Case No: UKSC 2018/0068

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

B E T W E E N:

HIS ROYAL HIGHNESS EMERE GODWIN BEBE OKPABI & OTHERS
(suing on behalf of themselves and the people of Ogale Community)

Appellants

v.

(1) ROYAL DUTCH SHELL PLC
(2) SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED

Respondents

—and—

LUCKY ALAME & OTHERS

Appellants

v.

(1) ROYAL DUTCH SHELL PLC
(2) SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED

Respondents

—and—

(1) THE INTERNATIONAL COMMISSION OF JURISTS
(2) THE CORPORATE RESPONSIBILITY (CORE) COALITION LIMITED
(3) CORNER HOUSE

Interveners

WRITTEN SUBMISSIONS OF THE INTERNATIONAL COMMISSION OF JURISTS AND THE CORPORATE RESPONSIBILITY (CORE) COALITION LIMITED

References to [HC Judgment §X] and [CA Judgment §X] are, respectively, to the judgments of the High Court and the Court of Appeal in these proceedings, with X being the paragraph number.

INTRODUCTION AND SUMMARY

1. The International Commission of Jurists and The Corporate Responsibility (CORE) Coalition Limited (together "**the Interveners**") intervene in this appeal in order to assist the Court by drawing attention to a discrete body of standards and comparative law jurisprudence that will assist in the resolution of this appeal. Those materials support the Appellants' contention that the First Respondent ("**RDS**") at least arguably owed them a duty of care in relation to certain operations of the Second Respondent ("**SPDC**"), one of RDS's subsidiary companies.

2. The materials in question comprise: (i) international and domestic standards regarding the responsibilities of business enterprises in relation to human rights and environmental protection; and (ii) comparative law jurisprudence.

3. This Statement in Intervention adopts the following structure:

   3.1. **Section 1** briefly identifies the relevant legal framework within which the Interveners' submissions are situated. It explains where the majority of the Court of Appeal erred when identifying that framework.

   3.2. **Section 2** sets out the international and domestic standards that the Interveners invite the Court to consider when determining this appeal.

   3.3. **Section 3** identifies and summarises the relevant comparative law jurisprudence that the Interveners also invite the Court to consider.

   3.4. **Section 4** makes a series of succinct submissions setting out the relevance and significance of the materials collated in Sections 2 and 3 for the determination of this appeal.

4. In brief summary, the Interveners submit as follows:

   4.1. Both courts below erred when they analysed this case by reference to the test set out in *Caparo Industries plc v Dickman* [1990] 2 AC 605. As the Supreme Court's judgment in *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2019] 2 WLR 1051 reiterated, the proper approach – in a case of this kind – is first to consider whether it (at least arguably) comes within one of the well-established categories where a defendant owes the claimant a duty of care in respect of the harmful activities of a third party. The *Caparo* analysis is only engaged if that question is answered in the negative.

4.2. There is a well-established body of international and domestic standards which indicate that a responsible parent company will monitor and direct the activities of its subsidiaries, in order to prevent or mitigate the risk of their having adverse impacts on human rights and the environment. RDS publicly endorses those standards, and holds itself out as exercising supervision and control over SPDC. As a result, there would be nothing inherently surprising about RDS (and other parent companies in relevantly similar situations) having assumed a duty of care to those affected by a subsidiary's activities. This supports the proposition that this case at least arguably falls within the established *Dorset Yacht* category of case whereby A owes a duty of care in respect of the conduct of B.[1] Accordingly, the majority of the Court of Appeal was, with respect, wrong to suggest that the international standards, which they considered only very briefly, are irrelevant when determining whether or not RDS arguably owed a duty of care to the Claimants [**CA Judgment §§130-1**].

4.3. Further, the comparative law jurisprudence underlines the particular need for caution in rejecting claims of this sort at an interlocutory stage in advance of disclosure by the Defendants, since the existence or otherwise of relevant documentation in their possession is likely to be central to any analysis of control and assumption of responsibility.

4.4. If, in the alternative, the Court were to conclude that this case does not (at least arguably) fall within an established category of duty, such that it would be necessary to consider *Caparo*, the materials drawn together in these submissions would point towards it being *"fair, just and reasonable"* to recognise the duty contended for. In particular, the duty would: (i) reflect widely-accepted standards, which have been endorsed by RDS itself; (ii) be consistent with the comparative law jurisprudence; and (iii) be consistent with the United Kingdom's international obligations to provide effective remedies for infringements of human rights and environmental damage.

SECTION 1: THE LEGAL FRAMEWORK

5. The High Court and the majority of the Court of Appeal held that RDS did not even arguably owe the Claimants a duty of care in respect of SPDC's operations. The

[1] See *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and the cases that have followed it.

Interveners submit that the courts below erred in two respects, when reaching that conclusion.

6. First, the courts below reached this conclusion by reference to what they described as the *"three-fold test"* or *"three-part test"* derived from *Caparo*, and the *"four factors"* identified in *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111, §80: see especially [**HC Judgment §§107-17; CA Judgment §§23-4, 192**].

7. In fairness to the courts below, they did not have the benefit of this Court's judgment in *Vedanta. Vedanta* makes clear that (see especially §§54-56, 60):

   7.1. Cases in which a parent company is alleged to owe a duty of care to third parties in respect of a subsidiary's harmful activities should be assessed by reference to the established category of situations where *"A owes a duty of care to C in respect of the harmful activities of B"* (as illustrated by *Dorset Yacht* and subsequent authorities).

   7.2. There is no need to apply a *Caparo* analysis where one is dealing with an established category of duty. Whether or not a duty of care should be imposed is determined by reference to the facts, properly understood in their relevant context.

   7.3. The factors mentioned in *Chandler* should not be treated as a *"straightjacket"*, and are merely *"particular examples of circumstances in which a duty of care may affect a parent"*.

8. Second, the Supreme Court in *Vedanta* considered and rejected key elements of the reasoning of the majority of the Court of Appeal in this case. In particular:

   8.1. The majority of the Court of Appeal in *Okpabi* held that merely by laying down mandatory group-wide policies and guidelines, a parent company cannot incur a duty of care in respect of a subsidiary's activities [**CA Judgment §§89, 205**].[2] The appellants in *Vedanta* sought to rely on that finding before the Supreme Court. However, it was rejected in the judgment of Lord Briggs: there is no such reliable limiting principle (*Vedanta*, §52).

   8.2. The majority of the Court of Appeal in the present case also held that a duty of care could only arise if a parent company took control of a subsidiary's operations

[2] Sales LJ also reached the same erroneous conclusion, although he went on to find for the Appellants overall: [**CA Judgment §140**].

and/or enforced the imposition of the relevant standards [**CA Judgment §§89, 205**]. Again, the Supreme Court made clear in *Vedanta* that this is not so. Lord Briggs said at §53: *"the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility that it has publicly undertaken"*.

8.3. Further, the Chancellor expressed the view, in the present proceedings, that it was inherently unlikely that a parent company would assume responsibility in relation to the operations of its subsidiaries [**CA Judgment §§195-6, 206**]. By contrast, the Supreme Court judgment in *Vedanta* did not suggest that any especially unusual feature is required to give rise to a duty of care on the part of a parent company. The particular factors on which the Supreme Court based its conclusion that there was at least an arguable duty of care in *Vedanta* – i.e. standard setting by the parent company, along with a measure of training, monitoring and enforcement – are commonplace in modern corporate groups, particularly publicly listed companies with international operations carrying with them a real prospect of adverse environmental or human rights impacts.

9. The Interveners submit that the relevant analytical framework is as follows:

9.1. The primary question is whether the Claimants have a real prospect of showing that the case falls within an established category of duty. The established categories in which a defendant will owe a duty of care in relation to harm done by a third party include (i) *"where* [the defendant] *was in a position of control over* [the third party] *and should have foreseen the likelihood of* [the third party] *causing damage to somebody in close proximity if* [the defendant] *failed to take reasonable care in the exercise of that control"*; and (ii) where there is *"an imposition or assumption of responsibility upon or by the* [defendant]*"*: *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241 (HL), 271-2 per Lord Goff; *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732, §§97-100 per Lord Toulson.

9.2. Only if the Supreme Court concludes that the Claimants have no real prospect of showing that the case comes within a recognised category of duty would it then be necessary to consider whether they have a real prospect of establishing a novel category of duty by reference to the *Caparo* principles.

SECTION 2: INTERNATIONAL AND DOMESTIC STANDARDS CONCERNING BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

(A) The International Standards

10. The key international standards regarding the responsibilities of multinational businesses in the fields of human rights and environmental protection – which States have an international obligation to promote[3] – include the following:

10.1. The *UN Guiding Principles on Business and Human Rights* ("**UNGPs**"). The UNGPs were endorsed by agreement of all States of the United Nations Human Rights Council that included the United Kingdom,[4] and are considered by many States and businesses to be an authoritative global standard on businesses' human rights responsibilities.[5]

10.2. The *OECD Guidelines for Multinational Enterprises* ("**OECD Guidelines**"). The OECD Guidelines are a set of recommendations addressed by the governments of all OECD member states (including the United Kingdom) and various other countries to "*multinational enterprises*" operating in or from those countries.[6] The OECD Guidelines include specific chapters on both human rights and environmental protection.

10.3. The *Ten Principles* of the UN Global Compact (**"the Compact"**). The Compact is a UN initiative that encourages businesses worldwide to adopt sustainable and socially responsible policies and to report on their implementation. RDS has signed up to the Compact, as have in excess of 14,000 other participants from over 160 States.[7] The Compact's Ten Principles include:[8]

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[3] See further below in section 2(C)

[4] UN Human Rights Council Resolution 17/4 (2011, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement).

[5] For recognition of the authoritative status of the UNGPs, see the statement of the UN High Commissioner for Human Rights (17 November 2015, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16760&LangID=E) and paragraph I(a)(1) of the appendix to Recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe (https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4).

[6] OECD Guidelines (2011 edition), Foreword http://www.oecd.org/daf/inv/mne/48004323.pdf

[7] https://www.unglobalcompact.org/what-is-gc/participants/8082-Royal-Dutch-Shell-plc.
The participants in the Compact are listed at https://www.unglobalcompact.org/what-is-gc/participants.

"Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
Principle 2: make sure that they are not complicit in human rights abuses.
…
Environment
Principle 7: Businesses should support a precautionary approach to environmental challenges;
Principle 8: undertake initiatives to promote greater environmental responsibility; and
Principle 9: encourage the development and diffusion of environmentally friendly technologies."

10.4. The International Finance Corporation's Performance Standards on Environmental and Social Sustainability (**"the IFC Standards"**).[9] The International Finance Corporation is part of the World Bank, and the IFC Standards apply to recipients of finance for specific projects, which are generally businesses or others in the private sector.

11. In addition to these international standards, there are also sector-specific guidelines issued by IPIECA (previously known as the International Petroleum Industry Environmental Conservation Association), of which RDS is a member. IPIECA publicly states its members' support for the UNGPs.[10]

The standards expected of a reasonable and prudent enterprise

12. The international standards identified above establish that a reasonable and prudent enterprise will take proper steps to: (i) conduct due diligence as to the risks of adverse impacts on human rights and the environment; (ii) prevent or mitigate the risks of such adverse impacts; and (iii) remediate such adverse impacts as may occur. Those principles are elaborated in turn below.

(i) Human rights and environmental due diligence

13. The international standards are unanimous that a reasonable and prudent enterprise will conduct ongoing human rights and environmental due diligence. The language used in the standards is normative throughout (*"should…"*, *"needs to…"*, etc.):

13.1. Guiding Principle 17 of the UNGPs states: *"In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business*

[8] The *Ten Principles* are set out at https://www.unglobalcompact.org/what-is-gc/mission/principles.
[9] https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Document.pdf?MOD=AJPERES&CVID=jkV-X6h
[10] http://www.ipieca.org/our-work/social/human-rights/

enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."

13.2. The OECD Guidelines make much the same point: *"Enterprises should…Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts…and account for who these impacts are addressed"*.[11] In the specific context of environmental impacts, the commentary which accompanies the Guidelines stresses the importance of *ex ante* assessment.[12]

13.3. The Office of the High Commissioner for Human Rights ("**OHCHR**") has defined human rights due diligence as: *"…an ongoing management process that a **reasonable and prudent enterprise** needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights"* (emphasis added).[13] The language of *"reasonable and prudent"* reflects the standard of care in common law negligence.

13.4. This language of "*reasonable and prudent*" behaviour is mirrored in the *Framework Report (Protect, Respect and Remedy: A Framework for Business and Human Rights)*, which pre-dated and informed the UNGPs.[14] The *Framework Report* stressed that the duties of corporate entities to respect human rights flowed from the wider expectations of society concerning how enterprises should behave: "… *the broader scope of the* [corporate] *responsibility to respect is defined by **social expectations** - as part of what is sometimes called **a company's social licence to operate***" (emphasis added).[15]

13.5. The first of the IFC Standards concerns *"Assessment and Management of Environmental and Social Risks and Impacts"*, and is focussed on standards of due

[11] OECD Guidelines, p. 20. The OECD has recently published extensive advice on due diligence: *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.
[12] See §§63-67 of the Commentary to the OECD Guidelines.
[13] Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), p6 (https://www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf).
[14] Report to the UN Human Rights Council, UN Doc. A/HRC/8/5, 7 April 2008, www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf
[15] Ibid §54.

diligence. It makes clear that the obligation to assess environmental and social risks (and ensure that effective grievance mechanisms are available) extends to the risks presented by third parties – such as governments and contractors – over which an entity does not enjoy "*control or influence*."[16]

(ii) Prevention or mitigation of risks of adverse impacts on human rights and the environment

14. The international standards are equally clear that prevention or mitigation of the risks of adverse impacts on human rights and the environment also forms a part of the ordinary behaviour that should be expected of any reasonable enterprise:

    14.1. The OECD Guidelines state that enterprises should *"… take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development... Maintain contingency plans for preventing, mitigating and controlling serious environmental and health damage from their operations."*[17]

    14.2. The UNGPs use similar language to similar effect, referring to the responsibility of business enterprises to: (i) *"avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur"*; and (ii) *"Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts"*.[18]

    14.3. Principle 7 of the Compact is that *"Businesses should support a precautionary approach to environmental challenges"*.

    14.4. The third of the IFC Standards is specifically concerned with *"Resource Efficiency and Pollution Prevention"*.

(iii) Remediation

15. Providing access to effective remediation also forms a core part of reasonable corporate conduct:

[16] See §2 of Performance Standard 1.
[17] Chapter 6, opening paragraph and §5.
[18] Principle 13.

15.1. The commentary to the OECD Guidelines stresses the importance of remediation: *"Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation"*.[19]

15.2. Similarly, the UNGPs devote an entire section to *"Access to Remedy"*, and, separately, provide that: *"Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes"*.[20]

The responsibilities of parent companies

16. The international standards identified above are clear that their application is not confined to the direct employees of a parent company. They apply to all corporate structures and entities, whether transnational or otherwise.

17. Taking the UNGPs first:

17.1. The UNGPs apply to *"all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure"*.[21]

17.2. The phrase *"regardless of their… structure"* is consistent with the approach taken by the drafters of the UNGPs when they selected the term *"business enterprises*". That term is sufficiently broad to encompass all forms of business organisation, including corporations, unincorporated associations, partnerships and groups. Were there any doubt on this question, the Commentary to Guiding Principle 2 provides that a State may place "*requirements on 'parent' companies to report on the global operations of the entire enterprise*".

17.3. Guiding Principle 13 of the UNGPs provides:

> "The responsibility to respect human rights requires that business enterprises:
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their

[19] See §14 of the Commentary to the OECD Guidelines. See Guiding Principle 14 on the application of that approach to the duty to respect human rights in particular.
[20] Principle 22.
[21] UNGPs, p1.

> business relationships, even if they have not contributed to those impacts."

17.4. Accordingly, the responsibility to avoid causing or contributing to adverse human rights impacts and to address those impacts encompasses impacts caused or contributed to by both the parent itself and its subsidiary. Further, under the second strand of responsibility in Principle 13, a business enterprise should take steps to prevent or mitigate adverse impacts to which the enterprise's own operations do not contribute directly.

18. Similar points arise in respect of the OECD Guidelines:

18.1. The OECD Guidelines apply to "*multinational enterprises*", and are *"addressed to all the entities within the multinational enterprise (parent companies and/or local* entities)." Like the UNGPs, therefore, the OECD Guidelines treat both parent and subsidiary companies as part of a single *"enterprise"*.[22] The Commentary on the *"General Policies"* section of the OECD Guidelines states:

> "8. The Principles call on the board of the parent entity to ensure the strategic guidance of the enterprise, the effective monitoring of management and to be accountable to the enterprise and to the shareholders, while taking into account the interests of stakeholders…
> 9. The Principles extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries. Furthermore, the board's monitoring of governance includes continuous review of internal structures to ensure clear lines of management accountability throughout the group."

18.2. A very recent decision within the OECD framework from The Netherlands in relation to RDS and SPDC illustrates the responsibilities of a parent company under the OECD Guidelines. The OECD Guidelines require Member States to create a National Contact Point (**"NCP"**). In *Obelle Concern Citizens v Shell Petroleum Development Company of Nigeria Limited and Royal Dutch Shell*, a group of Nigerian citizens affected by pollution from SPDC's activities made a complaint of non-compliance with the OECD Guidelines to the Dutch NCP, there being no NCP in Nigeria. The Dutch NCP offered its good offices to seek to resolve the complaint, but SPDC declined this offer; notably, it was RDS (not SPDC itself) that communicated this message to the NCP. The NCP concluded that SPDC had not complied with the OECD Guidelines, and urged RDS to act to remedy the

[22] See OECD Guidelines, Concepts and Principles, §4.

situation. In this regard, the NCP said (i) that RDS had *"a substantial amount of leverage"* over SPDC; and (ii) that *"if a company is directly linked to an impact, for example in the role of mother company such as RDS, the company can be expected to take a role in remediation. For example, it should use its leverage to the greatest extent possible to stimulate its subsidiary to provide for remedy or participate in processes to provide for remedy"*.[23]

19. Likewise, the principles on which the Compact operates assume the responsibility of a parent company for its subsidiaries. The Compact's website explains:[24]

> "The UN Global Compact applies the leadership principle. If the CEO of a company's global parent (holding, group, etc.) embraces the Ten Principles of the UN Global Compact by sending a letter to the UN Secretary-General, the UN Global Compact will post only the name of the parent company on the global list assuming that all subsidiaries participate as well."

(B) <u>The domestic standards</u>

20. The key domestic publication on the standards that the United Kingdom Government expects of UK-domiciled companies is *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* ("**Good Business**").[25] As the title of that document indicates, it seeks to give effect to the UNGPs, and as recently as 27 May 2020 the United Kingdom Government published a progress update on its National Action Plan for their domestic implementation.[26] The UNGPs are not, however, the only set of international standards on which *Good Business* draws; it also refers to various other international instruments that the UK has endorsed, including the OECD Guidelines. The international standards set out above are therefore very much mirrored on the domestic plane.

21. Three features of *Good Business* are especially notable in the present context:

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[23] *Obelle Concern Citizens (OCC) v Shell Petroleum Development Company of Nigeria Limited (SPDC) and Royal Dutch Shell (RDS)* (Final Statement of the Dutch National Contact point, 27 February 2020). See especially pp 6-8.

[24] https://www.unglobalcompact.org/about/faq.

[25] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf

[26] https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020

21.1. First, *Good Business* stresses the importance of victims being able to secure access to justice in respect of wrongdoing by UK-based business enterprises both domestically and overseas, and indicates that such persons should have access to remedies through the judicial mechanisms of the UK itself:

> "The UK has a range of judicial mechanisms that help to support access to remedy for human rights abuses by business enterprises both at home and overseas. This includes:
>
> …. Avenues to pursue **civil law claims** in relation to human rights abuses by business enterprises" (underlining added; bold type as per the original).[27]

21.2. Second, *Good Business* recognises that human rights and environmental issues are intertwined. A number of the examples of good practice set out in *Good Business* refer to the importance of environmental protection and environmental impacts, when considering compliance with the UNGPs.[28] The attention paid to environmental issues in *Good Business* also reflects the OECD Guidelines, which contain a whole chapter on environmental protection.

21.3. Third, *Good Business* indicates that amendments to the Companies Act 2006 made in 2013 were intended to give domestic effect to principles articulated in the UNGPs.[29] Following these amendments, Section 414A of the Act provides that "*The directors of a company must prepare a strategic report for each financial year of the company*". Section 414A(3) provides that, where there is a parent company and subsidiaries with consolidated financial accounts, the directors of the parent company must prepare a strategic report in respect of the corporate group. Section 414C(7) requires that the strategic report of a quoted company must include information about *"environmental matters (including the impact of the company's business on the environment)"* and *"social, community and human rights issues"*, *"including information about any policies of the company in relation to those matters and the effectiveness of those policies"*.[30] Sections 414CA and 414CB also impose obligations on certain kinds of company (e.g. companies whose shares are traded on regulated markets) to include similar information in a strategic report. By

[27] See §28.
[28] See the examples on p19 (concerning the Myanmar Centre for Responsible Business in Burma, and its role in shaping the debate concerning environmental impacts) and p23 (concerning the World Wildlife Fund's complaint about environmental damage associated with oil exploration in Virunga National Park in the Democratic Republic of Congo).
[29] See §15.
[30] The Financial Reporting Council has published Guidance on the Strategic Report (July 2018): https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf and see especially pp31-34.

requiring environmental and human rights reporting at the level of the corporate group, the Companies Act (as amended) mirrors the UNGPs – as explained above, the UNGPs emphasise the responsibilities of a *"business enterprise"* as a whole, whatever its corporate structure.

(C) The United Kingdom's international obligations

22. The provisions cited above focus on the responsibilities of business enterprises. The United Kingdom itself has also undertaken international law obligations, which should inform the application and development of the common law by the Courts, as organs of the State, in relation to the recognition of a duty of care on the part of parent companies. These international obligations are part of the general legal obligation on all States to protect individuals against adverse conduct by private entities, including business enterprises.[31]

23. Under the International Covenant on Economic, Social and Cultural Rights, the United Kingdom has agreed (*inter alia*) to take steps necessary for *"the improvement of all aspects of environmental and industrial hygiene"*.[32] The UN Committee on Economic, Social and Cultural Rights has said the following in its General Comment on State obligations under the Covenant in the context of business activities (emphasis added):[33]

    23.1. *"The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to*

[31] For example, Committee on Economic, Social and Cultural Rights, General Comment No 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, §8: "*the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities*." (http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D).

[32] International Covenant on Economic, Social and Cultural Rights, article 12(2)(b). The United Kingdom ratified the Covenant in 1976. Other relevant rights in this instance include the right to safe and healthy work conditions (Article 7) and the right to an adequate standard of living, including food and water (Article 11).

[33] United Nations Committee on Economic, Social and Cultural Rights General Comment No 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiuZ1yrkMD/Sj8YF%2BSXo4mYx7Y/3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y).

identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights" (§16).

23.2. *"The extraterritorial obligation to protect requires States Parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective"* (§30).

23.3. *"In discharging their duty to protect, States Parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States Parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located"* (§33).

23.4. *"Because of how corporate groups are organized, business entities routinely escape liability by hiding behind the so-called corporate veil, as the parent company seeks to avoid liability for the acts of the subsidiary even when it would have been in a position to influence its conduct. Other barriers to effective access to remedies for victims of human rights violations by business entities include the difficulty of accessing information and evidence to substantiate claims, much of which is often in the hands of the corporate defendant…"* (§42).

23.5. *"In some jurisdictions, the forum non conveniens doctrine, according to which a court may decline to exercise jurisdiction if another forum is available to victims, may in effect constitute a barrier to the ability of victims residing in one State to seek redress before the courts of the State where the defendant business is domiciled. Practice shows that claims are often dismissed under this doctrine in favor of another jurisdiction without necessarily ensuring that victims have access to effective remedies in the alternative jurisdiction"* (§43).

23.6. *"States Parties have the duty to take necessary steps to address these challenges in order to prevent a denial of justice and ensure the right to effective remedy and reparation.* ***This requires States Parties to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes****…"* (§44).

24. There are similar provisions in the UN Committee on the Rights of the Child's General Comment on State obligations regarding the impact of the business sector on children's rights: see especially §§38, 39, 43, 62, 67.[34]

25. Principle 26 of the UNGPs likewise provides that *"States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy"*. The Commentary on this Principle identifies that States should address barriers that result from *"The way in which legal responsibility is attributed among members of a corporate group under domestic…civil laws facilitates the avoidance of appropriate accountability"*.

26. In a similar vein, the Committee of Ministers of the Council of Europe's recommendation on *"Human rights and business"* states:[35]

26.1. *"Member States should apply such measures as may be necessary to encourage or, where appropriate, require that…business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations…"* (§20).

26.2. *"Member States should apply such legislative or other measures as may be necessary to ensure that their domestic courts have jurisdiction over civil claims concerning business-related human rights abuses against business enterprises domiciled within their jurisdiction. The doctrine of forum non conveniens should not be applied in these cases"* (§34).

[34] United Nations Committee on the Rights of the Child General Comment No 16 (2013) on State obligations regarding the impact of the business sector on children's rights (https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf). The United Kingdom ratified the UN Convention on the Rights of the Child in 1991.

[35] Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states, "*Human rights and business"* (https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html).

SECTION 3: COMPARATIVE LAW JURISPRUDENCE

27. There have been a number of cases before national courts – in both common law and civil law jurisdictions – that have sought to identify the appropriate circumstances in which to impose a duty of care on parent companies. None of these cases was referred to in the judgment of the Court of Appeal. Taken together, these cases indicate that recognition of a duty of care on the part of RDS would be consistent with the developing international jurisprudence in this field. They also illustrate the perils, and inappropriateness, of depriving Claimants of access to Court at an interlocutory stage in advance of disclosure by a Defendant. To show the development in the jurisprudence, the cases are discussed here in chronological order.

28. In *Recherches Internationales Québec v Cambior Inc* [1988] QJ No 2554, the Superior Court of Quebec held that it had jurisdiction to hear claims against the Canadian parent of a Guyanese mining company, in respect of environmental damage caused by the bursting of a dam at an effluent treatment plant. The parent company argued that the court had no jurisdiction, on the basis that the mine operator was a separate legal entity, and that the parent had little or no involvement in the day-to-day running of the mine (§§17-19). The Court rejected these arguments, holding that the parent company could in principle be liable in respect of damage caused by its subsidiary's activities (§§20-27). In reaching this conclusion, the Court noted that there was some evidence of the parent company having involved itself in the subsidiary's activities (e.g. by financing a feasibility study for the mining project in issue), but said that it would be premature to make any findings on liability *"until all evidence relating to the causes of the spill is on the table"* (§§24-26). Having concluded that it had jurisdiction, however, the Court declined to exercise it, on the grounds that Guyana was the appropriate forum on the facts of the case (§§28-100).

29. In *Choc v Hudbay Minerals Inc* 2013 ONSC 1414, the Superior Court of Ontario dismissed an application to strike out claims against a Canadian mining company in respect of violence said to have been perpetrated by security personnel working for one of its subsidiaries in Guatemala. The claimants alleged that the parent company had been negligent in its management of those working for the subsidiary. The Court held that the claimants had pleaded facts that could give rise to a duty of care on the part of the parent company (§§50-75). In particular, the Court noted that the parent company had arguably assumed responsibility for the actions of its subsidiary's security personnel, *inter alia* by making public statements about its adoption of international standards applicable to the use of private security forces at resource extraction projects (§§67-

69).[36] The Court therefore declined to dismiss the case at an interlocutory stage, since it was "*not plain and obvious that no duty of care can be recognized"*, so that a *prima facie* duty of care was found to exist for the purposes of the strike out motion (§70).

30. In *Eric Barizaa Dooh of Goi and others v Royal Dutch Shell Plc and Others*,[37] the Court of Appeal at The Hague held that RDS could be liable for environmental damage caused by a leak from an oil pipeline operated by SPDC. The Court of Appeal held that it was arguable that Nigerian law would impose a duty of care on RDS, on the basis of a culpable failure to act, whether or not it was actively involved in its subsidiary's operations: "*it cannot be ruled out in advance that a parent company may, in certain circumstances, be liable for damages resulting from acts or omissions of a (sub)subsidiary*" (§3.2). As a result, if the judgment of the Court of Appeal in the present proceedings were upheld, there would be inconsistent judgments of the English and Dutch courts as to whether RDS at least arguably owed a duty of care in respect of SPDC's activities.[38] Further, it should be noted that, after finding the claim to be arguable, the Dutch court ordered the defendants to provide inspection of various documents relevant to the claim against RDS (§§6.6-6.12). This underlines that in a case of this nature a claimant will generally not have access to key documents at an interlocutory stage.

31. *Das v George Weston Ltd* 2017 ONSC 4129 was also decided by the Superior Court of Ontario. The principal defendants were garment retailers, which had bought clothes made in a factory in the Rana Plaza building in Bangladesh.[39] The building collapsed in 2013, killing 1,130 people. The claimants alleged that the defendants had negligently failed to secure safe conditions for persons working in their supplier's factory. The Court dismissed the claims, holding that the defendants did not owe an arguable duty of care to persons working in a factory operated by an unrelated third party. However, in reaching this conclusion, the Court emphasised that a duty of care is more likely to arise

[36] In reaching this conclusion, the Court applied the approach to novel duties of care under Canadian law, as articulated by the Supreme Court of Canada in *Kamloops (City of) v Nielson* [1984] 2 SCR 2 and *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263. Those cases draw on *Anns v Merton London Borough Council* [1978] AC 728 (HL), which is of course no longer good law in this jurisdiction. The Canadian courts have, however, interpreted *Anns* in such a way as to require consideration of foreseeability, proximity and policy considerations (see *Odhavji*, §52), i.e. factors which closely resemble those referred to in *Caparo* at 617H-618A.

[37] 200.126.843 (case c) + 200.126.848 (case d), 18 December 2015, ECLI:NL:GHDHA:2015:3586.

[38] *Esther Kiobel v Royal Dutch Shell PLC* [2019] ECLI:NL:RBDHA:2019:4233 offers a further example of the Dutch Courts being willing to impose liability on a parent for the conduct of a subsidiary company (or at least not dismiss a claim at a preliminary stage). The claim also concerned the liability of RDS for the actions of SPDC in Nigeria, albeit in relation to alleged human rights violations (rather than tortious liability).

[39] There was also a claim against a company that had carried out an inspection of the factory.

in the context of a parent company's liability for damage caused *by a subsidiary* rather than a downstream supplier (§§433-435, 538-540). The Court of Appeal for Ontario upheld the first instance judgment, and emphasised that one reason why the claim had no reasonable prospect of success was that the operator of the factory was merely a supplier, and not a subsidiary of the defendants: *Das v George Weston Ltd* 2018 ONCA 1053, §177.

32. In *James Hardie Industries plc v White* [2018] NZCA 580, the Court of Appeal of New Zealand upheld a first instance Judge's refusal to strike out claims founded on the alleged duty of care of three parent companies. The case concerned what were said to be defective building products manufactured by the subsidiaries. The case antedated the Supreme Court's judgment in *Vedanta*, but the New Zealand Court of Appeal reviewed the earlier English and Commonwealth authorities (§§40-66). In so doing, it doubted the suggestion of the Court of Appeal in the present proceedings that a parent's publication of guidelines and policies could not suffice to establish a duty of care (§66). The New Zealand Court of Appeal noted that the ultimate parent company's annual reports indicated a degree of oversight and direction of the operations of subsidiary companies, and that marketing websites presented the corporate group as a single entity, with an international reputation and resources (§§84-89). The Court further observed that evidence as to how the companies within the corporate group coordinated with one another was primarily in the hands of the defendants, and that they had yet to provide detailed disclosure (§§90-1). In light of this, the Court held that the publicly available material was sufficient to raise a serious issue as to whether the parent companies had acted in such a way as to give rise to a duty of care, and declined to dismiss the claims at an interlocutory stage (§§92-3, 117-26). The Supreme Court of New Zealand dismissed the parent companies' applications for permission to appeal: [2019] NZSC 39.

33. In summary, the comparative law jurisprudence demonstrates that other leading jurisdictions have, taking account of the particular factual matrix of the cases before them, recognised that parent companies may owe a duty to exercise reasonable care in monitoring and controlling their subsidiaries in relation to human rights and environmental protection, and that in carrying out such an analysis it will be relevant to have regard to the potential for Defendant companies' disclosure to provide support for a claim.

SECTION 4: SUBMISSIONS

34. The majority of the Court of Appeal was, with respect, wrong to find that the international standards set out above are irrelevant when determining whether or not RDS arguably

owed a duty of care to the Claimants [**CA Judgment §§130-1**]. Rather they, along with the comparative law jurisprudence, support the Claimants' contention that RDS at least arguably owed the Claimants a duty of care.

35. In the first place, the material discussed above supports the conclusion that RDS may well have been in a position of control over SPDC and/or assumed responsibility for monitoring and controlling its activities. That being the case, the material supports the Appellants' submission that this case at falls (at least arguably) within the established categories of situation in which a defendant will owe a duty of care in relation to harm done by a third party (see §9.1 above):

    35.1. First, the international and domestic standards discussed above form an important part of the context for the assessment of the extent to which – as a matter of fact – RDS exercised oversight and control in relation to the operations of SPDC.[40] The various standards – including the Companies Act reporting requirements that were amended in light of the UNGPs – make clear that it is now widely expected that: (i) any responsible business will seek to minimise its adverse impacts on the environment; and (ii) parent companies will oversee and control their subsidiaries accordingly. In light of this, it should come as no surprise whatsoever if a parent company exerts control over and/or assumes responsibility for the activities of a subsidiary, such as to give rise to a duty of care on well-established principles. A parent company that acts in this manner is simply adhering to the ordinary standards of responsible business in the twenty-first century.[41] Indeed, consistent with the well-established international standards discussed above, it would be a surprise if a reasonable and prudent corporate parent had not assumed responsibility for the conduct of its subsidiaries, to at least some extent.

    35.2. Second, RDS publicly proclaims its commitment to many of the key standards referred to above. Its corporate website lists a series of *"external voluntary codes"* that it supports, including the UNGPs, the Compact, and the OECD Guidelines.[42] RDS's Sustainability Report for 2019 (published on 7 April 2020) states that it adheres to the UNGPs and the IFC Standards, and stresses that it was a founding

[40] The Interveners do not seek to make submissions on the detailed facts of the case.
[41] In light of the widely-accepted standards discussed in these submissions, the Chancellor was, with respect, wrong to suggest that it is inherently unlikely that a parent company would assume responsibility in relation to the operations of its subsidiaries [**CA Judgment §§195-6, 206**].
[42] https://www.shell.com/sustainability/transparency/external-voluntary-codes.html

member of the Compact.[43] RDS's 2018 Sustainability Report does the same, and also refers to RDS's support for the OECD Guidelines.[44] Similar references appear in RDS's Annual Reports for the years ending 31 December 2018 and 31 December 2019, each of which also states that *"A single overall control framework is in place for the Company and its subsidiaries"*.[45]

35.3. Consistent with the international standards to which RDS publicly subscribes, its Sustainability Reports (the preparation of which is a statutory duty arising out of the Companies Act), contain numerous references to the activities of its subsidiaries in Nigeria and the steps RDS has taken to tackle and remediate environmental damage there. In particular:

35.3.1. RDS's 2019 Sustainability Report begins with an introductory letter from the CEO, which states: *"in Nigeria, we continue to tackle environmental challenges related to oil spills in places with oil theft or sabotage of pipelines, as well as illegal oil refining. We also have programmes in places to reduce the number of operational spills over the long term. In 2019, we continued to carry out vital work to clean up Bodo, an area badly affected by oil spills"* (pp4-5). The equivalent letter in RDS's 2018 Sustainability Report describes Nigeria as *"a country that presents complex operating challenges"* (p1).

35.3.2. RDS's 2019 Sustainability Report states that the Safety, Environmental and Sustainability Committee, which is described as *"one of four standing committees of the Board of Royal Dutch Shell plc"*, has *"reviewed Shell companies' operations and the challenges faced in Nigeria"* (p17). RDS's 2018 Sustainability Report notes that the members of RDS's Safety, Environmental and Sustainability Committee made a three-day visit to Nigeria, where they *"met with Shell staff, government officials, and*

[43] See pp5, 11, 12, 20, 21, 30, 61, 62, 66, 69 (https://reports.shell.com/sustainability-report/2019/servicepages/downloads/files/shell_sustainability_report_2019.pdf).

[44] See pp1, 11, 14, 20, 27, 66, 72 (https://reports.shell.com/sustainability-report/2018/servicepages/downloads/files/shell_sustainability_report_2018.pdf). The Interveners understand that RDS's Sustainability Reports from various previous years are already in evidence.

[45] For the quotation, see p103 of the 2018 Annual Report (https://reports.shell.com/annual-report/2018/servicepages/download-centre.php), and p168 of the 2019 Annual Report (https://reports.shell.com/annual-report/2019/servicepages/downloads/files/shell_annual_report_2019.pdf). For references to international standards, see pp68, 70 and 80 of the 2018 Annual Report and pp76, 90 and 100 of the 2019 Annual Report. The Interveners understand that RDS's Annual Reports from various previous years are already in evidence.

representatives from local non-governmental organisations to gain a deeper understanding of operations in the Niger Delta" (p17).

35.3.3. RDS's 2019 Sustainability Report includes six *"Special Reports"* which are said to *"Take a detailed look at how we put sustainability at the heart of our biggest business decisions and in key locations during 2019"* (p71). Two of these *"Special Reports"* are about Nigeria, and one specifically concerns oil spill prevention and response. This describes various measures which are apparently being taken to prevent and address oil spills, and states that SPDC is *"run according to the same technical standards as other Shell companies globally"* (p75). RDS's 2018 Sustainability Report includes two similar *"Special Reports"* on Nigeria (pp38-42).

35.4. RDS thus holds itself out as: (i) adhering to international standards that would require it to monitor, control and mitigate the conduct of its subsidiaries; (ii) consistent with those standards, carrying out actual monitoring of the operations of its Nigerian subsidiaries and imposing technical standards on them; and (iii) taking action – presumably through its ability to direct the activities of SPDC – *"to tackle environmental challenges related to oil spills"* associated with SPDC's operations. That RDS holds itself out as exercising a degree of supervision and direction over SPDC supports the proposition that RDS has (at least arguably) assumed responsibility for monitoring and controlling SPDC, such as to give rise to a duty of care: *cf Vedanta*, §53.

35.5. Third, the comparative law jurisprudence affirms that interlocutory applications to dismiss claims based on a parent company's alleged duty of care in advance of disclosure should be treated with caution. The documents that would evidence the nature and extent of the parent's oversight and control of the subsidiary's activities will generally still be in the hands of the defendant(s): see especially *James Hardie Industries*, discussed at §32 above. Much the same point is made in the General Comment of the UN Committee on Economic, Social and Cultural Rights, quoted at §23.4 above. This is consistent with *Vedanta*: see §§44-45, 57, 61, including in particular Lord Briggs' observation that it was *"blindingly obvious"* that proof of the factual issues relating to the alleged duty of care *"would depend heavily on the contents of documents internal to each of the defendant companies, and upon correspondence and other documents passing between them, currently unavailable to the claimants, but in due course disclosable"*. In short, the Court of Appeal's conclusion runs contrary to the existing trends within both the comparative law jurisprudence and this Court.

35.6. Fourth, if the judgment of the Court of Appeal is upheld, there will be inconsistent judgments of the Dutch and English Courts concerning whether or not RDS arguably owed a duty of care in respect of SPDC's activities in Nigeria. See §30 above.

36. The international standards and jurisprudence set out above are also relevant if the Court were to find that this case does not (at least arguably) fall within any previously established category of common law duty. In those circumstances, it would become necessary to consider the *Caparo* test (for the avoidance of doubt the Interveners do not submit that this is necessary). The materials identified above strongly support the conclusion that it would be *"fair, just and reasonable"* to find that such a duty is owed. In particular:

36.1. The duty contended for would be consistent with the international standards concerning the conduct that may reasonably be expected of a business enterprise and the social expectations that inform "*a company's social licence to operate*" (see §13.4 above). The relevant standards are now well established at both a domestic and global level: both the United Kingdom Government, and various international organisations, have clearly set out that duty (see Section 2 above). The better-established a standard of conduct, the more likely it is to be fair, just and reasonable for the common law to require adherence to it.

36.2. RDS has itself publicly endorsed such standards of conduct: see §35.2 above.

36.3. The recognition of such a duty would be consistent with the United Kingdom's international obligations to protect individuals against adverse conduct by private entities and to provide effective remedies for infringements of human rights and environmental damage: see §§22-26 above.

36.4. The recognition of the duty contended for would also be consistent with the developing jurisprudence in other leading jurisdictions: see Section 3 above.

CONCLUSION

37. For the reasons above, the Interveners invite the Court to find that RDS at least arguably owed the Claimants the duty of care for which they contend. They also contend that, as the comparative law jurisprudence illustrates, it would be potentially unjust and wrong as a matter of principle to reach a conclusion to the contrary at a stage when the

Defendants have not provided full disclosure of potentially relevant documentation in their possession.[46]

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