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Corporate Legal Liability for Breach of Environmental, Social & Governance Responsibilities: Recent Developments in the UK and European Union

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In the more rarified corporate circles of the UK and continental Europe, it is difficult to avoid discussions of environmental, social, and governance (ESG) and sustainability, brought ever more to the fore by the Covid-19 pandemic, climate change, and an increasingly partisan approach to treatments of economic inequality and associated problems regarding class, ethnicity, and gender. But as undoubtedly important as these issues are, their legal implications outside the purely public law sphere have been largely nebulous and intangible.

It would be a mistake, however, to suppose that this will remain the case. In the first of a series of articles highlighting recent legal developments in the UK and European Union, we look at a recent UK Supreme Court decision that demonstrates that ESG responsibilities, policies, and statements of intent amount to a lot more than corporate window dressing.

Okpabi and Others v Royal Dutch Shell plc and Another

In February this year, the UK Supreme Court handed down a decision that has potentially significant implications for UK entities with subsidiaries operating overseas, *Okpabi and Others v Royal Dutch Shell plc and Another* ([2021] UKSC 3). The leadership of the Ogale and Bille communities in Rivers State, Nigeria, brought proceedings on behalf of themselves and the people of those communities in England against Royal Dutch Shell plc (RDS), a UK incorporated and listed company. However, the immediate cause of the claimants' concern was a Nigerian subsidiary of RDS, The Shell Petroleum Development Company of Nigeria Limited (SPDC). It was claimed that SPDC's mismanagement of an oil pipeline and subsequent spills had rendered natural water sources unusable for drinking, fishing, agricultural, washing, or recreational purposes.

Under English procedural law, it was necessary for the claimants to obtain the court's permission to serve proceedings on SPDC out of the jurisdiction, and bound up in the court's discretion as to whether to give that permission was the question of the viability of the claim against RDS as an 'anchor' defendant grounding the jurisdiction of the English courts. The claim against RDS depended on the existence of a duty of care in

tort on the part of RDS effectively to ensure groupwide directives and policies were put in place that would have prevented the environmental damage that was the subject of the proceedings and/or ensure that SPDC complied with those directives and policies.

Both the High Court and Court of Appeal (by a 2:1 majority) found that the claims against RDS did not have a real prospect of success and that there was no real issue to be tried. The case then paused whilst a similar case, *Lungowe v Vedanta Natural Resources plc* ([2019] UKSC 20) was considered by the UK Supreme Court. Although many of the legal questions answered by the Supreme Court in *Vedanta* also arose in *Okpabi*, the latter case was also heard by the same court on the rather unusual basis that it might equally have been the lead case. Despite the overlap of legal questions between the two cases, the combined effect of the two decisions is helpful in discerning certain general principles that will apply to cases of this nature in the future.

In both cases, the Supreme Court was anxious to maintain that the tortious duties of care that might be owed by a parent company to those who had suffered at the hands of a subsidiary did not amount to a particular sub-species of negligence claims. Rather, the general principles that applied to the establishment of such duties with regard to proximity, fairness, and reasonableness were equally applicable in the circumstances at hand. That said, however, four guiding considerations or 'routes' to liability of a parent for the acts of its subsidiaries, adumbrated in *Vedanta*, were found to be of equally valuable application in *Okpabi*:

1. RDS's taking over the management of the relevant activity of SPDC.
2. The provision by RDS of defective advice or its promulgation of defective groupwide safety and/or environmental policies that were implemented as a matter of course by SPDC.
3. RDS's promulgation of groupwide safety and/or environmental policies and ensuring their implementation by SPDC.
4. RDS's holding out that it exercises a particular degree of supervision or control over SPDC.

The Supreme Court found that both the first instance judge and the majority of the Court of Appeal had erred on these potential routes to liability as a matter of law. First, because of the degree of interaction of RDS and SPDC in terms of the management of projects and the promulgation and implementation of groupwide policies, there was an evidential foundation for a claim with a real prospect of success. Moreover, none of the general principles relating to proximity, reasonableness, and fairness precluded the imposition of a duty of care as a matter of principle. The Supreme Court also found that there were real issues to be tried, at least for liability routes (1) and (3).

In adopting this reasoning, the Supreme Court castigated, as it had done in *Vedanta*, the effective conduct in the lower courts of a 'mini-trial' of liability within the context of a jurisdictional challenge. In particular, the point was made that, in cases where much depended on the interaction of individuals, policies, and corporate entities within a complex organization, a trial conducted before the formal disclosure of documents was of questionable value to say the least.

The case will now return to the High Court (where it began life four years ago) to be tried.

Commentary

Unsurprisingly, the headlines accompanying the decision focused on the potential for liability of parents in connection with the acts of their subsidiaries. Without a doubt, *Okpabi* (in combination with *Vedanta*) has significantly moved the dial in this respect. It is not only possible for liability to attach to a parent when a subsidiary fails to implement a groupwide policy but also for liability to arise when a policy is faithfully implemented but subsequently judged not to be up to scratch.

Of course, the cases in question concerned potential, not actual, liability. It is one thing to establish a real prospect of success but quite another to establish liability at trial on a balance of probabilities. However, important as that consideration is, it is already clear that the Supreme Court does not approve of attempts to shut out evidence when there is a plausible tortious claim. One might anticipate, in the circumstances, a greater number of high-profile settlements before or during the formal disclosure process, and quite possibly a greater number of claims as a result.

Each case, of course, must be judged on its individual merits – and there is no substitute for effective groupwide policies effectively implemented – but wise executives may wish to cast an eye over such policies to ensure that events that occur far away from the place where those policies were formulated do not come back to haunt them.

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