12 February 2021

PRESS SUMMARY

Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)
[2021] UKSC 3
On appeal from [2018] EWCA Civ 191

JUSTICES: Lord Hodge (Deputy President), Lady Black, Lord Briggs, Lord Kitchin, Lord Hamblen.

BACKGROUND TO THE APPEAL

This appeal concerns the jurisdiction of the court over claims in tort involving a defendant foreign company, where jurisdiction is sought to be founded on an alleged common law duty of care owed by a UK domiciled parent company. A similar issue was addressed in the recent Supreme Court decision of *Lungowe v Vedanta Resources plc* [2019] UKSC 20, which is very relevant to both the procedural and the substantive issues raised on this appeal.

The appeal concerns two sets of proceedings, the Ogale proceedings and the Bille proceedings. In both proceedings, it is alleged that numerous oil spills have occurred from oil pipelines and associated infrastructure operated in the vicinity of the appellants' communities in Nigeria, causing widespread environmental damage including serious water and ground contamination. The appellants' case is that the oil spills were caused by the negligence of a Nigerian registered company named The Shell Petroleum Development Company of Nigeria Ltd (**"SPDC"**), the second respondent in these proceedings, which operates the pipeline and infrastructure under a joint venture. SPDC is a subsidiary of the first respondent, Royal Dutch Shell Plc (**"RDS"**), a UK domiciled company and the parent company of the multinational Shell group. The appellants contend that that RDS owed them a common law duty of care because it exercised significant control over material aspects of SPDC's operations and/or assumed responsibility for SPDC's operations, which allegedly failed to protect the appellants against the risk of foreseeable harm arising from SPDC's operations.

On 26 January 2017, the High Court held that although the court had jurisdiction to try the claims against RDS, the claims did not have a real prospect of success and, as a consequence, the conditions for granting permission to serve the claim on SPDC as *"necessary or proper party"* to the claims against RDS for the purposes of the jurisdictional gateway in paragraph 3.1(3) of Practice Direction 6B was not made out. Accordingly, orders were made setting aside service of the claim forms on SPDC and striking out the appellants' statements of case insofar as they related to RDS.

After a three-day hearing, the Court of Appeal dismissed the appellants' appeal on 14 February 2018. Whilst it was found that the High Court judge had erred in certain respects in his approach to the evidence, the majority of Court of Appeal reached the same conclusion that there was no arguable case that RDS owed the appellants a duty of care. Sales LJ dissented, concluding that there was a good arguable case that RDS did owe the appellants such a duty.

The appellants' application for permission to appeal was deferred by the Supreme Court until after its judgment in *Vedanta*. Following that judgment, permission was granted. This appeal raises two principal issues: (i) whether the Court of Appeal materially erred in law; and (ii) if so, whether the majority was wrong to decide that there was no real issue to be tried.

JUDGMENT

The Supreme Court allows the appeal. Lord Hamblen gives the lead judgment, with which Lord Hodge, Lady Black and Lord Briggs agree.

REASONS FOR THE JUDGMENT

Proportionality

The Supreme Court reiterates the importance of proportionality in relation to the jurisdiction issues, as previously emphasised in *Vedanta* and *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337. The analytical focus should be on the particulars of claim, or witness statement setting out the details of the claim, and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. The filing of large quantities of evidential material is inappropriate. In the present case there were numerous witness statements and files of exhibits, running to over 2000 pages of evidential material **[20]-[23]**.

Issue (i) – Material error of law

The Court of Appeal materially erred in law in that it was drawn into conducting a mini-trial which led it to the adoption of an inappropriate approach to the contested factual issues and to the documentary evidence. This was contrary to the guidance provided by the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 and the Supreme Court in *Vedanta* **[101]-[119]**. Instead of focusing on the pleaded case and whether that disclosed an arguable claim, the court was drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at the interlocutory stage. The factual assertions made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable

In relation to the contested factual issues, the majority of the Court of Appeal preferred and accepted the evidence of various RDS witnesses, notwithstanding the fact that there had been no opportunity for cross-examination and minimal disclosure from RDS. Such an approach was inappropriate at this stage in the proceedings **[120]-[125].** In relation to the documentary evidence, the likely importance of internal corporate documents is well established in the context of cases concerning liability in negligence of a parent company for the acts of its subsidiary. This has been recognised in a number of authorities, most recently by Lord Briggs in *Vedanta* **[126]-[132]**. The Court of Appeal erred in its approach to the prospect of the disclosure of internal corporate documents material to the claims made and the appellants were able to identify specific internal documentation, not yet disclosed, which is likely to be material. The appellants therefore established a material error of law in the approach of the Court of Appeal to the determination of the arguability of the claim at an interlocutory stage **[135]-[140]**.

Other errors of law by the Court of Appeal were also made out **[141]-[152]**. First, the majority appeared to accept a 'general principle' that a parent company could never incur a duty of care in respect of the activities of a subsidiary by maintaining group-wide policies and guidelines. That is inconsistent with *Vedanta*, in which Lord Briggs confirmed that there was no such *"reliable limiting principle"* **[143]-[145]**. Secondly, the majority may have focussed inappropriately on the issue of control. As Lord Briggs explained in *Vedanta*, the issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity. That may or may not be demonstrated by the parent controlling the subsidiary **[146]-[148]**. Finally, the Court of Appeal erred in its approach to whether a duty of care exists in this type of case. The majority treated the liability of a parent company in relation to the activities of its subsidiaries as a distinct category of common law negligence, contrary to the guidance subsequently provided in *Vedanta*. It was therefore incorrect to analyse this case by reference to the threefold test set out in *Caparo v Dickman* [1990] AC 605 **[149]-[151]**. It is not, however, necessary to determine the disputed question of whether such errors were material to the decision reached **[152]**.

Issue (ii) – Real issue to be tried

Having full regard to the appellants' case, which was summarised in detail at **[24]-[69]**, and the respondents' written and oral submissions and evidence, it has not been shown that the asserted facts in the particulars of claim should be rejected as being demonstrably untrue or unsupportable. On that basis, the appellants' pleaded case, fortified by the points made in reliance on the two RDS internal documents so far disclosed, establishes that there are real issues to be tried, in light of the guidance in *Vedanta* **[153].** That conclusion is further supported by the evidence of the appellants' witnesses and the very real prospect of further relevant disclosure being provided **[154]**. In this regard, the analysis and conclusions of Sales LJ in the Court of Appeal is generally to be preferred to that of the majority. In particular, the Shell group's vertical corporate structure, with organisational approval generally proceeding corporate approval, allowed for delegation of authority, including in relation to operational safety and environmental responsibility. How this organisational structure worked in practice and the extent to which authority was delegated, clearly raised triable issues **[155]-[158]**. The majority of the Court of Appeal was therefore wrong to decide that there was no real issue to be tried **[159]**.

Conclusion

The appeal is allowed. If the respondents intend to pursue the other challenges to jurisdiction which were not resolved by the High Court judge, the matter will have to be remitted to the High Court **[160]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html