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UK: Supreme Court decides that mass tort claim against UK parent company arising from subsidiary's activities is arguable, and criticises Court of Appeal's approach

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In Okpabi v Royal Dutch Shell [2021] UKSC 3, the UKSC has allowed an appeal against a Court of Appeal ruling that a tort claim against a parent company for environmental damage allegedly caused by one of its subsidiaries was not arguable. In particular, the Court of Appeal made significant procedural errors in assessing this.

Coupled with the UKSC's earlier decision in Vedanta, the case may further increase the litigation risk that UK domiciled parent companies face before the English courts as, at the jurisdiction stage, arguability will largely be assessed on the basis of the claimants' pleaded case.

The background to *Okpabi*

Okpabi concerns claims brought in the English courts against Royal Dutch Shell Plc ("**RDS**") and a Shell Group company, Shell Petroleum Development Company of Nigeria Ltd ("**SPDC**"), by local communities affected by oil in the Niger Delta. RDS is a UK Plc and the ultimate holding company in the Shell Group. SPDC is a Nigerian incorporated subsidiary in the Shell Group which carries on oil exploration and production activities in Nigeria.

The claimants' case in respect of RDS was that it owed them a duty of care for alleged acts/omissions committed by SPDC leading to the situation in the Niger Delta. In common with a number of recent mass tort claims in England, this issue was before the court as part of a challenge to the court's jurisdiction. In particular, the basis upon which the claimants sought to establish the English court's jurisdiction over SPDC[1] required, as one component, there to

[1] CPR PD6B 3.1(3).

be a real issue between RDS and the claimants.[2] So if there was no real issue as between the claimants and RDS, the claim against SPDC (and RDS) would fall away.

Okpabi: The alleged duty of care

In *Vedanta*,[3] the UKSC emphasised that cases concerning the liability in negligence of parent companies for their subsidiaries were not some distinct category but were to be determined on ordinary, general principles regarding the imposition of a duty of care. So, in that context, whether a duty of care arises "*depends on 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 (including land use) of the subsidiary*." (see *Vedanta* at [49])

In *Okpabi*, permission to appeal to the UKSC was initially deferred pending that decision and was then granted on the basis that, although *Vedanta* had adequately clarified the law, it would be unfair to deny permission in *Okpabi* as it could have been the lead case (the Court of Appeal hearings in the two having been broadly contemporaneous).

Before the UKSC, the claimants in *Okpabi* had therefore refined their arguments on the duty of care to be more in line with *Vedanta*. They identified four routes to its existence.[4] In summary, that RDS: took over the relevant management of SPDC, provided defective advice/policies which SPDC implemented, promulgated group environmental policies and took steps to ensure their implementation at SPDC, or held out that it exercised control of/supervised SPDC.

In support, the claimants' case relied on a number of factual matters; the detail of which is set out in full at [29-73].

In summary, however, there were a number of general points made such as: RDS having a global HSSE policy applicable to group companies, RDS's monitoring of those standards, and a degree of involvement by its officers/board in providing that oversight [29]. Then, there were more specific issues relating to SPDC such as RDS's executive remuneration scheme being linked to SPDC's sustainable development performance, regular reporting by SPDC to RDS, RDS setting specific standards for dealing with oil spills and having control over oil spill response, RDS having control over specific areas of SPDC's business and the fact that some individuals working for RDS had key roles at SPDC [30].

Further, in addition to witness evidence as to the relationship between RDS and SPDC [60-69], there were two internal documents upon which particular reliance was placed. The first was a "Control Framework" which, in overview, provided evidence that whilst formal, legal, decisions were effected by the relevant corporate entities, wider decision making within the group was

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[2] This is because the claimants were relying on RDS, as a company domiciled within the jurisdiction, as an "anchor" defendant (to which SPDC might be joined as a necessary and proper party).

[3] [2019] UKSC 20. Click here to read more.

[4] See paragraph [26]. Any further references in square-brackets are to paragraph numbers in the UKSC's judgment in *Okpabi*.

organised by broader "business" and "function" streams which were accountable to RDS [37-51]. Second was a "HSSE Control Framework" which was relied upon to evidence that RDS set specific and granular requirements in the health & safety field [52-58].

Although the claimants' legal case had been recast before the UKSC, the factual material was the same as that before the Court of Appeal. In the Court of Appeal, the majority's view [summarised at 76-93] was, generally speaking, that none of it went beyond showing the existence of centralised, group level standards as opposed to any specific degree of control over SPDC. They therefore held that the case was unarguable - so no real issue between the claimants and RDS.

Where the Court of Appeal went wrong; arguability before the UKSC

The UKSC overturned the Court of Appeal's decision. The principal basis for this was that it had erred in its procedural approach to assessing the arguability of the claimants' case.

At the outset, Lord Hamblen, who gave judgment for the UKSC, laid down a strong indication of the direction of travel. At [20-23] he emphasised that in assessing whether, at the jurisdictional stage, there is a triable issue against a defendant, a mini-trial must not be conducted. The 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. Unless (exceptionally) they are demonstrably untrue it would not be appropriate for the defendant to dispute the facts through evidence of its own.

In his view, the Court of Appeal (and the first instance judge) fell into that exact error. Looking at the decision-making process of the majority, Lord Hamblen concluded that they had made evaluations of, and judgments on, the *evidence* before them and based their conclusion regarding arguability on the same [110-119]. Lord Hamblen then illustrated why such an approach was inappropriate. On factual witness evidence it meant, for example, that the claimants' evidence was effectively rejected without cross-examination of the other side's [120-125]. On documentary evidence, it led the Court of Appeal to take too restrictive an approach to the possibility of relevant material being provided by disclosure, and to effectively discount that possibility out of hand. In that respect they should have asked whether there were reasonable grounds for believing that disclosure may materially add to the relevant evidence. And that would have been the case; the importance of internal documents to this type of case being well documented, and there being numerous instances in the claimants' case and material before the court providing signposts to the potential for such documentation to exist [126-140].[5]

[5] For completeness, the claimants, as additional points of appeal, pointed out flaws in the Court of Appeal's reasoning concerned with when a duty of care may arise in such cases; and in particular issues such as a tendency in that judgment towards an assumption that a duty of care could not arise for simply promulgating group standards, as well as placing an emphasis on *control* of the subsidiary. This was all clearly inconsistent with the UKSC's approach in *Vedanta* and at [140-152] Lord Hamblen repeats the key propositions of law from that case to illustrate the same (although, having found that the Court of Appeal had erred in the manner discussed above, this was not, as he acknowledged, strictly necessary for his decision).

Lord Hamblen then proceeded to assess whether the claimants' case *did* raise a real issue to be tried [153-159]. In that respect he found that their pleaded case, fortified by the points made in relation to the two internal documents discussed above, did establish that there were real issues to be tried in relation to the degree to which RDS may have taken over the management of SPDC, or promulgated policies and secured their implementation. Although sufficient in itself, he regarded that conclusion to be further supported by the claimants' witness statements, the real prospect of relevant disclosure, and the real dispute over how the vertical structuring of the Shell Group into "businesses/functions" worked in practice – which clearly raised a triable issue.

Comment and conclusions

Stakeholder expectations in relation to the environmental and social impacts of business operations at home, abroad and in supply chains continue to rapidly evolve. Calls at EU level for new laws regarding corporate accountability in this area are one manifestation of this. The recent, and frequent, claims being brought against parent companies in the UK are another.

Whilst a somewhat procedural decision, *Okpabi* is likely to have significant consequences on such litigation. Everything will depend on the facts and corporate structure before the court, but, in general, the approach of the UKSC will mean that parent company defendants in such cases can anticipate a tougher task in seeking to have such claims struck out on the basis that they are not arguable. *Okpabi* is a clear message not to prejudge factual issues at an inappropriate stage. Particularly where the substantive law of the tort is one which focusses on the actuality of the parent/subsidiary relationship (as *Vedanta* emphasises is the case under English law)[6] then this clearly provides litigation opportunities for claimants to push cases towards fuller disclosure and, potentially, a trial.

That being said, these cases have come at a time of countervailing litigation developments in the UK. Jurisdictionally, both *Okpabi* and *Vedanta* (having been instituted before the end of the EU/UK Transition Period) fall under the EU Law regime under which the ability of the English courts to decline jurisdiction over a UK domiciled parent company is significantly circumscribed. For new cases (and insofar as the UK is not permitted to re-accede to the Lugano Convention) that will not be the case so, for example, *forum non conveniens* arguments become available to remove the action against the UK parent.[7] Further, in another recent case, the English court robustly deployed abuse of process arguments to a claim with little apparent connection to England.[8] Perhaps the net result for both sides of these disputes may be a

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[6] In the international tort context, issues of applicable law will often arise, and it may be that a different law, under which a different approach, or causes of action, applies. In *Okpabi* it was agreed that English law could be applied as the other candidate, Nigerian law, would take the same approach [7].

[7] For a past example see ***Lubbe v Cape*** [2000] UKHL 41. In such cases these arguments will also be available vis-a-vis claims against the local subsidiary; this was so even under the EU Law regime insofar as that subsidiary was domiciled outside the EU (which explains the UKSC's reference to *Okpabi* potentially being remitted to the High Court for determination of further jurisdictional issues [14,160]).

[8] See ***Municipo di Mariana & others*** [2020] EWHC 2930.

change in the focus of jurisdictional battles to come, rather than a reduction in frequency.

Click here for a copy of the judgment.

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