SLAUGHTER AND MAY/

PARENT COMPANY LIABILITY BACK IN THE SUPREME COURT

Okpabi & Others v Royal Dutch Shell PLC & Another

Part of the Horizon Scanning series

The English courts have become a popular destination for foreign claimants seeking damages from UK-domiciled parents for the alleged wrongful actions of their overseas subsidiaries. A new judgment from the Supreme Court gives useful guidance on the application of 2019's landmark judgment in *Lungowe v Vedanta* and may further embolden claimant lawyers and funders – but this story is far from over.

Introduction

On 12 February, the Supreme Court handed down its judgment in Okpabi & Others v Royal Dutch Shell plc & Another, a high-profile appeal which provides important guidance on the proper approach to jurisdictional challenges and the potential liability of parent companies for damage caused by the activities of their subsidiaries.

The litigation was started in 2015 by some 40,000 Nigerian citizens affected by pollution caused by oil spills in the Niger Delta. They made claims in negligence against the Nigerian company which operated the relevant oil infrastructure ("SDPC") and Royal Dutch Shell plc ("RDS"), SDPC's parent company and the Shell group's holding company.

RDS applied to have the claims against it struck out on the basis that there was no arguable claim that it owed the claimants a duty of care. If that argument had succeeded, the basis for the English court's jurisdiction over SDPC would have fallen away too and the claims against both could not have been continued. Overturning the lower courts, the Supreme Court decided that the claimants did have an arguable case against RDS, meaning the claims – which are still at an early stage – can now proceed.

The decision in Okpabi applies and illustrates the guidance given by the Supreme Court two years ago in Lungowe v Vedanta, a landmark judgment on similar facts which touched on the circumstances in which a parent may assume a duty of care to those affected by the operations of a subsidiary.

The decision in Vedanta

In Vedanta, the claimants were individuals allegedly affected by toxic emissions from a Zambian copper mine operated by a local subsidiary of Vedanta Resources plc, a UK-incorporated holding company. The Supreme Court held that the claim raised a serious issue to be tried and should be allowed to continue in the English courts. The following general points were made:

1. A parent and its subsidiary are separate legal persons each with responsibility for their respective activities. Accordingly, a parent does not automatically incur a duty of care to those affected by the activities of a subsidiary. Conversely, there is no principled reason why a parent may not, in appropriate circumstances, assume a duty of care.

2. A parent will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of negligence are satisfied in the particular case.

3. In the context of parent/subsidiary relationships, 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 of the subsidiary.

It would have been for the High Court to determine whether, in fact, Vedanta Resources plc owed a duty of care to the claimants but in January this year, before the case could go to trial, the parties

announced a settlement on confidential terms without any admission of liability by the defendants.

Lessons from Vedanta and Okpabi

The decisions in *Vedanta* and *Okpabi* are of obvious interest to multinational groups with UK-incorporated parent companies. But they contain no bright-line or exhaustive guidance on when a parent will come under a duty of care to those affected by the operations of subsidiaries.

In large part that is because in neither case was the court deciding whether or not the parent company in question had actually come under a duty of care. Instead the court considered only limited evidence and documentation in order to decide the preliminary question of whether such a claim was properly arguable in the English courts. The summary nature of the judgments should be kept in mind when trying to apply them to new and necessarily individual circumstances. Nevertheless, the Supreme Court cited or approved the following as examples of situations in which a parent could, potentially, incur a duty of care to third parties affected by the operations of subsidiary:

A. Where a parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's management.

B. Where a parent takes active steps, by training, supervision and enforcement, to see that policies and guidelines are implemented by its subsidiaries.

C. Where a parent has given relevant advice to the subsidiary about how it should manage a particular risk.

D. Where a parent publishes materials in which it holds itself out as exercising control and supervision over its subsidiaries (even if, in fact, the parent did not exercise that degree of control or supervision).

E. Where a parent merely promulgates group-wide policies and guidelines, a duty of care could still arise in certain circumstances, for example where those guidelines contain systemic errors which, when implemented as a matter of course by subsidiaries, cause harm to third parties.

F. Where a group has implemented a vertical corporate structure whereby individual subsidiaries are organised into cross-group businesses, each of which is accountable to a senior executive who is in turn accountable to the CEO of the parent company, and that structure is used to exercise significant control over subsidiaries.

Global litigation risk

Will the judgment in *Okpabi* open the floodgates for a wave of further such claims in the English courts? Not necessarily: post-Brexit changes in English law will, for the moment, make it easier for UK-incorporated defendants to proceedings with a foreign focus to argue that any litigation should be conducted in the relevant foreign court, not England. But that doesn't eliminate litigation risk, so much as move it (this has always been an important consequence of any successful attempt by a defendant to argue that a claim should not be brought in England – it may simply be brought elsewhere instead.)

This highlights what has in any event always been an issue in these types of international disputes: the relevance and importance of foreign law and the role and expectations of foreign regulators and courts.

What it means for corporates

Parent companies will naturally be keen to manage their potential exposure to litigation, but the breadth of circumstances in which a duty of care could arise will often make it unrealistic, and even self-defeating, to make that aim the guiding principle in the way a group is structured and run.

Multinational groups, particularly in perceived higher-risk sectors and/or geographies, will seek to structure their operations in a way that meets the demands and expectations of many stakeholders. A holistic approach which recognises the risk of parent company liability but balances it against other imperatives may be a more effective way of preventing events that can lead to litigation from

happening in the first place – and managing them effectively when they do.

Slaughter and May is a market-leader in complex commercial litigation with particular expertise in large group actions, including those concerned with sustainability and wider ESG matters, and issues of parent/subsidiary liability. We are instructed in some of the largest proceedings currently before the courts and the Competition Appeal Tribunal.

This briefing is part of the Slaughter and May Horizon Scanning series

Click here for more details or to receive updates as part of this series. Themes include Beyond Borders, Governance, Sustainability & Society, Digital, Navigating the Storm and Focus on Financial Institutions. Navigating the Storm explores whilst a vaccine appears to be on course to help solve the health emergency that the pandemic presents, economic and other challenges remain. Navigating those challenges over the coming months will be key areas of focus for many businesses.

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