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Client Alert

Trial and Global Disputes Practice Group

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English Court of Appeal Rejects UK Parent Company Duty of Care to Those Affected by Pipeline Operations of Nigerian Subsidiary

In a decision likely to give comfort to parent energy companies, the English Court of Appeal has confirmed (by a majority of 2:1) that the parent company of the Shell Group owed no duty of care to approximately 42,500 Nigerian claimants in respect of serious historic and ongoing environmental damage caused by pipeline leaks in the Niger Delta - *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191.

Parent company duty of care will usually be considered as a matter of jurisdiction and so the question is whether claimants have a "real prospect of success" on establishing a duty of care. If the UK parent company owes no duty of care, it follows that the English courts will decline jurisdiction, over both the parent company and its overseas subsidiary (the UK parent having been used to anchor the claim in the English courts). At the heart of the Court of Appeal's reasoning is the test it recently set out for the imposition of a duty of care in mining operations in Zambia in *Lungowe v Vedanta* [2017] EWCA (Civ) 1528 (relying on *Chandler v Cape Plc* and *Thompson v The Renwick Group plc*): the test of foreseeability, proximity and reasonableness. These cases outline the special circumstances where a parent will owe a duty to those affected by the actions of its subsidiary, including where the parent (i) controls the operations giving rise to the claim, (ii) has taken direct responsibility for devising a health and safety policy the adequacy of which is the subject of the claim, and (iii) has similar knowledge to its subsidiary and jointly takes decisions, which the subsidiary implements.

The Court of Appeal in *Okpabi* emphasises the importance of identifying a person or class of persons said to be affected, and the issue of control of the material operations of the subsidiary. It was common ground amongst the parties that the principal cause of the leaks in the pipeline was damage from illegal siphoning (so called "bunkering"). The extent to which the UK parent company was responsible for its Nigerian subsidiary's alleged failure to maintain the integrity of the pipeline was in issue. The Court of Appeal held that the mere issuance of mandatory group-wide policies is unlikely, without more, to result in a duty of care; the "high-level guidance" in group-wide policies and operating guidance of the Shell Group only demonstrated "*exiguous evidence of centralised assistance…*" to its Nigerian subsidiary. Without any evidence of control of the subsidiary's operations or direct

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responsibility for the practices or failures at the heart of the claim, there was no proximity, and so no duty of care. Accordingly, the English court declined jurisdiction over the case.

The Court of Appeal was similarly unpersuaded by the claimants' general and abstract arguments on the reasonableness of imposing a duty of care, including their appeals to the importance of international standards on corporate social responsibility, oil production and environmental regulation, stating that *"the court had a responsibility in a case of this kind not to strive to find a reason to allow jurisdiction."*

The decision is a robust restatement of the conditions required for parent company liability, which were met in *Vedanta*. They were not met here, although the Lord Justices did not exclude the possibility of future claimants meeting them, provided that they bring sufficient evidence of control. It follows similarly robust decisions of the English court on environmental damage said to be caused by pipelines, including *The Ocensa Pipeline Litigation* [2016] EWHC 1699 (TCC).

It remains to be seen whether this decision will be appealed to the Supreme Court of the United Kingdom. Lord Justice Sales, dissenting, agreed with the majority's test, but would have allowed the appeal on the basis that the evidence disclosed a real prospect of success of establishing a duty of care under that test at trial, that was more than merely speculative. The Court of Appeal also emphasised the need for careful and precise pleadings and witness statements, that are regularly updated to take account of developments, in cases where there is a threshold jurisdictional issue on whether a duty of care is owed by an anchor defendant to a claimant.

In the light of the current state of the law and its application in recent cases, multinationals are well advised to be mindful of balancing their desire to maintain control and influence over subsidiaries against the attendant risks and liabilities that can arise. To avoid 'home court' litigation, the objective ought to be to give sufficient autonomy to overseas subsidiaries, so that a level of remoteness is maintained between parent company and any liabilities which arise in local markets as a result of an overseas subsidiary's actions. In practice this is a difficult balance to strike, bearing in mind that most parent companies want to maintain ultimate control and direction (or at least substantial influence). Some protective steps and practical measures to consider include:

- reviewing all contracts to ensure that there are no agreements directly between parent companies and entities/individuals in overseas jurisdictions which might create contractual or tortious liabilities;

- ensuring there are clear corporate governance structures, lines of reporting and group policies in place and observed, *e.g.*, overseas subsidiaries with their own boards of directors and executive management teams, comprising (at least in part) individuals from the local market, who meet and take decisions locally (with written minutes). If directors sit on the boards of parent companies and subsidiaries, it should be made clear in which capacity they are being involved in decision making;

- participating in the 'bigger picture' strategic decisions, but keeping direct influence in the day-to-day affairs of the subsidiary to a minimum, *e.g.*, the parent should not take decisions on behalf of the subsidiary unnecessarily. If a parent does intervene in the affairs of a subsidiary, such interventions should be necessary, considered and executed with a clear and stated objective and linked to high level corporate strategy; and

- checking that, if a parent company guarantees liabilities of an overseas subsidiary, it makes sure that jurisdiction and liability are dealt with in all paperwork relevant to the overseas subsidiary and any would-be claimants, *e.g.*, exclusive jurisdiction clauses which stipulate that any disputes involving the overseas subsidiary are to be resolved only in the local jurisdiction, notwithstanding that a parent company might be providing a financial guarantee and/or oversight.

If in any doubt that a particular structure of operations might give rise to unacceptable levels of risk or liability, and steps might be available to mitigate those risks and liabilities, a parent company would be well served taking legal advice in anticipate of, rather than in response to, potential law suits and actions.