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Case No: **[2015] EWHC HT-2015-000241 & HT-2015-000430**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
7 Rolls Building
Fetter Lane
LONDON
EC4 1NL
Draft date: 26/01/2017

Before :

THE HONOURABLE MR JUSTICE FRASER
Between :

Claimant

HIS ROYAL HIGHNESS EMERE GODWIN BEBE OKPABI AND OTHERS

- v -

ROYAL DUTCH SHELL PLC **First Defendant**

and **Second Defendant**

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD

Richard Hermer QC, Marie Louise Kinsler and Edward Craven (instructed by Leigh Day) for the Claimants.
Lord Goldsmith PC QC and Sophie Lamb (instructed by Debevoise & Plimpton LLP) for the Defendants.

Hearing dates: **22 to 24 November 2016**
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JUDGMENT

Mr Justice Fraser:

1. This judgment concerns four applications. There are two sets of proceedings being heard together, and in those sets of proceedings there are four applications, one by each defendant in each set of proceedings. Both sets of proceedings arise out of oil operations in Nigeria. The first defendant in each action is Royal Dutch Shell plc ("RDS"), the ultimate holding company of the worldwide Shell Group which comprises many oil companies in a great number of different countries. The second defendant is the Nigerian company that is responsible for Shell onshore oil operations in Nigeria, the Shell Petroleum Development Company of Nigeria Ltd ("SPDC"). It is a subsidiary within the Shell group of companies, and the precise corporate relationship between SPDC and RDS is directly relevant to the issues on this application, and will be dealt with later, in Part I "The Shell Group corporate structure". This judgment is in the following parts:

A Introduction

2. The first set of proceedings has action number HT-2015-000241 and is entitled ***His Royal Highness Emere Godwin Bebe Okpabi and others v (1) Royal Dutch Shell plc (2) The Shell Petroleum Development Company of Nigeria Ltd***. There are twenty named claimants in what is a representative or group action. HRH Okpabi is the first named claimant and is King and Paramount Ruler of the Ogale community in Nigeria. The second named claimant is the Staff Bearer, the third named claimant is the Land Priest, and these three persons, together with the fourth to 17th named claimants, comprise the Council of Chiefs of the Ogale community. The 18th named claimant is the Palace Secretary, the 19th claimant is the Chairman of the Community Development Committee and the 20th named claimant is the Youth President. All of the first to 17th named claimants are chiefs. These proceedings are brought by these twenty named claimants both for themselves and on behalf of the people of the Ogale community in Nigeria. This community comprises approximately 40,000 individuals. The Ogale community are part of the Ogoni people. I shall refer to these proceedings as "the Ogale claims". Paragraph 1 of the Particulars of Claim pleads that the claimants "seek damages arising as a result of serious and ongoing pollution and environmental damage caused by oil spills emanating from the Defendants' oil pipelines and associated infrastructure in and around the Ogale Community in

Nigeria". Damages for clean-up and remediation costs, alternatively injunctive relief, are claimed.

3. The second set of proceedings has action number HT-2015-000430 and is entitled ***Lucky Alame and others v (1) Royal Dutch Shell plc (2) The Shell Petroleum Development Company of Nigeria Ltd***. There are a total of 2,335 different claimants in these proceedings. These proceedings concern damage said to have occurred in and around Bille Kingdom in Nigeria. I shall refer to these proceedings as "the Bille claims". Paragraphs 1 and 2 of the Particulars of Claim in the Bille claims plead that the claims are for "damages arising as a result of serious and ongoing pollution and environmental damage caused by oil spills emanating from the Defendants' oil pipelines and associated infrastructure in and around Bille Kingdom in Nigeria". The claims against RDS "are based on the tort of negligence under the common law of Nigeria." The claims against SPDC "are based on relevant causes of action under Nigerian statute and common law".

4. These two claims therefore between them concern about 42,500 individual claimants. Without wishing to over-simplify what are very detailed claims, in summary they concern oil pollution in Nigeria that has affected wide areas of land across the Niger Delta, the waters of the Delta itself, activities both on land and on water, and considerable numbers of people. The claimants in both sets of proceedings are all resident in Nigeria and Nigerian citizens. The place of incorporation of RDS is the United Kingdom, and it has its registered office in the United Kingdom. It is listed on the FTSE stock exchange in London, as well as on other stock exchanges worldwide such as in New York and Amsterdam. SPDC is a Nigerian-registered exploration and production company incorporated under the laws of the Federal Republic of Nigeria. Its registered office is in Port Harcourt, Rivers State in Nigeria. It is the operator of a joint venture formed by means of an agreement between itself, the Nigeria National Petroleum Corporation, Total Exploration and Production Nigeria Ltd and Nigeria Agip Oil Company Ltd ("the Joint Venture"). These latter two companies are also Nigerian-registered oil companies. RDS is not a member of the Joint Venture.

5. The Claim Form in the Ogale claims was issued on 14 October 2015 and served on RDS within the jurisdiction. Service was acknowledged by Debevoise & Plimpton LLP on behalf of RDS by means of an Acknowledgement of Service dated 30 October 2015. That form made clear that RDS intended to contest the jurisdiction of the court.

6. The Claim Form in the Bille claims was issued on 22 December 2015 and served on RDS within the jurisdiction. Service was again acknowledged by Debevoise & Plimpton LLP on behalf of RDS by means of an Acknowledgement of Service dated 6 January 2016. That form also made clear that RDS intended to contest the jurisdiction of the court in those proceedings too. RDS issued applications seeking a declaration that the court did not have jurisdiction to try the claims, alternatively should not exercise any jurisdiction that it does have, pursuant to CPR Part 11.1(a) and/or (b).

7. In both the Ogale claims and the Bille claims, SPDC was served with the respective proceedings outside the jurisdiction, pursuant to an Order of HHJ Raeside QC made after a half-day *ex parte* hearing on 2 March 2016. On 26 April 2016, SPDC applied

to have the Claim Form, service of the Claim Form and the Orders by HHJ Raeside QC set aside, alternatively to have those proceedings against it stayed.

8. The four applications in the two actions therefore raise very similar, but not identical, issues, and were case managed and heard together. The reason that they are not identical is there are other proceedings in the Federal Court of Nigeria have been issued in the name of Chief Gani Topba stating that they are on behalf of the people of Ogoniland ("the Ogoni people"), defined by four different Local Government Areas. The Ogale people are part of the Ogoni people, although the claimants in the Ogale proceedings deny that Chief Gani Topba has authority to act on their behalf. SPDC is the fourth named defendant in those proceedings, which were issued on 28 May 2015, the other defendants being the Federal Republic of Nigeria, the Attorney-General of the Federation at the Federal Ministry of Justice, and the National Oil Spill Detection and Response Agency. That claim is for a declaration, a sum in excess of one billion US dollars in special damages, and general damages of one hundred billion US dollars in respect of clean-up and remediation costs. On the face of it, this includes a claim by the Ogale community as the members of that community are part of the Ogoni people.

9. RDS and SPDC were represented by the same law firm and the same counsel before me, as were all the claimants in both the Ogale claims and Bille claims. Hearings contesting jurisdiction are not supposed to require full expositions of the factual and legal issues. In ***VTB Capital Plc v Nutritek International Corp*** [2013] 2 AC 337 Lord Neuberger said:

> "…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."

Most recently in the Technology and Construction Court, in ***Lungowe and others v (1) Vedanta Resources plc (2) Konkola Copper Mines plc*** [2016] EWHC 292 (TCC) ("the Vedanta litigation") Coulson J referred, in the context of the jurisdictional challenges in that case, to the fact that "the central issue raised by these twin applications, namely where these claims should be tried, assumed all the trappings of a State trial". The two instant sets of proceedings continued what must be described as an alarming trend. These applications involved a bundle for the hearing of 33 lever arch files, with 37 witness statements from 29 different individual witnesses, together with reports from a number of experts dealing with Nigerian law issues. The authorities bundle numbered 123 different cases, articles and pieces of legislation, including cases from this jurisdiction, European cases, Nigerian, Australian and American decisions. The total number of 29 different individual factual witnesses includes that of Professor Siegel for the claimants to which I will return in further detail below. The skeleton arguments lodged by both parties were extensive; almost 100 pages for the defendants, and 137 pages for the claimants.

10. Three days were available for oral argument (reduced from the original four due to the need for a reading day). Both parties expressly agreed that these three hearing days

were sufficient, and so they did not need to accept the invitation of a fourth day on a future date that was potentially available. This meant that some of the defendants' reply submissions were made in writing after the hearing. However, these attached yet further factual material as appendices, to which objection was then taken by the claimants. I am of the view that the time available for the oral hearing was sufficient to deal with the four applications fairly. 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.

11. It is necessary to deal with the procedural history in more detail than is ideal, as the issuing of an application by RDS on 7 October 2016 is partly relied upon by the claimants as underpinning their submissions on the first question for the court to resolve, namely the strength of the claim against RDS and whether there is a serious issue to be tried in relation to the claim against RDS.

12. That application was made expressly reserving RDS' rights in respect of jurisdiction. This was made clear in the 1st statement of Conway Blake, an associate at the defendants' solicitors, supporting the application. The origin of that application was said to be the vast amount of evidence of fact served by the claimants in their response evidence. This was described as "an extraordinary amount of evidence" by Mr Blake, and was calculated by the defendants, in the letter that accompanied the application, as comprising 450 pages of evidence with almost 6000 pages of exhibits in 22 files. It was said that the evidence went "well beyond the evidence originally served in support of the application for permission to serve SPDC out of [the] jurisdiction, and attempts to draw on a diverse range of material for the purpose of bolstering the assertions advanced in the claims". The application sought to stay the jurisdictional challenges by SPDC (hence leaving that issue pending) whilst the issue of whether RDS owed a duty of care to the claimants was dealt with by way of a preliminary issue. At that stage, two of the witnesses giving evidence for the claimants (former Shell employees) were seeking to do so anonymously. It was also said by the defendants that Professor Siegel's evidence was of an expert nature, as he proffered his opinions on Shell's corporate structure and the way that the Shell Group operated, and there was no permission for such expert evidence, as the Order of 9 June 2016 gave permission for expert evidence only in respect of Nigerian law issues. Professor Siegel is an academic, who was at Harvard Business School, and who has given evidence before in the United States on the way that Shell operated worldwide. Accordingly, RDS sought to have the anonymous statements and Professor Siegel's statement ruled inadmissible. RDS offered, without prejudice to its jurisdictional challenge, to submit to the jurisdiction to have the preliminary issue of a duty of care owed by the parent company of the Shell group determined.

13. There were difficulties with the application for a preliminary issue made at that stage, which was strongly opposed by the claimants, and I refused the application. It is obviously sensible, and entirely conventional, to have challenges to jurisdiction dealt with at the beginning of any action, and until just a few weeks before the hearing of the jurisdiction applications, that was the approach that had been adopted by all the parties including both defendants. The parties had been preparing against an agreed timetable since early 2016 to have the issue of jurisdiction resolved first. Originally that was to have been resolved in March 2016 and by consent that had been moved, eventually to November 2016. Adopting the course of action proposed by RDS would have postponed resolution of the question of the court's jurisdiction over the SPDC claims into 2017 at the earliest, if not into 2018 (if any appeal were mounted against the judgment on the preliminary issue). Further, preliminary issues can often be treacherous short cuts, particularly if undertaken on anything other than agreed or assumed facts. The prospect of the parties reaching agreed or assumed facts in these two cases seemed to me to be entirely remote. The Technology and Construction Court Guide deals with such matters in paragraph 8.1. The question of further time in order for the defendants to prepare for the hearing, given the vast quantity of material served by the claimants, seemed to be a reasonable request but in light of the extra time offered by the court (one week) counsel for RDS stated that it would be better to keep to the original dates, and he declined the offer of additional time. I ruled that witness evidence from anonymous individuals (who were former Shell employees) would not be admitted; in the event one of those individuals decided to permit his identity to be known. I will deal with the evidence of Professor Siegel in the separate section dealing with "Disputed Evidence" below. Accordingly, no preliminary issue was ordered on the issue of whether RDS owed the claimants a duty of care; however, Lord Goldsmith QC made it clear that RDS did not concede that this was a serious issue to be tried.

14. It was entirely accurate to refer to the breadth of the evidence served by the claimants as a diverse range of material, including as it did a report by Amnesty International and various confidential US State Department cables disclosed by Wikileaks, a website set up to bring secret government communications and other information into the public domain. It would however be wrong to give the impression that it was the claimants alone who were responsible for expanding the scope of the evidence before the court for these applications. On 8 November 2016, the defendants served what was described by the claimants as "(late) 363 pages of 'reply' witness statements and expert reports (in addition to the 305 pages of statements and reports served previously in support of their applications)". Even after the hearing, further material was submitted, some with permission due to the shortness of time for oral submissions, some without. In order to be fair to the parties, as well as the short time available for reply submissions, I gave the defendants permission to put submissions in reply in writing. When these arrived, they came accompanied by three reports and one article. Objection is taken by the claimants to these, and together with the situation concerning the witness statement of Professor Siegel, this has to be resolved first. I will however first set out the issues on these applications.

15. In order to provide a superficial overview of the situation in the Niger Delta, and without making any factual findings at this stage (which obviously would not be possible given the early stage of the proceedings), it would be an understatement to describe that region of Nigeria as one with enormous difficulties. Oil pipeline

sabotage, bunkering and illegal crude oil refining activities are said to be widespread in this area of Nigeria. Nigeria is a very large country, and the security situation there is difficult and, it must be said, also dangerous. Bunkering in this sense is a term used to describe what is basically theft of crude oil, by unlawfully tapping into pipelines to take the contents. This oil is then illegally refined. The Federal Government of Nigeria loses huge quantities of revenue as a result of this, but the effect is not solely economic. These illegal activities not only damage the infrastructure, but the defendants' case is that they lead directly to pollution as those responsible illegally (and incompetently) refine the crude oil. The defendants' case is that not only do the local communities plainly know about and suffer from this activity, but some of the inhabitants must be complicit in it too. The Nigerian armed forces have even resorted to air strikes against illegal refineries to bring an end to this activity, bombing the makeshift facilities to prevent these operations from continuing. The heavier products of the illegal refineries are of no use to those involved, who wish only to use and exploit the lighter petroleum products. Accordingly, it is said that there are hundreds of thousands of barrels of roughly refined crude oil products simply dumped into the rivers and creeks of the Delta. Widespread environmental damage, including in particular but not limited to mangrove forests, occurs as a result. Indeed, an independent international agency, the United Nations Environment Programme ("UNEP") has both inspected and reported upon the environment in the region. The parties before me both relied upon parts of the UNEP Report which was published in 2011, which recommended what is called a multi-stakeholder approach to redressing environmental impacts in the Niger Delta. This report refers to "*illegal activity [which] is endangering lives and causing pockets of environmental devastation in Ogoniland and neighbouring areas*" (UNEP Report, page 9) and reference is made to the risk of "*an environmental catastrophe*" in the Niger Delta (UNEP Report, page 104). The state of Nigeria and its people therefore suffer economically, as the oil that is stolen in this way is lost as a source of potential state revenue; environmentally; and its people suffer physically. The claimants' case is that the oil companies that profit handsomely from their operations in the Niger Delta do so without making adequate safeguards for the population, the ordinary people most directly affected by the oil operations, whose livelihoods and daily activities are damaged considerably. It is against this background that the claimants seek redress in this jurisdiction against both SPDC and its ultimate parent, RDS, both for injunctive relief and damages.

B The issues on these applications

16. At its heart, the stance taken by the defendants on these applications is that these claims have nothing whatsoever to do with this jurisdiction and should proceed in Nigeria. The defendants describe the approach of bringing claims such as these in this jurisdiction against a parent company such as RDS, with the intention of placing that defendant in the position of what is called an "anchor defendant", as a device being used cynically by the claimants (or more accurately, it is said, by the claimants' advisers) to bring claims, that would otherwise have no connection whatsoever with this court, to trial before the Technology and Construction Court in England. I will deal with certain aspects of this in the section below entitled "The Position of Leigh Day". As will be seen in the section dealing with the law below, claims against non-domiciled defendants can more readily be brought before the courts of this jurisdiction if there is a suitable anchor defendant. On the other hand, the claimants submit that both defendants are legally responsible for what are described as appalling instances and levels of oil pollution that have seriously affected huge areas of land,

and the health and livelihood of many thousands of people, whose chances of redress rest substantially (or even entirely) on the ability to bring proceedings in this jurisdiction. Contrasts are drawn between the tactics of SPDC in actions brought against it in Nigeria, and the progress of that litigation, with the way that the Technology and Construction Court has dealt with similar cases before it. I will return to this further in the section below entitled "The *Bodo* litigation".

17. The parties, and their legal advisers, occupy firmly entrenched battle lines and are bitterly opposed to one another's evidence and arguments. They are agreed that there is highly detrimental oil pollution in the Niger Delta, and Lord Goldsmith QC for the defendants was anxious to make it clear that the defendants do not seek to minimise the problems of this nature. The parties are, however, entirely at loggerheads as to cause and responsibility for the situation, and cannot agree where these disputes can be resolved. Notwithstanding this complete polarisation of views, I have been greatly assisted by counsel on both sides, and the hearing was conducted with consummate professionalism on both sides and a very high degree of legal analytical skill. The breadth of the material submitted to the court to resolve these applications was however considerable. I only refer to such authorities and evidence as I consider necessary to determine the applications; it should not be thought that because I have not specifically identified all of the deponents who provided witness statements that I have not considered their evidence.

18. Given the completely opposite points of view, it was perhaps not surprising that the parties could not agree about the correct order in which to address the issues on each of the different applications. Lord Goldsmith QC invited me to consider SPDC's applications before RDS' applications, and he also invited me to "take a step back" in order to encourage an overview that Nigeria is the best, if not the only, place for this litigation to proceed. Mr Hermer QC for the claimants submitted that this was the wrong approach and was "unworkable". This is because the relevant gateway under paragraph 3.1(3) of PD 6B only applies in circumstances where a claim is made against another defendant (D1) and a claim form has been served on that defendant otherwise than in reliance on paragraph 3.1(3). This is the step that enables the court to decide whether there is an anchor defendant at all. The gateway requires the court to consider the merits and reasonableness of the claim against D1 as well as whether the additional defendant (D2) is a "*necessary or proper party*" to the claim against D1. As Mr Hermer QC expressed it, the existence of D1 and the claim against it are fundamental to the operation of the rule. This is necessary in order for the court properly to consider whether England is the proper place to try the claim against D2 – in other words, by establishing who the parties to that trial are or will be, the court can come to a proper conclusion about whether D2 would or should be involved in a trial between the claimant and D1.

19. I accept the submissions of Mr Hermer QC on this point. It is consistent with authority to approach the case against RDS in isolation, and first, upon such an application. In ***Erste Group Bank AG, London Branch v JSC 'VMZ Red October' and others*** [2015] EWCA Civ 379 Gloster LJ stated in [38] when considering PD 6B 3.1(3):

> "Thus a claimant has to demonstrate that both threshold requirements are met. At the first stage under paragraph

> 3.1(3)(a), the court has to examine the nature of the claim which arises against the anchor defendants in isolation; that is to say on the assumption that there will be no additional joinder of the foreign defendants. The court has to be satisfied that not only is there 'a real issue' between the claimant and the anchor defendants, but also that it is an issue 'which it is reasonable for the court to try'."

This can only be done if this is approached first. It is important to consider the claim against D1, which here is RDS, the company at the top of the entire Shell group company structure, first and in isolation. This will enable the court then to consider SPDC's applications, knowing that there either is, or is not, an anchor defendant involved in proceedings in this jurisdiction, and also knowing the answer to the question of whether there is a "real issue to be tried" so far as RDS and the claimants are concerned.

20. The issues therefore are as follows, in my judgment:
    1. Do the claimants have legitimate claims in law against RDS?
    2. If so, is this jurisdiction the appropriate forum in which to bring such claims? This issue encompasses an argument by RDS that it is an abuse of EU law for the claimants to seek to conduct proceedings against an anchor defendant in these circumstances.
    3. If this jurisdiction is the appropriate forum, are there any grounds for issuing a stay on case management grounds and/or under Article 34 of the Recast Regulation in respect of the claim against RDS, so that the claim against SPDC can (or should) proceed against SPDC in Nigeria?
    4. Do the claims against SPDC have a real prospect of success?
    5. Do the claims against SPDC fall within the gateway for service out of the jurisdiction under paragraph 3.1(3) of CPR Practice Direction 6B?
       This issue requires consideration of two separate sub-issues, namely (a) whether the claims against RDS involve a real issue which it is reasonable for the Court to try; and (b) whether SPDC is a necessary or proper party to the claims against RDS.
    6. Is England the most appropriate forum for the trial of the claims in the interests of all parties and for the ends of justice?
    7. In any event, is there a real risk the Claimants would not obtain substantial justice if they are required to litigate their claims in Nigeria?

21. The issues at 1, and 5(a), above, therefore both include consideration of the validity and strength of the claims brought against RDS.

C Disputed Evidence

22. At the hearing of the application by RDS for a preliminary issue, I heard arguments by RDS seeking to have the whole of Professor Siegel's evidence ruled inadmissible as it was evidence of an expert nature and the claimants had no permission for such expert evidence.

23. Under CPR Part 35.1, the court has a duty to restrict expert evidence. Expert evidence "shall be restricted to that which is reasonably required to resolve the proceedings". Under CPR Part 35.4, no party may call an expert or put in evidence an expert's

report without the court's permission. Permission was given by the court for expert evidence in this case, in an order dated 9 June 2016 which stated the following in paragraph 4:

"The parties have permission to rely on two expert witnesses in total in relation to issues of Nigerian law and the Nigerian legal system (including access thereto). Their expert evidence shall be limited to the issues of Nigerian law and issues relating to the Nigerian legal system (including access thereto) arising on the Jurisdiction Applications".

24. The claimants served evidence from Professor Jordan Siegel in a witness statement dated 23 September 2016. Professor Siegel was an Associate Professor of Business Administration at Harvard University teaching Global Strategic Management and the Economics of International Business to students on the Masters of Business Administration ("MBA") course. He is now an Associate Professor of Strategy at the Ross School of Business at the University of Michigan in the United States. He had been instructed as an expert in litigation in 2008 in the United States called ***Ken Wiwa et al v Royal Dutch Petroleum Co et al*** No. 96 Civ 8386 (KMW)(HBP). One of the defendants was SPDC. Royal Dutch Petroleum Co was the former parent company of the Shell Group, and is a different company and hence a different legal entity to RDS. That litigation concerned claims (arising prior to 2005) that SPDC was complicit in human rights abuses in Nigeria, including the execution and torture of Ken Saro-Wiwa and other Ogoni activists; the action was settled out of court. His witness statement in the applications before me contained expressions of his opinion concerning the Shell Group corporate structure, and also exhibited his report that had been submitted in that earlier litigation. In his statement for the hearing before me, he discussed the corporate reorganisation that had been performed by the Shell Group in 2005 and identified reporting lines, group policies and the structure and significance of the Joint Venture.

25. It can therefore be seen that Professor Siegel does not possess qualifications in Nigerian law and his witness statement cannot remotely be said to fall within the permission granted by the court on 9 June 2016 for expert evidence. Permission was not sought for his expert opinions. His statement did not however deal solely with matters that were opinion in nature, it also contained and identified statements of fact and exhibited certain other documents.

26. It was for that latter reason that I did not rule the whole of the statement inadmissible when ruling upon the application by the defendants on 7 October 2016. I made it clear that I would pay no attention to the opinions of Professor Siegel which were plainly inadmissible, and I also made this clear at the hearing of these applications on 22 to 24 November 2016. This was for two reasons, which I consider to be equally compelling. The first reason is that there was no permission for the claimants to adduce expert evidence on the subject of the Shell corporate structure, which included matters such as whether Shell is more, or less "vertically integrated" compared to other international oil groups. The second reason is that is not a subject upon which I consider the court would be assisted by evidence of this nature by a witness such as Professor Siegel in any event.

27. Mr Hermer QC accepted that he was not asking the court to make any findings regarding any opinion evidence contained in Professor Siegel's statement. When I

asked him whether, were the defendants' applications to fail and these actions to proceed to trial, he would expect to be given permission by the court to adduce such expert evidence at trial (given the subject matter, namely control by a parent of a subsidiary) he was highly circumspect in his answers to that question (which I asked him more than once). He explained that the court could conclude that evidence or assistance of this nature would be potentially available to the claimants at any trial, either by seeking to call it at trial or to assist "behind the scenes". He said that Professor Siegel's report was an indication of the type of evidence that might be available following disclosure, and that it mitigated against a finding that there was no arguable case against RDS at this stage. I do not accept that Professor Siegel's report is an indication of the type of evidence that might become available. A witness either can give admissible evidence including their opinion if the court gives permission, and if he or she is suitably qualified, or they can not. If there is no permission, that evidence is inadmissible. I do not consider it likely that the claimants would obtain permission to rely upon expert evidence of this nature at trial. Even if I am wrong about that, the claimants had no permission for expert evidence from Professor Siegel, and did not seek such permission. In those circumstances, the correct course to adopt concerning his evidence is straightforward.

28. Professor Siegel's witness statement contains expressions of his opinion, and in so far as it does so, I have had no regard to those opinions for the reasons that I have explained. There is the danger of becoming distracted on what is essentially a side-issue (or even a non-issue) concerning the validity, accuracy or usefulness of Professor Siegel's report in 2008 in the ***Ken Wiwa v Royal Dutch Petroleum Co*** litigation, for no reason other than it was dealing with the pre-2005 Shell Group corporate structure. It is common ground that in 2005 the two former parent companies of the Shell Group were replaced with a sole parent company of the Shell Group, namely RDS. I consider that this represented a significant re-organisation of the Group holding structure. RDS is now the holding company (the term used by RDS) or the parent company (one of the terms used by the claimants) in the post-2005 structure. RDS was not used at all prior to 2005 and was a shelf company. Before 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. The challenge to evidence being given by deponents for the claimants who were not prepared to be identified was resolved by their anonymity not being maintained.

29. I now turn to the other material submitted with the defendants' reply submissions, namely three reports and an academic article, to which objection is taken by the claimants. The reports are:

1. The 2015 edition of Form 20-F for Total SA, whose place of incorporation is France. Form 20-F is a form required by the Securities Exchange Commission ("SEC") in the United States. Total is registered on the New York Stock Exchange ("NYSE"). It is the Annual Report of Total SA required under the Securities Exchange Act 1934, which is legislation in the United States.
2. Chevron Corporate Responsibility Report Highlights – Human Energy – of 2015. This, inter alia, explains what is called "The Chevron Way". Chevron Corporation is an American oil group whose address is in San Ramon, California.
3. Part of BP's Annual Report and Form 20-F 2015, entitled "Corporate Governance". BP is name given to a group of companies that used to be known as British

Petroleum. BP plc has its shares listed, as well as in the United Kingdom on the FTSE Share Index, in New York and the Frankfurt Stock Exchange too.

30. The article is entitled "The boundaries of an undertaking in EU Competition Law" [2012] 8(2) European Competition Journal 301-331 by Alison Jones, Professor of Law at King's College London. The article is stated as being based on a chapter "Drawing the boundary between joint and unilateral conduct: Parent-Subsidiary Relationships and Joint Ventures" published in A Ezrachi (ed) *International Research Handbook of Competition Law* (Edward Elgar, 2012), and quotes from it with permission.

31. The reports are submitted in relation to the defendants meeting a point raised by the claimants that the operations of Shell in terms of group or holding company activity are unusual in the framework of international oil companies. I consider that this material ought to have been served as part of the defendants' evidence of fact prior to the hearing. Although it could be said that the reports are matters of public knowledge, publicly available and/or that judicial notice ought to be taken of their contents, as a matter of fairness the claimants have not made submissions about them nor could they have known that such material was to be deployed by the defendants. The claimants cannot have been expected to be face all or any publicly available material about international oil companies worldwide unless that was contained in the defendants' evidence for the applications. There has to come a time when the court decides that no further factual material can or should be submitted. These reports, on their face, appear to have been available earlier in 2016. I am not therefore prepared to consider them in evidence or to have regard to their contents.

32. Although the article could have been submitted with the bundle of authorities (and would have brought the total contents number to 124) there is nothing in the article relevant to these applications that cannot be divined from the cases in any event. I have therefore read and taken account of its contents, although I do not consider that it adds anything to the parties' submissions one way or the other. Had it raised any new point, I would have given the claimants the opportunity of responding to that point, having identified it and invited further submissions.

D The Position of Leigh Day

33. The next matter that has to be addressed, before turning to the substantive issues on the applications, is the position of the claimants' solicitors Leigh Day. The court's attention has been drawn by the defendants to the very high level of costs incurred in other cases in which Leigh Day have been involved in this jurisdiction, acting in similar actions. Since the withdrawal of legal aid for almost all purposes in civil litigation, the only recourse to justice for the impecunious claimant has been what are called Conditional Fee Agreements or CFAs. These operate in the following way. Claimants' lawyers, both solicitors and barristers, agree to provide their services on a no-win, no-fee basis to claimants, but are entitled to charge an "uplift" to their usual rates in the event of success (which because costs follow the event, means that an unsuccessful defendant would pay the winning party's costs in the higher amounts after the uplift has been applied). The uplift is not currently permitted to be in excess of 100%. Provision for payment of a successful defendant's costs, in case a claimant were to lose, is made by what is called After-The-Event (or "ATE") insurance. The premiums for this insurance are usually structured in such a way that they form part of

the costs of the action, payable by the unsuccessful defendant, again usually with the most sizeable part of the premium not payable until conclusion of the case. Often that latter part of the premium is in excess of 90% of the total premium. Accordingly, a claimant can bring proceedings against a defendant in these circumstances without funding the litigation costs during the action. If he or she wins, the defendant pays far higher costs (double, if the uplift is 100%) and the ATE premium. If he or she loses, the defendant's costs are paid by the ATE insurer. As long as legal representatives and ATE insurers can be found to act on these CFA arrangements, access to justice is available to claimants with deserving cases but who have no financial means.

34. However, the defendants in this case point to this approach being used by the claimants' solicitors in an oppressive way in claims such as these. The following statements in the defendants' skeleton argument provide a summary:

> "Indeed this is one of a series of overseas tort claims brought by the Claimants' law firm in which novel claims are asserted against UK domiciled parents or (in this case) holding companies, in order to bring fundamentally foreign claims into the jurisdiction in which the Claimants' law firm is admitted to practice…..
>
> It is a further essential part of the business model for the Claimants' lawyers to persuade the Court that other legal systems are inferior. This draws the court into risking making damaging colonialist judgments based on inappropriate comparisons between one judicial system and another. In fact, many oil spill cases have been pursued and are on foot in Nigeria including by Claimants from these communities……
>
> Allegations of the existence of a risk that justice will not be done in a foreign sovereign state have been advanced in the course of the last few months in the Vedanta litigation in relation to Zambia, in these two claims in relation to Nigeria and, it is understood, in the Unilever litigation in relation to Kenya. It is notable that these assertions are being advanced by the same firm of solicitors in relation to three very different sovereign states. The Court is invited to note the generalised nature of the allegations advanced in the current proceedings; it is submitted that the fact that such allegations appear to be capable of being made with such apparent frequency and ease serves to underline the importance of Lord Collins's warnings as to the need both for extreme caution on the part of the Court when considering such allegations and of cogent evidence in relation to such allegations….."

35. In addition to the litigation referred to in the preceding paragraph, Leigh Day also acted for claimants from Nigeria in what is called the Bodo litigation, which is dealt with further below. The claimants' advisers reject the submission that there is anything wrong in bringing international companies to book in this way in this jurisdiction, and rely upon the fact that CFAs are lawfully available in this jurisdiction

for cases such as these. Although the evidence shows that CFAs happen to be available in Nigeria too, it is submitted by the claimants in opposition to this attack by the defendants that the motives are entirely proper and the claimants' best, if not only, chance of meaningful justice is if proceedings are brought here.

36. I am of the view that the availability of CFAs in this jurisdiction, and hence the ability or otherwise of impecunious claimants to bring proceedings to obtain justice here compared to Nigeria, would be a relevant consideration under Issues 6 and 7 above if CFAs (or some other similar model) were *not* available in Nigeria. However, given that the evidence is that they are, the "business model" of Leigh Day is not a relevant factor one way or the other on the issues that I have to consider on these applications. Leigh Day maintain that they are providing a valuable service to many thousands of claimants for egregious conduct by powerful international companies. The defendants' view of the matter is that their motivation is rather less altruistic. Enquiring into, let alone making findings concerning, the motives of particular legal advisers is an exercise that is unlikely to be productive on any level, and in my judgment is not necessary to resolve the issues on these applications.

E Other relevant litigation – the Bodo litigation and the Vedanta litigation

37. Two other sets of proceedings were referred to, and relied upon, by the parties to these applications. It is sensible to provide some background to them both. Leigh Day acted for the many thousands of claimants in both, but that is not relevant as I have explained. However, the issues that arise are relied upon by the parties in different ways before me as will become clear in the section dealing with the law.

The Bodo litigation

38. In ***The Bodo Community and others v Shell Petroleum Development Company of Nigeria Ltd*** [2014] EWHC 1973 (TCC) some 15,000 claimants, resident in the areas of Nigeria known as Bodo and Gokona, brought proceedings in this jurisdiction against SPDC seeking damages for oil spills in 2008 in that region. Akenhead J heard preliminary issues concerning the statute that governs oil exploration and exploitation in Nigeria, the Oil Pipelines Act 1956 ("OPA"), and the claims that were brought in that case. Nigeria became an independent sovereign nation in 1960, but the OPA is still the relevant statute (although it has been amended). The Petroleum Act 1969 was passed in Nigeria and vested the ownership and control of oil assets in the State. The reference given is for the judgment on the preliminary issues that were considered by the court, which were as follows:

> Issue 1: Whether the Claimants are only entitled to claim compensation in respect of the 2008 spills under the OPA?
>
> Issue 2: Whether SPDC can be liable under Section 11(5)(b) of the OPA to pay just compensation for damage caused by oil from its pipelines that has been released as the result of illegal bunkering and/or illegal refining?
>
> Issue 3: Whether compensation under the following pleaded heads of loss is recoverable by individual claimants under the OPA: shock and fear; annoyance, inconvenience, discomfort and illness; distress and anxiety; aggravated damages; exemplary damages?
>
> Issue 4: Whether the amount of just compensation recoverable under the OPA in relation to damage arising from oil spills (save in respect of the claims for loss of

earnings) will be assessed in accordance with the diminution in value of the land and/or interest in land which have been damaged and/or the loss of the amenity value of that land or interests therein and/or consequential loss? If not, what alternative measure should be used?

Issue 5: Whether awards of just compensation under the OPA, or awards of general damages at common law, should be valued by reference to previous awards made by the English Courts or by reference to the value of land and/or the cost of living in Nigeria?

Issue 6: Whether the Court lacks jurisdiction to try some or all of the claims (as pleaded) on behalf of the Bodo Community and the claims by the individuals under the OPA and/or in nuisance and/or in negligence and/or Rylands v Fletcher by reason of Section 30 of the CJJA 1982?

Issue 7: Whether the damage - both pecuniary and non-pecuniary - alleged to have been suffered by the claimants, in both the individual and community claim, are recoverable in claims (whether brought individually or by representative action) for damages in public nuisance?

Issue 8: Whether interest is recoverable on awards of just compensation and/or damages at common law for past losses?

39. The most relevant issue for present purposes was the first, and the finding by the judge who answered the first preliminary issue as "yes" at [69]. His answer at [93] in respect of the second issue was "no" – there has to be neglect on the part of the licensee in question, namely SPDC.

40. The Bodo litigation therefore concerned Nigerian claims, by thousands of Nigerian citizens, against SPDC in this jurisdiction. However, the passage of that litigation is of more than passing interest. It was in 2008 that the oil spill occurred from the Trans-Niger Pipeline. SPDC offered the Bodo Community an inadequate amount of compensation, which led to the issue of proceedings. In 2011 Leigh Day were instructed to represent the community and 15,601 individuals. Claim forms were issued in this jurisdiction against both RDS and SPDC in 2012, but the claims proceeded against SPDC alone on the basis of an agreement that it would voluntarily submit to the jurisdiction; SPDC also admitted liability. In January 2015 the claims settled for a total of £55 million plus costs prior to the substantive trial, which was to have taken place in May 2015. The claim for clean-up and remediation has been stayed as the defendants have stated that they will clean-up the contamination in Bodo, although this is yet to commence. There was also some dispute about the degree to which Leigh Day had, or had not, interfered in the planned remediation which it is not necessary to consider in any detail. An ex-parte application was made to me as the vacation judge in the TCC in September 2016 to vary the terms of the settlement order in the Bodo litigation in relation to imposing further safeguards to protect the interests of minor claimants in their share of the settlement sums.

41. Lord Goldsmith QC referred to the Bodo case as a "highly cautionary tale". Although SPDC admitted liability for the operational oil spill, at the point that this was done the only claimants were the Bodo Community, and the only relief sought was damages. The number of claimants grew considerably after that, and a claim for injunctive relief seeking to order SPDC to remediate and clean up the relevant area of Nigeria was

added after SPDC had submitted to the jurisdiction. In 2014, a claim for wayleave damages in the sum of £100 million was added. In the event, the claims were settled by means of the payment of £55 million, but the costs bill that attached to that settlement was also measured in the tens of millions of pounds. He submitted that SPDC "had no wish to repeat" the experience of that litigation, and that was why the defendants in the two instant sets of proceedings had decided to insist on their strict legal rights so far as jurisdiction is concerned.

42. Mr Hermer QC for these claimants also acted for the claimants in the Bodo litigation. He relied upon that litigation as demonstrating that actions such as the instant ones had a much better prospect of progress and success if undertaken in the English courts, rather than those in Nigeria. He also sought to use SPDC's submission to the jurisdiction in the Bodo litigation to bolster his arguments concerning jurisdiction on these applications. He argued the point in the following way. He said that the claimants accepted that the Bodo litigation had "no legal relevance" but he did seek to rely upon if for five reasons. The way it was put by the claimants is as follows:

> (1) The first reason that it was said it assisted the claimants was that it demonstrated that SPDC clearly thought it appropriate to submit to a claim before the English courts that included a claim for injunctive relief, notwithstanding the UNEP plan for multi-stake holder involvement and remediation.
>
> (2) The second reason was that it was plainly considered by SPDC that the English court was an appropriate forum for dealing with a large group claim involving complicated issues of Nigerian law arising out of the oil spill from one of their pipelines, and that the English court was a just and efficient forum for the disposal of such claims.

In a sense, the first reason is simply a sub-set of the second; alternatively, the claim for an injunction and the large group claim are simply characteristics of the action that SPDC considered was suitable to be determined by the English courts.

> (3) The third consideration was what was called "the Cambridgeshire factor" which is essentially that the parties' advisers have accumulated a body of experience and knowledge in this jurisdiction already. It takes its name from the judgment of Staughton J (as he then was) in ***Spiliada Maritime Corporation v Cansulex*** [1986] AC 460, 471 ("***The Spilada")***, who explained that in an earlier case (the 'Cambridgeshire' action): "*The plaintiff's solicitors have made all the dispositions and incurred all the expense for the trial of one action in England; they have engaged English counsel and educated them in the various topics upon which expert evidence will be called; they have engaged English expert witnesses; and they have assembled vast numbers of documents. They have also, no doubt, educated themselves upon the issues in the action*".

Having regard to the fact that similar issues had already been litigated in England, the Judge concluded that, "*it would be wasteful in the extreme of talent, effort and money if the parties to this case were to have to start again in Canada. The case is a proper one for service out of the jurisdiction.*" On appeal Lord Goff agreed that the expertise the parties' lawyers acquired in the earlier litigation was crucial in establishing England as the appropriate forum for the trial of the claims. He said that this would "*contribute to efficiency, expedition and economy"*.

> (4) The fourth factor was that it suggested that RDS in the Bodo litigation must have thought that there was at least an arguable case against it as a parent company, because it did not seek to strike out the claim, but rather "sought to do a deal on jurisdiction", to use the language of Mr Hermer QC.
>
> (5) The fifth point was that it showed a degree of co-ordination between RDS and SPDC which was relevant when one considered that they were effectively claiming to be essentially totally distinct entities.

Mr Hermer QC sensibly stopped short of submitting that SPDC's voluntary submission to the jurisdiction in that case operated as a legal impediment upon RDS, in the claimants' favour, on these applications. He did however rely upon it as being relevant when considering the legal tests of "reasonableness".

43. In my judgment, the fact that SPDC voluntarily submitted to the jurisdiction in the Bodo litigation, as part of an agreement between the claimants and RDS whereby the latter played no part in that litigation, is of no relevance to the issues before the court on these applications. The Bodo litigation cannot be ignored; it comprised the same defendants, similar issues, the same jurisdiction where the events occurred (Nigeria) and therefore the same Nigerian statutory framework. There is also a detailed judgment upon preliminary issues of law that was not appealed. However, the voluntary submission of SPDC to the jurisdiction in that case cannot govern, or substantially influence, any of the factors under consideration on these applications. Any party is free to clothe the courts of England and Wales with jurisdiction voluntarily. Sometimes this is done contractually by means of, for example, an express jurisdiction clause before any dispute arises. Sometimes it is done after a dispute has arisen, either before or after proceedings are issued. To weigh an earlier voluntary submission to the jurisdiction by SPDC heavily in the balance on these applications would, in my judgment, be wrong in principle. What is relevant are the findings of Akenhead J on the substantive preliminary issues, in particular his findings on the first preliminary issue, namely that the statutory regime under the OPA constitutes the remedy available to those affected by such matters. These were not overturned on appeal – I am unaware of whether permission to appeal was even sought – and although I have not heard the same evidence, nor conducted a trial of any preliminary issues, the findings of Akenhead J are highly persuasive, and without full argument on the points all over again, the parties can probably expect the same answers if the same points are argued again in this litigation.

The Vedanta litigation

44. There is other prior litigation also relied upon by the claimants, although it does not concern Nigeria but Zambia, and does not concern the Shell Group. In May 2016, in the Vedanta litigation, Coulson J heard applications by the defendants challenging the jurisdiction of the court in a case concerning copper mining in Zambia. This case is ***Lungowe and others v (1) Vedanta Resources plc (2) Konkola Copper Mines plc*** [2016] EWHC 292 (TCC). In that litigation, the claimants are 1,826 Zambian citizens who are resident in four communities in the Chingola region of Zambia. They commenced proceedings on 31 July 2015, seeking damages for personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land arising out of pollution and environmental damage said to have been caused by the Nchanga copper mine, one of the world's largest, from 2005 onwards. These claimants were again represented by Leigh Day and the same leading counsel. The number of claimants was potentially to change because there had already been a dispute between Leigh Day, and another English firm of solicitors, Hausfeld, as to who was representing those allegedly affected by pollution from the mine. Hausfeld are stated in the judgment as being in the process of assessing the viability of potential new claims involving over 1,000 additional claimants. There is a distinct possibility, therefore, that the number of claimants may increase significantly.

45. The second defendant ("KCM") is a public limited company incorporated in Zambia which owns and operates the mine. The first defendant ("Vedanta") is a holding company for a diverse group of base metal and mining companies, including KCM, which is a very important copper mining investment within the Vedanta group. Permission had been granted to the claimants to serve the Claim Form and the Particulars of Claim out of the jurisdiction on KCM. Vedanta applied for declarations that the court did not have jurisdiction to try the claims; alternatively, that the court should not exercise any jurisdiction which it did have to try these claims, pursuant to CPR Part 11(a) and/or (b); and a stay of proceedings pursuant to CPR Part 11(6)(d) and/or CPR 3.1(2)(f) and/or pursuant to the court's inherent jurisdiction. KCM applied for declarations that the court did not have jurisdiction to try the claims; alternatively, that the court should not exercise any jurisdiction which it may have to try the claims pursuant to CPR Part 11(a) and/or (b); together with an order setting aside the claim form, the service of the claim form and the order of Akenhead J dated 19 August 2015 permitting service out of the jurisdiction.

46. The applications were therefore very similar, but the locus of the acts in question was Zambia, and access to justice issues therefore took into account the Zambian justice system rather than that of Nigeria. Coulson J found that the challenges to the jurisdiction failed, and that there was a real issue to be tried between the claimants and Vedanta, and that the interests of justice were served by KCM being joined to those proceedings.

47. The claimants in these proceedings, in particular, relied upon the judgment in ***Vedanta*** to an extraordinary degree. This seemed to be part of an approach that sought to persuade me that, because the decision reached by the court in ***Vedanta*** was to dismiss the jurisdictional challenges of both defendants, the decision on these applications should follow that on an almost automatic basis, and similarly dismiss the jurisdictional challenges of both defendants. The defendants, on the other hand, sought to persuade me that the decision in ***Vedanta*** was wrong, that the judge had

paid insufficient attention to the dicta in ***Thompson v The Renwick Group plc*** [2014] EWCA Civ 635, and given permission to appeal had been granted in that case by Jackson LJ, the decision of Coulson J might be overturned. With the permission of the parties in ***Vedanta,*** a bundle of appeal documents was provided to me, including the appellants' notices, and all the parties' skeleton arguments.

48. The correct approach is not slavishly to follow the decision in ***Vedanta.*** It may be stating the obvious, but the correct approach is to apply existing principle to the facts of these Nigerian claims concerning these two Shell companies and arrive at the relevant conclusion. The fact that Coulson J arrived at one particular conclusion, on one particular corporate structure concerning claims from copper mining in Zambia, does not direct me in one direction or the other on the different Shell corporate structure concerning claims from oil exploitation in Nigeria. There are numerous differences – the obvious ones being the jurisdictions involved, the governing law of the claims (at least against the second defendants in each case), the two corporate groups, and that CFAs are available to claimants in Nigeria and not in Zambia. The fact that there is to be an appeal does not change that approach.

49. As set out in [19] to [21] above, the correct place to start is the claims brought against RDS.

F The Governing Law

50. Due to the coming into force of Regulation (EC) 864/2007 on the law applicable to non-contractual obligations ("the Rome II Regulation") on 12 January 2007, some differentiation is made by the claimants concerning applicability of substantive law depending upon when it is said that the acts complained of occurred. The Rome II Regulation included measures to promote the compatibility of the rules applicable in Member States concerning the conflict of laws and jurisdiction. This was part of the progressive establishment of an area of freedom, security and justice, which required judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market. This is clear from Recitals (1) and (2) of the Rome II Regulation.

51. In the Ogale claims, so far as the law governing the determination of the claims against RDS is concerned, in the part of the Particulars of Claim dealing with applicable law (paragraphs 58 and 59) the claimants plead the following. In respect of the claim against RDS:
(1) In relation to acts and omissions that occurred between 1 May 1996 and 11 January 2009:
Pursuant to sections 77 and 1.2 of the Private International Law (Miscellaneous Provisions) Act 1995, the applicable law is the law of England and Wales as it is "substantially more appropriate" for the case against RDS to be determined in accordance with the law of England and Wales. In the alternative, pursuant to section 14 of the Private International Law (Miscellaneous Provisions) Act 1995, it would be contrary to the principles of public policy to apply the law of Nigeria to the claim against RDS if, as the defendants aver, Nigerian legislation excludes any claim in tort against an English domiciled parent company that knowingly and negligently permits its Nigerian subsidiary to cause extensive environmental pollution and consequential damage.
(2) In relation to acts and omissions occurring after 11 January 2009:

Pursuant to Article 7 of the Rome II Regulation the applicable law is said to be the law of England and Wales, this being the jurisdiction where the acts and omissions of RDS giving rise to the damage in question occurred. Further (or alternatively) pursuant to Article 4 of the Rome II Regulation the applicable law is said to be the law of England and Wales, it being the jurisdiction which is manifestly more closely connected with the relevant torts committed by RDS. Yet further, or in the second alternative, pursuant to Article 26 it is said by the claimants that it would be manifestly incompatible with the public policy of England and Wales to apply the law of Nigeria if, as the Defendants aver, Nigerian legislation excludes any claim in tort against an English domiciled parent company that knowingly and negligently permits its subsidiary to cause extensive environmental pollution and consequential damage. Yet further or in the third alternative, the claimants plead that if the law applicable to the claim against RDS is Nigerian law, the claimants aver that the Nigerian legislation does not exclude a claim in negligence against RDS, and that the relevant principles of Nigerian common law are materially the same as those found in the common law of England and Wales.

52. As to the substantive law governing the determination of the claims against the SPDC, the claimants aver:
(1) In relation to acts and omissions that occurred between 1 May 1996 and 11 January 2009, pursuant to Part III of the Private International Law (Miscellaneous Provisions) Act 1995, the applicable law is the law of Nigeria; and
(2) In relation to acts and omissions occurring after 11 January 2009, pursuant to Articles 4 and 7 of the Rome II Regulation, the applicable law is the law of Nigeria.

53. In the Bille claims, the summary in paragraph 2 of the Particulars of Claim states that the claims against RDS are "based on the tort of negligence under the common law of Nigeria" and those against SPDC are "based on relevant causes of action under Nigerian statute and common law". However, Part D of the Particulars of Claim (paragraphs 31 to 33) in those proceedings puts this as a primary case against the defendants, namely that the substantive law is that of the law of Nigeria pursuant to Articles 4 and 7 of the Rome II Regulation. In the alternative, it is pleaded that pursuant to Article 26 of the Rome II Regulation it would be manifestly incompatible with the public policy of England and Wales to apply the law of Nigeria if, as the defendants are said to have stated in pre-action correspondence, the law of Nigeria excludes any claim in tort against an English domiciled company (namely RDS) that knowingly and negligently permits its subsidiary (SPDC) to cause extensive pollution and environmental damage. Accordingly, on that alternative case (which the claimants make clear is not one that they accept, so far as the operation of Nigerian law is concerned) the claimants will, under Article 26 of the Rome II Regulation, seek to have the law of England and Wales applied so far as the case against RDS is concerned. Although not expressly stated, it appears to be accepted in the pleading that the law governing the claim against SPDS must remain Nigerian on that alternative case.

54. The law governing the procedure of the claims is pleaded for both the Ogale and Bille claims as being that of England and Wales.

55. Under Article 7 of the Rome II Regulation, the law applicable to a non-contractual obligation arising out of environmental damage shall be the law of the country where

the damaged occurred "*unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred*". The claimants are therefore entitled to elect to pursue an environmental claim under the law where negligent supervisory acts and omissions occurred, rather than the place where the damage occurred. The claimants maintain that this entitles them to proceed against RDS under English law as the acts and omissions occurred (or are said to have occurred) in England. It should be said that the evidence of the defendants is that nothing has been done by RDS in England at all. The defendants contend that the claim against RDS must be governed by Nigerian law. In practice, given the substantial similarity between English and Nigerian common law, the difference is immaterial for the purposes of these jurisdictional challenges.

56. The parties are agreed that the claims against SPDC are governed by the law of Nigeria. It is only so far as the claims against RDS are concerned that there can be any dispute about the substantive law that governs those claims.

57. It is not necessary to determine the applicable law definitively at this stage. This is because the legal experts for the parties are agreed that the law of Nigeria would follow, or at least include as an essential component, the law of England in this respect. In other words, if there is no legal claim in English law against RDS, there would be no legal claim against RDS under the law of Nigeria as that is also a common law jurisdiction and would follow English law in this respect. Even if there is a claim in English law, that does not necessarily mean that it would be found that there would be a claim under the law of Nigeria. Lord Goldsmith used the phrase "necessary but not sufficient" to describe the ingredients of a common law duty of care in English law, and the effect of their absence upon any claim in Nigerian law. In those circumstances, it is agreed that I should apply English law principles to the claims advanced against RDS. If there is no claim in English law, it is agreed there will be no claim in Nigerian law.

58. Justice Ayoola, a retired Justice of the Supreme Court of Nigeria, provided expert evidence for the defendants. He is highly qualified, was a Justice of the Supreme Court between 1998 and 2003 and also appeared as an expert witness for SPDC in the Bodo litigation on the trial of the preliminary issues. He stated that the Nigerian courts would apply the principles established by the English common law, including the tripartite test in ***Caparo Industries Plc v Dickman*** [1990] 2 AC 605 for establishing a duty of care. He drew an analogy with the way in which the English common law is considered, and applied, in Guernsey. He stated that a Nigerian court would bear in mind that both English common law, and the common law as developed in other jurisdictions, have persuasive but not binding effect. In his conclusions he identified that the duty of care alleged to be owed by RDS would, under Nigerian law, be considered novel, and one of the predominant authorities relied upon, ***Chandler v Cape*** [2012] 1 WLR 3111 (which deals with a parent company's liability for acts of its subsidiary) has never been recognised under Nigerian law. In his expert opinion, the Nigerian courts will only "recognise novel duties of care cautiously, incrementally and by analogy".

59. Mr Eghobamien SAN gave expert evidence on behalf of the claimants. He is also highly experienced, and SAN are the initials that identify him as leading counsel and

a Senior Advocate of Nigeria. He was called to the bar in England and Wales in 1989 and was one of the founding partners of Perchstone & Graeys, one of the leading commercial law firms in Nigeria. His view is that the Nigerian courts would apply the principles in the cases of ***Donoghue v Stevenson*** [1932] AC 562 and ***Anns v Merton London Borough Council*** [1978] AC 728. He accepts that the claim against a parent company is a "relatively novel area of law for Nigeria", and that the Nigerian courts would be heavily influenced by judgments from other jurisdictions, including from the United Kingdom. He described English law as "important and influential". He stated that the courts would be "relatively liberal in ascribing a duty of care, particularly in 'troublesome' areas of tort such as pure economic loss and liability in respect of the acts and omissions of third parties". Although he stated that in his opinion a Nigerian court would be more likely to apply the general principles drawn from ***Anns v Merton London Borough Council*** to determine whether a duty of care is owed, he also stated "I consider the Nigerian Courts would reach the same result in the Ogale and Bille claims using the approach in ***Caparo v Dickman*** as they would using the approach in ***Anns v Merton***." (paragraph 18(b) of his report dated 16 September 2016).

60. The claimants' skeleton argument made it clear, in a footnote, that "in practice, this disagreement is unlikely to be significant because Mr Eghobamien SAN believes that a Nigerian court would reach the same decision whether following the approach in ***Caparo*** or in ***Anns***. However, Mr Eghobamien SAN's evidence does demonstrate that the Nigerian courts have tended to impose duties of care more liberally than the English courts in certain situations." The claimants maintain that the high persuasive value of English authorities in Nigeria has been stressed in a number of other cases before the English courts. For example, in ***Access Bank plc v Akingbola*** [2012] EWHC 2148 (Comm) at [10] the joint report of the two Nigerian law experts noted that: "*It is agreed between the experts that, although English decisions are not part of Nigerian law and not binding on Nigerian courts, they are nevertheless of highly persuasive value, and that, in the instant case, the two relevant authorities on the issue of what would qualify for the exception to s.159 provided for in s.159(3)(a)* [of the Nigerian Companies and Allied Matter Act] *would be followed by the Nigerian courts*". It is therefore clear that Nigerian law is heavily influenced by, and its direction affected and guided by, English decisions.

61. I consider – and the parties both suggested, and agreed, that this was correct – that the starting point is to consider the position of the claim against RDS by the application of existing English law principles. ***Anns v Merton*** was overruled some time ago in this jurisdiction in ***Murphy v Brentwood District Council*** [1991] 1 AC 398. In English law at least the three-fold test in ***Caparo v Dickman*** contains the statement of applicable principles that are in force in the English common law today, and in particular the three-step test necessary when considering whether a duty of care exists, or should be imposed. Mr Eghobamien SAN considers that the same result in Nigeria, so far as the claim against RDS is concerned, would be achieved either by applying ***Anns*** or ***Caparo***. I consider that English law, which the parties are agreed is what I should apply, requires application of the principles in ***Caparo*** and the cases that have come after it. If Mr Eghobamien SAN is right, the answer applying ***Caparo*** would be determinative under Nigerian law too.

G The law concerning jurisdiction and RDS

62. Paragraph 3.1(3) of Practice Direction 6B – Service out of the Jurisdiction provides as follows:

"*Service out of the jurisdiction where permission is required:*

> **3.1** The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> (1) ….
>
> (2) ….
>
> (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> > (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
> >
> > (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

In the authorities this is often referred to as the "necessary or proper party" gateway. It is this which is relied upon by the claimants as the relevant gateway here, on the basis that RDS has been served with the proceedings validly within the jurisdiction, that there is a real issue between the claimants and RDS which it is reasonable for the court to try, and that SPDC is a necessary and proper party to that claim.

63. Article 4 of the Recast Brussels Regulation provides that:

> "Subject to the Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

This is the successor to the earlier Article 2 and is the same terms. None of the exceptions within the Regulation apply to the claimants' claim against RDS. RDS is domiciled in the UK, and (effectively, although the claimants mount a far more sophisticated series of challenges to RDS's arguments on this point) the claimants submit that is the end of the matter so far as RDS' jurisdictional challenges are concerned.

64. The well-known case of ***Owusu v Jackson*** [2005] QB 801 is authority for the proposition that *forum non conveniens* arguments are irrelevant to the claim against RDS, given the effect of Article 4 of the Recast Regulation (which replaced the earlier Article 2). In that case, Mr Owusu, a British national domiciled in the United Kingdom, went on holiday to Jamaica and suffered a catastrophic injury whilst swimming. He waded into waist high water, dived in and struck his head against a submerged sandbank. The ensuing injury rendered him tetraplegic. He brought proceedings against Mr Jackson, who had rented him the holiday villa in Mammee Bay, Jamaica, which had a private beach. He alleged an implied term in the rental agreement that the beach would be safe. He also included as defendants various Jamaican companies who were involved in the management of the beach and the nearby resort and hotel. Mr Jackson was domiciled in the United Kingdom, the other

parties in Jamaica. All of the defendants sought to stay the proceedings, alternatively set aside service out of the jurisdiction. It was held, by answering the first of two preliminary issues, that "the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State."

65. The Court of Justice of the European Union ("CJEU") noted at [37] that it was common ground that no exception on the basis of the *forum non conveniens* doctrine was provided for by the authors of the Brussels Convention, and that respect for the principle of legal certainty was one of the objectives of the Convention. This would not be fully guaranteed if the court having jurisdiction under the Convention was permitted (the phrase used in the judgment was "had to be allowed") to apply the *forum non conveniens* doctrine as shown in [38]. This is because to permit the continuance of the application of the *forum non conveniens* test or doctrine would undermine the certainty which is at the heart of the approach under the Regulation (and continued by means of the Recast Regulation). This is because predictability is what is required, and given the wide discretion available under that doctrine, it might be said that predictability is precisely the opposite of what would pertain if different courts across different Member States were allowed to approach what is a highly important question in their own different discretionary way.

66. This can be seen at paragraphs 41-46 of the judgment of the CJEU:

> "41. Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.
>
> 42. The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he could be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another state and the prolongation of the procedural time limits.

…

44. The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.

45. In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in article 2 of the Brussels Convention, for the reasons set out above.

46. In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it by article 2 of that Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state."

67. It has been repeatedly held in subsequent decisions in the United Kingdom that the decision in ***Owusu v Jackson*** prevents any consideration of the *forum non conveniens* principle when the defendant, or one of the defendants, is domiciled in the UK. It is unnecessary to identify the different facts or reasoning in all of these cases, but a representative sample of those authorities is as follows:

(1) ***Global Multimedia International Ltd v Ara Media Services*** [2006] EWHC 3612 (Ch) Sir Andrew Morritt C noted that several of the defendants were domiciled in England. As a result he said:

> "Even if it were otherwise desirable, this court could not stay the proceedings against them (See Article 2 of the Judgments Regulation and ***Owusu v Jackson*** [2005] QB 801".

(2) ***In Attorney General of Zambia v Meer Care & Desai (A Firm)*** [2006] 1 CLC 436 Sir Anthony Clarke MR (as he then was) stated:

> "…a number of the defendants, including the first, second, fifth, eighth and twelfth defendants, are domiciled in a state which is a party to the Conventions the terms of which are now set out in Council Regulation

> EC 44/2001, which has the force of law in England. The effect of the decision of the European Court of Justice in ***Owusu v Jackson*** (Case C-281/02) [2005] 1 CLC 246 is that the English court could not grant a stay of proceedings against those defendants in favour of a court in a state which is not a party to a relevant convention, including Zambia. In any event, none of the defendants other than the appellants applied for a stay."

(3) In ***UBS AG v HSH Nordbank*** [2009] 2 Lloyds Rep 272, Collins LJ (as he then was) said:

> "103. The prevailing view is that there is no scope for the application of *forum conveniens* to remove a case from a court which has jurisdiction under the Regulation, even as regards a defendant who is not domiciled in a Member State…"

(4) In ***A v A (Children: Habitual Residence)*** [2014] AC 1, Baroness Hale stated the following:

> "31. In ***Owusu v Jackson*** (Case C-281/02) [2005] QB 801, the Court of Justice of the European Communities held that the rule in article 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Measures 1968, which required that "persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state", meant that the courts of that state had to assume jurisdiction, even though there was a third country which also had jurisdiction and even though that country was, on the face of it, the more appropriate forum in which to bring the action. Thus the English court was not only empowered but obliged to assert and exercise jurisdiction rather than leave the parties to the jurisdiction of a state (Jamaica) which was not party to the Convention."

68. Coulson J considered these same authorities in ***Vedanta*** and I reach the same conclusion as he did on this point. There is simply no scope, in the law of England and Wales, for the application of the doctrine of *forum non conveniens*, or any remnant thereof, to the claim against RDS, as it is domiciled within the jurisdiction.

69. Other than the argument raised by Lord Goldsmith QC that the claimants were guilty of an abuse under EU law, and/or that the domestic court should grant a stay in any event on case management grounds, the above analysis concludes the arguments in the claimants' favour so far as the challenges brought by RDS on what are, effectively, *forum non conveniens* grounds, as long as there is a claim in law against RDS that should be resolved, and/or so far as there is a real issue to be tried against RDS. To use the language of issues 1 and 5(a), the questions are: do the claimants have legitimate claims in law against RDS; and/or do the claims against RDS involve a real issue which it is reasonable for the court to try? Neither the terms of the Recast Regulation, nor the case of ***Owusu v Jackson,*** removes that as a step to be considered on these applications. Further, it is only necessary to consider the arguments in favour of a stay on case management grounds (or an abuse of EU law) if those issues are

answered in favour of the claimants. If they are not, then the question of an abuse of EU law or the necessity of a stay on case management grounds do not arise.

H Liability in tort of a parent company for the acts/omission of a subsidiary

70. It is therefore necessary to consider the way in which the claims against RDS are framed to consider if this part of the test is satisfied in the claimants' favour. RDS and SPDC are two entirely separate legal entities, and SPDC is a member of the Joint Venture in Nigeria that is engaged in the business of oil exploration and commercial exploitation. The Government of Nigeria is a member of the Joint Venture through the Nigerian National Petroleum Corporation.

71. The defendants on these applications do not shirk from mounting a robust attack on the prospects of the case being brought against RDS, which it is said is a holding company. It is the defendants' case that the claims against RDS are bound to fail. It is necessary for the court to reach a view on this issue, bearing in mind that this is a summary stage of the proceedings. It is said by the claimants that the hurdle which must be overcome is not a high one, and an analogy was drawn with the necessary standard that must be reached for a claimant to avoid having his or her claim struck out. I accept that. However, it is a hurdle that still must be overcome.

72. The focus of the argument by the defendants is that RDS owes no duty of care in common law to the claimants for the acts and/or omissions that have taken place that have led to the situation in the Niger Delta. The parties were agreed that the starting point is ***Caparo Industries Plc v Dickman*** [1990] 2 AC 605, and its three ingredients of foreseeability, proximity and reasonableness. The question is always to consider whether, on the facts of any particular case, the three ingredients have been made out. The case of ***Chandler v Cape*** [2012] 1 WLR 3111 is heavily relied upon by both parties, and it is therefore necessary to analyse the dicta in that case in some detail. However, before doing so there are other cases to which reference can usefully be made. The first case in which it was held that a parent company might arguably owe a duty of care to the employees of subsidiaries was ***Ngcobo and others v Thor Chemicals Holdings Ltd*** (November 1996, per Maurice Kay J, unreported). The judge refused an application to strike out the claim against the parent company, stating:

> "the fact that the law does not impose liabilities upon companies in respect of the acts or omissions of other companies in the same group simply by reason of their common membership of the same group does not mean that circumstances cannot arise where in more than one company in the same group each incurs liabilities in respect of damage caused to a particular plaintiff." (emphasis added)."

This case in my judgment does no more than state that in some factual situations such a duty of care might exist. The judge said that the court had to look at the evidence in a particular case to see whether there was a potential for liability attaching to more than one company in the group. He identified a range of factual matters (including the Memorandum of Association of the holding company, the common directors and so forth), to conclude that in that case it was arguable that a claim existed against the parent company.

73. In ***Connelly v RTZ Corporation Plc*** [1998] AC 854, there was a claim by employees of a subsidiary against the parent. The main issue concerned access to justice in Namibia. The judge at first instance described the situation said to give rise to the duty of care as an unusual one, but went on to say that, if the pleading was proved, then so too were the three elements of proximity, foreseeability and reasonableness arising from ***Caparo***. The case went on appeal to the House of Lords, and the point under consideration was essentially whether the availability of legal aid was a relevant consideration. In that case it was held by the House of Lords that the availability of financial assistance in this jurisdiction, coupled with the non-availability in the appropriate forum (which was Namibia) was "exceptionally a relevant factor in this context" per Lord Goff at [30]. However, the scope and existence of the relevant duty of care by a parent company was not considered to any appreciable degree.

74. It can readily be seen that both ***Ngcobo*** and ***Connelly*** were claims by former employees of the subsidiary company, being considered at an interlocutory stage. ***Lubbe and others v Cape Plc*** [2000] 1WLR 1545 was another decision on an interlocutory basis, although this time the House of Lords was dealing with a claim against a parent company which involved both employees of the subsidiary, and those living close to the factories where the asbestos in question that had caused the damage was being produced. The issue under consideration proceeded on the assumption that the claimants would be able to prove that the parent company "exercised *de facto* control over the operations of a (foreign) subsidiary and knew, through its directors, that those operations involved risks to the health of workers and persons in the vicinity of the factory". The issue in that case essentially concerned access to justice, rather than the legal characterisation of the claim, and the duty, themselves. Lord Bingham stated the following concerning the legal ingredients of the claim against the parent company:

> "The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken."

75. There are then two very important decisions in this area, and they both, rightly, occupied a great deal of time during the oral arguments on these applications. In ***Chandler v Cape Plc*** [2012] EWCA Civ 525; [2012] 1 WLR 3111, the Court of Appeal upheld the first instance judge who had concluded, after a trial, that the claim in negligence by the employees of a subsidiary against the parent company itself had indeed been made out. Although the personal injury was based on exposure to asbestos, I do not consider that this is any particularly special ingredient of this, or indeed any, of the cases, and the principles are not limited to asbestos exposure cases. Arden LJ rejected the defendants' submission that, in determining whether there had been an assumption of responsibility, the court was restricted to matters which might be described as "not being normal incidents of the relationship between a parent and

subsidiary company". Arden LJ made clear that the way in which groups of companies operated was very varied and that sometimes a subsidiary was run purely as a division of a parent company, even though the separate legal personality of the subsidiary was retained and respected. She said it was not possible to say in all cases what was or was not a 'normal incident' of the parent/subsidiary relationship.

76. The Court of Appeal concluded that, on the evidence in that case, the threefold ***Caparo*** test had been made out. I will deal further with that test below in the section of this judgment entitled "Applying the relevant test". At [80] of her judgment, in an important passage, Arden LJ said:

> "80. In summary, this case demonstrates that 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 issues."

77. In ***Thompson v The Renwick Group Plc*** [2014] EWCA Civ 635, the Court of Appeal concluded that, on the facts of that case, there was no duty on the part of a parent company. The claimant suffered from asbestos related illnesses, and had worked in the 1970s with asbestos, including something called "hand baling" of actual asbestos. The conditions in which he had worked were described by the Court of Appeal as "really quite shocking and should be a cause for shame". However, the employer companies themselves were not viable and had no insurance. The claimant therefore brought his claim against the parent holding company, which appealed against a finding at first instance that it owed him a duty of care. The proceedings were based on a claim that the parent company had assumed a duty of care towards employees of the subsidiary company for health and safety matters, by virtue of having appointed an individual as director of the subsidiary with responsibility for those matters. The Court of Appeal held that this act did not establish the necessary duty on the part of the parent company and (per Tomlinson LJ) identified the various factors which demonstrated that the case was some way removed from ***Chandler v Cape.*** None of the particular factors set out in [80] of Arden LJ's judgment were found to be present

in the ***Thompson*** case. At [33] Tomlinson LJ stated that the formulation by Arden LJ was intended to be descriptive rather than exhaustive of the circumstances in which a duty may be imposed. At [37] he stated:

> "There is no evidence that the Renwick Group Limited at any time carried on any business at all apart from that of holding shares in other companies, let alone that it carried on either a haulage business or, as would in fact be required were the Respondent's case to have a prospect of success, a business an integral part of which was the warehousing or handling of asbestos or indeed any potentially hazardous substance. Thus the first of Arden LJ's indicia is not satisfied. This is no mere formalism, for as the balance of Arden LJ's indicia indicate, what one is looking for here is a situation in which the parent company is better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary companies against the risk of injury and moreover where, because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge in order to protect its employees from risk of injury."

(emphasis added)

78. Coulson J in [115] in ***Vedanta*** identified the following principles from these cases. He stated that they were:

> "(a) Every claim of this kind requires the claimants to satisfy the three-part test in ***Caparo v Dickman***.
>
> (b) Depending on the facts, it is arguable that a claim in negligence against a parent company arising out of the operations of its subsidiary might give rise to liability: ***Chandler v Cape***.
>
> (c) For obvious reasons, such a claim is more likely to succeed if advanced by former employees (***Ngcobo***, ***Connelly v RTZ***, ***Chandler v Cape***). However, depending on the facts, claims made by residents, rather than former employees, are still arguable (***Lubbe***)."

79. To the list I would add the following. When approaching the four factors that were identified by Arden LJ in ***Chandler v Cape*** as indicating the existence of a duty of care on the part of a parent company arising out of operations of a subsidiary, the purpose of the enquiry is to see whether "the parent company is better placed, because of its superior knowledge or expertise" than the subsidiary is in respect of the harm, and "moreover where, because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge" in order to avoid the harm. Unless this is borne in mind, then the statements of Tomlinson LJ in [37] of ***Thompson v The Renwick Group Plc***, which are plainly part of the ratio of that case, would have no effect. There is therefore a two-fold approach, and each of these two

steps should be approached sequentially. The first is whether the parent company is better placed than the subsidiary. The second is, if the finding is that the parent company *is* better placed, whether it is fair to infer that the subsidiary will rely upon the parent. It is also the case that both the cases make an express distinction where the parent company is simply holding shares in other companies. This must be borne very much in mind.

80. The four factors listed by Arden LJ were the fact the companies were operating the same businesses; that the parent had superior or specialist knowledge compared to the subsidiary; that the parent had knowledge of the subsidiary's systems of work; and that the parent knew that the subsidiary was relying on it to protect the claimants. Although the factors are descriptive rather than exhaustive, the presence of some, or all, of those factors, would bring any particular case more closely within the scope of a duty of care owed by a parent company, the existence of which has already been recognised by the Court of Appeal. The higher the number of those four factors that are present, the more likely that will be.

I The Shell Group corporate structure

81. It is not possible to resolve detailed disputed evidence of fact on an application such as this one. In any event, the role of the court at this stage of any proceedings is to consider whether the claim or claims brought by the many claimants against RDS is or are reasonably arguable, or are bound to fail. However, that does not mean that mere pleaded assertion by the claimants of a duty is sufficient to provide an answer favourable to the claimants on the questions "do the claimants have legitimate claims in law against RDS; and/or do the claims against RDS involve a real issue which it is reasonable for the court to try?"

82. There are three different types of company within the corporate structure of the many different Shell companies. These are holding companies, which hold shares in other companies; operating companies, which as the name suggests carry out operations; and service companies, which provide services. Within the corporate family of Shell companies, there are 1367 different companies which are located in 101 different countries. RDS holds shares in Shell Petroleum NV, itself a holding company.

83. RDS has its headquarters in the Netherlands. RDS holds shares in Shell Petroleum NV, which is based in the Netherlands. RDS has a board of directors, the majority of whom are non-executive, and it has its board meetings either in the Netherlands or elsewhere in the world. The evidence before the court is that it has never held a board meeting in the United Kingdom. It has no employees, and does not engage in any operations, nor does it provide any services. It has no oil producing assets, and does not have any of the regulatory licences that would permit it to become engaged in operational activities. It is described in the 1st witness statement of Mr Brandjes, the Company Secretary of RDS, as "the ultimate holding company of the Shell group of companies".

84. Shell Petroleum NV is also a holding company. It holds shares in other companies, and one of these other companies is SPDC. It holds these shares both directly, but also through other companies such as The Shell Transport and Trading Company Ltd. It also holds shares in other operational companies that carry out business in Nigeria, for example Nigeria LNG Ltd, but these shares are also held through other holding

companies (and in the case of Nigeria LNG Ltd, through Shell Gas BV). There are therefore other holding companies between RDS (the "ultimate holding company", to use Mr Brandjes' phrase) and the operational companies engaged in oil exploitation in Nigeria, but in particular SPDC.

85. Prior to 2005, RDS was not the ultimate holding company of the Shell Group – indeed, it was for a short while a shelf company which was called Forthdeal Ltd, and it was incorporated in 2002. There were, prior to 2005, two holding companies which were called Royal Dutch Petroleum Company NV, and the "Shell" Transport and Trading Company plc. The former company was based in the Netherlands, and the latter company was based in the United Kingdom. The Group was known as the Royal Dutch/Shell Group. Operating activities were carried out by subsidiaries. In 2005 the structure of the Shell Group was reorganised in something called the Unification Transaction. This occurred on 20 July 2005 and Mr Brandjes describes RDS as "an entirely new vehicle created and introduced at the very top of the Shell Group structure". A summary of RDS' activities is stated in the following way (in Mr Brandjes own words):

> "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."

86. There is a further feature that is important in the context of these claims against RDS and that is the legislative and regulatory structure in Nigeria itself. The OPA was

explained by Justice Ayoola in the Bodo Litigation in his 3rd Expert's Report dated 28 February 2014 which he exhibited to his 1st Expert's Report in these proceedings dated 4 July 2016. He explained that the OPA is a comprehensive and complete statutory code for the operation of oil pipelines and the compensation that is payable, on a strict liability basis. Akenhead J accepted that analysis at [21] to [69] in the *Bodo* litigation and so do I (preliminary issue 2 in the *Bodo* litigation found that neglect was required for pollution required by illegal activities). Section 1 of the OPA states that "the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State". It is necessary, in order to comply with the law of Nigeria, for any entity operating a pipeline to have a licence from the relevant Minister, which section 2(1) OPA grants the Minister the power to award. SPDC has such a licence. RDS does not. Lord Goldsmith QC submitted that not only does RDS not engage in oil operations at all, anywhere, but so far as Nigeria is concerned, RDS is prohibited by the laws of that sovereign state from so engaging. I accept that submission, and there is nothing in the evidence served by the claimants to suggest that RDS has *itself* operated in that way in Nigeria by performing illegal oil exploration, exploitation or activities. The claimants' case is that RDS is responsible to the claimants for what SPDC has done, or omitted to do.

87. Justice Ayoola is of the view that the Petroleum Act 1969 operates in the same way for spills from non-pipeline installations as the OPA does for those emanating from operation of a pipeline. So far as this statute is concerned, there is a difference between the Bille and the Ogale claims. The Bille claims seek compensation under Regulation 23 of the Petroleum (Drilling and Production) Regulations 1969, whereas the Ogale claims seek compensation under section 37 of the First Schedule to the Petroleum Act. Unlike the interpretation upon which Justice Ayoola relies, Mr Eghobamien SAN for the claimants refers to the compensation provisions in the Petroleum Act being "extremely terse and limited", unlike the OPA in this respect. However, it is not necessary to rule on that point specifically, although it would make sense for the Petroleum Act to work in the same manner as Akenhead J has found the OPA works. Mr Eghobamien SAN has been instructed to approach the matter as though Akenhead J were correct on the comprehensive nature of the scheme under the OPA (although he seems rather grudging about this and states that he is unaware of any Nigerian case that interprets the OPA in that way). He accepts that it is SPDC that is the licence holder who would be liable to pay compensation, not RDS. Accordingly therefore, the way in which the cases are put, in both sets of proceedings and under both statutes (both the OPA, and the Petroleum Act), is that RDS itself is liable through its supervision of SPDC and its policies, not because RDS' personnel were negligent in acting or failing to act in the operation of Nigerian oil assets such that oil spills resulted.

88. Mr Hermer QC made it clear that the claimants did not accept that RDS was what he termed "a true holding company" and he also submitted that what the defendants said in their evidence should not necessarily be taken at face value. In other words, simply because Mr Brandjes states that RDS operates its business in the way described, that is not determinative of the issue of parent company liability. He stated or hypothesised what material might become available on disclosure to the claimants to make good the factual basis of the claims of parent company liability.

89. I am firmly of the view that I must apply the law as it is now, and not the law as it might develop at some indeterminate stage in the future. I must also be rigorous not to permit the perceived justice, or injustice, of any particular result to influence the application of principle. There is no doubt that the claimants are all, or mostly all, very poor, and both the defendant companies are very wealthy. Oil is a lucrative business. However, 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.

90. One topic will serve as an illustrative example. Each party provided after the hearing a list of references at my request identifying where in their respective evidence reference was made to the factual case against RDS, including its corporate structure. That of the claimants was helpfully categorised under sub-headings. One of those sub-headings was "Control and Direction of RDS" – which is one of the factors to be considered given the authorities on parent company duties of care such as ***Chandler v Cape*** and ***Thompson v Renwick Group***. Considering the totality of the claimants' evidence makes it clear how lacking in substance it is.

91. The relevant paragraphs in Mr Leader's 1st statement consists of his anticipation of what disclosure will reveal, based on research carried out by his firm. However, that research includes analysis of other litigation against Shell, including the Shell Group prior to 2005. He asserts that "the management of the Group remains the same" as it was prior to 2005, and that even where the evidence relates to the period prior to 2005 "clear conclusions can still be drawn from them about the relationship between RDS and SPDC." I disagree with the approach taken by Mr Leader in this statement. 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. Part of it relies upon the Nigeria Country Review of 2002, which predates the re-organisation of the Shell Group in 2005. This is no evidence at all in relation to the case against RDS which became the ultimate holding company only in 2005.

92. The traditional view of companies is that they are each separate legal personalities, even if connected in the sense that they are all members of the same group of companies. No agency relationship is advanced by the claimants in either set of proceedings. Further, membership of the same group does not of itself clothe RDS, the ultimate holding company, with responsibility for acts or omissions on the part of subsidiary companies within the group. This is a fundamental principle of the law of England concerning the separate legal personality of subsidiary companies. In ***Adams v Cape Industries plc*** [1990] 1 Ch 433 the question of piercing the corporate veil arose in the context of Cape carrying on business worldwide, through subsidiaries, involved in the sale of asbestos. In the late 1970s Cape decided to put its US subsidiary, NAAC, into liquidation and formed a new Illinois corporation, CPC and an entity in Lichtenstein referred to as AMC. Shares in CPC were held by M, the chief executive of NAAC, and those in AMC were held by a nominee on trust for another Cape subsidiary referred to as CIOL. Upon enforcement proceedings in England

against Cape, Scott J dismissed the actions and on appeal the issue of a "single economic unit" was considered by the Court of Appeal. Slade LJ stated (at 536) when dealing with the arguments on behalf of the claimants that:

> "…the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A. Salomon & Co Ltd* merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

Slade LJ also cited (at 538) with approval the dicta of Robert Goff LJ in ***Bank of Tokyo Ltd v Karoon (Note)*** [1987] AC 45, 64 when he said:

> "[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context: economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged."

93. There are a large number of references in the evidence for the claimants to "the Shell Group" and to Shell. There are also many references to public statements made both by the Shell Group and by RDS about the Group's commitment to environmental issues, and the organisation of the Shell Group. Given the standards of the London Stock Exchange where (amongst others) shares in RDS are listed, such public statements are a function of the listing regulations. I do not consider that statements made by companies to fulfil their listing obligations are, in the vast majority if not all cases, sufficient to establish a duty of care on the part of a parent company in RDS's position. This is for two reasons.

94. Firstly, the following words (or words very similar) appear on the documents themselves. The following form of words is taken from the 2014 Sustainability Report upon which the claimants seek to rely:

> "Royal Dutch Shell plc and the companies in which it directly and indirectly owns investments are separate and distinct entities. But in this publication, the collective expressions "Shell" and "Shell Group" may be used for convenience where reference is made in general to those companies. Likewise, the words 'we', 'us', 'our' and 'ourselves' are used in some places to refer to the companies of the Shell Group in general. These expressions are also used where no useful purpose is served by identifying any particular company or companies."

95. In my judgment, 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 passage which I have quoted, and other similar ones, simply reinforce the status of the different companies as "separate and distinct entities". I suggested to Mr Hermer QC that the words were effectively a disclaimer about the legal entity making the statements, and he agreed. The legal effect of such a disclaimer was not addressed in submissions. However, I interpret those words as making it clear, to any reader of those public documents, that the statements contained within them should not be construed as diluting the concept of the separate and distinct legal personalities of the different companies within the Group.

96. However, the second reason is that I do not consider that such a presumption would operate in any event on the basis of such statements. The London Stock Exchange is a Recognised Investment Exchange under UK law, and operates a regulated market. The 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 (both primary and secondary). That includes complying with certain disclosure standards. It is highly unlikely in my judgment 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. There is certainly no authority to this effect and in the absence of any, I would hold that such compliance cannot in itself be a sufficient factor to found a duty of care on the part of a parent holding company.

97. Great store is placed by the claimants on the different statements in such public documents dealing with matters such as the global policy of the Shell Group concerning the environment, and health. In my judgment, although those statements have undoubtedly been made and cannot be ignored, they relate to the activities of the group. They do not relate to the activities or operations of RDS. They would not weigh heavily, if at all, in the balance when considering whether a duty of care is arguable in any event. This would be the case even if they did not face the insurmountable twin obstacles of the express disclaimer about separate legal entities, and compliance with listing obligations. This is because it would be counter-productive to the availability of information to investors about the activities and aspirations of listed companies if the contents of generic statements about (for example) the implementation of a global policy on sustainability, were to be held against different companies within the corporate group when seeking to maintain the separate legal personality which the corporate veil permits them.

98. Mr Leader's 1st statement is not the only evidence advanced by the claimants, but gives a good illustration of the approach by the claimants, which as I have stated is very strong on assertion and rather light on analysis. In his 5th statement, he goes further in terms of the nature of the assertions but they remain that, simply assertions. For example, in paragraph 19 he states:

"The Claimants contend that RDS exercised a high degree of control and direction over SPDC's environmentally harmful activities, and that RDS had ultimate responsibility for ensuring that SPDC's operations in Ogale and Bille did not cause foreseeable harm to the Claimants. The Claimants allege that, as a result, RDS owed the Claimants a common law duty of care in respect of the oil pollution that caused damage to the Claimants and that it breached that duty of care. In particular, the Claimants contend that RDS failed to ensure that repeated oil leaks from SPDC's infrastructure were expeditiously and effectively cleaned up so as to minimise the risk to the Claimants' health, land and livelihoods. Further, RDS failed to take appropriate measures to address the well-known systemic problems of its operations in Nigeria which led to repeated oil spills. Those systemic problems included inadequate maintenance of equipment, deficient decommissioning of disused infrastructure, operation of faulty equipment, failure to protect pipelines from third party interference and failure to implement adequate systems for detecting leaks and shutting down pipelines." (emphasis added)

99. The emphasised passage demonstrates the flaw in this – RDS does not have any operations in Nigeria. Indeed, RDS does not have operations anywhere; it does not have any infrastructure in Nigeria. It is the subsidiary companies that perform operations in different countries, and that own the infrastructure. In paragraph 30 Mr Leader states "the claims against RDS are premised on the high level of oversight that it exercised over SPDC's operations in Nigeria." This is similar to his statement in the passage above that "RDS exercised a high degree of control and direction over SPDC's environmentally harmful activities". There is simply no evidence of such a high level of oversight or high degree of control and direction, or indeed of any appreciable level of oversight or control either. Paragraph 32 of the same statement contains a summary of the different sources upon which Mr Leader relies. They are as follows:

1. Public statements by RDS regarding the degree of extent and control it is said to exert over SPDC;
2. Statements in corporate materials published by RDS that emphasis the ultimate responsibility of RDS' board of directors;
3. The role of the RDS Executive Committee;
4. The role of the RDS Corporate Social Responsibility Committee, which effectively ensures compliance with Group policies and business standards;
5. Corporate literature published by RDS which contains references to the scope and scale of pollution by SPDC;
6. Widely publicised reports about the harmful effect of SPDC's polluting activities in the Niger delta.

100. For the reasons I have explained in paragraphs 90 to 94 above, I do not consider that the public statements can be relied upon in the manner contended for by Mr Leader. Even if they can, as a matter of principle, be relied upon, I consider they are insufficient (either alone, or in conjunction with one another) to establish an arguable duty of care upon RDS for the acts and/or omissions of SPDC for which the claimants seek relief. For those reasons, categories (1), (2) and (5) in the preceding paragraph do not contribute towards the evidence which it is necessary for the claimants to produce to demonstrate an arguable case for the establishment of a duty of care on the part of the ultimate parent RDS.

101. Categories (3) and (4) merit closer analysis, however. Evidence concerning the Committee of Managing Directors, or CMD, relates to the period prior to 2005 and is not relevant. Mr Leader states that "it is clear from the Group's organisational structure that RDS does exercise significant control over the financial, business and operation affairs of the subsidiaries through the RDS Executive Committee, which is the central decision making body of the Shell Group of companies." Given he accepts that it is making decisions on behalf of the Group, I do not equate decisions taken by the Executive Committee of the Shell Group with decisions taken by RDS. The "Shell Group" and RDS are not the same legal entity. The Executive Committee 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; Mr Brandjes in his 2nd witness statement made this clear. The Executive Committee also does not make operational decisions within the Group. The Executive Committee only considers matters pertaining to subsidiaries when they have strategic consequences, and it does not interfere in the affairs of the operating subsidiaries.

102. There are references (some are identified in the factual content of Professor Siegel's evidence) to group policies, which include phrases such as "all Shell companies must….." but this is insufficient, in my judgment, to demonstrate any particularly unusual or high degree of control or reliance. Similar statements must be made every week in almost every group of companies. Adopting Group policies does not, in my judgment, affect or dilute the concept of separate legal personality of the different companies within the Group. Compliance with Group policies, which is what the RDS Corporate Social Responsibility Committee oversees, or observance of those Group policies, does not either. To suggest that it does is simply to resurrect, in a different guise, the "single economic unit" argument which was disapproved in ***Adams v Cape Industries plc***. Professor Siegel identifies some particular matters which he says amounts to "joint venture management" in paragraph 65 of his statement. However, the conclusion that they are "joint venture management" is obviously one of opinion which I have ruled inadmissible. It is rather surprising that the contents, for example, of some Shell personnel's online CVs making statements such as "leading the negotiations" for a very large financing package in Nigeria could be relied upon as demonstrating an arguable duty of care. Professor Siegel describes the person in question as "a member of the Senior Executive Group of RDS". However, the CV uses the description of the roles Bernard Bos has occupied as follows: "VP Global Head M&A and Commercial Finance – Shell…..Member of the Senior Executive Group of Royal Dutch Shell and of the Upstream Africa Leadership team"; and "VP Finance Shell Upstream Africa – Shell…..Member of the Senior Executive Group of Royal Dutch Shell and of the Upstream Africa Leadership team." This cannot be equated, in my judgment and taking account of what Mr Brandjes has said, as Mr Bos being even employed by RDS, the entity that is the first defendant. RDS has no employees. A description by Mr Bos of a job description in his role when employed as a Vice President in the Shell organisation does not assist the claimants.

103. One item relied upon by Professor Siegel, and also therefore by Mr Leader, is a claim that on a telephone call to investors in 2013 the CFO of RDS, Simon Henry, said during the call that he had personally shut down facilities in Nigeria. The phone call was on 2 May 2013 and the transcript provided by the claimants is from an investor

information website called Seeking Alpha.com. The phrase relied upon is "I have also shut down facilities in country", which is on page 15 of 22 of the transcript. This is in the context of a report to investors from a variety of institutions concerning RDS's first quarter (or Q1) results from 2013. Mr Brandjes explains in his statement that the official transcript of the call has the phrase recorded as "ENI have also shut down facilities in country". In my judgment such an isolated statement is not sufficient, in my judgment – whether Mr Henry said "I" and/or "ENI" - to found any duty of care on the part of RDS.

104. The claimants also rely upon evidence from two former employees of Shell companies who state that the direction of the Group comes from the Executive Committee, and other general statements to the same effect. Some of it relates to the period prior to 2005. Those that do relate to the pre-2005 period do not advance the claimants' case. The amount of material deployed from the 1990s, for example, demonstrates that the wholesale reorganisation of the Shell Group in 2005 that placed RDS at the top of a complicated holding structure does not, so far as the claimants are concerned, make any difference to the analysis of the claims against RDS. The evidence proceeds as though the current corporate structure is the same now as it was in the 1990s, or at least as it was before 2005. I consider that entirely ignores the structure established in 2005 and also ignores the principle of separate corporate personality.

105. Finally in this respect, the claimants rely upon the contents of a US diplomatic cable (classified by the US Consul General) dated 26 July 2006 that reported what had occurred at a recent meeting. This cable was some 9 years prior to issue of proceedings. I assume the report is to the State Department in Washington DC but the recipient of the cable is not relevant. The cable was disclosed by www.wikileaks.org, a well-publicised leak of confidential US Government material. A summary of the meeting is included in the cable; the meeting took place between the US Consul General and Ann Pickard, described as "Shell Exploration and Production Executive Vice-President" who at the time was "Shell's ranking executive in Nigeria". There is no evidence to suggest Ms Pickard was employed by or seconded to RDS at the time, and such evidence that there is from RDS suggests she was not, given RDS has no employees, and had only a CEO and CFO and Ms Pickard was neither. The meeting summarises steps Shell were taking in 2006, and were hoping to take, concerning activities in Nigeria, and nothing in that cable advances the claimants' case against RDS in any appreciable respect. None of it identifies RDS as doing any particular act regarding SPDC at all.

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.

J Applying the relevant test

107. In ***Caparo Industries plc v Dickman*** [1990] 2 AC 605 the House of Lords considered the scope of the law of negligence in an action brought by a public limited company against, amongst others, its auditors. Both ***Chandler v Cape*** and ***Thompson v Renwick Group*** make it clear that this authority is the correct place to start when considering the question of whether a parent company owes a duty of care in respect of acts or omissions by its subsidiary.

108. Lord Bridge, at 616 to 618, expressed the views of the House concerning negligence and duties of care generally. His statements include the following at 616H:
"Yet Lord Atkin [in *Donoghue v Stevenson*] himself sounds the appropriate note of caution by adding, at p580:

> 'To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials'.

After referring to the development of the principle that emerged in ***Anns v Merton London Borough Council***, Lord Bridge continued at 617G:

> "But since the *Anns* case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith of Kinkel, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope……What emerges is that, in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other……I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes." (emphasis added)

The emphasised passage contains what is known as the three-fold test.

109. He described at 681C "the wisdom" of the seminal statement by Brennan J in the High Court of Australia in ***Sutherland Shire Council v Heyman*** (1985) 60 ALR 1, 43-44 when he stated:

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinably "considerations which ought to negative, or to reduce or limit

> the scope of the duty or the class of persons to whom it is owed."

Although Lord Bridge then continued to consider the different approach in cases concerning different damage – namely pure economic loss, which ***Caparo*** concerned, rather than physical damage – the statements that he made are of general principle and apply to negligence generally.

110. The headnote at 606H provides the following summary, which demonstrates the majority expressly agreed with the statements of Lord Bridge:

> "Per Lord Bridge of Harwich, Lord Roskill, Lord Ackner and Lord Oliver of Aylmerton. Whilst recognising the importance of the underlying general principles common to the whole field of negligence, the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

111. Lord Bridge also said, having considered and approved the dissenting judgment of Denning LJ (as he then was) in ***Candler v Crane, Christmas & Co*** [1951] 2 KB 164, 179, 180-181, 182-184 – which he described as a "masterly analysis" at 623A – that the concept of a voluntary assumption of responsibility on the part of the maker of a negligent statement did not, in the context of the appeal in ***Caparo***, make any difference.

112. Lord Oliver, said, dealing with "proximity" at 633:

> " '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".

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.

114. Each of the second and third limbs are problematic for the claimants. Considering them each in turn and dealing with proximity, the relationship between the ultimate holding company of the Shell Group and the many thousands of claimants in the Niger Delta is not a close one. I have in mind that these actions are at an early stage and disclosure has not occurred. However, the following features of this case apply now, and will continue to apply regardless of the stage of the proceedings. In other words, these features will not change as the actions develop:

1. RDS does not even hold shares in SPDC. It holds shares in another company, Shell Petroleum NV, and it is that company that holds shares in SPDC. This is one further degree of separation than other cases dealing with subsidiaries, such as ***Chandler v Cape***.

2. RDS does not conduct any operations. The following passage of Arden LJ in ***Chandler v Cape*** is of considerable importance, at 3114G, when describing the activity of Cape, the parent company in that case:

"However it is noteworthy that at no relevant point in time did Cape cease to be an operating company itself or merely hold the shares in its subsidiaries as if it were an investment holding company."

Arden LJ must have considered the fact of the parent conducting operations to be of note in that case, and I consider the fact of RDS *not* conducting operations is of note in these proceedings. She also considered that a company that "merely hold[s] the shares in its subsidiaries as if it were an investment holding company" would be a factor that militated against a duty of care being found to exist.

3. The Executive Committee of the Shell Group has a number of high-ranking members of other Shell companies. Although the two officers of RDS sit on that Committee, these two constitute a minority of that membership.

4. RDS is not permitted to conduct operations in Nigeria as it does not hold the relevant licence. Nigerian law therefore prohibits it from doing so.

5. There is a Joint Venture in existence engaged in such activity in Nigeria of which RDS is not a member.

6. Imposing a duty of care upon RDS would potentially impose "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class"; to apply the classic expression of Cardozo CJ in ***Ultramares Corporation v Touche*** (1931) 174 NE 441, 444. In my judgment, that is the antithesis to proximity or neighbourhood. There are 1366 other companies in the Shell Group, and the service and operating companies amongst that number perform activities in 101 different countries.

115. Turning to whether it is fair, just and reasonable to impose a duty of care of the nature alleged by the claimants upon RDS, the following features are relevant and in my judgment will not change as these proceedings unfold:

1. The legal concept of the law of negligence, or a cause of action for breach of a duty of care, is not the same as one of strict liability. Nigeria has imposed a statutory framework upon the oil business in that country, with obligations upon companies that engage in such business to compensate for damage. The operating company of a pipeline in Nigeria, SPDC, has statutory liability under the law of Nigeria for oil spills (which is one of strict liability, save for illegal activities). Concepts of fairness, justice and reasonableness do not therefore require (or argue in favour of) the imposition of a duty of care upon the ultimate holding company, RDS.

2. Indeed, if the judgment in ***Bodo*** is correct, and the claimants are only entitled to claim compensation from SPDC under the OPA, it is difficult to see how the test of fairness, justice and reasonableness could justify the claimants in seeking further and far wider damages from RDS than those to which they are entitled from SPDC.

3. RDS is prohibited, by the law of Nigeria, from performing operations in that country. RDS simply does not have any oil pipelines and associated infrastructure in Nigeria at all.

4. RDS "merely hold[s] the shares in its subsidiaries at if it were an investment holding company". I consider this factor relevant to both the second and third parts of the tripartite test.

5. The relevant activities are carried out by SPDC as part of the Joint Venture with the Nigerian state. I consider this to be a relevant feature for this part of the test as well as for the second limb.

116. Considering the four factors identified by Arden LJ in ***Chandler v Cape***, they can be seen as indicia relating to proximity, but also with some degree of overlap into the third element of the ***Caparo*** test. It should first be noted that the claimant in ***Chandler v Cape*** was a former employee. That is, by definition, a closer relationship than parties affected by operational activities. ***Vedanta*** makes clear that a claimant does not have to be an employee of the subsidiary in order to be owed a duty of care by a parent company. However, in my judgment a duty of care is more likely to be found in respect of employees, a defined class of persons, rather than others not employed who are affected by the acts or omissions of the subsidiary. Even putting that distinguishing feature to one side, not one of the four factors identified by Arden LJ is present in these two sets of proceedings. Again, this will not change as the proceedings develop:

1. RDS is not operating the same business as SPDC. RDS is the ultimate holding company, and does not operate any business other than holding shares, and dealing with the financial matters that affect it as the ultimate holding company. SPDC is the company in Nigeria that is licensed to carry out the relevant operating activities, and which is a minority member of the Joint Venture in which the Nigerian State owned corporation NNPC is a member.

2. RDS does not have superior or specialist knowledge compared to the subsidiary SPDC. Indeed, rather to the contrary, SPDC has all the specialist knowledge relevant to an operating company licensed by the relevant Minister in the Nigerian Government under the relevant legislation. Its state of knowledge is far more specialist than, and wholly superior to, that of RDS so far as Nigeria is concerned.

3. RDS can have only a superficial knowledge or overview of the systems of work of SPDC. Given the scale of the activities of the many companies in the Shell Group, the degree of knowledge held by RDS, rather than SPDC its specialist operating subsidiary, can never sensibly be considered as comprehensive, or anything other than knowledge at a very high or superficial level. However, satisfaction of this factor is at least potentially arguable by the claimants, whereas I consider that so far as the other three factors are concerned, there is simply no case at all for the claimants.

4. RDS could not be said to know that SPDC was relying upon it to protect the claimants. There is simply no evidence that SPDC ever did rely upon RDS. Indeed, the notion of SPDC relying upon RDS for anything in relation to its operations in Nigeria is somewhat fanciful. SPDC is a wholly autonomous subsidiary with considerable income and sizeable assets of its own.

117. Considering the principle explained in ***Thompson v Renwick Group*** by Tomlinson LJ, the purpose is to consider whether "the parent company is better placed, because of its superior knowledge or expertise" than the subsidiary is in respect of the harm, and "moreover where, because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge" in order to avoid the harm.

Applying the facts of these proceedings to the first limb, whether the parent company is better placed than the subsidiary, in my judgment that plainly could not be said to apply here so far as RDS and SPDC are concerned. RDS is not better placed, and this feature of the cases will not change by trial. RDS simply has no experience whatsoever of oil operations in Nigeria, which is an extraordinarily difficult place to carry on such activities, as is made obvious by the UNEP report. Even if I am wrong about that, and must move on to consider the second limb, I do not consider that it would be fair to infer that the subsidiary would rely upon the parent. There is no evidence that such reliance has ever occurred since 2005.

K Conclusion

118. It was agreed by both parties that if my judgment was such that there was no arguable duty of care on the part of RDS to the claimants under English law, then there would not be any cause of action in common law under the law of Nigeria. It was also agreed that the effect of this so far as SPDC was concerned was that there would be no "anchor defendant" and SPDC's applications challenging jurisdiction would succeed, due to the lack of connection of the claims against SPDC with this jurisdiction. It was not agreed how, procedurally, the claims against RDS should be disposed of in these circumstances. There are two potential routes, with the substantive outcome being the same in each case. The first would be to uphold RDS' jurisdictional challenges. The second would be to dismiss then, for the court to declare that it had jurisdiction, and then to strike out the claims pursuant to CPR Parts 3.3 and 3.4(2)(a). I will hear the parties further on the correct course to adopt in the order to be made on the applications if this cannot be agreed. To use the terminology of Gloster LJ in ***Erste Group Bank AG, London Branch v JSC 'VMZ Red October'*** at [38], the claimants have failed to demonstrate that the first threshold requirement - "is there a 'real issue' between the claimant and the anchor defendants" – is met, and also the second threshold requirement too. In those circumstances, the outcome of the applications will be the same regardless of the procedural route adopted.

119. Absent the existence of proceedings on foot in England against RDS, there is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts and omissions in Nigeria, by a Nigeria company. Accordingly, my findings on the issue of a duty of care on the part of RDS are effectively dispositive of both applications in both sets of proceedings. It also means that it is not necessary to consider the other issues, including the other litigation already commenced in Nigeria against SPDC by Chief Gani Topba, which on their face purport to be on behalf of the Ogoni people. The claimants in the Ogale proceedings deny that Chief Topba has authority to act on their behalf.

120. However, given the amount of time and submission devoted to the issue of access to justice in Nigeria, it might be helpful to the parties if I express some preliminary views. These proceedings against two Shell companies appear to me to be a world away from the facts concerning access to justice in ***Vedanta.*** That case concerned Zambia, and impecunious claimants such as in that case simply have no ability to bring legal proceedings at all in Zambia given the way that such litigation is funded (or more accurately, not funded); [178] to [186] of the judgment of Coulson J. It is to be noted specifically what the judge stated in that case concerning Conditional Fee Agreements, or CFAs. They are not available in Zambia; indeed, they are unlawful.

The judge also found legal aid would not be granted to those claimants. By contrast, CFAs are permitted in Nigeria, and are in use, for litigation such as this. The evidence before the court is that access to justice in Nigeria would not be denied to the claimants if these proceedings were not to continue in London. Mr Hermer QC made a valiant effort to maintain a submission that it would be so denied, not by reason of the funding model for legal representation through CFAs, which he admits are available in Nigeria, but rather because the way in which experts are, or can be, paid in Nigeria is different than in England. In this jurisdiction, experts are not entitled to be paid a percentage recovery of damages as payment for their fees (see for example ***Factortame Ltd v Secretary of State for Transport (No.8)*** [2003] QB 381) but funding models are available to litigants who have engaged lawyers on CFAs whereby expert evidence is available on their behalf. I do not see why experts who would have acted for these claimants in proceedings in this jurisdiction could not be paid, under the arrangements available in Nigeria, to go to Nigeria and give evidence in proceedings there. Even if they are not prepared to do so, I consider that there would be experts who would do so. Expert evidence is permitted in Nigeria.

121. A great deal was also made by the claimants about delay in legal proceedings in Nigeria. The court has to be very careful before passing qualitative judgments on the legal systems of other sovereign nations. No modern legal system of which I am aware is without its delays, including the one in this jurisdiction. In ancient times some legal systems seem not to have been unduly troubled by delay, but they were generally rather arbitrary and the swift justice available would not stand scrutiny today. There is nothing in the evidence before the court on these applications that suggests that those responsible for the administration of justice in Nigeria, most notably the current Chief Justice, are doing anything other than taking concrete and effective steps to improve the speed with which cases such as this one are dealt with in Nigeria.

122. Finally, it should not be thought that this judgment is expressing any view on the merits of the case in terms of minimising or ignoring the effects upon the claimants of the conditions in the Niger Delta. They do at least potentially have other redress available to them in Nigeria against SPDC. In ***Thompson v Renwick Group***, the conditions in which Mr Thompson had worked were described by Tomlinson LJ as "really quite shocking and should be a cause for shame". This involved the hand-baling of asbestos in the 1970s, a material which was the subject of a report to Parliament entitled *Occurrence of Pulmonary Fibrosis & Other Pulmonary Affections in Asbestos Workers*, as long before those events as 24 March 1930. However, that judicial view of his working conditions did not lead to the imposition of a duty of care upon a parent company in circumstances where consideration and application of the legal principles led to the conclusion that there was no such duty. In my judgment, consideration and application of the relevant principles to these two sets of proceedings leads to the conclusion that it is not reasonably arguable that there is any duty of care upon RDS, the ultimate holding company for the Shell Group, for the acts and/or omissions of the operating subsidiary within the Shell Group for Nigeria, SPDC. Based on the state of the law as it is today, in my judgment those claims against RDS will fail. Accordingly, the claims against RDS will not proceed, and it is common ground that in those circumstances, the applications by SPDC also succeed.