Neutral Citation Number: [2018] EWCA Civ 191

Case No: A1/2017/0407 and 0406

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT
(The Hon. Mr Justice Fraser)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 February 2018

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE SALES
and
LORD JUSTICE SIMON

- -

Between:

HRH Emere Godwin Bebe Okpabi and others (suing on behalf of themselves and the people of Ogale Community)	**Appellants**
and	
(1) Royal Dutch Shell Plc (2) Shell Petroleum Development Company of Nigeria Ltd	**Respondents**

and

Between:

Lucky Alame and others	**Appellants**
and	
(1) Royal Dutch Shell Plc (2) Shell Petroleum Development Company of Nigeria Ltd	**Respondents**

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Mr Richard Hermer QC and **Mr Edward Craven** (instructed by **Leigh Day**) for the Appellants
Lord Goldsmith QC and **Ms Sophie Lamb QC** (instructed by **Debevoise & Plimpton**) for the Respondents

Hearing dates: 21 to 23 November 2017

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Approved Judgment

Lord Justice Simon:

A. Introduction

1. The claimants in these two actions seek damages arising as a result of serious, and ongoing, pollution and environmental damage caused by leaks of oil from pipelines and associated infrastructure in and around the Niger Delta for which, they contend, the 1st defendant ('RDS') and the 2nd defendant ('SPDC') are responsible.

2. The claimants are citizens of Nigeria and inhabitants of the areas affected by the oil leaks. RDS is a company incorporated in the United Kingdom and is the parent company of the Shell group of companies ('the Shell Group'). SPDC is an exploration and production company incorporated in Nigeria, and is a subsidiary of RDS. It is the operator of a joint venture agreement between itself, the Nigeria National Petroleum Corporation, Total Exploration and Production Nigeria Ltd and Nigeria Agip Oil Company.

3. The claims against both RDS and SPDC are based on the tort of negligence under the common law of Nigeria which, for present purposes, is to be regarded as the same as the law of England and Wales. The claim against SPDC is brought also under Nigerian statutory law. The claim against RDS is brought on the basis that RDS owed the claimants a duty of care either because it controlled the operation of pipelines and infrastructure in Nigeria from which the leaks occurred or because it had assumed a direct responsibility to protect the claimants from the environmental damage caused by the leaks.

4. The claimants were able to effect service on RDS because it is registered and domiciled within the jurisdiction. Leave to serve SPDC out of the jurisdiction in Nigeria was obtained under Practice Direction 6B 3.1(3), on the basis that the claim forms had been, or would be, served on RDS within the jurisdiction, and (a) there was a real issue between the claimants and RDS which it was reasonable for the court to try; and (b) SPDC was a necessary and proper party to those claims. In this situation the party that is legitimately served within the jurisdiction on the basis of its place of incorporation or domicile is often referred to as the 'anchor defendant'.

5. RDS applied under CPR Part 11(1) for orders declaring that the court had no jurisdiction to try the claims against it, or should not exercise such jurisdiction as it had.

6. Those applications were heard by Fraser J ('the Judge') in a hearing that lasted three days in the Technology and Construction Court. In a judgment, dated 26 January 2017, he concluded that there was no arguable case that RDS owed the claimants a duty of care, see *Okpabi and others v. Royal Dutch Shell Plc and another* [2017] EWHC 89 (TCC); and, by an order of 1 February 2017, he made the following declarations [**1#7**]:

    (1) Pursuant to CPR 11(1)(a) the court did not have jurisdiction to try the claims against SPDC because there was no real issue between the claimants and RDS which it was reasonable for the court to hear.

(2) The court had jurisdiction to try the claims against RDS.

(3) However, the claimants' statements of case disclosed no reasonable ground for bringing the claim.

7. The claimants appeal against the judgment and order; and the appeal raises what might appear to be a short point: whether, to the standard required, RDS owed a duty of care to those affected by oil leaks from pipelines and associated infrastructure in the Rivers State of Nigeria.

B. The claimants

8. Although there are two claims and two appeals, for present purposes the claimants and their claims can be described compendiously. The communities who are represented by the two claims either own or occupy land adjacent to the oil pipelines and infrastructure operated by SPDC from which there have been substantial discharges of crude oil as a result of oil spills, sabotage, deliberate abstraction (referred to as 'bunkering') and illegal crude refining of oil from SPDC's pipelines and oil infrastructure.

9. The oil has contaminated the land, swamps, groundwater and waterways; and they claim that there has been no adequate cleaning or remediation, with the consequence that the natural water sources cannot be used for drinking, agricultural, washing or recreational purposes. Between them, the two claims concern about 42,500 individuals.

C. The approach to the issue of jurisdiction

1. Initial observations

10. This appeal and the hearing before the Judge raise in stark form how the court should, and can properly be expected to, determine the issue of jurisdiction.

11. The issue was considered by Lord Neuberger of Abbotsbury in *VTB Capital plc v. Nutritek International Corp* [2013] 2 AC 337:

> 82. The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.

> 83. Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial.

12. In the following paragraphs Lord Neuberger referred to the number of occasions on which the courts had regretted, if not deplored, the expenditure of time, effort and financial resources on jurisdiction issues, see for example, *Cherney v. Deripaska (No.2)* [2009] EWCA (Civ) 849 at [6] and [7]; *Friis v. Colburn* [2009] EWHC 903 (Ch) at [3] and [5]; and *Alliance Bank JSC v. Aquanta Corp* [2012] EWCA (Civ) 1588 at [4].

13. At [89] he referred to the court's case management powers and added:

> Accordingly, judges should invoke those powers to ensure that the evidence and argument on service out and stay applications are kept within proportionate bounds and do not get out of hand.

14. In the present case, the central issue is relatively easy to state: whether the claimants are able to demonstrate (to the standard required) that RDS owed them a duty of care (in the relevant respects). For reasons that I will come to, neither the hearing of the application nor the appeal proceeded as it should.

15. Before elaborating on this point, I would note that this is not the type of case, referred to by Lord Neuberger in [82] of the *VTB Capital* case (above), where there was a risk that one party was seeking to wear down the other party by the deployment of superior resources. Both parties are well-resourced and neither has been diffident about introducing material that it believed would advance its case on the application and the appeal.

2. The practical issues arising on the application and appeal

16. The parties deployed a large number of witness statements and exhibits before the Judge and on this appeal.

17. At the hearing before the Judge the parties' 'skeleton arguments' ran to 259 pages, plus 17 additional pages of detailed criticism of the other side's case and 61 pages of post-hearing notes. RDS deployed 13 lengthy witness statements and 3 expert reports; and the claimants served 15 witness statements and 2 expert reports. The total length

of the witness statements ran to over 2,000 pages of material, quite apart from the 8 files of exhibits.

18. In advance of the appeal, the claimants and defendants served further skeleton arguments and additional material running to 40 pages with the permission of Jackson LJ, and RDS served a further skeleton argument of 19 pages. Following the conclusion of the hearing the Court invited the parties to serve additional written material which they had not been able to deploy in the 3 days set aside for the hearing of the appeal. The parties took this to be an invitation to set out further lengthy written submissions much of which amounted to re-argument.

19. I mention these matters because it seems to me that the hearings of what should have been a confined issue became overburdened with paper long before the hearing of the appeal; and it is in the light of this background that the criticisms of the Judge must be seen.

20. Although I will endeavour to deal with all the relevant material, I am firmly of the view that steps must be taken by courts to control and limit what is placed before the Court in the future, as Lord Neuberger indicated at [89] in the *VTB Capital* case (above).

21. The Judge in the present case was also concerned about the nature of the hearing. He expressed himself at [10] of the judgment as follows:

> I am however firmly of the view that the views of Lord Neuberger *must* be observed. The current approach of parties in litigation such as this is wholly self-defeating, and contrary to cost-efficient conduct of litigation. This case is an ideal example of one with 'masses of documents, long witness statements, detailed analysis of the issues, and long argument' being deployed on both sides. The costs burden upon the parties must be enormous, and this approach is, in my judgment, diametrically opposed to that required under the overriding objective in CPR Part 1. It would be regrettable if the only way that compliance could be ensured were to be by the court imposing a strict limit on the number of witness statements that could be lodged, and also restricting their length. Experienced legal advisers ought not to need such strictures in order to concentrate their minds. However, a fundamental change of approach is required by the parties in cases such as these for applications of this nature.

With those observations, and in particular the last sentence, I entirely agree.

22. In a case where the central issue is whether a duty of care is owed by an anchor defendant to a claimant, one would expect the facts giving rise to that duty to be set out in a pleading and a statement of truth. If a defendant challenges the factual assertions in a Particulars of Claim it can do so in witness statements in response, with an opportunity to a claimant to provide a witness statement in reply. The parties

should not be allowed to file large quantities of material, much of which is unlikely to resolve the central issue, without the leave of the court. On any view of the matter such cases need watchful case management before they come to a hearing.

3. The duty of care

23. For the purpose of the appeal, both sides accepted that the general statement, which followed a review of prior authorities, in *Lungowe and others v. Vedanta and KCM* [2017] EWCA (Civ) 1528 at [83] was correct, or as Lord Goldsmith put it, 'arguably correct'.

> 83. … certain propositions can be derived from these cases which may be material to the question of whether a duty is owed by a parent company to those affected by the operations of a subsidiary. (1) The starting point is the three-part test of foreseeability, proximity and reasonableness. (2) A duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary, in certain circumstances. (3) Those circumstances may arise where the parent company (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim. (4) *Chandler v. Cape Plc* and *Thompson v. The Renwick Group Plc* describe some of the circumstances in which the three-part test may, or may not, be satisfied so as to impose on a parent company responsibility for the health and safety of a subsidiary's employee. (5) The first of the four indicia in *Chandler v. Cape Plc* [80], requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary. If both parent and subsidiary have similar knowledge and expertise and they jointly take decisions about mine safety, which the subsidiary implements, both companies may (depending on the circumstances) owe a duty of care to those affected by those decisions. (6) Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary. (7) The evidence sufficient to establish the duty may not be available at the early stages of the case. Much will depend on whether, in the words of Wright J (in *Connelly v. RTZ Corporation Plc* [1999] C.C.C 533), the pleading represents the actuality.

24. It is clear that the three-part test set out in the *Caparo* case is not a forensic equation to which values may be attached that yield the answer to whether or not a duty is owed. The point was expressed by Lord Oliver in *Caparo* at p.639 at A-D:

> … the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of what has been called a 'relationship of proximity' between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be 'just and reasonable.' But although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, one looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible. 'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.

25. Mr Hermer QC argued that RDS had both (a) assumed responsibility for, and (b) taken control of, pipeline integrity, security and remediation in Nigeria; and that the appellants were able to prove this to a standard sufficient to establish jurisdiction.

26. Lord Goldsmith QC submitted that control of the pipeline vested in SPDC under the joint venture agreement; and that in asserting the existence of a duty of care, the claimants had necessarily to show that a duty of care was assumed, or a degree of control exercised, at a high level within the Shell group towards the particular individuals bringing the claims. He submitted that in no case had the English courts found that a parent company owed a duty of care to those affected by the operations of a subsidiary and that *Chandler v. Cape Plc* [2012] EWCA Civ 525 was the only case in which a duty of care by a parent company was found to exist in favour of an employee of its subsidiary. He drew attention to what he described as a crucial factor in the *Chandler* case: namely, that the parent company had employed a doctor whose specific function was to protect the employees of the subsidiary, thereby founding a nexus for the assumption of responsibility. There was no such analogous nexus in the present case.

4. The standard required

27. There is a stark issue as to whether RDS owed a duty of care to the claimants in the particular circumstances; and that issue is fundamental to the court's jurisdiction to try the claims.

28. The question as to how the court should approach an issue of law which may be fundamental to the court's jurisdiction was addressed by Lord Collins giving the judgment of the Privy Council in *Altimo Holdings v. Kirgyz Mobil Tel Ltd* [2011] UKPC 7, and was not in issue before us.

29. Among a number of issues that arose in that case was the issue as to what the 'merits threshold' was where a party (D1 or the 'anchor defendant') was sued within the jurisdiction see [74]. At [80] Lord Collins made clear:

> … the action is not properly brought against D1 if it is bound to fail: *The Brabo* [1949] AC 326, 338-9, per Lord Porter. He also put the point (echoing *Witted v. Galbraith* [1893] 1 QB 577) on the basis that leave will not be granted if the lack of a plausible cause of action against D1 shows that the presence of D1 in the jurisdiction is being used as a device to bring in D2. See also *Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd.* [1983] Ch 258, 268, 273-274.

30. At [81] to [86] under the headings 'Bound to fail/'Serious issue to be tried' and 'questions of law', Lord Collins considered how the court should approach the tests for the establishment of jurisdiction where a question of law arose.

> 81. A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *Hutton (EF) & Co (London) Ltd. v Mofarrij* [1989] 1 WLR 488, 495 (CA); *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [2002] 3 All ER 17, [136].
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> 82. Because this appeal is concerned with the 'necessary or proper party' provision, the question of the merits of the claims is relevant to the question of whether the claim against D1 is 'bound to fail' and to the question whether there is a 'serious issue to be tried' in relation to the claim against D2. There is no practical difference between the two tests, and they in turn are the same as the test for summary judgment.

31. At [84] Lord Collins gave additional guidance as to how this test should be applied when the viability of the claims depended on a substantial issue of law; and, in particular, whether the court was bound to decide that question on the application to set aside service out of the jurisdiction.

> 84. The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: e.g. *Lonrho Plc. v. Fayed* [1992] 1 A.C. 448 , 469 (approving *Dyson v Att-Gen* [1911] 1 KB 410, 414: summary procedure 'ought not to be applied to an action involving serious investigation of ancient law and questions of general importance ..'); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 741 ('Where the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts'); *Barrett v Enfield London BC* [2001] 2 AC 550, 557 (strike out cases); *Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (U.K.) Ltd.* [1990] 1 WLR 153 (summary judgment). In the context of interlocutory injunctions, in the famous case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407 it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It was no part of the court's function to decide difficult questions of law which call for detailed argument and mature consideration.

32. While, of course, I accept these observations, I would note that it gives rise to a paradox: the more difficult the legal issue, and therefore the more problematic the issue may ultimately prove to be for a claimant, the easier it may be to establish jurisdiction.

33. I would therefore approach the jurisdictional issue between the claimants and RDS by posing the question: is the claim bound to fail, which is essentially the Part 24 test, whether the claimants have no real prospect of succeeding on the claim?

D. The claimants' case

34. For the reasons set out above, the starting point for considering the existence of a duty of care should be the pleadings. However, by the conclusion of the argument before us, the claimants' case bore little resemblance to their pleadings which had not been amended to take into account the developing case.

35. The pleaded case dealing with RDS's duty of care (taking the *Okpabi* claim by way of example) is set out in §§84-95, which sets out the matters relied on as showing that RDS:

> … owed a common law duty of care to the claimants … to take all reasonable steps to ensure that oil spills from the … Pipelines and Infrastructure did not cause foreseeable damage [to community land and other common interests of the community] (**§84**).

36. At §86 it is said that as a result of RDS's knowledge of and control over SPDC's operations and their foreseeable effect on the environment and communities there was a relationship of proximity between RDS and the claimants; and that it is fair, just and reasonable to impose a duty of care in the light of the fact that both companies are involved in exploration, extracting and transportation of crude oil. RDS had (or ought reasonably to have had) superior expertise, knowledge and resources in respect of health and safety, and environment protection; and knew (or ought reasonably to have foreseen) that SPDC would rely on its superior expertise, knowledge and resources in those respects.

37. A number of matters are pleaded in the claim in support of the existence of RDS's duty of care to the claimants under four broad headings: (1) RDS's 'control over and direction of the management of [SPDC's] pollution and environmental compliance and the operation of its infrastructure' (§89); (2) RDS's 'knowledge of environmental damage in the Niger Delta caused by SPDC' (§90); (3) RDS's 'superior expertise, knowledge and resources concerning relevant aspects of health, safety and environmental protection' (§93); and (4) RDS's knowledge that SPDC would rely on RDS's 'superior expertise, knowledge and resources concerning the operation of oil pipelines and infrastructure, and … relevant health, safety and environmental protection requirements' (§95).

38. Before dealing with the claimants' developed case on the existence of the duty of care, it is necessary to refer to the material put before the court, focussing at this point on the documents. For this purpose, the material can be categorised under various headings.

39. (1) In 2005, the Shell Group was reorganised and RDS came into existence. At this point the RDS Executive Committee ('ExCo') was established. In addition to the CEO and CFO, it consists of the head of each of RDS's Global Businesses. Although there is a factual dispute about its functions and at [101] the Judge said that he did 'not equate decisions taken by [ExCo] with decisions taken by RDS', I would regard ExCo as carrying out material functions in relation to the business which are attributable to RDS for present purposes.

40. RDS's 2005 Annual Report describes ExCo as 'responsible for [RDS's] overall business and affairs … It implements all Board resolutions and supervises all management levels at [RDS]' (**10 p.2693.1**). RDS's 2015 Annual Report describes the CEO as responsible for the operational management of RDS, in which he is supported by ExCo (**11 p.2897**); and ExCo as operating under the direction of the CEO in support of his responsibility for overall management (**11 p.2899**).

41. (2) **The Shell Control Framework**. This document emerged late in the proceedings in circumstances I will come to. It is described in its terms as 'the single overall control framework that applies to all Shell Companies' (**Application Bundle #4 p.3**). It is, as its name suggests, RDS's overall framework for control of all companies within the Shell Group; and includes for example, general business principles. It is a document that was obtained by those representing the claimants after the hearing in front of the Judge and is therefore not referred to in the claimants' pleadings. It is, however, a document which was an important foundation for the claimants' developed argument.

42. (3) RDS's Corporate and Social Responsibility Committee (**'CSRC'**). This committee was established in December 2012 made up of a number of RDS non-executive directors, and assisted the RDS main board in reviewing policies and the conduct of the Shell Group in relation to, among other things: (a) the Shell General Business Principles, (b) Shell's Health, Safety, Security, Environment and Social Performance ('HSSE & SP') and (c) the Shell Code of Conduct.

43. (4) **Shell's Sustainability Reports**. For a number of years Shell has published Sustainability Reports which addressed environmental issues. The claimants relied in their pleadings on the contents of a number of the 2010 and 2014 Sustainability Reports. In the developed submissions, further reliance was placed on the 2009 Sustainability Report.

44. (5) **Shell's HSSE & SP Control Framework**. This is to be distinguished from the Shell Control Framework. Shell's approach to HSSE & SP had developed over time in different forms. In earlier and more confined manifestations it had been referred to as 'HSE' and 'HSSE'. The developed HSSE & SP Control Framework set out mandatory requirements for all Shell Group companies, defined standards and established processes and procedures. It consists of a number of elements, including the **HSSE & SP Standards** and the **HSE Policy and Commitment**. RDS disclosed two pages of the HSSE & SP Control Framework (12 p.3426). The rest of the document was disclosed during the course of the hearing. It was referred to in general terms by reference to Shell's 2014 Sustainability Report (**§89(i)**).

45. It will be necessary to look in more detail at the contents of these documents in due course.

46. At §89 of the Particulars of Claim, under the general heading: '[RDS's] control over and direction of the management of [SPDC's] pollution and environmental compliance and the operation of its oil infrastructure', the claimants set out some of the contents of some of these documents, as well as other material. These can be summarised as matters referred to in the 2009 HSSE & SP Control Framework; oversight by the CSRC on behalf of the board of RDS, the contents of the 2010 and 2014 RDS Sustainability Reports; reporting to RDS's CEO by Shell's Heads of Business and Functions; and the contents of diplomatic cable disclosed by Wikileaks summarising a meeting with Ann Pickard (Shell's Executive Vice-President of Sub-Saharan Africa between 2005-2010) and what she is reported to have said.

47. Relying on these matters, the claimants pleaded:

> 90 … [RDS] exerts significant control and oversights over [SPDC's] compliance with its environmental and regulatory obligations and has assumed responsibility for ensuring observance of proper environmental standards by [SPDC] in Nigeria. [RDS] carefully monitors and directs the activities of [SPDC] and has the power and authority to intervene if [SPDC] fails to comply with the Shell Group's global standards and/or Nigerian law.

48. The pleading continues under 3 headings: (1) '[RDS's] knowledge of environmental damage in the Niger Delta caused by [SPDC]'; (2) '[RDS's] superior expertise,

knowledge and resources concerning relevant aspects of health, safety and environmental protection'; (3) '[RDS's] knowledge that [SPDC] would rely on [RDS's] superior expertise, knowledge and resources concerning the operation of oil pipelines and infrastructure and compliance [with] relevant health, safety and environmental protection requirements'.

49. This part of the Particulars of Claim is plainly intended to replicate the four indicia set out in the judgment of Arden LJ in *Chandler v. Cape Plc* (see above) at [80].

> … in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issue.

E. The Judge's findings

50. Having set out and dealt with a number of matters that do not arise on this appeal, the Judge approached the issue of governing law as it applied to the claimants' dispute with RDS on the basis that the laws of England and Wales and the law of Nigeria were materially the same [57]. At [70] to [80] the Judge reviewed the authorities and considered those factors that were material to the existence of a duty of care owed by a parent company to those affected by the operations of its subsidiary. At [81] to [106] the Judge dealt with the evidence.

51. At [85] he set out part of the evidence of Michiel Brandjes (RDS's Company Secretary and Corporate General Counsel) in relation to RDS's position.

> 10. RDS, as the ultimate holding company of the Shell Group of companies, carries out activities commensurate with this role, including holding shares in its subsidiaries and investments and setting the overall strategy and business principles for the Shell Group of companies. RDS reports on the consolidated performance of the Shell Group of companies, makes appropriate disclosures to the markets, and maintains

> relationships with investors. It is also responsible for approving changes to the capital and corporate structure of the Shell Group of companies.
>
> 11. RDS is a holding company. It is not an operating company. As a holding company, it does not have any employees. A limited range of corporate services are provided by individuals employed elsewhere in the Shell Group of companies from time to time seconded to RDS ...
>
> 12. RDS does not involve itself or otherwise intervene in the operational activities of its many hundreds of subsidiaries. As a holding company, it does not have the expertise or capacity to do so … each operating company is autonomous, with its own properly constituted board of directors, its own management, its own business purpose, its own assets and its own employees appropriate for that purpose. Its board and management take the operational decisions necessary to run its business. Each operating company is responsible and accountable for its operational performance including its Health, Safety, Security, the Environment and Social Performance … compliance and performance.

52. At [86] the Judge set out his findings in relation to RDS's involvement in the damage to the environment in the Niger Delta. He accepted that RDS did not engage in oil exploration in Nigeria and was prohibited from doing so as a matter of Nigerian law.

53. At [89] he summarised his view of the claim against RDS:

> … the evidence on the part of the claimants that is relied upon to found a claim against RDS (rather than SPDC) is extremely thin, bordering on sketchy, and in a great many instances simply not evidence at all. I take it at its highest for the claimants due to the early stage of the proceedings. However, upon analysis it can be seen that it is very strong on assertion and considerably weak on actual evidence.

54. The Judge was critical of the assertion in the witness statement of Mr Leader of Leigh Day that the management of the Shell Group remained the same after the restructuring in 2005. At [91] the Judge said this:

> I disagree with the approach taken by Mr Leader … Events prior to 2005 on a different corporate structure when RDS was a shelf company are simply not relevant to these claims against RDS. Part of Mr Leader's evidence relies upon the view of Professor Siegel, for which no permission was given and in any event which relates to matters pre-2005 …

55. I will return later in this judgment to this issue: first, in relation to the claimants' argument that the Judge failed to acknowledge that the degree of central control increased following the restructuring and therefore the degree of central control prior to 2005 was highly material; and secondly, in relation to the vexed question of the status of Professor Siegel's evidence.

56. At [93] to [106], the Judge reviewed the evidence that was relied on by the claimants in proof of RDS's duty of care towards them. The Judge analysed this under six headings: (1) statements in public documents, for example the 2014 Sustainability Report, at [93] to [97] and [109]; (2) evidence showing 'the high degree of control and direction over SPDC's environmentally harmful activities', at [98] to [99]; and in particular: (3) the role of ExCo at [101]; (4) the role of the CSRC, at [102]; (5) the evidence of two former employees, Messrs Sticco and Briggs, at [104]; and (6) the evidence linked to Ann Pickard.

57. Against this evidence, which he largely discounted, the Judge weighed the evidence from SPDC, which he described at [106]:

> The evidence from those at SPDC is to the effect that it is that company, rather than RDS, that takes all operational decisions in Nigeria, and that there is nothing performed by RDS by way of supervisory direction, specialist activities or knowledge, that would put RDS in any different position than would be expected of an ultimate parent company. Rather to the contrary, it is SPDC that has the specialist knowledge and experience – as well as the necessary licence from the Nigerian authorities – to perform the relevant activities in Nigeria that form the subject matter of the claim. This paragraph is but a short summary of what is a considerable body of evidence, but in essence it distils that evidence into the necessary points. SPDC is the specialist operating company in Nigeria; SPDC is the entity with the necessary regulatory licence; RDS is the ultimate holding company worldwide and receives reports back from subsidiaries such as SPDC.

58. At [107] to [112], the Judge analysed the law in a way which is not criticised on this appeal, concluding at [113]:

> The three-fold test therefore requires the following elements to be satisfied:
>
> 1. The damage should be foreseeable;
>
> 2. There should exist between the party owing the duty and the party to whom it is owed a relationship of proximity or neighbourhood;
>
> 3. The situation should be one in which it is 'fair, just and reasonable' to impose a duty of a given scope upon the one party for the benefit of the other.

59. In the Judge's view, it was the second and third of these elements which were problematic for the claimants. At [114], he explained why there were difficulties both in demonstrating the necessary degree of proximity, and at [115] that it would be fair, just and reasonable to impose a duty of care on RDS of the nature alleged by the claimants. At [116] and [117], the Judge analysed the facts by reference to the two cases which were most relevant to the existence of a duty of care in comparable circumstances: *Chandler v. Cape Plc* (above) and *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635. At [122], he concluded that it was not reasonably arguable that RDS owed any duty of care to the claimants.

60. Before considering this conclusion more fully, it is necessary to consider three preliminary criticisms which the claimants make of the Judge's approach.

F. The claimants' three preliminary criticisms

61. Mr Hermer submitted that the Judge made three initial errors in his analysis.

62. First, he excluded from consideration the evidence as to structure and actions of the Shell Group before 2005. This was wrong because it was clear that the degree of centralised control over the operations of the subsidiaries increased, rather than decreased, after the reorganisation of the group in 2005. Secondly, he erred in treating the control functions exercised by ExCo on behalf of RDS as limited in the way he did. Thirdly, the Judge was wrong to have ignored statements in corporate literature referring to the commitment of the Shell Group and RDS to environmental issues on the basis that these reflected requirements of companies listed on the London Stock Exchange. In fact, these were statements which could properly be viewed as showing both a high level of control and direction over SPDC's environmentally harmful activities and an assumption by RDS of ultimate responsibility for ensuring that SPDC's operation in Ogale and Bille did not cause foreseeable harm to the claimants, whatever the precise purpose of the publication.

63. Mr Hermer submitted that these three errors led the Judge to the unjustifiable conclusion, expressed at [99] of the judgment:

> There is simply no evidence of such high level of oversight or high degree of control and direction, or indeed of any appreciable level of oversight or control either.

64. The claimants contended that such a conclusion was unsustainable in the light of the evidence before him; and was, in any event, wrong in the light of the new evidence that has emerged since the hearing before the Judge.

65. Two points can perhaps be made at this stage in relation to the first and third of the points.

66. So far as the first point is concerned, the Judge was faced with a vast amount of material which he necessarily had to evaluate, while keeping in mind the test of arguability that he had to apply. The pre-2005 material was not relied on in the

Particulars of Claim to any significant degree; and, in the light of the fact that the claims were issued in October 2015 (Okpabi) and December 2015 (Alame), it is not immediately obvious why the position in 2005 (or earlier) would be material to the existence of the applicable duty of care at the date of the accrual of the causes of action. The claimants wished to rely on the position before 2005 because at least some their evidence (the witness statements of Mr Briggs and Professor Siegel, and to a lesser extent Mr Sticco) related to that period. The relevant question was the degree of control and whether RDS had assumed responsibility in the material respects after RDS was set up in 2005; and that did not depend on the position over 10 years prior to the issue of proceedings.

67. So far as the third point is concerned, there is force in the claimants' criticism. For example, I would accept that statements made in the 2014 Sustainability Report were potentially relevant to the existence of the duty of care relied on by the claimants. Whether in fact they do so is a matter to which I will return later in this judgment. However, the purpose for which statements were made by RDS may bear on this question.

G. The claimants' witness statement evidence before the Judge

68. The evidence broadly fell into two parts: first the witness statements of Mr Leader of Leigh Day adducing documents on which he commented and from which he invited the court to draw inferences as to the existence of the duty of care; and secondly, the evidence of witnesses whose evidence was directly relied on as showing the degree of central control by RDS over the operations in Nigeria.

69. Gene Sticco (**8#81**) was employed by the Shell Group between 2003-2009, primarily dealing with corporate affairs. His evidence was that, although Shell was made up of multiple entities, the direction for them all was based on streamlined processes, 'with the ultimate direction coming from [ExCo]', and a requirement that all the companies within the Shell Group adopt mandatory universal standards. According to his evidence it was the role of Regional Managers to ensure that Shell's global standards were implemented; and that the relevant Regional Manager responsible for Nigeria 'unusually, had a direct link to Malcolm Brinded, the [ExCo] member for [Exploration and Production]'.

> 18. The special treatment granted to this Regional Manager was because SPDC was seen as a particularly risky country (*sic*) and so attracted particular attention from Malcolm Brinded. This Regional Manager could also go directly to the head of SPDC and tell him what the Executive Committee wanted to see happen, so there was a two-way connection between the Executive Committee and SPDC.
>
> …
>
> 23. When I was working for the Shell Group, [ExCo] considered Nigeria and Iraq to be the **highest risk countries** in the Group portfolio … For example, I know that intelligence about the **security situation in Nigeria** was regularly provided

> to senior executives in the Shell Group, including those on [ExCo].
>
> …
>
> 27. There was definitely **interaction and consultation** between SPDC and the Hague, leading all the way to [ExCo], in particular when it came to significant issues in Nigeria, such as HSE, security, government affairs and ensuring that SPDC retained its licence to operate. These issues in Nigeria were all firmly on the agenda of the E&P [ExCo] member. I had **less exposure to operational or financial issues, so could not comment with certainty** on the nature or extent of the interaction and oversight in these areas.

70. Paddy Briggs (**8#80**) worked for Shell between 1964 and 2002, and described the structure of the Shell Group before the restructuring in 2005. He expressed various opinions about the measure of control exercised by 'the people at the Hague or in London' over the Nigerian subsidiary, on the basis of his experience working for Shell in Oman. He referred to articles he had written since leaving Shell and referred to one particular observation:

> Thus, it is likely that even comparatively minor events (a small to medium oil spillage for example) will be immediately reported so **that the best remedial action, based on Shell's global experience, can be taken**. (**§32.1.3**)

71. Professor Siegel (**8#79**) is Associate Professor of Strategy at the Ross School of Business, University of Michigan. He had been instructed to review documents in a claim brought in the United States by the estate of Ken Saro-Wiwa: *Ken Wiwa, et al v. Royal Dutch Petroleum Company et al*. The claim alleged that SPDC had been complicit in human rights abuses, including the execution and torture of Ken Saro-Wiwa and others; and Professor Siegel had been asked to consider the relationship between various companies in the Shell Group. Much of the evidence in his witness statement in the present proceedings was inadmissible opinion evidence. However, he relied on Professor Siegel's expert report in the US proceedings, and his opinion in the present proceedings, that 'the Royal Dutch Shell group of companies tightly controls its Nigerian subsidiary, SPDC', and that 'SPDC acts in the interests of the parent company and does not act on its own' (**Transcript 1/93/21-94/3**). The justification for relying on this evidence was that Professor Siegel had seen 'thousands of pages of internal documents and numerous pieces of evidence which are consistent with [his] conclusion' (**Transcript 1/95/10**).

72. The Judge dealt with the evidence of Mr Sticco and Mr Briggs at [104] of the judgment. As already noted, he found that the evidence relating to the period before 2005 did not advance the appellant's case, in the light of the reorganizational changes. However, in my judgment, on a proper view of the matter, the evidence of these two former employees provided scant support for the claimants' argument that RDS owed them a duty of care.

73. The fact that Nigeria was regarded as one of the countries where there were inherent risks which required particular attention, as Mr Sticco's evidence indicated, is (at least without more) an insubstantial foundation for the finding of a duty of care based either on the basis of control or an assumption of responsibility.

74. Mr Briggs's evidence is also slight. His specific contention that best practice, 'based on Shell's global experience' might be deployed in remediation of oil spillage', suggests an unrealistically extensive duty since it was not directed to Nigeria or the position of the claimants.

75. So far as Professor Siegel's evidence is concerned, the Judge rightly excluded it as opinion evidence. Its utility was anyway very limited, since it was not open to the claimants to rely on a statement that there were many documents which supported Professor Siegel's inadmissible conclusions.

76. My view of this evidence does not however dispose of the evidential issues since, both before the Judge and on the appeal, the claimants' primary focus was on the documents on which they relied whatever the view that the Court took about the witness statements.

H. New evidence relied on in the Court of Appeal

77. On 19 October 2017, about a month before the hearing of the appeal, the claimants applied to adduce the witness statement of Rebecca Sedgwick. Ms Sedgwick had worked for SPDC in its security department in Nigeria between 2006 and 2012. The Shell Group operated across different business lines and each of these 'Businesses' was subdivided into geographical regions. Thus, SPDC was within the Upstream International Business and fell within the Sub-Saharan Africa region ('SSA') (**Applic Bundle #2 p.16 §8**). Much of the witness statement consists of her 'understanding' of the degree to which SPDC's operations were controlled from 'upstream' (**p.27 §44**). Her conclusion (**§51**) was that SPDC was constrained in its decision-making as to security and other HSSE issues, that it was 'dependent upon guidance and direction from RDS and regional management'; and that Shell Group standards, policies and procedures could only be deviated from by SPDC with approval from management 'external' to SPDC (in particular, the executive vice-president of SSA and the Head of Upstream International Business who was a member of ExCo).

78. The extent to which the operations of SPDC were 'controlled' by RDS, either by ExCo, other organisations within RDS or by senior management has always been in issue between the parties; and RDS served three witness statements in response to Ms Sedgwick's statement which challenged her knowledge of the material relationships between SPDC and other members of the Shell Group, her reliability and her detachment. It was said (for reasons that it is unnecessary to elaborate upon) that she had an animus against Shell as her former employer.

79. We indicated that we would consider the claimants' application to adduce this new evidence and give our decision and ruling in this judgment. I would refuse to admit Ms Sedgwick's witness statement. However, I would admit the Shell Control Framework which was an exhibit to her statement and to which reference has already been made. My reasons are as follows.

80. For the Court of Appeal to exercise its discretion to admit evidence it must be satisfied that the 'fresh evidence': (1) could not have been obtained with reasonable diligence for use at the hearing of the application; (2) would probably have an important, although not necessarily decisive, influence on the result; and (3) is apparently credible: see CPR Part 52 .21(2), *Ladd v. Marshall* [1954] 1 WLR 1489 CA and White Book 1 52.21.3.

81. While I would accept that the evidence could not have been obtained earlier, the difficulties arise from the witness's apparent partiality and the limitations on her knowledge of the material matters. The critical passages on which the claimants rely (see for example §§44-45) do not come from personal knowledge which was necessarily confined by the post she occupied at the time.

82. As Mr Hermer accepted (**Transcript 1 p.25 l.21**) part of the reason for adducing the witness statement was to show the likelihood that further material evidence might be forthcoming from current or former employees. This was similar to his submission in relation to the evidence of Professor Siegel. I would accept that this is possible, but the prospect of further evidence relevant to the existence of the duty of care does not assist on the present appeal in relation to jurisdiction, which must be decided on the material available and in accordance with the relevant test.

83. The position in relation to the exhibit is different. This is an RDS document and I see no compelling argument why it should be excluded.

I. Whether the claimants can establish the existence of a properly arguable duty of care owed by RDS to the claimants?

Introduction

84. As already noted, the Judge approached this issue on the basis that the relevant question was whether the claimants could satisfy the second and third of the limbs of the *Caparo* test. He seems to have accepted that the claimants had satisfied the first limb to the standard required. In my view, he was right to have done so. There is at least sufficient information in the documents about the frequency, location and scale of oil spills from the pipeline and infrastructure operated by SPDC on behalf of the joint venture to establish the foreseeability of harm to the claimants.

85. The areas of dispute between the parties related to proximity and whether it was fair, just and reasonable that such a duty be imposed.

Proximity

86. The claimants relied on five main factors to demonstrate RDS's arguable control of SPDC's operations: (1) the issue of mandatory policies, standards and manuals which applied to SPDC, (2) the imposition of mandatory design and engineering practices, (3) the imposition of a system of supervision and oversight of the implementation of RDS's standards which bore directly on the pleaded allegations of negligence, (4) the imposition of financial control over SPDC in respect of spending which, again, was

directly relevant to the allegations of negligence and (5) a high level in the direction and oversight of SPDC's operations. Some of these factors overlap.

87. Before addressing the claimants' detailed submissions, it is important to bear in mind certain matters which may confine the relevance of the material that emanated (or which the claimants contended emanated) from RDS.

88. In the present context, when the law refers to a parent company assuming direct responsibility for devising a policy the adequacy of which is the subject of the claim, or controlling the operations which are said to give rise to the claim, it is concerned with a duty owed to a particular person or class of persons. It is therefore important to distinguish this situation from the more abstract (although no less important) concepts of moral responsibility: for example, to reduce global warming and to protect the environment.

89. It is similarly important to distinguish between a parent company which controls, or shares control of, the material operations on the one hand, and a parent company which issues mandatory policies and standards which are intended to apply throughout a group of companies in order to ensure conformity with particular standards. The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care in favour of any person or class of persons affected by the policies.

(1) Mandatory policies, standards and manuals

90. The claimants' submissions referred to a number of documents and functions under this heading.

91. First, the 2009 Shell Sustainability Report (**10 p.2695**) which drew attention to 'high-level guidance and … detailed mandatory standards that support them'; and to the function of the HSSE & SP Executive Committee.

> Each business and facility is responsible for complying with Shell's safety, environmental and social requirements. They must also set out to achieve targets measured against their industry peers.

92. In this document, the HSSE & SP Global Discipline team is described (**10 p.2695 box**) as:

> Specialist teams responsible for supporting the business in implementing company-wide standards and requirements. They share industry best practice, integrate external learning into our approach and monitor performance.

93. Second, there is a document (dated June 2010), with the title 'Oil Spill Emergency Response' (**12p.3361**) containing the statement:

> We manage oil spill response capability on a global scale. Shell ensures that adequate resources are maintained for managing regional and local spills … in countries where national oil spill response plans are in place, our plans and those of Shell operating companies and other companies refer to them where necessary … For response to larger spills we use global resources and mobilise Shell staff from around the world.

94. Third, as at December 2012, the Board of RDS had created the HSSE & SP Executive, whose tasks included, 'review' of 'the standards, policies and conduct of [RDS] relating to HSSE & SP and the safe condition and environmentally responsible operation of [RDS's] facilities and assets' (**10/103/2646**).

95. Fourth, there is the Shell Control Framework (apparently dated 2013) (**Applic Bundle #4**). This document is described as, 'the single overall control framework that applies to all Shell companies' (**p.3**):

> (**p.4**) Shell internally organises its activities principally along Business and Function lines. It transacts its business through Legal Entities.

96. These are defined (**at p.13**): 'The Businesses are Upstream, Integrated Gas and New Energies and Projects & Technology … The Functions are Finance, Human Resources and Corporate, and Legal.' The Business and Function Heads are members of ExCo (see glossary p.18-20).

> (**p.4**) Where major risks are present that require **common treatment across the Shell Group**, the risk response may be to define Standards as mandatory rules. Manuals provide more detailed mandatory instructions on how to implement Standards or other parts of the Shell Control Framework. A risk response, typical for routine risks, is for Businesses and Functions to design and operate Controls. Controls help to assure that risks are managed in a fit-for-purpose manner and objectives are achieved.
>
> …
>
> (**p.6**) 'Group Standards are adopted for matters that present significant Group-level risks … They apply across all of Shell's activities and are mandatory for all Shell companies.
>
> Operating Standards define mandatory rules that are needed in addition to the Group Standards, to manage significant risks encountered in specific business activities …
>
> Manuals provide more detailed instructions on how to implement Group or Operating Standards …
>
> …

> In the technical area, the Technical Practices establish requirements for all design engineering and construction activities as well as for the operation of assets and wells. The Technical Practices are approved by the relevant Technical Function Head or Global Discipline Head.
>
> Technical requirements related to Process Safety are mandatory for all projects, well activities and asset operations. Any derogation from a SHALL [PS] or SHALL [WELLS] requirement must follow the derogation process and shall be approved by the relevant Technical Authority.
>
> The application of all other Technical Practices is optional unless the Project Manager or Asset Manager mandates their use for a specific project, activity or operation.
>
> …
>
> (**p.10**) Independent Assurance. The Process Safety and HSSE & SP Controls Assurance team, through its mandate from the Corporate and Social Responsibility Committee, provides independent assurances as to the effectiveness of the HSSE & SP Controls including Process Safety Controls.'

97. Fifth, the 2014 Shell Sustainability Report (which figures prominently in the Particulars of Claim) (**10 p.2767**) described, in broad terms, the governance and standards of the Shell Group. This included the CSRC. Under the heading 'Our Standards' there was the following:

> Our standards are established by our [HSSE & SP] Executive team, chaired by our CEO which shapes, drives and assesses how we manage our performance in these areas … Our standards set out in our HSSE & SP Control Framework are supported by a number of guidance documents. They apply to **every Shell company, including all employees and contractors**, and to Shell operated joint ventures …

and under the heading 'HSSE & SP Assurance:

> The process safety and HSSE&SP assurance team with a mandate from the CSRC, provides independent assurance on the effectiveness of the **HSSE & SP Control Framework** and reviewing the effectiveness of other assurance activities operating within Shell.
>
> This assurance is provided against Shell's broad mandatory requirements which are outlined in the HSSE & SP Control Framework. It applies to all operated [joint ventures] and non-operated areas where agreed. The mandated requirements cover

> risk areas within health, personal safety, process safety, environment, security and social performance.

98. Under the heading, 'Safety', the 2014 Sustainability Report (**10 p.2769**) provided:

> We apply **consistent standards around the world** to which everyone must comply … **These can be found in the HSSE & SP Control Framework**. They **describe what is required** to maintain the safety of facilities that we operate throughout their life cycle from design, construction and operation to decommissioning ...

and, as part of 'Process Safety':

> Process Safety is making sure the right precautions are in place to prevent unplanned releases of hydrocarbons and chemicals. We seek to ensure that our facilities are well designed, inspected, maintained and operated.
>
> Shell has defined global technical safety standards for all projects and facilities. These are **based on industry standards as well as best practice**. If an incident takes place, we learn from the outcome and embed any new knowledge into our technical safety standards and practices …
>
> Our ability to manage oil spills has been enhanced by our global response network that can attend to an oil spill anywhere in the world. We also have a global centre that tests our oil spill response capabilities.

99. Among the environmental data included in the 2014 Sustainability Report (which includes information about flaring and fresh water extraction) are details of operational spills of oil, including (under a separate heading) Nigeria.

(2) The imposed system of mandatory design and engineering practices

100. Under this heading the claimants relied on various documents which refer to a centralised system of detailed mandatory design and engineering practices that SPDC had to comply with, including pipeline and leak detection standards, which bear directly on the pleaded allegations of negligence.

101. As at 2009 a new business division of RDS, Projects and Technology ('P&T') was set up to centralise the mandatory Design and Engineering Practices ('DEPs') which governed, among other things, all relevant aspects of pipeline integrity and leak detection, down to the detail of the welds that had to be used. P&T was headed by a member of ExCo and was to serve 'all of Shell's businesses globally.' (**10 p.2638**).

102. SPDC was required to comply with the DEPs which also formed part of the HSSE & SP Control Framework that was under the ultimate control and supervision of RDS, in the construction of, operation and maintenance of its pipeline and other oil infrastructure. The claimants identified a material DEP on Pipeline Integrity (DEP 31.40.00.11-Gen [**12 p.3335**]), published in January 2010.

103. DEP 31.40.00.11-Gen reads as follows:

> DEP … publications reflect the views of [two identified Shell companies] and/or other Shell Service Companies. They are based on the experience acquired during their involvement with the design, construction, operation and maintenance of processing units and facilities, and they are supplemented with the experience of Shell Operating Units. Where appropriate they are based on, or reference is made to, international, regional, national and industry standards.
>
> The objective is to set the recommended standard for good design and engineering practice applied by Shell companies operating an oil refinery … oil and gas production facility or any other such facility, and thereby achieve **maximum technical and economic benefit from standardisation**.
>
> The information set forth in these publications is provided to Shell companies for their consideration and decision to implement … The system of DEPs is expected to be sufficiently flexible to allow individual Operating Units to adapt the information set forth in DEPs to their own environmental requirements.

104. Despite the indication in the last paragraph that adopting the DEP was optional, it is clear that Process Safety requirements were mandatory. §2.2.1 states, 'a large number of Shell standards are applicable to pipeline integrity activities and the main standards are referenced within the Group HSSE Control Framework', including 'several relevant pipeline specific DEPs' and 'HSSE Management System Manual'.

105. Initially, RDS disclosed two pages of the 'Shell HSSE & SP Control Framework' (**12 p.3426**) dealing with 'Spill Preparedness and Response'. The claimants relied on this short extract to demonstrate that the 'Business Leader' was 'accountable' for requirements 1 and 2, defined as '1. Establish, maintain and exercise spill response plans based on Tiered Preparedness and Response where permitted by law. 2. Provide the resources needed for spill response.'

106. As a result of a belated application made by the claimants under CPR Part 31.14 during the course of the hearing of the appeal, RDS disclosed the full version of the 'Shell HSSE & SP Control Framework.' The claimants argued that the disclosure of the document at such a late stage illustrated the danger of summarily disposing of a complicated, document-heavy case, in a developing area of the law. The HSSE & SP Control Framework revealed the existence (although not the content) of a large

number of mandatory technical practices which, the claimants submitted, might to an arguable standard, establish a significant degree of proximity by virtue of their detail and their prescriptive nature.

107. The claimants focussed on a number of DEPs in the HSSE & SP Control Framework relating to pipeline design and operations, for example: metallic components, engineering, metallurgy, valve specification, welding and alarm management. Mr Hermer submitted that these were mandatory technical specifications directed to how operating subsidiaries should conduct operations in, what he characterised as, 'granular' detail.

108. In summary, the claimants submitted that the Shell HSSE & SP Control Framework provided the means by which RDS maintained a tight oversight of SPDC's operations in relation to activities that were directly relevant to the pleaded causes of action, including security, emergency response and control of joint ventures.

(3) The imposition of a system of supervision and oversight in implementing RDS's standards

109. It was in this context that the claimants relied on the operation of the CSRC, and its role in overseeing safety and environmental policies throughout the Shell group and ensuring that they were complied with. The CSRC terms of reference (**10 p.2643**) set out CSRC's functions in assisting the RDS Board in reviewing the policies and conduct of the Shell Group:

> … with respect to the Shell General Business Principles (including Sustainable Development and HSSE & SP policy), the Shell code of Conduct and to major issues of public concern. [CSRC] also carries out certain oversight functions on behalf of the Board.

110. Among the CSRC's duties (**10 p.2646**) was the obligation to:

> - review the standards, policies and conduct of [RDS] relating to HSSE & SP and to the safe condition and environmentally responsible operation of the [RDS's] facilities and assets;
>
> …
>
> - monitor the effectiveness of the HSSE & SP risk based internal control system and have access to any audit, incident and investigation report it considers relevant;
>
> …
>
> - review and assess management's response to audit findings and recommendations.

111. In addition, the CSRC was required to report to the Board on its proceedings on all matters relating to its duties and responsibilities.

112. The 2014 Sustainability Report described how the CSRC mandated the HSSE & SP assurance team to provide independent assurance on the effectiveness of HSSE & SP controls (**10 p.2767**).

> This includes testing the compliance with the HSSE & SP Control Framework … This assurance is provided against Shell's broad mandatory requirements which are outlined in the HSSE & SP Control Framework. It applies to all operated JVs … [and] … risk areas within … environment [and] security.

113. The January 2009 'Standard: HSSE auditing' (12 p.3278) was stated to create a uniform way of managing HSSE, which includes verifying the existence and effectiveness of internal controls.

(4) RDS's financial control over SPDC in respects directly relevant to the allegations of negligence

114. Mr Hermer submitted that RDS had overall central budgetary control over SPDC's investment in infrastructure and, in particular, pipeline maintenance and replacement, as well as the cost of measures to prevent third party bunkering, to clean up oil-spills and to remediate damage. It was, he submitted, part of an overall system of resource allocation.

115. He relied on deposition evidence given in November 2006 in the course of securities litigation in the United States in relation to the position before 2005. The relevance of this evidence related primarily to SPDC's reserves. Mr Hermer submitted that the evidence was potentially relevant to decisions being at 'Business' level within Shell in relation to pipelines and remediation, and the centralisation of expertise (**12 #134, #136 and #137**). Although, the context appears to relate to the value of reserves, Mr Hermer submitted that it was potentially relevant in so far as SPDC's budgetary constraints were shown at trial to have caused the failure of its infrastructure, particularly in circumstances where the evidence showed that RDS knew of the poor state of the pipelines.

(5) The significance of the level of centralised direction and oversight of SPDC's operations in relation to security.

116. The claimants argued that this was relevant to those parts of the claim which related to the failure to take sufficient measures to protect the pipelines from third-party interference. Mr Hermer submitted that RDS's degree of control over SPDC was significantly greater than over other subsidiaries. He relied in this context on §§18, 23 and 27 of Mr Sticco's evidence and the reported conversation contained in a 2006 United States diplomatic cable disclosed by Wikileaks.

117. This conversation appears to have been between the US Consul-General and Ann Pickard (who as Executive Vice-President of Sub-Saharan Africa) reported to Mr Brinded, the Head of Upstream and a member of ExCo:

> … Pickard has launched both a comprehensive re-organization of [SPDC] and Shell's security apparatus. Among the changes, Pickard wants to make sure her staff in Lagos was fed more security information from their people on the ground in the Delta. Shell security will now report directly to her staff.
>
> …
>
> Discussing Shell Nigeria's internal operation Pickard outlined two serious re-organization efforts. First, she planned a large-scale re-organization of [SPDC], Shell's flagship joint-venture company, responsible for most Shell production in Nigeria. However, SPDC has not been meeting Shell's international performance benchmarks, and Pickard saw the deficit as being a fillip for substantial organizational reform.
>
> Pickard also discussed challenges in managing Shell's security apparatus. She acknowledged some frustration in dealing with Shell security staff, saying the staff on the ground were well-connected, but somehow much of the valuable information was not reaching her. Pickard pointedly said that she was re-organizing Shell security for 'performance reasons', placing four well-trusted and direct-report expatriates in charge, to ensure that pertinent information gathered on the ground finds its way to her desk.

Conclusion on the issue of proximity

118. It is clear from the Shell Control Framework that the Shell Group is organised both through legal entities (parent, holding and operating companies) and on Business and Function lines. Thus, the Legal and Human Resources functions might operate across company lines; and, materially for present purposes, so might the Upstream Business (oil production and supply). That plainly assists the claimants in their response to an argument that the issue of proximity can be answered exclusively by reference to the responsibility of, and control by, SPDC of its own operations in Nigeria.

119. There are however, considerable difficulties with the documents that the claimants rely on to establish their case to the standard required.

120. First, the extracts relied on by the claimants are short extracts from relatively long documents; and some are published for the purpose of informing shareholders and regulators about the Shell Group businesses. Such statements must be read in their proper context.

121. Secondly, and crucially, the extracts relied on reveal a centralised system based on industry standards and the Shell Group's own developed best practice. These are to be

found in HSSE & SP Control Framework which provides for consistent mandatory standards throughout the Shell Group. To the extent that they established mandatory requirements, they were mandatory across all Shell Group companies. This is clear in the references, for example, to 'common treatment across the Shell Group' in the Shell Control Framework, to 'consistent standards around the world' in the 2014 Sustainability Report, and to 'the maximum technical and economic benefits of standardisation' in DEP 31.40.00.11-Gen. All this is as one might expect of best practices which are shared across a business operating internationally.

122. So far as the short initial extract from the HSSE & SP Control Framework is concerned, I am very far from persuaded that one can read from this short passage that RDS exercised material control over SPDC's material operations. The passage relied on indicates that the Business Leader is 'accountable' for the existence of a plan (although it does not specify the plan as such) to respond to a substantial spill. Although, the claimants make a further point that it is illustrative of what may emerge on disclosure, the difficulty is that jurisdiction is founded on a properly arguable cause of action and not on what may (or may not) become a properly arguable cause of action.

123. The full (or at least the fuller) text of the HSSE and SP Control Framework is consistent with the other material advanced by the claimants: it constitutes high level guidance, based on the centralised accumulation of a wide range of expertise and experience, and which is then made available to its subsidiaries.

124. The HSSE & SP Assurance indicates that the team would review the effectiveness of the HSSE & SP Control Framework across all of the Shell Group's operations; but it does not indicate the exercise of any degree of control or amount to control.

125. It is plain that there were concerns about the security of SPDC's operations in Nigeria and that this concern was expressed at a high level. This is hardly surprising since it affected both Shell's general reputation and the output of an important source of oil. However, the concern was to ensure that there were proper controls and not to exercise control.

126. Even putting it at its highest, the exiguous evidence of centralised assistance to SPDC (in contradistinction to all operating companies) does not come close to supporting the sort of proximity on the basis of which the court might find a duty of care to exist in favour of the claimants.

127. In the light of the evidence and, in particular, the documentary evidence before the court, I would conclude that none of the matters identified at (1)-(5) above, demonstrates a sufficient degree of control of SPDC's operations in Nigeria by RDS to establish the necessary degree of proximity. Nor, taken cumulatively do they do so. There were reputational concerns (in part in relation to personnel), there was concern about losses of oil and environmental damage, there was a desire to ensure that proper systems were put in place to reduce such losses and environmental damage; and there was the establishment of an overall system which was there to ensure best uniform practices. However, the claimants have not demonstrated an arguable case that RDS controlled SPDC's operations, or that it had direct responsibility for practices or failures which are the subject of the claim.

128. At [114] of the judgment, the Judge approached the issue of proximity differently. First, he noted that RDS was not a direct parent of SPDC, in the sense that it did not hold shares in SPDC; and nor did it conduct operations itself, in contrast to the position of the defendant in *Chandler v. Cape Plc* (above). Second, the executive officers of RDS (the CEO and CFO) who sat on ExCo were in a minority. Third, RDS was not itself permitted to carry out operations in Nigeria, and was not a party to the joint venture agreement, pursuant to which the operations were carried out. Fourth, imposing a duty of care on RDS would potentially impose 'liability in an indeterminate amount, for an indeterminate time, to an indeterminate class', see Cardozo CJ in *Ultramares Corporation v. Touche* (1931) 174 NE 441 at 444.

129. In view of the way in which the case has always been put by the claimants, it seems to me that the first point is of limited weight, although I would accept the facts of the *Chandler* case with the parent directly engaging someone to address the relevant risk strongly favoured a relationship of proximity in contrast with the present case. I would discount the second point, since ExCo (at least arguably) carried out functions on behalf of RDS. The third point is of some weight, but requires rather more analysis than the Judge felt able to give it. I would accept the fourth point at least to this extent: much of the claimants' argument was designed to show that the Shell Group imposed a wide-ranging degree of direction from the centre. However, in my view, the argument proved too much; in the sense that what it in fact showed was standardisation of policies and practices across all the operations and in all the countries in which the Shell Group operated.

Fair, just and reasonable

Introduction

130. The claimants argue that a number of considerations bear on whether it is fair, just and reasonable to impose a duty of care on RDS in the circumstances as they presently appear. First, the importance of multi-national parent companies conducting themselves consistently with international standards, including those relating to corporate social responsibility and oil production. Second, there is only limited enforcement of environmental regulations in Nigeria. Third, the recognition of a duty of care owed by RDS would not subvert or compromise the Nigerian statutory scheme which prohibits claims for oil spills caused by the malicious acts of third parties, since a pipeline operator may be liable for such spills where there has been a negligent failure to protect the pipeline. Fourth, there is a current claim against RDS and one of its Nigerian subsidiaries in respect of an off-shore oil spill, in respect of which the Nigerian state body claimants do not perceive policy obstacles to the pursuit of such a claim against RDS. Fifth, in circumstances where RDS has exercised significant control over SPDC's operations and has made billions of pounds of profit from those operations, it is neither unreasonable nor unfair to require RDS to take reasonable care to mitigate the foreseeable risks of harm that arise from those operations to individuals affected by them.

131. I do not regard any of these matters to be very persuasive. The first point may be unobjectionable as an abstract principle, but is a doubtful foundation for the imposition of a duty of care; and there is an inherent tension between the second and

third points. The fourth point relies on the views of one party to different litigation and the fifth point seems to assume the issue of proximity in the claimants' favour.

J. Conclusion

132. In my judgment, this is not a case in which the claimants can demonstrate a properly arguable case that RDS owed them a duty of care on the basis either of an assumed responsibility for devising a material policy the adequacy of which is the subject of the claim, or on the basis that it controlled or shared control of the operations which are the subject of the claim.

133. For these reasons, although I have approached the issue in a different way and on the basis of different materials to the Judge, I would dismiss the appeal.

Lord Justice Sales:

Introduction

134. I am in favour of allowing the appeal, in respectful disagreement with Simon LJ and the Chancellor. In my view, the claimants have shown at this stage that they have a good arguable case that RDS owed them a duty of care at the material times and that it breached that duty of care, resulting in losses to the claimants of a kind in respect of which damages are recoverable. This means that, in my opinion, the claimants are entitled to sue RDS in this jurisdiction and to treat it as an anchor defendant for the purposes of potentially also bringing a claim against SPDC.

135. I agree with Simon LJ's helpful and succinct setting of the scene and statement of the legal test we should apply, at paras. [10]-[33] above. Like Simon LJ, I have considerable sympathy with the judge, who was deluged with documents to an extent well beyond what was appropriate in the case, as were we. However, in common with Simon LJ, I consider that the judge's approach to the law and to the facts was flawed. Also, significant additional evidence is before us which was not available to the judge. The result of all this is that this court has to make its own assessment whether the claimants have a case against RDS which has a real prospect of success.

136. Simon LJ has helpfully outlined the thrust of the claimants' case against RDS, which is based on an analogy with the analysis set out by this court in *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 WLR 3111 and succinctly elaborated by Simon LJ in *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 at [83] (set out at para. [23] above). In essence, it is not a case which is difficult to understand. To my mind, the critical question for present purposes is whether the claimants have shown on the evidence available that they have a case which is more than merely speculative in relation to the alleged legal responsibility of RDS in respect of the losses which the claimants say they have suffered.

137. SPDC is the operator of the pipeline and oil-pumping facilities which are alleged to have been managed over many years in a negligent fashion. The negligent management is alleged both in relation to maintenance of the pipeline and facilities to acceptable standards and in relation to taking effective measures to protect them from interference by third parties, in the form of unlawful siphoning off of oil (so-called

bunkering) which has also involved damage to the pipeline and other facilities and consequent spillage of oil. The alleged negligence is said to have resulted in massive pollution in the vicinity of the pipeline and more widely in the Niger Delta, causing damage to land owned by some of the claimants and harm to the livelihood and health of many others.

138. RDS is the ultimate holding company of SPDC. In that capacity, taken by itself, RDS does not have legal responsibility in relation to any shortcomings by SPDC in its management of the pipeline and facilities. However, the claimants say that in practice RDS took control itself of trying to ensure that the pipeline and facilities were maintained to a proper standard and that effective security was put in place in respect of them. This was done because the Shell Group faced significant reputational harm and loss of oil revenues if the maintenance and security of the pipeline and facilities were not managed effectively. SPDC had experienced such significant problems in Nigeria that RDS had found it necessary to step in to manage those problems itself (including by directing SPDC regarding the steps it should take) or to take decisions jointly with SPDC regarding the management of those problems. According to the claimants, RDS thereby assumed responsibility, or took joint responsibility (see *Lungowe v Vedanta Resources* at [83]), for the effective management of the operation of the pipeline and facilities and of the security arrangements in respect of them. On the claimants' case, RDS was negligent in its discharge of the tasks for which it had assumed responsibility.

139. RDS denies that it did in fact take control and assume responsibility for the operation and security of the pipeline and facilities in this way. It also denies that there was any negligence in the management of their operation and security. In answer to the claimants' attempt to sue RDS, the focus before the judge and before us has been on the first of these points: RDS says that the claimants have no good arguable case that it owed them any duty of care regarding the operation and security of the pipeline and facilities.

140. In relation to this question, I also agree with the distinction drawn by Simon LJ at para. [89] above, between a parent company which controls, or shares control of, the material operations of a subsidiary, on the one hand, and a parent company which simply issues mandatory policies as group-wide operating guidelines for its subsidiaries. In the latter case, the guidelines would have a function equivalent to published industry standards which tell a company how it should be carrying out its relevant operations, but where the control of those operations and responsibility for their proper conduct remains with the company itself (even if in discharging that responsibility it should have regard to those standards). No duty of care on the part of the standard-setting parent company would arise in that case. By contrast, for a duty of care to arise in the former case in line with the analysis in *Chandler v Cape Plc* and *Lungowe v Vedanta Resources*, it would be necessary to establish that the parent had taken control (or joint control) of the relevant operations in a much more direct and substantial way.

141. The issue in this case is whether the claimants have a good arguable case - that is, a case with a real prospect of success - that RDS did involve itself in the management of the operation and security of the pipeline and facilities in such a direct and substantial way, exercising a degree of real control in relation to those matters going significantly beyond the mere setting of group-wide standards by the Shell Group's

central management teams. Before turning to consider whether the claimants can show on the available evidence that they have a good arguable case against RDS to this effect, I will first explain why in my view, and with respect to the judge, his legal analysis in relation to the existence of a duty of care was flawed.

Legal analysis

142. We were not presented with an analysis of all the different interests of the claimants which are affected by the alleged want of care in the management of the operation and security of the pipeline and the facilities. However, it is well arguable that in English law terms SPDC would owe a duty of care to those whose property in the vicinity would be damaged by spillage of oil from the pipeline and facilities under its management. Neighbouring landowners are likely to be in a relationship of proximity with SPDC and cannot be said to be an indeterminate class of persons. It is also arguable that SPDC would be in a relationship of proximity with those claimants whose health or livelihoods depend upon use of land or water affected by the oil spills and who would therefore also suffer loss as a result of such spills. For the purposes of analysis under English law, the same would be true of any Shell company around the world operating an oil pipeline in the vicinity of property belonging to others. If RDS can be shown to have taken over practical control of the management of the operation and security of the pipeline and facilities from SPDC, or to have exercised joint control with SPDC, it is well arguable that RDS would likewise be in a relationship of proximity with the claimants, or at least a significant number of them.

143. Thus, contrary to the view of the judge at [114(6)], I do not think that RDS has a good answer to the claimants' case against it based on the famous dictum of Cardozo CJ in *Ultramares Corp. v Touche* (1931) 174 NE 441, at 444, that recognition of a duty of care will not be appropriate where it would impose "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class." To take, by way of example, a claimant who owns land in the vicinity of the pipeline which is damaged by oil spilling from it, that claimant will be a member of a determinate class who suffers loss at a determinate time and in relation to a determinate amount, by reference to the impact on the value of his land. The obvious risk of serious harm to neighbouring property-owners posed by spillage of oil creates proximity and defines the relevant class to whom the duty is owed. It is arguable that other claimants are within other relevant classes meriting protection by recognition of a duty of care on the part of RDS as well.

144. Lord Goldsmith QC, for RDS, emphasised that we should examine whether RDS had assumed responsibility for the risk of harm in relation to this group of claimants. The authorities indicate that assumption of responsibility and the fair, just and reasonable test expounded in *Caparo Industries v Dickman* [1990] 2 AC 605 tend to run together. However, on the claimants' case, RDS *has* taken control of management of the operation and security of the pipeline and facilities, and hence of the management of the risk of spills from the pipeline and facilities, to a material degree.

145. If the claimants make out such a case at trial on the facts, then I do not think there would be any insuperable difficulty in saying that RDS had assumed responsibility for the proper management of the relevant risk and in a way which engages legal responsibility on its part in relation to at least some of the claimants. This duty of care would arise in the same way that SPDC would in English law terms (if left in control

of those matters itself) have assumed responsibility for that risk in a way which would engage its responsibility. On this view, if the factual allegations made by the claimants are made out, it is my view that this would be a true *Chandler v Cape Plc* type case.

146. Lord Goldsmith suggested that SPDC could not be said to owe a duty of care to the claimants, because he says that SPDC's liability for oil spills is governed by statute in Nigeria and in any event in English law terms would be covered by the rule in *Rylands v Fletcher* (1868) LR 3 HL 330. On his submission, this indicates that RDS can owe no duty of care to the claimants. I do not agree.

147. In my view, the argument based on the Nigerian statute does not assist RDS, because the reason for examining whether SPDC could owe a duty of care according to English law in the analysis above is to test whether RDS could do so, and there is nothing in the statute to regulate RDS's liability or which would make it inappropriate to find that RDS owed the claimants a duty of care in tort. In any event, we were not shown any statutory provision or authority to the effect that SPDC could not be liable in negligence in relation to at least some of the activities complained of, as well as being strictly liable under the statute in relation to those activities or others not covered by the statute. We were told that the strict liability regime in Nigeria only covers the operation of the pipeline, not the other facilities, and even in relation to the pipeline it does not apply in relation to damage caused by the unlawful acts of third parties. This is an area in relation to which the claimants say that SPDC and RDS took insufficient care to safeguard the security of the pipeline and the facilities from unlawful bunkering by third parties. Further, it is arguable that, if anything, the Nigerian statute imposing strict liability tends to support the imposition of a duty of care on RDS as well, since it shows that damage from oil spills is something so obviously harmful that the local legislature has decided that liability for it should be strict.

148. The judge regarded it as significant that, according to the statutory regime and the licence under which the pipeline is operated, it is SPDC alone which is lawfully entitled to operate it and that this is also the position under the joint venture agreement: [114(4) and (5)]. However, we were not shown any evidence that indicated that RDS, via ExCo, could not lawfully provide direction and guidance to SPDC in its management of the pipeline and facilities, including to a degree which, for the purposes of the law of negligence as set out in *Chandler v Cape Plc* and *Lungowe v Vedanta Resources*, would amount to sufficient control or shared control in relation to addressing the risks posed by oil spills.

149. The *Rylands v Fletcher* argument also does not assist RDS. *Rylands v Fletcher* covers the liability of a landowner who brings dangerous materials onto his land, but SPDC is not being sued as landowner, but as operator of the pipeline, and may not have been a relevant landowner at all. Also, *Rylands v Fletcher* is a form of strict liability at common law, which makes it easier for a claimant to establish liability, and it is well arguable that it does not exclude the possibility that a duty of care may be owed as well. That is true in relation to SPDC, and still more is it true in relation to RDS, which clearly is not liable under *Rylands v Fletcher* but is claimed to be liable in negligence.

150. The judge held that it is not fair, just and reasonable to impose a duty of care on RDS, in part because SPDC has strict liability imposed upon it under the Nigerian statute: [115(1) and (2)]. In my view, however, it is well arguable that this is not a good answer, because it is perfectly possible to have two persons legally liable for the same damage. Indeed, if SPDC became insolvent (which is at least a possibility, given the size of the claim), it would be very important to recognise the liability of others as well, if the relevant legal test for liability is satisfied. The claimants maintain they will be able to show that the relevant legal test, according to *Caparo, Chandler v Cape Plc* and *Lungowe v Vedanta Resources,* is met in the case of RDS.

151. Lord Goldsmith suggests that there is an inconsistency in the claimants' case, in that they wish to sue RDS (relying on its corporate personality) but at the same time refuse to recognise the distinctness of this corporate personality from that of SPDC. The judge also said that the claimants improperly seek to ignore the distinct corporate personalities of the two companies: [95], [102] and [104].

152. However, I do not consider there is any inconsistency. The claimants have to sue legal persons, hence they have to sue RDS as a person if they say, as they do, that they have a claim against it. But in analysing the way responsibilities are shared within the Shell group, they are entitled to say that the group (and in particular RDS and SPDC) have organised the distribution of at least some responsibilities on functional business lines rather than by reference to corporate personalities. Indeed, it is clear that at least to some extent the group has done so: see the description of Business responsibilities and Function responsibilities in the Shell Control Framework referred to at paras. [41] and [95]-[96] above.

Assessment of the evidence

153. The claimants submitted that the judge erred in his assessment of the evidence before him in three main ways. In my judgment, each of these criticisms is made out:

    i) The judge held that evidence in relation to the way the Shell group organised its affairs and sought to exercise a degree of control over the conduct of SPDC in Nigeria before the re-organisation of the group in 2005 was not relevant to the claimants' case: [28] and [104]. However, in my opinion, evidence of the position prior to 2005 could not properly be dismissed as irrelevant. The Shell group faced the same practical problems in Nigeria regarding the operation and security of the pipeline before and after 2005 and the claimants' evidence, in particular from Mr Sticco, was that it tightened central control over the group's affairs in Nigeria after 2005. Therefore, in my view, evidence about a high degree of group central control over the conduct of SPDC in Nigeria in the period before 2005 is arguably capable of supporting the claimants' case that after 2005, when the central control became even tighter, RDS did take a sufficient degree of control in relation to the operation and security of the pipeline and facilities as to show that it assumed responsibility for this, giving rise to a duty of care vis-à-vis the claimants.

    ii) The judge held that the actions of ExCo (see paras. [39]-[40] above) could not be attributed to RDS: [101] and [114(3)]. However, from the evidence before us it appears that ExCo was set up by RDS to assist its own officer, the CEO of the group, run the group; and the CEO, who appears to act in that capacity

on behalf of RDS (at least, arguably so), decides who is to be on it, according to a functional distribution of responsibilities across the group, according to "Business" and "Function". The claimants therefore have an arguable case that the actions of ExCo are attributable to RDS.

iii) The judge discounted the significance of Shell corporate literature in the public domain, which included statements about the policy of the Shell Group in relation to protection of the environment and health, by reason of a form of words which the judge described as a "disclaimer" which made it clear that the collective expressions "Shell" and "Shell Group" were used in the documents loosely and for convenience, and could not establish the presumption of a duty of care on the part of RDS as parent company for the acts of SPDC as its subsidiary: [94]-[97]. However, when taken with other evidence relied upon by the claimants as tending to show practical assumption of control by central group management on functional lines and identification of Nigeria as an area in which oil spillage and pollution were particular concerns for the group, I do not consider that the Shell corporate literature can be dismissed as a support for the claimants' case in the manner set out by the judge. The corporate literature shows that the group had a strong reason for trying to ensure that the management of the operation and security of the pipeline and facilities was effective, for reputational and business reasons; and since there are several indications in the papers that the group was aware of particularly acute problems in Nigeria, in respect of which it could be inferred that RDS would wish to exert direct central control if SPDC were perceived as being ineffective in managing the risk of oil spills, this is material which is capable of providing more support for an arguable case against RDS than the judge was prepared to allow.

154. I also consider that the judge erred in failing to consider properly and explain his reasoning in relation to rejecting the most directly significant witness evidence deployed by the claimants in respect of the post-2005 period, namely that of Mr Sticco (referred to at para. [69] above): see [89] and [104]. On his evidence, Mr Sticco had been well placed to observe how RDS (acting in particular by ExCo) became involved with and in practice sought to control to a material degree the management of the pipeline and its security. He worked for the Shell Group between 2003 and 2009, primarily in its corporate affairs group, which deals with issues including reputation management, risk management and security. It appears, therefore, that he was in a position to see how the Shell Group reacted to the problems it experienced in relation to handling the operation and security of the pipeline in Nigeria. In fairness to the judge, we have the advantage, which the judge did not, of seeing the Shell Control Framework, which (though dated 2016) tends to corroborate Mr Sticco's general account of management structures in the group.

155. According to Mr Sticco, the Shell Group was organised by reference to "Businesses", management of which was organised across the group on functional lines rather than according to corporate status. Each operating company sat within a particular Business. One such Business was Exploration & Production (in the Shell Control Framework of 2016, the name of this Business seems to have been changed to "Upstream"). Leadership for each Business came from a member of RDS's ExCo, who determined the strategy of the particular Business for which they had

responsibility. (In the Shell Control Framework, it is stated that "Each Business is led by a Business Head who is accountable to the CEO for the performance of their Business", and the Business Head appoints a leadership team made up of senior executives "who are accountable for the performance of their Business Unit(s) and support the Business Head's accountability for the performance of the entire Business"; it is a fair inference that if the Business Head was accountable for the performance of the Business, this was on the basis that he had a significant measure of practical control over the management of the Business and the corporate entities which fell within it). It is at least arguable, therefore, that the management structures of the group were intended to allow the exercise of executive power from group central management, in the form of the CEO and ExCo of RDS, down to the practical operations of the operating companies in each Business.

156. According to Mr Sticco, some people working at Shell Group's headquarters in The Hague were allocated to a particular Business or a particular region. Others were allocated to departments with global oversight across all the group's Businesses. These seem to correspond to the sort of subject matters described as "Functions" in the Shell Control Framework, although there are some differences. According to Mr Sticco, in his time the central group-wide functional departments included departments concerned with Health, Safety and the Environment (HSE) and security. In the Shell Control Framework, these functions are not listed as Functions, and so appear in 2016 to be aspects of management via the "Projects and Technology" Business. This may have been the result of some organisational changes after Mr Sticco left the group. In the Shell Control Framework, the "Projects and Technology" Business is stated to be "overall accountable for wells engineering and wells completion, for project execution and project engineering … It provides technical services and technology capability covering both upstream and downstream activities. It is also responsible for providing functional leadership across Shell in the areas of safety, environment and sustainable performance …". According to Mr Sticco, staff from these functional departments "were pulled off to different countries and operating companies to advise on particular projects or issues." Whether these functions were regarded in the Shell nomenclature as part of a Business or part of a Function does not seem to make much difference, since the Functions appear similarly to be controlled by and accountable to RDS's CEO and ExCo. (In the Shell Control Framework, it is stated that "Each Function is led by a Function Head … The Functions have an executive role, with delegated authorities and accountabilities for an area of functional responsibility. They assist the CEO and the [ExCo] by providing functional direction, support and leadership to Shell and provide services to the Businesses and the other Functions … The Function Heads are accountable to the CEO for the performance of their Function across Shell").

157. The Shell Control Framework states that it applies to all Shell companies in which RDS has a direct or indirect controlling interest (i.e. including SPDC). This is on the basis that:

> "A controlling interest allows Shell to require the implementation of the Shell Control Framework by the company. In addition, Shell companies which are formally designated as the operator of a joint venture (JV) apply the

> framework to the operation of the JV" (this covers the position of SPDC as the operator of the joint venture in Nigeria).

Again, therefore, it is arguable that RDS is conscious that it has the practical means of asserting executive power from the centre of the group to control at least some aspects of management of operating companies and that RDS has the will and intention to do so.

158. According to Mr Sticco's evidence and the Shell Control Framework, RDS's CEO and ExCo, in providing central management for the Shell Group, appear (at least, in my view, to the standard of a good arguable case) to have the ability to recruit expertise in dealing with particular problems from across all group companies and then deploy it as required on behalf of RDS to address particular issues in specific operating companies which affect the interests of RDS and the group. SPDC no doubt has some local expertise of its own in handling problems in Nigeria, as witness statements adduced by RDS sought to emphasise. But that does not exclude (to the summary judgment standard) the significant possibility that RDS both brings its own expertise (recruited by it from around the Shell group and deployed on its behalf) to bear on such problems as well and that it in fact exerts its own powers of control over the affairs of SPDC to require SPDC to take action to prevent oil-spills according to the judgment of those acting on behalf of RDS. The fact that a subsidiary such as SPDC may have local knowledge and experience of its own does not in itself disprove the possibility that RDS, via ExCo or the CSRC, will impose its own pipeline management solutions when it thinks it appropriate to do so. Also, the application of local knowledge and experience by SPDC may only show that there is shared functional responsibility in relation to the management of the pipelines and their security, which according to *Lungowe v Vedanta Resources* would still be a sufficient basis for the imposition of a duty of care on the part of RDS.

159. Mr Sticco's evidence is that from 2005 the ExCo decided that RDS should take greater control of the conduct of the business of operating companies around the world, including in particular by laying down uniform group standards for the conduct of operations and issuing a detailed manual about how they should be implemented. This part of his evidence was corroborated at the hearing before us, when RDS disclosed the HSSE & SP Control Framework (para. [44]). It is clear from this document that the Shell Group central management has issued a large number of standards or DEPs to be adhered to by all group companies in their operations, including DEPs which cover the principal aspects of the operations of SPDC in managing the pipeline and related facilities. Some DEPs allow discretion to operating companies how they are applied, but a number of them are given mandatory status (although it is possible that some of these still allow a measure of discretion in implementation for the local management of operating companies). The Shell Control Framework also states that "Where major risks are present that require common treatment across the Shell Group, the risk response may be to define standards as mandatory rules". Mr Sticco's evidence is that from 2005 the group central management became more proactive in ensuring that the global standards were properly implemented, with lines of reporting back to the centre via the Business management structure.

160. Mr Sticco also says Shell had Regional Managers with an important role of ensuring that the global standards were implemented, with a channel of accountability back to

ExCo. The relevant Regional Manager for Africa had a particular focus on SPDC's operations and, unusually, was granted a direct line of communication to a member of ExCo, because the operations of SPDC in Nigeria were seen as particularly risky. Mr Sticco's evidence is that while he was working for the Shell group, ExCo considered Nigeria and Iraq to be the highest risk countries in the group portfolio, so that they were seen as a priority for the corporate affairs department, where he worked.

161. As I have said above, simply setting global standards (even those which purport to be mandatory) to guide the conduct of operating subsidiaries would not be sufficient to lead to the imposition of a duty of care on RDS. However, they are significant in the context of the claimants' case overall. This is because the existence of such standards was capable of providing a mechanism for the projection of real practical executive control by RDS's CEO and ExCo over the affairs of SPDC, if they wished to. They could review how the global standards were implemented in Nigeria and, as deemed necessary, could use them as the basis for ExCo to impose operational measures according to its wishes in relation to SPDC's management of the pipeline and facilities. It is plausible to infer that there may well have been particularly close monitoring and direction by ExCo of the implementation of its mandatory instructions on the ground in the case of SPDC, even if the implementation of the mandatory instructions was not so enforced in the case of other, less troublesome subsidiaries.

162. In that regard, the claimants point to other materials which also support Mr Sticco's general account. In the Shell Sustainability Report for 2014, the losses due to oil spillage in Nigeria were singled out in the table of Environmental data on account of their volume compared to the rest of the world. This equated to major revenue losses for the Shell group and major reputational damage for it, as evidenced by the UN Environment Programme report documenting the serious pollution in the Niger Delta. It is therefore well arguable that RDS had a particularly strong interest in ensuring that the management of the pipeline and facilities was conducted effectively (which, arguably, was not the case over many years) and thus was strongly motivated to be proactive in assuming control of the operational decisions about how to manage the risk of oil loss and spillage from them. Moreover, it appears from Shell group documents that part of the remuneration of members of ExCo was linked to their success in controlling environmental damage, so it is arguable that they would have been personally interested in ensuring that they could exert effective executive control in managing that risk. This is linked to the point made above about the accountability of Business Heads on ExCo for the operations of their Business.

163. Shell's Sustainability Reports (para. [43] above) provide material support for the claimants' case. Shell's Sustainability Report for 2009 stated, "Management accountability for sustainable development rests with our [CEO] and the [ExCo]", and "Sustainable development is … part of how we assess our overall business performance and reward our people". A statement in terms similar to the first of these quotations was also included in Shell's Sustainability Report of 2014, which also in the same section referred to the standards set out in the HSSE & SP Control Framework and the work done by the HSSE & SP assurance team, "with a mandate from the CSRC" – another RDS body – which "provides independent assurance on the effectiveness of HSSE & SP controls". Similarly, RDS's Annual Report for 2015 refers to the standards defined in the HSSE & SP Control Framework, makes clear that they apply to every Shell entity and Shell-operated venture, and states "The

process safety and HSSE & SP assurance team provides assurance on the effectiveness of HSSE & SP controls." This appears to contemplate scope for an assurance team acting for ExCo and/or the CSRC, as bodies representing RDS, to take action on the ground if an operating company is not being effective in implementing the standards itself.

164. The Pickard cable (paras. [46] and [117] above) supports the claimants' case that group central management (including in particular RDS's CEO and ExCo) was motivated to intervene to control the management of SPDC's affairs, had the ability to do so and actively intended to do so. To the extent that Ms Pickard referred to what the group planned to do in the future, it is a fair inference that RDS, acting via the CEO and ExCo, sought to exercise a material degree of functional control as planned, since it had the practical means to do so. I think the judge erred at [105] in dismissing the evidence of the Pickard cable meeting as not advancing the claimants' case against RDS in any appreciable respect. In fact, it is evidence derived from a senior Shell group officer (the authenticity of which has not been denied by RDS) which shows the central management of the group (i.e. RDS, acting by ExCo) taking a very close interest in the management of the pipeline and asserting its own ability to control how SPDC conducts its operational management.

165. In my view, the evidence of Mr Sticco and the Shell Control Framework and the HSSE & SP Control Framework support a case that there was a pattern of distribution of expertise and control in relation to the handling of the risk of oil spills in the Niger Delta which is arguably capable of meeting the criteria for imposition of a duty of care as set out in *Chandler v Cape plc* and *Lungowe v Vedanta Resources.*

166. In my opinion, the other evidence filed by the claimants also tends to support their case and cannot readily be discounted. According to the witness statement of Paddy Briggs, he had worked for Shell between 1964 to 2002 in a variety of roles and had a good understanding of how the group organised its operations. He describes how the Committee of Managing Directors, the predecessor of ExCo, took a direct interest in issues involving large financial impacts and substantial HSE and reputational issues. He describes how Nigeria was seen within the group as a "hot potato". He also describes how even before he left in 2002 there was more tightening and centralisation of management in the group. Given Mr Sticco's evidence that central management tightened still further after 2005, this is supportive of the account given by Mr Sticco of central control in relation to the period which is material for the purposes of these proceedings.

167. Also, I am in favour of admitting the witness statement of Rebecca Sedgwick (see para. [77] above) as fresh evidence on this appeal. I entirely agree with Simon LJ that the Shell Control Framework document exhibited to her statement should be admitted as fresh evidence (para. [78]), but I would also admit the evidence set out in her witness statement itself. In my view it satisfies the test in *Ladd v Marshall* [1954] 1 WLR 1489, CA, for admission of fresh evidence. Ms Sedgwick explains why she did not come forward before and it is clear that it was not evidence available to the claimants at the time of the hearing before the judge. Although RDS has put in evidence which seeks to suggest that Ms Sedgwick might have some ill-feeling towards the Shell Group and to cast doubt on the extent of her knowledge of its operations, it is not disputed that she worked for the security department of SPDC in Nigeria between 2006 and 2012. It is credible that she was in a position to acquire a

reasonable understanding of how security concerns were passed on to the central management of the Shell Group and of how the central management reacted to those concerns, and required SPDC to deal with them. Her evidence is that RDS adopted a centralised and controlled approach to SPDC, allowing it only limited autonomy while key decisions on sensitive issues such as HSSE were in fact taken by senior management external to SPDC. According to her, operations in Nigeria were "subject to detailed control and direction from the very top [of the group]". Read in the context of the entirety of the claimants' case against RDS, I consider that Ms Sedgwick's evidence provides a material degree of support for that case and tends to corroborate the evidence of Mr Sticco. I would add, however, that my view that the claimants have made out a good arguable case against RDS does not depend upon the admission of Ms Sedgwick's witness statement into evidence.

168. In giving weight to the evidence of Mr Sticco, Mr Briggs and Ms Sedgwick, I also bear in mind that the claimants have had to find internal witnesses who were willing to act in a certain sense as whistleblowers. This has evidently not been easy and it is likely at this stage that this is the best which could reasonably be expected of them by way of such evidence. In terms of the credibility of their evidence, and in particular that of Mr Sticco, I also attach significance to the way in which his general account has been corroborated by the two important internal documents which emerged late in the day, after his witness statement was prepared: the Shell Control Framework and the HSSE & SP Control Framework. By contrast, the witnesses deployed by RDS to explain the operational workings of the Shell Group and SPDC did not deal with these documents and did not explain clearly and with precision how the management structures described in those documents were in practice implemented by ExCo and were in practice taken into account by SPDC. In my judgment, the evidence filed by RDS does not answer or dispel what appears to me to be a valid claim, to the good arguable case standard, put forward by the claimants.

169. I also consider that the evidence of Professor Siegel provides some support for the claimants' case. As I understood the claimants' submissions regarding him at the hearing, the point is not that he is an expert regarding Shell's control systems, but that he is a witness of fact who can say that he has inspected a large number of confidential Shell management documents and that they show a high level of functional control exercised by the centre over SPDC. His evidence goes some way to show that there is a very real prospect that highly relevant documents, which may well be supportive of the claimants' case, will be forthcoming on disclosure if the action proceeds. In that regard, his evidence is in line with, and is itself corroborated by, the emergence of the Shell Control Framework and the HSSE & SP Control Framework produced at the hearing. Both are relevant to the claimants' claim and supportive of it to a significant degree.

170. In my judgment, it cannot be said that the claimants' claim is wholly speculative, based on a Micawber-like hope that something will turn up later on disclosure. In my view, the evidence deployed at the moment, as reviewed above, is sufficient to show that the claimants have a good arguable case against RDS which ought to be tried.

171. My view that the claimants have a good arguable case against RDS is reinforced by the fact they have, through the evidence of Professor Siegel and the production of the Shell Control Framework and the HSSE & SP Control Framework, shown that there is a very real - and far more than a speculative - possibility that documents will

emerge on disclosure which will provide substantial support for their case at trial: see *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661; [2006] ETMR 65, at [17]-[18]. It is not possible for RDS to say that the evidence relied upon by the claimants is contradicted by the documents; still less can it say that it is contradicted by *all* the documents in the case: cf *Mentmore International Ltd v Abbey Healthcare (Festival) Ltd* [2010] EWCA Civ 761, [21]-[23].

Conclusion

172. Turning back to the judgment below, I respectfully consider that the assessment of the judge regarding the application of the "fair, just and reasonable test" in this case at [114] to [116] is not sustainable at this preliminary stage of the proceedings. I summarise the position briefly as follows:

i) **[114(1)]**: *RDS does not hold shares in SPDC.* This is irrelevant on the claimants' case, since it appears that RDS can and, the claimants say, does exert practical control over SPDC.

ii) **[114(2)]**: *RDS does not conduct any operations*. This is irrelevant on the claimants' case, and is a point which in fact depends on the judge's wrongly failing to recognise that the actions of ExCo, which arguably involve executive control over the Business in which SPDC is located, are arguably attributable to RDS. It is consistent with this case that the evidence of Mr Anietie (head of pipeline integrity for SDPC) and Mr Aganmwonyi (head of security for SDPC) says that they have been involved in providing expertise which goes into DEP instructions issued by ExCo. They do not say that they have been fully responsible for the content of all relevant mandatory DEPs which have been issued by ExCo.

iii) **[114(3)]**: *ExCo has a number of high-ranking members of other Shell companies, and the two officers of RDS who sit on it are in a minority.* However, ExCo is appointed by and assists the CEO of RDS and the actions of ExCo are arguably attributable to RDS.

iv) **[114(4)]**: *RDS is not permitted to conduct operations in Nigeria under the relevant licence*. However, the fact that SPDC holds the licence and conducts the management of the pipeline is not inconsistent with the claimants' case that RDS in practice ensures that SPDC behaves in a particular way in carrying out its management responsibilities, thereby either assuming practical (and hence, vis-à-vis the claimants) legal responsibility for that or sharing that practical responsibility with SPDC to a material degree. It has not been demonstrated that it would be unlawful for RDS to behave in such a way.

v) **[114(5)]**: *RDS is not a member of the joint venture*. However, it has not been demonstrated that the joint venture agreement prevents RDS from exercising material control over the conduct of SPDC in managing the pipeline.

vi) **[114(6)]**: *in view of the size of the Shell group, the dictum of Cardozo J in* Ultramares Corp. v Touche, *supra, applies.* However, in my view Cardozo J's dictum is not apposite in this case. It may be that RDS will ultimately show

that not all the claimants are proximate sufferers of damage, but it is strongly arguable that at least some of them are. The point about the size of the Shell group is misplaced, in my view. Whether RDS owes a duty of care in relation to the operations of subsidiaries will depend upon whether the operations of those subsidiaries arise in the context of affecting a foreseeable and proximate class of claimants (e.g. neighbouring property owners affected by oil spills) and whether on the facts RDS has assumed a material degree of responsibility for how the relevant operations of any particular subsidiary are carried out. It is certainly not enough that RDS, by ExCo, issues some DEPs which have some mandatory instructions, since even in these cases not every mandatory instruction will involve RDS assuming control to a relevant degree. But on the facts of a particular case, the issuing of mandatory instructions combined with close monitoring, intervention and enforcement, may show that there has been a material assumption of responsibility. More generally, I do not think that the simple matter of the sheer size of the Shell group can be an answer to the present claim: why should the parent of a large group escape liability just because of the size of the group, if the criteria for imposing a duty of care are satisfied for a number of companies in the group, while the parent of a smaller group (e.g. with one subsidiary) has a duty of care imposed on it when precisely the same criteria are satisfied in relation to its subsidiary?

vii) **[115(1) and (2)]**: *SPDC is subject to strict liability under the Nigerian statute, so there is no need to impose a duty of care on RDS.* In my view, the strict liability of SPDC in some respects is not an answer to the claimants' case against RDS: see para. [147] above.

viii) **[115(3)], [115(4)] and [115(5)]**: these points correspond with those made at [114(4)] (the licence point), [114(1)-(3)] (the ExCo attribution point) and [114(4)] above (the joint venture point), and the comments on those sub-paragraphs are also applicable here.

ix) **[116(1)]**: *RDS is not operating the same business as SPDC, but is the ultimate holding company which is not licensed and is not a party to the joint venture.* The comments above on the ExCo attribution point, the licence point and the joint venture point above apply here as well.

x) **[116(2) and (3)]:** *RDS does not have superior knowledge compared with SPDC.* However, the claimants have a good arguable case that in some respects, at least, RDS does have superior knowledge and expertise than SDPC, since via ExCo RDS recruits its expertise from across the whole Shell group and via group-wide instructions (combined in the case of SPDC with monitoring and enforcement) disseminates that expertise to group companies, including SPDC. The claimants also have a good arguable claim that RDS assumed a material degree of responsibility in relation to the management of the pipeline and facilities according to the criteria in *Chandler v Cape Plc* and *Lungowe v Vedanta Resources.*

xi) **[116(4)]**: *RDS could not be said to know that SPDC was relying on it to protect the claimants.* However, what is important on the claimants' case is not that RDS thought that SPDC was relying on it to protect the claimants, but that RDS assumed control of an activity (management of the oil pipeline and

facilities), largely to promote its own interest, which, if negligently mishandled, would result in damage to them. In my view the claimants have a good arguable case that RDS gave directions to SPDC regarding important aspects of the management of the pipeline and facilities, specifically in relation to controlling the risk of oil spills, which RDS sought to monitor and enforce. It is well arguable that the claimants, or some of them, are in a proximate relationship with whoever controlled the operation of the pipeline and facilities.

173. For the reasons given above, I would allow the appeal.

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

174. In the light of the disagreement between Simon and Sales LJJ, I will give my reasons for agreeing with the main conclusions that Simon LJ has reached in a little more detail than I might otherwise have done.

175. Before doing so, I would mention that the fact that none of the judgments in this case dwell upon the underlying facts of the claims should not be taken as any depreciation of their gravity. The severe pollution caused by the repeated large oil spills in respect of which these claims are made has impacted the lives, health and local environment of some 50,000 people forming part of the communities in the Niger Delta represented by the appellants. Despite the gravity of the public health situation and the fact that clean-up operations are still incomplete, it is necessary for this court to focus on the legal foundation of the claims against the anchor first defendant, Royal Dutch Shell plc ("RDS"). If those claims cannot be shown to have a real prospect of success, jurisdiction cannot be established in England and Wales and none of the claims can proceed.

176. Otherwise, I do not intend to repeat sections A-G of Simon LJ's judgment, with which I agree, and which set the background to what I have to say.

New evidence

177. Having seen the disagreement between Simon and Sales LJJ on this point, I would admit Ms Sedgwick's evidence since it seems to me that it fulfils the *Ladd v. Marshall* criteria. Whilst I accept that the critical passages of Ms Sedgwick's evidence are not entirely from her own knowledge, I can see no reason to think that what she says is not reasonably credible, even having taken into account the evidence put in by RDS seeking to suggest otherwise. I take the view that excluding what is alleged to be important is undesirable if it can be avoided. In a case of this kind, the true value of such evidence can only be ascertained in the final evaluation, so I am able to say that the evidence "would probably have an important, although not necessarily decisive, influence on the result".

178. In this connection, I should mention that we refused, on 26th January 2018, an application to postpone giving judgment on the basis that a whole raft of new Shell documentation had come into the hands of the claimants. The claimants thought that some of the documentation might be relevant to the issue we have to determine and so asked for a delay so they could inspect the documentation in detail. We declined that

request because we did not see how multiplying the production of the kind of material already referred to in Shell's HSSE and SP Control Framework document dated 29th February 2016 (which was itself disclosed during the hearing) would be likely to affect the outcome of the appeal, so as to satisfy the *Ladd v. Marshall* tests on any putative future application to adduce new evidence. Even the other types of document that had apparently arrived in the hands of the claimants, such as manuals, user guides and design guides, were unlikely to advance the matter much further, where the court was engaged neither in a trial nor even a mini-trial of the action. In my judgment, there has to be finality to litigation determining jurisdictional questions within a reasonable timescale and, for that reason alone, proceedings cannot be delayed to allow for unlimited attempts to gather evidence that might be said to support the claim.

The applicable test

179. It is perhaps worth restating at the outset that the applicable test under CPR Part 6.37(2) is to ask whether there is "a real issue which it is reasonable for the court to try". In a case of this kind, this question has been held to be equivalent to the CPR Part 24.2 tests for summary judgment, so that the claimants must show that they have a real prospect of succeeding on their claims against RDS.

The tensions that exist when applying the appropriate test in this case

180. The difficulties in this case are partly because of the tensions that exist in the way in which jurisdictional arguments of this kind come before the court. First, there is a clear tension between Simon LJ's entirely justifiable wish to control the volume of the evidence with which the court is burdened on this type of application or appeal (section C.2 above), and his conclusion that the documentation produced is, at its highest, "exiguous evidence of centralised assistance to SPDC" (paragraph 126 above). See also Simon LJ's comments about the possibility of further evidence appearing at paragraphs 82 and 122 of his judgment. This tension is exacerbated by the late application that was made to delay the judgments so that voluminous new evidence of further RDS documentation could be considered.

181. Secondly, there is the tension to which Simon LJ has alluded at paragraph 32 above between the claimants' contention that they should be allowed to proceed because the case raises a novel and difficult legal issue, and the consequence if they were right that it would thereby be easier to establish jurisdiction for the resolution of a difficult legal issue than for the resolution of a simple one.

182. Thirdly, there is a tension, I think, between the court's natural desire not to shut out claimants who may in the future prove to have a sustainable claim, and what is, to say the least, a very real question mark over whether those claimants have on the material currently available been able to show that they have a real prospect of success against RDS. A series of cases have made clear that any submission that something may turn up should be approached with caution. If any weight is to be accorded to such a submission, particularly where the consequence will be to accord jurisdiction to claims that would otherwise not be possible, there must, as it seems to me, be a clear prospect that new material will become available before the trial which is likely to give the claimants a real prospect of success (see paragraph 38 per Peter Prescott QC sitting as a deputy High Court judge in *Fraser v. Oystertec plc* [2003] EWHC 2787

(Ch), , paragraph 13 per Moore-Bick LJ in *ICI v. TTE Training* [2007] EWCA Civ 725, and paragraph 4 per Briggs J in *Lexi Holding v. Pannone* [2009] EWHC 2590).

183. In these circumstances, and in the light of the disagreement between Simon LJ and Sales LJ, I prefer to approach the appeal from first principles. The first question is whether it has been shown that Fraser J made any error of law that allows this court to reconsider the question he decided. Only if he did, can we properly proceed to do so.

Is it appropriate for this court to re-open the decision of Fraser J?

184. As Simon LJ explained in *Lungowe v. Vedanta Resources plc and Konkola Copper Mines plc* [2017] EWCA Civ 1528 ("*Vedanta*") at paragraphs 46-50 by reference to the authorities, appellate courts should be slow to interfere with a lower court's evaluation of a jurisdictional challenge. Lord Goldsmith QC relied particularly on Beatson LJ's well-known *dictum* at paragraph 33 of his judgment in *Trust Risk Group SpA v. Am Trust Europe Limited* [2015] EWCA Civ 437 where he said that: "[t]he evaluation of the factors relevant to … disputed evidence is very much the province of the first instance judge … an appellate court should only interfere where it is clear that an error of principle has been made or that the result falls outside the range of potentially "right" answers". Lord Goldsmith relied also on paragraph 136 of *Vedanta*, where Simon LJ had said that: "[t]he appellants have not persuaded me that the Judge misdirected himself on the law, nor that he failed to take into account what mattered or that he took into account what did not matter. How the various matters weighed with him, either individually or together, was for him to decide, provided that he did not arrive at a conclusion that was plainly wrong". These passages explain what is required before this court can interfere in a case of this kind.

185. As both Simon and Sales LJJ have already said, Mr Hermer QC submitted that Fraser J made three important general errors, namely (1) excluding all evidence relating to the period prior to the Shell Group's internal corporate restructuring in 2005, (2) concluding that the actions of the RDS Executive Committee ("ExCo") and RDS's Corporate and Social Responsibility Executive Committee ("CSRC") could not be attributed to RDS, and (3) placing no reliance on statements made (for example by the Shell Group and RDS in documents such as its 2014 Shell Sustainability Report) in the context of fulfilment of listing obligations.

186. As regards the first of these alleged errors, Fraser J said at paragraph 28 of his judgment that: "[b]efore 2005, the Shell group had an entirely different structure, and I do not consider anything relating to the situation prior to 2005 to be relevant to the issues on these applications. If evidence is not relevant, it is not admissible". This was not an adequate reason to exclude all evidence relating to the period prior to the 2005 restructuring. If that evidence showed a high level of control by the former parent companies over the second defendant, Shell Petroleum Development Company of Nigeria Ltd ("SPDC"), then it would be potentially relevant (though of course not decisive) in considering the level of control under the new structure. This is particularly so in the light of the claimants' submission that the witness statements of Mr Gene Sticco ("Mr Sticco") and Professor Jordan Siegel ("Professor Siegel"), suggested that the reorganisation served to *increase* the parent's control over its operating subsidiaries. The judge should, as it seems to me, have evaluated the pre-2005 evidence, rather than simply excluding it.

187. The second alleged error was that the judge wrongly concluded that the only acts that could be attributed to RDS were those of the Chief Executive Officer and the Chief Financial Officer, and not those of either the CSRC or ExCo. At paragraph 101 of his judgment, Fraser J reasoned that "[t]he Shell group and RDS are not the same legal entity. [ExCo] is led by the Chief Executive Officer of RDS, and although the Chief Financial Officer of RDS is also a member, there are six other members who do not therefore fall under the scope of RDS at all … [ExCo] also does not make operational decisions within the group. [ExCo] only considers matters pertaining to subsidiaries when they have strategic consequences, and it does not interfere in the affairs of the operating subsidiaries" (see also paragraphs 102 and 114(3) of the judgment). The fact of the matter is that the Shell Group is not a legal entity, and there must be a company within the Shell Group that has legal responsibility for the actions of Exco. Exco is established by the Board of RDS, and led by the CEO of RDS. Its members are appointed by the Board and CEO of RDS, and report directly to the Board of RDS. Its actions must be attributable in some measure to RDS. Likewise, the CSRC is an RDS board committee with oversight of the Shell Group and its actions must also be attributed to RDS.

188. In relation to the third main alleged error, Fraser J gave two reasons for rejecting statements made in publicly available corporate literature. First, at paragraph 94, he relied on published words drawing attention to the distinct legal personality of the members of the Shell Group. He then said at paragraph 96 that "even if passages in public documents that state the policies of a group of companies could be construed as being sufficient to establish the presumption of a duty of care on the part of a parent for the acts of its subsidiary, then the words which appear in the Shell documents effectively disclaiming that interpretation would negate that presumption". The second reason the judge gave at paragraph 96 was that The London Stock Exchange must ensure that all securities admitted to trading on its markets, and the dealing in those securities, are conducted in accordance with the relevant legislation, and that there is compliance with certain disclosure standards. It was therefore, he thought, "highly unlikely … that compliance with such disclosure standards could of itself be characterised as an assumption of a duty of care by a parent company over the subsidiary companies referred to in those statements", so that "such compliance cannot in itself be a sufficient factor to found a duty of care on the part of a parent holding company". In my judgment, the statement about distinct legal entities is no disclaimer at all. Secondly, whilst compliance with stock exchange disclosure standards cannot of itself be characterised as an assumption of a duty of care, that does not inform the question of whether a statement made for compliance purposes is capable of giving rise to a duty of care. If anything, the regulatory context means that such statements are more likely to be true, and so should be accorded greater evidential weight. The judge should, I think, have focused on the content of the statements to establish whether they were capable of establishing an arguable duty of care, rather than rejecting them in their totality because of their context.

189. I therefore accept the claimants' submission that the judge made three general errors of principle as described by Beatson LJ in *Trust Risk Group supra*. The judge failed to take into account what mattered, and I therefore conclude that it is appropriate for this court to re-consider the correctness of Fraser J's decision.

190. The claimants also argued that Fraser J had, in effect, conducted a mini-trial of the evidence rather than taking the evidence advanced by the claimants at face value and determining whether an arguable case had been demonstrated. Paragraph 10 of Potter LJ's judgment in *ED&F Man Liquid Products Ltd v. Patel* [2003] EWCA Civ 472 (with which Peter Gibson LJ agreed) suggested that "where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial … However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable". In my judgment, the judge did not fall into this trap, and was entitled to subject the evidence on both sides to critical analysis. The errors that he made in that analysis, which I have mentioned above, do, however, allow this court to reconsider the conclusion he reached.

Is there a real issue that RDS owed the claimants a duty of care?

191. I gratefully adopt the factual summaries of the documentary and witness statement evidence contained in paragraphs 68-71, 77-8, and 90-117 of Simon LJ's judgment. I shall not repeat what he has so carefully summarised in those paragraphs.

192. Moreover, it was not in dispute that Fraser J applied the correct test for the existence of a duty of care in this situation, by considering the factors identified in *Chandler v. Cape Plc* [2012] EWCA Civ 525 ("*Chandler*") and *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635 ("*Thompson*") in the context of the three-stage test set out in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605. This approach remains correct following this court's decision in *Vedanta* (see paragraph 83 of the judgment recited by Simon LJ at paragraph 23 above).

193. In my judgment, Simon LJ correctly identified proximity as the central question in this case. At paragraph 86 of his judgment, he set out the 5 factors relied upon by the claimants to demonstrate RDS's control of SPDC's operations as follows:- (1) the issue of mandatory policies, standard and manuals which applied to SPDC; (2) the imposition of mandatory design and engineering practices; (3) the imposition of a system of supervision and oversight of the implementation of RDS's standards which bore directly on the pleaded allegations of negligence; (4) the imposition of financial control over SPDC in respect of spending which, again, was directly relevant to the allegations of negligence; and (5) the high level of direction and oversight of SPDC's operations. I adopt also, as I have said, his analysis of the evidence in these areas.

194. I do, however, adopt a slightly different approach from Simon LJ when conclusions come to be drawn from the documentary and witness evidence as to whether there is an arguable case that RDS was sufficiently proximate to the claimants. As Simon LJ correctly says at paragraph 25 of his judgment, Mr Hermer sought to establish such proximity by arguing that RDS had both (i) assumed responsibility for, and (ii) taken control of, pipeline integrity, security and remediation in Nigeria. I do not think that there is any difficulty with the documents on which the claimants rely. They seem to me to show a consistent picture. This is another reason why I was reluctant to allow the claimants to delay judgment in order to look through many more such documents.

195. The documents demonstrate rather what I would, from a commercial perspective, expect. They show that RDS laid down detailed policies and practices as to management, oversight and engineering which they expected their subsidiaries and joint ventures to follow. The Nigerian joint venture, operated by SPDC, was only special because it had particular problems and was particularly important from an economic perspective. The detailed policies and practices do not seem to have been tailored specifically for SPDC. Rather, they all apply across the board to all RDS subsidiaries and joint ventures, without distinction. It has already been said that it would be surprising if an international parent were to owe duties to those affected by the operations of all its subsidiaries and that there needs to be something more specific for the necessary proximity to exist. It is, I think, useful to delve a little deeper into why that might be the case.

196. That, I believe, is the case because it would be surprising if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility for the operations of each of those subsidiaries. The corporate structure itself tends to militate against the requisite proximity. That is particularly so here where RDS's subsidiary SPDC was not even the majority stakeholder in the joint venture. One can imagine, of course, circumstances where the necessary proximity could be established, even absent the kind of specific facts that existed in *Vedanta* (to which I shall allude in a moment). Such a case might include the situation, for example, where a parent required its subsidiaries or franchisees to manufacture or fabricate a product in a particular way, and actively enforced that requirement, which turned out to be harmful to health. One might suggest a food product that injured many, but was created according to a prescriptive recipe provided by the parent. This case is very far from that kind of situation.

197. Secondly, as the Court of Appeal's decision in *Vedanta* demonstrates, there are important factual distinctions between this case and that. Here, SPDC operates the pipeline pursuant to a joint venture between itself, the Nigeria National Petroleum Corporation ("NNPC") and two other parties. The majority interest is held by NNPC, not SPDC, and therefore the capacity of SPDC (let alone RDS) to avoid the breaches alleged by the claimants is at least questionable. The position in Vedanta was different: the parent company had a majority 80% shareholding in Konkola Copper Mines ("KCM"), the subsidiary that operated the mine which caused the damage. Moreover, in *Vedanta*, the underlying documentary evidence set out at paragraph 84 of Simon LJ's judgment included (a) a report which stressed that Vedanta's board had oversight of all its subsidiaries, and said that it had a governance framework to ensure that surface and ground water did not get contaminated by its operations; (b) a management and shareholders' agreement by which Vedanta agreed to provide KCM with geographical and mining services, employee training services, metallurgical consulting services, administrative and financial support services, assistance with management systems and technical and information technology, and strategic planning, business and corporate strategy and planning including product development and management; (c) Vedanta's investment of some $3 billion in KCM; and (d) Vedanta's public commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure, and its design of a comprehensive and well-funded program specifically to address the legacy environmental issues in KCM. None of these factors are present to the same degree, if at all, in this case. Finally in

this connection, the witness evidence in *Vedanta* specifically explained how the parent company had discarded the operational policies of the subsidiary and put in place its own policies and management. As will be seen, that was very much more specific than anything in the witness statements that the claimants could rely upon here.

198. Thirdly, I entirely agree with Simon LJ when he says that the documentation relied upon by the claimants, and even the documentation that they can reasonably be expected to turn up on disclosure, seems to constitute high level guidance based on the centralised accumulation of a wide range of expertise, experience and best practice. It does not, however, indicate, or even point towards, either the exercise of any degree of control, by RDS over the operations of SPDC or the assumption of responsibility; rather, it suggests the reverse.

199. In the light of the evidential points made by Sales LJ, therefore, it is necessary to consider whether the other evidence adduced by the claimants is sufficient to elevate their claims against RDS into a good arguable case. I refer in this regard to the witness statements of Mr Sticco, Mr Briggs and Ms Sedgwick, the Pickard cable, and the expert report of Professor Siegel.

200. The majority of Mr Sticco's evidence relates to the Shell Group structure in general, and not specifically to Nigeria or SPDC. It therefore suffers, to a large extent, from the same defects as the documentary evidence referred to above. What Mr Sticco does say in relation to Nigeria and SPDC is that Nigeria was viewed by the Shell Group as a particularly risky country, meaning that there was a "direct link" between its Regional Manager and the ExCo, intelligence about the security situation in Nigeria was regularly provided to Shell Group senior executives, and there was interaction and consultation between SPDC and ExCo with respect to "significant issues in Nigeria". Thus RDS wanted to be kept closely informed about the operations of SPDC, and particularly with respect to "significant issues". This is, however, not the same as assuming responsibility for, or controlling, the day-to-day operations of SPDC. The gap could perhaps be bridged if Mr Sticco made any reference to what RDS actually did with the information it received, but he does not. I note that Sales LJ in paragraphs 155-161 refers to a number of passages from Mr Sticco's statement that might give rise to a contention that RDS could or had the ability to control SPDC, but little, if any, evidence that RDS actually did so in relevant respects.

201. The high point of Mr Briggs's statement is his comment that "it is safe to assume that anything significant in SPDC's operation would be put to the CMD [the predecessor to the ExCo]". This is, however, of limited value because Mr Briggs has (in his own words) "never worked in Nigeria so… cannot speak authoritatively about the country or business". In any event, his reference to "anything significant" is too vague to demonstrate that RDS assumed responsibility for, or controlled, the aspects of SPDC's operations relevant to the present case.

202. Ms Sedgwick's statement is the only one which goes so far as to say in terms that RDS exercised control over the operations of SPDC. She maintains that "RDS adopts a centralised and controlled approach to SPDC", resulting in SPDC having "limited autonomy" with "key decisions on sensitive issues such as HSSE" being "taken by senior management external to SPDC", and that the Managing Director of SPDC is

"effectively a puppet role" with "all key HSSE decisions regarding SPDC [being] made by the Head of Upstream International" (a member of the ExCo). In my judgment, these statements are insufficient even arguably to establish a duty of care on the part of RDS for three reasons. First, they are merely assertions, and the evidence that Ms Sedgwick provides in support (for example that an ExCo member typically spoke at SPDC's town hall meetings) does not really bear them out. Secondly, they are not supported by the documentary evidence, which, as I have said, does not indicate any exercise of actual control by RDS over SPDC's operations. Finally, their relevance is undermined by the witness statement of Mr Dean Emanuel ("Mr Emanuel"), Ms Sedgwick's supervisor while she worked at SPDC, which was put in evidence by RDS. Mr Emanuel says that Ms Sedgwick was a "relatively junior employee of SPDC", "removed from decision making processes" and thus "never in a position to observe first-hand much of what she alleges".

203. The relevant contents of the Pickard cable are reproduced at paragraph 117 of Simon LJ's judgment. I do not think that it takes the matter much further. It seems clear that the primary objective of Ms Pickard's re-organisation of SPDC was to ensure a better flow of information to her team. As I have said, this is not the same as assuming responsibility over, or taking control of, SPDC's operations. I also note that Ms Pickard was not a member of ExCo, but merely reported to it, so it may be questionable whether her actions are in any event attributable to ExCo and thus RDS.

204. As for the evidence of Professor Siegel, I agree largely with Simon LJ at paragraph 75 of his judgment. I do not feel that his evidence adds materially to the other evidence.

205. For these reasons, and in agreement with Simon LJ, I think that a proper evaluation of the evidence, rectifying Fraser J's errors of approach, does not lead to any different conclusion. In my judgment, the claimants fail in each of the five areas they sought to rely upon to establish proximity. So far as concerns the issue of mandatory policies, standards and manuals which applied to SPDC, these were, as I have said, of a high-level nature, even when quite specific at an engineering level. They did not indicate control; that control rested with SPDC which was responsible for its own operations. The promulgation of group standards and practices is not, in my view, enough to prove the "imposition" of mandatory design and engineering practices. There was no real evidence to show that these practices were imposed even if they were described as mandatory. There would have needed to be evidence that RDS took upon itself the enforcement of the standards, which it plainly did not. It expected SPDC to apply the standards it set. The same point applies to the suggested "imposition" of a system of supervision and oversight of the implementation of RDS's standards which were said to bear directly on the pleaded allegations of negligence. RDS said that there should be a system of supervision and oversight, but left it to SPDC to operate that system. It did not have the wherewithal to do anything else. Likewise, in relation to the supposed imposition of financial control over SPDC in respect of spending. Any parent is concerned to ensure sound financial management, but the fact that spending decisions required parental approval is not an indication that RDS controlled SPDC's operations. Finally, I do not think that the evidence supports the contention that RDS had a high level of involvement in the direction and oversight of SPDC's (day-to-day) operations. SPDC's evidence, which was not really capable of challenge, pointed in the other direction.

206. In these circumstances, I have concluded for similar, but not identical, reasons to Simon LJ that the claimants have failed to show an arguable case that they will establish the necessary proximity at trial to support a claim that RDS owed the claimants a direct duty of care. I agree with what Simon LJ has said about the third aspect of the test, namely whether it would be fair, just and reasonable to impose a duty of care in this situation. On this aspect, I would very much pray in aid the unlikelihood, which I have already mentioned, of an international parent like RDS undertaking a duty of care to all those affected by the operations of all its subsidiaries.

Conclusions

207. In conclusion, therefore, despite my criticism of aspects of Fraser J's approach to the evidence, I agree with Simon LJ that he was right to hold that the claimants' claims against RDS were bound to fail because it was not arguable that RDS owed them a duty of care. There is simply no real prospect that the claimants will succeed against RDS.

208. I might mention in closing that I thought throughout the hearing of the appeal that the court had a responsibility in a case of this kind not to strive to find a reason to allow jurisdiction. I became increasingly convinced as the argument progressed that the ultimate claim against RDS could simply never succeed. These thoughts may not be relevant to our decision, but they do endorse, I think, the correctness of the legal conclusion that we and the judge have ultimately reached.

209. In the circumstances, this appeal will be dismissed.