

# Parents beware – environmental claims against Shell Plc for its subsidiary’s actions in Nigeria

On 27 January 2023, 11,317 individuals and 17 institutions from the Ogale community in Nigeria filed claims against Shell Plc (**Shell**) for its alleged role in oil spills in the Niger Delta. The significance of this filing following recent decisions of the UK Supreme Court cannot be overlooked. More broadly, the claims bring into focus the potential liability of parent companies for the activities of their subsidiaries, particularly as regards environmental, health and human rights impacts.

In this bulletin we provide context to the claims, and highlight potential repercussions for multinational corporations with subsidiaries operating globally.

## A long road

On 12 February 2021, the UK Supreme Court ruled, in *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 (*Okpabi UKSC*), that the English courts had jurisdiction to hear a claim by over 40,000 Nigerian individuals against Shell, a UK-domiciled parent company, and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (**SPDC**), in relation to alleged environmental and human rights impacts caused by SPDC. The UK Supreme Court reached this determination on the basis that the appellants had a good arguable case that Shell owed them a common law duty of care.

The claims were then remitted to the High Court. In *Okpabi v Royal Dutch Shell* [2022] EWHC 989, the High Court declined to grant a group litigation order, and directed each individual claimant to specify additional details to formulate a complete cause of action for the defendants to respond. Following this, on 27 January 2023, the Ogale claimants filed their group register at the High Court.





The claims consist of the:

- (1) 'Ogale Individual Claims' and the 'Bille Individual Claims': compensation for individual loss of livelihood; and
- (2) 'Ogale Community Claim' and the 'Bille Community Claim': representative actions against Shell to secure the clean-up and remediation of, as well as compensation for, communally owned property damage.

The claims are brought against both Shell and SPDC, though pursuant to different causes of actions. The claims against Shell are based on common law negligence as well as actions under the Nigerian Constitution and the African Charter. The legal claims against SPDC are brought pursuant to actions under Nigerian statutory law, the Nigerian Constitution and the African Charter.

Since the UK Supreme Court ruling in *Okpabi UKSC*, Shell has filed its legal defence, arguing that:

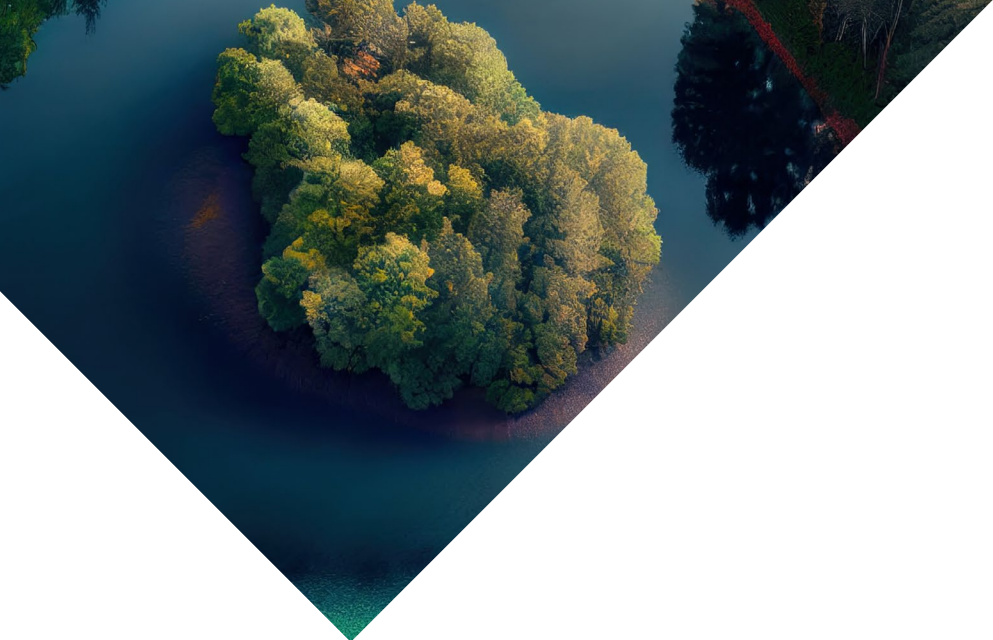
The Bille and Ogale communities have no legal standing to enforce a clean-up of the oil spills against Shell – only Nigerian regulators have that legal authority

Many of the spills took place more than five years before the claims were brought and the communities are therefore time-barred from seeking compensation for those spills

Shell cannot be held accountable for any spills caused by illegal 'bunkering' of its pipelines and

On the evidence, despite the findings in *Okpabi UKSC*, Shell cannot be liable for any pollution arising from SPDC's operations

The ruling in *Okpabi UKSC* follows an earlier decision in ***Vedanta Resources PLC and another v Lungowe and others [2019] UKSC 20 (Vedanta)***, in which the UK Supreme Court provided the test for determining whether a duty of care arises in a parent-subsidary relationship, being 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 of the subsidiary. In *Vedanta*, the Court held that a claim for negligence and breach of statutory duty against a Zambian mining company and its English parent could be heard by the English courts.



## Broader significance

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Despite the long-running history, there is likely still some way to go before we have a full hearing of the substantive issues in the claims against Shell. A full trial is unlikely to take place until at least 2024.

In both *Okpabi UKSC* and *Vedanta*, the UK Supreme Court placed particular emphasis on the existence of group-wide documents and steps purportedly taken by the parent companies to ensure their implementation by subsidiaries. In *Vedanta*, the Court determined that a sustainability report evidenced that Vedanta assumed responsibility for the maintenance of proper standards of environmental control over its subsidiaries' activities, including implementation of standards by training, monitoring and enforcement. In reaching its decision, the UK Supreme Court referenced the findings of the UK Court of Appeal in *Chandler v Cape* [2012] EWCA Civ 525, which found that a parent company can incur a common law duty of care to persons harmed by the activities of one of its subsidiaries. In *Okpabi UKSC*, Shell's Health, Security, Safety and Environment policy, which applied to all of its subsidiaries and set out mandatory standards, and Shell's monitoring of its subsidiaries' compliance with these standards, contributed to the Court's conclusion that there was a real issue to be tried.

It is evident that similar claims against parent companies may also be brought in respect of other issues such as climate change, human rights and supply chain impacts. This comes at a time when courts across multiple jurisdictions are being tested as to how far they will adapt longstanding principles of liability to more recent concerns over climate and human rights.

More broadly, we are also starting to see cases designed to test the boundaries of directors' duties as regards climate. On 9 February 2023, a filing was made against Shell's 11 Board directors in the High Court of England and Wales concerning an alleged failure to manage the risks posed to the company by climate change. Notably, the action appears to have received support from institutional shareholders in Shell. The claim, which alleges that the directors have breached legal duties under the UK Companies Act by failing to adopt and implement a Paris Agreement-aligned energy transition strategy, presents a potential opportunity for the court to expound on the nature and scope of directors' duties in the context of the energy transition. The High Court will now determine whether to grant permission to proceed with the claim.

Whilst there is much focus on the wave of regulatory developments across jurisdictions seeking to drive decarbonisation and supply chain management through multiple policy tools, the role of the courts in the transition is coming into focus. We can expect to see a growing number of claims which seek to impose liability on parent companies for alleged environmental and human rights impacts, and attempts to be more explicit about directors' duties on these issues.

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