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# Parent company liability – is there a new frontier in oil & gas disputes?

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## Matters I will (briefly) consider today

- > What is the issue and why it isn't just a question of English law
- > What are the grounds of the claims and what are the relevant considerations?
- > Forecasting the future and should oil & gas multinationals be concerned?

## What is the issue? What is its reach? Why is it important?

What?

- > A 'foreign' subsidiary (incorporated/based outside UK) causes harm or loss to third parties in that 'foreign' state
- > Third party claimants wish to bring a claim against the subsidiary. Where do they bring the claim?
- > Claimants seeking to 'anchor' their claims against a UK-based parent company in order to trigger the jurisdiction of the English courts to hear the claims against the UK parent and the 'foreign' subsidiary (under the applicable laws)
- > How? Claims first anchored against parent on grounds of domicile in the jurisdiction. Next, claimants seek permission to serve claims on 'foreign' subsidiary through the "necessary and proper party" jurisdictional gateway

Why choose the English jurisdiction? Why implead the parent as well as the subsidiary?

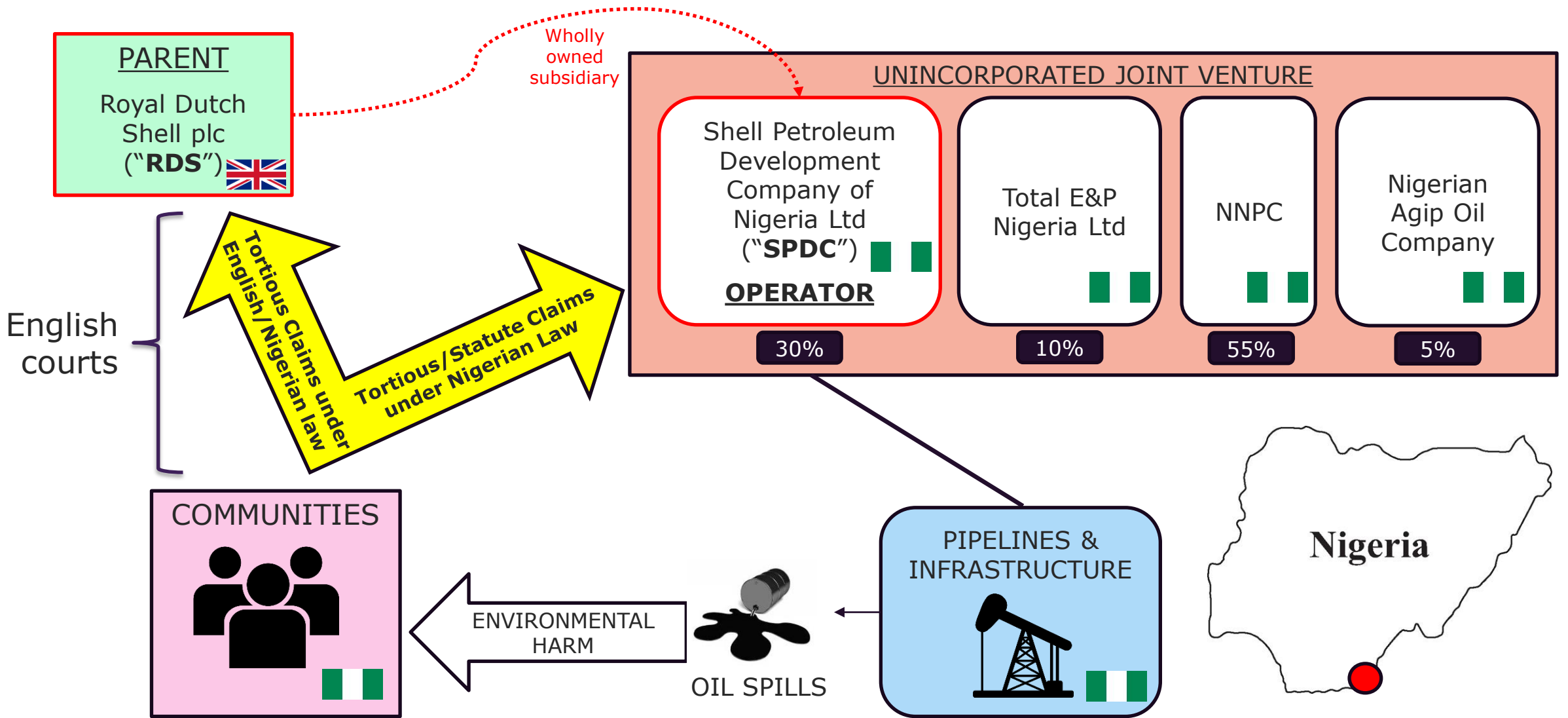
- > Access to justice issues (third party funding; conditional fee arrangements)
- > Due process issues (perceived independence issues; delay; group claim expertise/procedures)
- > Enforcement strategies (realisable assets (*e.g.*, subsidiary a shell SPV); settlement strategy)

Global reach? Importance?

- > Recent cases try to pin liability on parents for activities of foreign subsidiaries in Nigeria, Zambia and Kenya.
- > Serious implications for multinationals with group structures touching on UK – notably oil & gas companies? Might it expose UK-based corporates to the liabilities of any subsidiaries within the group anywhere within the world?

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HRH Emere Godwin Bebe Okpabi & Others v. (1) RDS and (2) SPDC [2017] EWHC 89 (TCC)



## The basis of the claim against parent companies?

- > Primary vehicle: the parent company owed (and breached) a tortious duty of care to the claimants
- > After UK Supreme Court decision in *Vedanta* [2019] UKSC 20, whether there is a duty of care:

***“...depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise management of the relevant operations (including land use) of the subsidiary”*** per Lord Briggs [¶ 49]

- > Recently deployed in context of:
  - Environmental damage in Nigeria resulting from oil spillage and pollution (*Okpabi v. Shell* [2021] UKSC 3)
  - Ethnic violence in Kenya by third party rioters against employees (*AAA v. Unilever* [2018] EWCA Civ 1532)
  - Environmental damage in Zambia resulting from copper mining (*Lungowe v. Vedanta* [2019] UKSC 20)
- > Applicable law varies (see, e.g., Section F of High Court judgment in *Shell* [2017] EWHC 89 (TCC))

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## What factors are relevant to establishing a duty of care?

- > Highly fact sensitive analysis. No rules or criteria provided; only guidance.
- > Corporate structuring and parent/subsidiary relationship insufficient to preclude duty of care
- > Claimants cases have focussed on nature and extent of parent involvement in the setting and enforcing of group policies and standards. Parent assuming responsibility for subsidiary decisions.
- > How involved? Mere laying down of group policies and expecting compliance could be sufficient
- > Types of evidence of parent involvement?
  - Documents and witness evidence (particularly former employees). Policies, manuals, processes, best practice.
  - Heavy claimant reliance on publicly available information, *e.g.*, parent annual reports, press releases, policies.
  - Vertically integrated management. Business/functional line approval vs. organisational approval?
- > The greater the steps taken by groups to manage and minimise risk, the greater the exposure of parents to the liabilities of the acts or omissions of their subsidiaries in conducting operations?
- > Do riskier operations (*e.g.*, oil & gas exploration & production) increase exposure? Possibly.

## Should oil & gas corporates be concerned *now*?

- > At this time, arguably too soon to tell.
- > Why? Context of current line of English court decisions is important:
  - Decisions approached question of existence of duty of care in context of establishing jurisdiction only
  - Claimant must show a “real issue to be tried” against parent company (note: only *one* of the hurdles to clear)
  - Imputes summary judgment test: do the claims have no real prospect of success/bound to fail? (A low hurdle)
  - None of recent cases yet addressed actual existence/breach of parent duty of care. *Vedanta* likely the first; due 2022.
- > Is there anything to be learned now? Yes:
  - Greater preparedness of Court to scrutinise the specific facts over dismissing based on corporate structure/separability?
  - Claimant friendly? Claimants asserted facts accepted unless demonstrably untrue or unsupported. Floodgates?
  - Should not dismiss likelihood that later anticipated disclosure by corporate defendants would be relevant.
- > Are there some crumbs of comfort for corporate defendants? Yes, for example:
  - Demonstrating a real issue to be tried is only one of the hurdles. Have some hurdles been ‘heightened’ recently? Has Brexit made establishing jurisdiction against parents harder? Has Supreme Court judgment in *Vedanta* limited clearing jurisdictional hurdles to cases where substantial justice cannot be achieved in jurisdiction of ‘foreign’ subsidiary?
- > *Vedanta* has cleared jurisdictional hurdles. Shell is half-way there. Unilever, however, failed.

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## Forecasting the future

- > *Vedanta* judgment on substantive claims likely 2022. One to watch...
- > *Shell* judgment on remaining jurisdictional hurdles possibly this year. Heightened hurdles?
  - Remains to be seen what impact Brexit has (cf. accession to Lugano Convention) vs. forum non conveniens
- > Is it time now to revisit corporate governance and risk management and public reporting?
- > Will *Unilever* become an increasingly important safe harbour for corporates?
- > Arbitration? English law on duty of care will still be relevant in all contexts.

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## Further reading

<https://www.stewartslaw.com/news/multinational-companies-subsiidiary-liabilities/>

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Dan specialises in international arbitration. He is described in a leading directory as “an exceptional talent” with a “prescient understanding of how tribunals are going to decide issues” and is ranked as a future leader in international arbitration by GAR’s Who’s Who Legal 2021. Dan has a broad practice, with a particular focus on oil & gas and disputes arising in Africa.



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