights impacts allegedly caused by the subsidiary. This much-anticipated judgment follows the Supreme Court's landmark 2019 decision in *Lungowe v Vedanta Resources plc.*, which confirmed the legal test that claimants must satisfy in order to establish a duty of care owed to them by a parent company in relation to the activities of its subsidiary. This new decision also provides an insight into the factors and circumstances which may give rise to such a duty of care and liability for a breach thereof.

Here we discuss the most salient points from the decision, what it means for the environmental and human rights policies and practices of British multinational companies, as well as the litigation strategies of potential claimants motivated to seek access to judicial remedies against multinationals in the UK.

Environmental and human rights claim against Shell and its Nigerian subsidiary

The appellants were the Ogale and Bille communities of Nigeria, comprising over 40,000 individuals. They sought damages in respect of oil spills allegedly caused by the Shell Petroleum Development Company of Nigeria Ltd (**SPDC**), a Nigerian registered company which operated a pipeline in the Niger Delta on behalf of a joint venture. SPDC is a Nigerian subsidiary of Royal Dutch Shell Plc (**Shell**), which is domiciled in the UK. The appellants claimed that the oil spills were caused by the negligence of SPDC, including by failing to protect its oil infrastructure against the risk of damage caused by the criminal acts of third parties.

The appellants sought to bring claims before the English courts against both SPDC and Shell for breaches of their duty of care to the appellants, as well as alleging the liability of SPDC under Nigerian law. The defendants challenged the jurisdiction of the English courts to hear these claims.

In proceedings brought prior to the end of the Brexit transition period, the English courts had jurisdiction over Shell, a UK-domiciled defendant, under Article 4.1 of the Recast Brussels Regulation. However, jurisdiction over a foreign-domiciled defendant, whom the claimants seek to join to a case against a defendant who is domiciled in England (the anchor defendant), is obtained by satisfying the so-called "necessary or proper party" gateway tests. One aspect of that test requires that there is *"a real issue to be tried, which means that the claims have a real prospect of success"* between the claimant and the English anchor defendant (in this case, Shell). The appellants therefore needed to show that it was at least arguable that Shell could be held liable for the alleged acts of its Nigerian subsidiary, SPDC.

At first instance, the court ruled that the appellants had failed to meet this test and concluded that it did not have jurisdiction over claims against SPDC as a necessary and proper party to the proceedings against Shell. On appeal, a majority of the Court of Appeal likewise held that there was no arguable case that Shell owed a duty of care to protect the appellants against foreseeable harm caused by SPDC.

The appellants sought permission to appeal, which was granted but stayed by the Supreme Court until after it issued the *Vedanta* judgment.

The main findings – arguable case that Shell owed a duty of care

Overturning the majority decision of the Court of Appeal, the Supreme Court unanimously held that the appellants did have an arguable case that Shell owed them a common law duty of care. The English courts therefore had jurisdiction to hear the claims against both SPDC and Shell. In reaching this conclusion, the Supreme Court made several important findings.

1. The documentary evidence – mini-trials inappropriate at the jurisdictional stage

The Supreme Court concluded that the Court of Appeal conducted a mini-trial that led it to adopt an inappropriate approach to contested factual issues and to the documentary evidence. The Supreme Court cautioned that, where the jurisdictional issue is whether there is a triable issue as against a defendant, judicial restraint must be observed to avoid mini-trials.

In this context, the Supreme Court castigated the parties for first swamping the courts with evidence, and then failing to update their pleadings to reflect that evidence. As a result, the Court of Appeal could not focus on whether the pleaded case disclosed an arguable claim, and was instead drawn into an evaluation of the evidence. This led to it making determinations in relation to contested factual evidence that were not appropriate on an interlocutory application.

In addition, the Supreme Court held that the Court of Appeal had erred in dismissing the relevance of future disclosure on the basis that a good arguable case has to be demonstrated on the material currently available. Instead, the Supreme Court endorsed the decision in Vedanta that *"the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue"*. The appellants had identified specific internal documents which were likely to be material to the claims made, including documentation that Shell and SPDC had been ordered to produce in related proceedings before the Dutch Court of Appeal. In other words, the lower courts had failed to give sufficient weight to internal corporate documents that were not yet available, but in due course might be provided on disclosure.

2. Establishing a duty of care – control and de facto management are two different things

The Supreme Court found that the Court of Appeal was wrong to analyse the case by reference to the threefold test for a duty of care set out in *Caparo v. Dickman*. It confirmed that, following Vedanta, the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence. It affirmed that whether a duty of care arises in a parent-subsidiary relationship depends on the extent to which, and the way in which it, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations of the subsidiary.

The appellants argued that Shell satisfied this test because it exercised a high degree of control, direction and oversight in respect of SPDC's pollution and environmental compliance, as well as the operation of its oil infrastructure. They claimed that Shell had deliberately structured the Shell group in a way that would enable it to direct, control and intervene in the management of subsidiaries' operations, including through mandatory policies, standards and technical requirements. The appellants relied on published Shell documents and corporate literature, such as Sustainability Reports, including in particular the following factors:

1. Shell's global Health, Security, Safety and Environment (**HSSE**) policy, which applied to all its subsidiaries and involved mandatory standards.
2. Shell's monitoring of its subsidiaries' compliance with mandatory standards set out in its HSSE policy as well as its Business Principles and Standards.

3. Shell's laying out of standards for all its subsidiaries' assets, facilities and infrastructure and its assumption of responsibility to ensure best practice was observed and unplanned oil spills were prevented.
4. Shell's establishment of a Corporate and Social Responsibility Committee to ensure compliance with minimum health, safety and environmental protection standards for its subsidiaries, responding to Shell's Board of Directors.
5. The fact that Shell's CEO and Executive Committee had overall responsibility for implementing HSSE standards and social performance for its subsidiaries. In addition, its executive remuneration scheme depended to a considerable extent on the sustainable development performance of SPDC.
6. Shell's control over its global oil spill response procedure, as well as specific areas of SPDC's business and operations, such as its security apparatus, pipeline replacement and divestment.
7. The fact that SPDC reported key performance indicators to Shell on a monthly basis, including asset maintenance, safety and the environment, and detailed business plans and budgets annually.
8. The fact that a number of individuals working for Shell played key roles in managing SPDC's business and operations.

Shell strongly disputed that these factors demonstrated that it exercised direction, control and oversight over SPDC, which made all relevant operational decisions itself. Shell argued that SPDC is financially independent and responsible for its own operations, including the implementation of group-wide standards, and is more knowledgeable and experienced regarding oil operations in Nigeria than Shell.

Further submissions were made by interveners in the proceedings, which urged the court to consider international and domestic standards regarding the responsibilities of multinational business enterprises in relation to human rights and environmental impacts.

The Supreme Court determined that the Court of Appeal had erred in law by focusing inappropriately on the issue of control. It emphasised that *"control is just the starting point"* and, in a sense, all parents control their subsidiaries. However, control and *de facto* management of certain activities are two different things. Nevertheless, control gives the parent the opportunity to get involved in management, and *"the issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here, the pipeline operation)"*.

The Supreme Court also noted that a duty of care could arise even in the absence of the exercise of control. This could happen, for example, if a parent publicly holds itself out as exercising that degree of supervision and control of its subsidiaries, but does not actually do so.

3. Arguable case for a duty of care due to management and group policies

The Supreme Court concluded that the appellants had an arguable case that Shell owed them a common law duty of care by: (i) taking over the management or joint management of the relevant activity of SPDC; and/or (ii) promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by SPDC. It found that the appellants' pleaded case and reliance on Shell's control and HSSE frameworks were sufficient to raise a real issue to be tried, which was further bolstered by witness evidence and the real prospect of relevant disclosure being provided.

The Supreme Court further referred to the relevance of the management framework of the Shell group, which was organised along business and functional lines involving significant vertical delegation. The appellants argued that the group businesses were carried on as if they were a single commercial undertaking. However, the Supreme Court noted that the way in which the organisational structure worked in practice, and the extent to which the delegated authority of Shell was involved and exercised in relation to decisions made by SPDC, were very much a disputed and triable issue, such that proper disclosure would be important.

COMMENT

The Supreme Court's judgment in Okpabi confirms the importance of several holdings in Vedanta and provides further guidance about their application.

Together, these two cases set out what is required of claimants seeking to establish an arguable case for the existence of a duty of care owed to them by a parent company in respect of the actions of its subsidiary. It is clear that the mere existence of a parent-company relationship will not suffice to establish the jurisdiction of the English courts over claims regarding activities undertaken by foreign subsidiaries abroad. Rather, the focus will be on the extent of the parent company's involvement with the management of the foreign activities in question.

However, the difficulty for English domiciled parent companies and their foreign subsidiaries seeking to dispute jurisdiction in claims such as this, will be in showing the absence of such involvement sufficiently clearly without bringing evidence of their own to dispute the facts alleged by claimants. If they introduce such evidence at the jurisdictional stage, they risk demonstrating that there is an issue to be tried and engaging in the sort of "mini-trial" that the Supreme Court so clearly ruled out.

Both judgments also provide examples of the types of factors and evidence that may indicate the existence of a duty of care. The Supreme Court placed a particular emphasis on the existence of a group-wide sustainability report in Vedanta and group-wide safety and environmental policies in Okpabi, and steps purportedly taken by the parent companies to ensure their implementation by subsidiaries.

Companies considering how to react to the Supreme Court's judgments in Vedanta and Okpabi should remember that these decisions on jurisdiction tell only part of the story about the potential liability of parent companies for alleged adverse impacts by their foreign subsidiaries. Even if the claimants are able to establish that the parent companies owed a duty of care, no finding of negligence will be made unless it can be shown that the parent company breached that duty by failing to meet the relevant standard of care, causing harm to the claimants.

The courts in the UK have yet to rule on the merits of such a case. However, the relevant standard of care in negligence cases is generally that of a reasonable and prudent company operating in the same industry. What is regarded as "reasonable" ordinarily will take into account, among other things, industry codes of practice; and a company's own policies and procedures (although a court may determine that industry or company standards are insufficient or even negligent).

In short, compliance with the very same policies and practices that may give rise to a duty of care in accordance with the UK Supreme Court's holdings in Vedanta and Okpabi, may, if they are deemed to be reasonable and reflect common practice, satisfy the applicable standard of care. That would in turn prevent a finding of negligence, even where claimants have been harmed. Conversely, the absence of company policies and procedures will not prevent a defendant's conduct from being judged against industry standards, and that very absence may itself be regarded as evidence of a failure to meet the required standard.

The prospect of avoiding liability is one among a number of good reasons for companies to adopt policies and practices that reflect international standards and recommendations on best practice for responsible conduct, including the need to carry out effective due diligence to identify and address their own and their subsidiaries' adverse impacts on human rights and the environment. Impending regulation, at least in the EU, where the European Commission is expected to propose a new directive mandating that companies conduct due diligence with respect to such impacts in their own operations and value chains in the coming months, is another good reason. Shareholder and stakeholder expectations are another.

In the wake of the Vedanta and Okpabi judgments, it is clear that companies today need to step up their human rights and environmental due diligence – which means identifying, avoiding, mitigating and addressing their direct or indirect impacts – and not retreat from doing so. The risks – reputational, financial and legal – associated with not carrying out such due diligence are simply too high.

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