APPEAL NO. UKSC 2018/0068

ON APPEAL TO THE SUPREME COURT FROM

HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

HIS ROYAL HIGHNESS EMERE GODWIN BEBE OKPABI & OTHERS

(suing on behalf of themselves and the people of Ogale Community)

Appellants

-v-

(1) ROYAL DUTCH SHELL PLC

(2) SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD

Respondents

-and-

BETWEEN:

LUCKY ALAME AND 2,335 OTHERS

Appellants

-v-

(1) ROYAL DUTCH SHELL PLC

(2) SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD

Respondents

APPELLANTS' PRINTED CASE

RICHARD HERMER QC

ROBERT WEIR QC

EDWARD CRAVEN

12 May 2020

INTRODUCTION

1. This appeal concerns a single important question of law, namely whether the Appellants have an arguable case that the First Respondent, Royal Dutch Shell Plc ("**RDS**") owes them a common law duty of care in respect of extensive environmental harm caused by the dangerous operations of the Second Respondent, The Shell Petroleum Development Company of Nigeria ("**SPDC**").

2. The answer to that question has profound implications for tens of thousands of impoverished residents of two rural Nigerian communities whose lives and livelihoods have been blighted by toxic pollution caused by chronic leaks from oil pipelines and infrastructure operated by SPDC.[1]

3. The Appellants have brought claims in respect of that severe and ongoing harm against RDS (one of the world's ten largest corporations by revenue with assets of more than $400 billion) and its Nigerian subsidiary SPDC – a company which "*was and continues to be the single most dominant of the independent oil companies who have exploited the oil resources of Nigeria*" (*Bodo Community v Shell Petroleum Company of Nigeria Ltd* [2014] EWHC 1973 (TCC) at §5). The Appellants have chosen to bring claims in England – the country where RDS is domiciled – in part because they are unable to obtain substantial justice in Nigeria.[2]

4. In short, the Appellants' case is that RDS is liable in the tort of negligence because of the significant role that it has played in controlling material aspects of SPDC's operations and establishing and enforcing the policies, practices and decisions that

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[1] The oil pollution in the Ogale Community has resulted in "*a catastrophic*" humanitarian situation, where the United Nations Environmental Programme has found groundwater contamination at more than 4,500 times the Nigerian intervention level (see Ogale Particulars of Claim, §35(a)(i) **[Appendix 2A/11/218]**). The pollution in Bille Kingdom has similarly resulted in the contamination of more than 32,000 acres of mangrove habitat – the largest oil damage to a mangrove environment in history – and devastated the local environment (see Bille Particulars of Claim §25(a) **[Appendix 2A/13/354]** and fifth witness statement of Daniel Leader, §§17-18 **[Appendix 2C/34/1027-1028]**).

[2] This is not least because, as the Court of Appeal has observed, litigation in Nigeria is typically beset by "*extraordinary*", "*inordinate*", "*enormous*" and "*beyond...catastrophic*" delays, with civil cases frequently taking up to 40 years to reach a conclusion (see *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2015] CLC 815 per Christopher Clarke LJ at §§22 and 27). Christopher Clarke LJ added that "*the character and extent of the delay*" in the Nigerian legal system was such that a dispute "*is not likely to be resolved for up to a generation from now*" and a final determination in Nigeria "*would probably not take place for decades*" (§§167, 169). Accordingly, the Appellants are clear that the current proceedings represent the only effective route to legal remedy.

have governed the aspects of SPDC's operations that have inflicted such devastating damage on the Appellants' communities. In particular, it is alleged that RDS's material involvement in those operations includes direction, control, oversight and advice concerning SPDC's:

(1) **Pipeline integrity** (including construction, maintenance and repair of SPDC's pipelines and pipeline infrastructure);

(2) **Pipeline security** (including protecting SPDC's pipelines and infrastructure from the well-documented risk of attacks by criminal third parties[3]); and

(3) **Oil spill response and remediation of environmental damage** (including clean-up methodology).

5. The Appellants contend that the inadequacy of SPDC's pipeline integrity and pipeline security has been the cause of repeated and substantial oil spills in the Appellants' communities. The Appellants contend that the Respondents have failed to clean up those spills, resulting in chronic, toxic hydrocarbon pollution to the land and waterways on which the Appellants depend for their lives and livelihoods. The duty of care which RDS owes the Appellants is inextricably linked to precisely the type of damage they have suffered.

6. At first instance Fraser J struck out the Appellants' claims against RDS of his own motion. The Court of Appeal unanimously held that the Judge had committed multiple "*general errors of principle*" in his analysis of the evidence (CoA §189).[4] In light of this, and because there was "*significant additional evidence*" which was not before the Judge, the Court of Appeal "*ha[d] to make its own assessment of whether the claimants have a case against RDS which has a real prospect of success*" (CoA §135).

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[3] Third party criminal interference with pipelines is often referred to as "bunkering".

[4] The Court of Appeal held that Fraser J had wrongly (1) excluded all evidence relating to the period prior to the Shell Group's internal corporate restructuring in 2005; (2) concluded that the actions of the RDS Executive Committee and RDS's Corporate and Social Responsibility Committee could not be attributed to RDS; and (3) placed no reliance on published statements made by RDS in the context of fulfilment of listing obligations. The Respondents have not filed any cross-appeal in the Respondent's Notice and therefore do not challenge the Court of Appeal's conclusions regarding the Judge's errors.

7. The majority of the Court of Appeal nevertheless decided to strike out the claims against RDS. Sales LJ (as he then was) delivered a detailed dissenting judgment in which he explained why the Appellants "*have a good arguable case that RDS owed them a duty of care at the material times and that it breached that duty of care, resulting in losses to the claimants of a kind in respect of which damages are recoverable*" – "*a good arguable case against RDS*" which in his view "*ought to be tried*" (CoA §§134, 170).

8. The Appellants submit that Sales LJ was correct[5] and that the majority of the Court of Appeal were wrong in their conclusions on the duty of care issue. If the Supreme Court accepts that the majority of the Court of Appeal erred in law in its analysis of that issue, then, like the Court of Appeal, the Supreme Court will have "*to make its own assessment of whether the claimants have a case against RDS which has a real prospect of success*".

9. For the reasons set out below, the Appellants have a real prospect of establishing that RDS owed them a duty of care. Indeed, this is a paradigm example of a strongly arguable case that should proceed to trial. Denying the Appellants the opportunity to have these claims tried on their merits would cause grave injustice to many tens of thousands of vulnerable individuals, would leave the case law in a contradictory and confusing state, and would disregard "*the rule of public policy which has the first claim on the loyalty of the law: that wrongs should be remedied*" (*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 663 per Sir Thomas Bingham).

A. THE UNUSUAL CONTEXT IN WHICH THE APPEAL ARISES

10. This appeal arises in unusual procedural circumstances.

11. **First**, the judgment under appeal was delivered before the Supreme Court's unanimous judgment in *Lungowe v Vedanta Resources Plc* [2019] UKSC 20, [2019] 2 WLR 1051 ("***Vedanta***"). In *Vedanta* this Court provided an authoritative clarification and exposition of the principles that determine whether and in what circumstances a parent company owes a duty of care in respect of harm caused to third parties by the dangerous operations of its subsidiary.

[5] Albeit that the legal test he postulated was more restrictive than that subsequently expounded by the Supreme Court in *Lungowe v Vedanta Resources Plc* [2019] UKSC 20.

12. Although the Appellants applied for permission to appeal some months before the hearing of the appeal in *Vedanta*, the Appeal Panel expressly deferred consideration of that application until after the *Vedanta* judgment. Following delivery of the *Vedanta* judgment, the Panel granted permission to appeal. The Panel explained that it "*consider[ed] that the law has been adequately clarified in Vedanta, but that it would be unjust to refuse permission in circumstances where this case might equally have been treated as the lead case*". Accordingly, it "*invite[d] the parties to consider whether it is necessary for the appeal to proceed to a full hearing, following the judgment in Vedanta*".[6]

13. It is implicit in that 'invitation' that the Panel considered that the Court of Appeal's decision to strike out the Appellants' claims was unsustainable in the light of the Supreme Court's judgment in *Vedanta*.[7] This is certainly the view taken by the learned editors of *Clerk & Lindsell on Tort*, who state that: "*Whatever the correct interpretation of Okpabi on its facts, the approach of the majority would therefore <u>appear to have been disapproved by the Supreme Court</u>*" in *Vedanta*.[8] The Respondents, however, insisted that this was not the case.[9] That insistence has resulted in the need for this one-day hearing.

14. **<u>Second</u>**, the appeal concerns an unusual order striking out the entirety of the Appellants' claims against RDS without the Respondents having produced any pleaded Defence to those claims, without the Respondents having provided any standard disclosure of relevant internal documents and without the courts below hearing any oral evidence from any of the parties' witnesses. The courts below took this unprecedented course despite:

    (1) **The vast evidential and factual dispute between the parties** – The parties are "*bitterly opposed to one another's evidence and arguments*" (HC §17) and the courts below were (in the Respondents' words) "*faced with claims and counter-claims made on the meaning and construction of a plethora of complex corporate documents*

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6 Letter from the Registrar of the Supreme Court to the parties **[Appendix 1/11/225]**

7 Had the Panel considered that *Vedanta* supported the Court of Appeal's judgment then it would inevitably have refused permission to appeal (as it did in the case of *AAA v Unilever Plc*, where the same Panel refused permission to appeal on the basis that: "*The relevant principles have now been clarified in Vedanta, and in so far as this case raises distinct issues, the factual conclusions both of the judge and of the Court of Appeal create such formidable obstacles to success that the refusal of permission to appeal will not cause injustice*".)

8 *Clerk & Lindsell on Torts* (22nd edition, supplement), §13-09B (emphasis added)

9 See letter from Debevoise & Plimpton to Leigh Day dated 22 July 2019

and literature which span many decades"[10] and "*a welter of evidence incapable of summary determination*"[11].

(2) **RDS and SPDC expressly requested the High Court to order a trial of the RDS duty of care issue** – RDS did not make any application for the Appellants' claims to be struck out or for summary judgment to be entered in its favour. Instead, RDS and SPDC applied for the question of whether RDS owed a duty of care to the Appellants to be tried as a preliminary issue with full pleadings, disclosure and exchange of witness evidence concerning the duty of care issue.[12] The Respondents' leading counsel, Lord Goldsmith QC, argued that, "*a trial of the duty of care issue as a first issue strikes as a good way of effectively managing this litigation*".[13] The Judge rejected that application on the basis that trials of preliminary issues are frequently "*treacherous shortcuts*" (HC §13); however he then proceeded to strike out the Appellants' claims against RDS of his own motion without any pleadings or disclosure by RDS and without any trial of any sort taking place.

15. **Third**, as explained above, the Court of Appeal unanimously held that the Judge had made multiple "*general errors of principle*" which vitiated his judgment. Accordingly, unlike in *Vedanta* (where the Supreme Court stated at §62 that it did not matter whether it would have reached the same view as the first instance judge about whether there was a triable case) if this Court finds that the majority of the Court of Appeal erred in law, then it will be entitled – and indeed required – to make its own determination about whether the Appellants have an arguable case against RDS.

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10 First witness statement of Respondents' solicitor, Conway Blake, §26 (referred to in the Appellants' Skeleton Argument on Appeal at §9(2) **[Appendix 2A/3/49]**).

11 Defendants' Skeleton Argument for hearing on 19 October 2016, §§10 and 11 (referred to in the Appellants' Skeleton Argument on Appeal at §9(1) **[Appendix 2A/3/48]**).

12 See Statement of Facts and Issues at §17. The order sought and proposed by the Respondents would have stated: "*There be a trial of the issue of whether or not the First Defendant owes a duty of care to the Claimants as alleged in these proceedings.*" (Referred to in the Appellants' Skeleton Argument on Appeal at p.3, footnote 9 **[Appendix 2A/3/48]**).

13 Letter from the Respondents' leading counsel, Lord Goldsmith QC, to Mr Justice Fraser dated 7 October 2016 (referred to in the Appellants' Skeleton Argument on Appeal at §9(1) **[Appendix 2A/3/48-49]**)

B. LEGAL FRAMEWORK

(i) Test for determining whether a parent company owes a duty of care to third parties in respect of the harmful activities of its subsidiary

16. The principles governing when a parent company may owe a duty of care to a third party in respect of harm caused by a subsidiary were authoritatively expounded in *Vedanta*. Lord Briggs (with whom the other members of the Court all agreed) began his analysis by explaining at §49 that, "*the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence*". Instead:

> "*Everything 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 the management of the relevant operations (including land use) of the subsidiary.*"

17. At §51 Lord Briggs endorsed the "*pithy and…correct summary*" of the legal position provided by Sales LJ (as he then was) in *AAA v Unilever plc* [2018] BCC 959[14]. Lord Briggs then explained:

> "*Sales LJ thought that cases where the parent might incur a duty of care to third parties harmed by the activities of the subsidiary would usually fall into two basic types: (i) where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's own management; (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk. For my part, I would be reluctant to seek to shoehorn all cases of the parent's liability into specific categories of that kind, helpful though they will no doubt often be for the purposes of analysis. There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant, until the onset of insolvency, as happened within the Lehman Brothers group.*"

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[14] The Court of Appeal's judgment in *AAA v Unilever* [2018] EWCA Civ 1532 was delivered several months after the Court of Appeal's judgment in the present case.

18. Although Lord Briggs was at pains to emphasise that there is no single all-encompassing test for determining whether a parent company owes a duty of care in respect of harm caused by the operations of a subsidiary, his judgment identified at least four different possible routes by which such a duty of care may arise:

(1) **First Route: Taking over the management or joint management of the relevant activity of the subsidiary** – Lord Briggs endorsed Sales LJ's statement in *Unilever* that a duty of care may arise "*where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's own management*" (§51).

(2) **Second Route: Providing defective advice and/or promulgating defective group-wide safety/environmental policies which are implemented as of course by the subsidiary** – Lord Briggs endorsed Sales LJ's observation in *Unilever* that a duty of care may arise where "*the parent has given relevant advice to the subsidiary about how it should manage a particular risk*". Lord Briggs further held that, "*Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties.*" He cited *Chandler v Cape Plc* [2012] 1 WLR 3111 as authority for the proposition that a parent company's promulgation of such deficient "*guidelines*" would be capable of establishing a duty of care (§52).

(3) **Third Route: Promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by subsidiaries** – Lord Briggs explained that, "*Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries*" (§53).

(4) **Fourth Route: Parent company holding out that it exercises a particular degree of supervision and control of its subsidiaries** – Lord Briggs explained that, "*Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such*

circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken" (§53).

19. For ease of reference, these four possible (non-exhaustive) factual bases for a duty of care to arise are referred to hereafter as "**Vedanta Route 1**", "**Vedanta Route 2**", "**Vedanta Route 3**" and "**Vedanta Route 4**".

20. Applying those principles to the facts of the case, Lord Briggs held that the corporate materials published by the parent company – in which it "*may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries*" – were "*sufficient on their own*" to establish that it was "*well arguable*" that "*a sufficient level of intervention by [the parent] in the conduct of operations at the Mine may be demonstrable at trial, after full disclosure of the relevant internal documents of [the parent] and [the subsidiary], and of communications passing between them*" (§61).

(ii) The strike out/summary judgment test

21. On a strike out application it is "*necessary to proceed on the basis that the facts alleged in the various statements of claim are true*" (*X v Bedfordshire County Council* [1995] 2 AC 633, 740 per Lord Browne-Wilkinson). It is "*not necessary to decide whether the [claimants'] claim must or should succeed if the facts they allege are proved... The question is whether if the facts are proved they must fail.*" (*W v Essex County Council* [2001] 2 AC 592, 600 per Lord Slynn).

22. On an application for summary judgment a court may consider whether the pleaded facts are supported by some evidence; however, summary disposal is unlikely to be appropriate where there is a real factual dispute between the parties. Cases involving "*conflicts of fact on relevant issues, which have to be resolved before a judgment can be given*" are a "*classic instance*" of a situation where "*the court should exercise caution in granting summary judgment*" (*Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co Ltd* [2007] FSR 3 per Mummery LJ at §17).

23. The need for caution before summarily disposing of a claim is *a fortiori* where the disputed facts are particularly complex. In *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1 Lord Hope stressed that, "*more complex cases are unlikely to be capable of being resolved [by summary judgment] without conducting a mini-trial on*

the documents without discovery and without oral evidence" (§95) (a passage quoted by Lord Briggs in *Vedanta* at §9).

24. In *Mentmore International Ltd v Abbey Healthcare (Festival) Ltd* [2010] EWCA Civ 761 Carnwath LJ referred to *Three Rivers* and explained that, "*Lord Hope had spoken of a statement contradicted by 'all the documents or other material on which it is based' (emphasis added). It was only in such a clear case that he was envisaging the possibility of rejecting factual assertions in the witness statements. It is in my view important not to equate what may be very powerful cross-examination ammunition, with the kind of "knock-out blow" which Lord Hope seems to have had in mind*" (§23).

25. Even in cases where there is no obvious conflict of fact at the time of an application for summary disposal, "*the court should also hesitate about making a final decision where...reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*" (*Doncaster Pharmaceuticals,* per Mummery LJ at §18).

(iii) Significance of future disclosure of internal corporate documents by parent company and subsidiary

26. The courts have stressed that, "*the existence of a duty of care is acutely fact dependent*" and will typically require "*further inquiry, disclosure of documents and cross-examination*" in order to determine it (*Hughmans v Dunhill* [2017] EWCA Civ 97, §§12, 22).

27. This is particularly true of cases concerning the negligence liability of a parent company for the acts of its subsidiary. In *Vedanta* Lord Briggs explained that the "*critical question*" was "*whether [the parent] sufficiently intervened in the management of the Mine owned by its subsidiary KCM to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants*". The question whether that level of intervention occurred "*is a pure question of fact.*" In this regard:

> "*it is blindingly obvious that the proof of that particular pudding would depend heavily upon the contents of documents internal to each of the defendant companies, and upon correspondence and other documents passing between them, currently unavailable to the claimants, but in due course disclosable.*" (§44)

28. Lord Briggs went on to emphasise that, "*the answer to the question whether [the parent company] incurred a duty of care to the claimants was likely to depend upon a careful examination of materials produced only on disclosure, and in particular upon documents held by [the parent company]*" (§57). In this regard, "*the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue*" (§45). Lord Briggs cited with approval *Tesco Stores v Mastercard Inc* [2015] EWHC 1145 where Asplin J explained at §73 that:

> *"account must be taken of all relevant factors relating to economic, organizational and legal links which tie the parent and the subsidiary on a case by case basis... [I]t seems to me that this is a matter which turns on a wide range of factors which should be decided at trial with the benefit of full disclosure, including possibly third party disclosure and oral evidence."*

29. In *Lubbe v Cape Plc* [2000] 1 WLR 1545, 1557 Lord Bingham similarly emphasised the central role that disclosure of internal corporate documents would play in determining whether a parent company owed an arguable duty of care to individuals who lived in the vicinity of its foreign subsidiary's operations:

> *"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. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence."*

C. ERRORS OF LAW BY THE COURT OF APPEAL

30. The analysis of the duty of care issue by the majority of the Court of Appeal involved significant errors of law. In particular, viewed through the prism of the Supreme Court's subsequent judgment in *Vedanta*, it is clear that the Court of Appeal erred both in its analysis of:

    (1) the **principles** of parent company liability (*viz.* what factors and circumstances may give rise to a duty of care);

    (2) the **procedure** for determining the arguability of such a claim at an interlocutory stage (*viz.* the threshold for what constitutes an arguable case, the correct approach to contested factual issues, and the relevance and significance of likely future disclosure by the parent company and the subsidiary of internal corporate documents); and

    (3) the **overall analytical framework** for determining whether a duty of care exists in cases of this type (*viz.* whether the court must apply the tripartite framework in Caparo v Dickman [1990] 2 AC 605 or whether this is wrong in principle since the pleaded case falls within an already-established category of duty).

31. **First**, all three members of the Court of Appeal proceeded on the basis that the promulgation of group-wide mandatory health, safety, security and environmental policies, guidelines or standards by a parent company was incapable itself of giving rise to a duty of care. Instead, the Court of Appeal held that a duty of care could only arise where the parent company had actively sought to enforce a particular group-wide policy/guideline/standard or had directly controlled the subsidiary's operations:

    (1) Simon LJ stated at §89 that it was "*important to distinguish between a parent company which controls, or shares control of, the material operations on the one hand, and a parent company which issues mandatory policies and standards which are intended to apply throughout a group of companies in order to ensure conformity with particular standards. The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care*".

(2) Sales LJ "*agree[d] with the distinction drawn by Simon LJ at para 89 above, between a parent company which controls, or shares control of, the material operations of a subsidiary, on the one hand, and a parent company which simply issues mandatory policies as group-wide operating guidelines for its subsidiaries. In the latter case, the guidelines would have a function equivalent to published industry standards which tell a company how it should be carrying out its relevant operations, but where the control of those operations and responsibility for their proper conduct remains with the company itself (even if in discharging that responsibility it should have regard to those standards). No duty of care on the part of the standard-setting parent company would arise in that case*" (CoA §140). Sales LJ added that "*simply setting global standards (even those which purport to be mandatory) to guide the conduct of operating subsidiaries would not be sufficient to lead to the imposition of a duty of care*" (CoA §161).

(3) The Chancellor likewise held that, "*promulgation of group standards and practices is not, in my view, enough*" to found a duty of care. Instead, "*There would have needed to be evidence that RDS took upon itself the enforcement of the standards*" in order for a duty of care potentially to arise (CoA §205).

32. As various commentators have noted, the judgment in *Vedanta* directly contradicts that approach.[15] In *Vedanta* Lord Briggs rejected the submission advanced by the parent company's leading counsel (which was expressly based on the Court of Appeal's judgment in the present case) that there is "*a general principle that a parent could never incur a duty of care in respect of the activities of a particular subsidiary merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them*". Lord Briggs was "*not persuaded that there is any such reliable limiting principle*". He went on to explain that the creation of policies and guidelines could give rise to a duty of care because "*Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties*" (§52). Lord Briggs made it clear at §53 that the mere

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15 For example, the editors of *Clerk & Lindsell on Torts* (22nd edition (supplement)) note that, in contrast to the majority's analysis in the present case, in *Vedanta* the Supreme Court "*made clear that the issuing of mandatory policies may, in some circumstances, be the basis for a duty on the part of the parent company, if that policy contained inherent flaws*" and that, as a result, "*the approach of the majority would therefore appear to have been disapproved by the Supreme Court*" (§13-09B).

promulgation of such policies/guidelines/standards could give rise to a duty of care even though the parent company does not take any active steps to enforce them (see *Vedanta Route 2*).

33. The Court of Appeal's error is particularly significant in the context of this case, because (as Simon LJ expressly acknowledged) the evidence shows that RDS had established "*a centralised system*" involving "*consistent mandatory standards*" and "*mandatory requirements*" which were "*mandatory across all Shell Group companies*" and which involved "*standardisation of policies and practices across all the operations and in all the countries in which the Shell group operated*" (CoA §§121, 125). In particular, in relation to health, safety, security and environmental ("**HSSE**") matters, RDS had established a specific "*control framework*" which imposed "*mandatory requirements for all Shell group companies, defined standards and established processes and procedures*" (CoA §44). Applying *Vedanta Route 2*, RDS's promulgation of those group-wide policies, requirements and guidelines, coupled with the clear evidence of massive environmental pollution caused by spills from pipelines operated by SPDC, was therefore sufficient in itself to establish an arguable duty of care against RDS even if (which is not the case) RDS had taken no steps to enforce them.

34. **<u>Second</u>** (and related to the point above), the majority of the Court of Appeal held that where a parent company establishes mandatory group-wide policies/standards/guidelines, the fact that they apply to all of the parent's subsidiaries is also incompatible with the existence of a duty of care. The Chancellor held that *"[t]he detailed policies and practices do not seem to have been tailored specifically for SPDC. Rather, they apply across the board to all RDS subsidiaries and joint ventures, without distinction… there needs to be something more specific for the necessary proximity to exist*" (CoA §195; and see to similar effect Simon LJ at CoA §§128-129).

35. In *Vedanta* Lord Briggs endorsed the exact opposite proposition. He stated that "*group-wide policies*" and "*Group guidelines"* could give rise to a duty of care (see both *Vedanta Route 2* and *Vedanta Route 3*). Moreover, in discussing *Chandler v Cape Plc* [2012] 1 WLR 3111 Lord Briggs observed that, "*It is difficult to see why the parent's responsibility would have been diminished if the unsafe system of work…had formed part of a group-wide policy and had been applied by asbestos manufacturing subsidiaries around the world*" (§§51-52). That observation supports the (correct) approach taken by Sales LJ in his dissenting judgment in this case (see CoA §172(vi)).

36. **Third**, by proceeding on the basis that a duty of care could only arise if RDS either controlled SPDC's activities or actively sought to enforce SPDC's compliance with mandatory policies, standards and guidelines, the Court of Appeal excluded the possibility of a duty of care being established on the basis of *Vedanta Route 4* (i.e. the parent company holding itself out as exercising that degree of supervision and control of its subsidiary, even if it does not in fact do so).

37. The Appellants' pleaded case makes extensive reference to RDS's published statements concerning the high degree of supervision and control that it exercises over its subsidiaries' health, safety, security and environmental practices.[16] Statements of that nature are at least arguably capable of giving rise to a duty of care under *Vedanta Route 4*. The Court of Appeal, however, dismissed those documents (which included documents "*published for the purpose of informing shareholders and regulators about the Shell group businesses*" (CoA §120)) on the basis that they did not demonstrate that RDS actually exercised control over SPDC. This was an error of law since, as *Vedanta Route 4* makes clear, such statements are capable of establishing a duty of care even if the parent company fails to exercise its purported supervision and control over the subsidiary. This error was particularly significant in the context of this case, where some of the alleged breaches of the duty of care by RDS involve failures to act (i.e. failures to exercise control which RDS has publicly held itself out as having).

38. **Fourth**, the Chancellor compounded those analytical errors by holding that, "*The corporate structure itself tends to militate against*" a parent company owing a duty of care in respect of harm caused to third parties by a subsidiary. This is because it would be "*surprising*" if a parent company were "*to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility for the operations of each of those subsidiaries*" (CoA §196). In upholding the order striking out the claims against RDS, the Chancellor "*very much pray[ed] in aid the unlikelihood...of an international parent like RDS undertaking a duty of care to all those affected by the operations of all its subsidiaries*" (CoA §206).

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[16] See, for example, Ogale Particulars of Claim at §89 **[Appendix 2A/11/232-237]** and Bille Particulars of Claim at §67 **[Appendix 2A/13/365-371]**.

39. This approach – which is tantamount to a presumption against the existence of a duty of care on the part of a parent company – is incompatible with *Vedanta Routes 1 to 4* and with Lord Briggs' statements in *Vedanta* that, "*there is nothing special or conclusive about the bare parent/subsidiary relationship*"; that, "*there is no limit to the models of management and control which may be put in place within a multinational group of companies*"; and that, "*Everything 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 the management of the relevant operations…of the subsidiary*" (§§51, 54). The Chancellor's approach is also inconsistent with Lord Briggs' express endorsement of Sales LJ's statement at §36 in *AAA v Unilever* that:

> *"There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. The legal principles are the same as would apply in relation to the question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary."*[17]

40. **Fifth**, the majority of the Court of Appeal held that, for the purpose of determining whether a parent company owed an arguable duty of care to the Appellants, the court should not have regard to the prospect of further material being disclosed by the parent company as part of the standard disclosure process. Simon LJ said that, "*the prospect of further evidence relevant to the existence of the duty of care does not assist on the present appeal…which must be decided on the material available*" (CoA §82). The Chancellor adopted the same approach (CoA §182). Conversely, in his dissenting judgment Sales LJ explained why there was "*a very real – and far more than speculative – possibility that documents will emerge on disclosure which will provide substantial support for [the Appellants'] case at trial*" (CoA §171).

41. As noted above, in *Vedanta* Lord Briggs explained that it was "*blindingly obvious*" that determining whether a parent company had intervened in the affairs of its subsidiary in a manner capable of giving rise to a duty of care "*would depend heavily*

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[17] The Chancellor's analysis was also premised on an erroneous understanding of what is meant by "*assum[ing] responsibility*" in this context. Contrary to what the Chancellor thought, a duty of care may arise without a parent company intending or positively undertaking to do anything to or for the claimant. As Arden LJ explained in *Chandler v Cape* [2012] 1 WLR 311: "*The court <u>does not have to find that the relevant party has voluntarily assumed responsibility</u>… The word "assumption" is therefore something of a misnomer. The phrase "attachment" of responsibility might be more accurate*" (§64).

upon the contents of documents internal to each of the defendant companies, and upon correspondence and other documents passing between them, currently unavailable to the claimants, but in due course disclosable" (§44). The majority of the Court of Appeal was therefore wrong to disregard the "*blindingly obvious*" possibility that RDS and SPDC would in due course disclose documents that (in Sales LJ's words) "*provide substantial support for*" the existence of a duty of care.

42. The significance of the majority's error is thrown into sharp relief by the fact that in materially identical proceedings against RDS and SPDC in the Netherlands, the Dutch Court of Appeal has held that RDS does arguably owe a common law duty of care to residents of Nigerian communities who suffer damage as a result of oil spills from SPDC's pipelines. The Dutch court has ordered RDS to disclose various categories of internal documents to the claimants in those proceedings on the basis that those documents are likely to be material to the negligence claims against RDS. The Appellants have sought disclosure of those documents from RDS in these proceedings. RDS has refused to provide them.[18]

43. **Sixth**, the majority of the Court of Appeal wrongly proceeded on the basis that the evidence of the Respondents' own witnesses – who claimed that RDS did not actively control or intervene in any aspect of SPDC's operations – was "*not really capable of challenge*" and that RDS "*did not have the wherewithal*" to enforce the mandatory standards it had imposed on SPDC (CoA §205). The majority made this factual determination adverse to the Appellants despite the fact that, "*The extent to which the operations of SPDC were "controlled" by RDS, either by ExCo, other organisations within RDS or by senior management has always been in issue between the parties*" (CoA §78) and despite the fact that the Appellants had adduced extensive evidence (including documentary and witness evidence from a former SPDC employee) which directly contradicted the evidence of the Respondents' witnesses in this regard.

44. By purporting to determine this critical and strongly contested factual issue in the context of an interlocutory application before any standard disclosure or cross-examination of witnesses, the majority of the Court of Appeal disregarded the legal

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[18] See letters from Leigh Day to Debevoise & Plimpton dated 14 April and 1 May 2020 (requesting disclosure) and replies from Debevoise & Plimpton dated 22 Apri l and 8 May 2020 (refusing disclosure).

principles set out at paragraphs 21 to 25 above. In particular, the majority failed to heed Lord Hope's warning in *Three Rivers* that "*complex cases are unlikely to be capable of being resolved*" on a summary basis without disclosure and oral evidence and Lord Browne-Wilkinson's warning in *X v Bedfordshire County Council* that in the context of applications to strike out, it is "*necessary to proceed on the basis that the facts alleged in the various statements of claim* <u>*are true*</u>" (emphasis added). These significant errors of law by the majority of the Court of Appeal had a decisive influence on the outcome of the appeal.

45. <u>**Seventh**</u>, several of the errors of law summarised above arose in part because the Court of Appeal proceeded (understandably but erroneously) on the basis that in order to determine whether RDS owed the claimants an arguable duty of care, the court was required to analyse the case by reference to the tripartite test of foreseeability, proximity and justice and reasonableness set out in *Caparo Industries Plc v Dickman* [1990] AC 605. Applying that approach, Simon LJ and the Chancellor expressly held that the Appellants were unable to establish either proximity between the Appellants and RDS (see CoA §§89-129 and §§193-206) or that the imposition of a duty of care on RDS would be fair, just and reasonable (see CoA §§130-131 and 206).

46. That approach has subsequently[19] been shown to be wrong by the Supreme Court's judgment in *Robinson v Chief Constable of West Yorkshire* [2018] AC 736. In *Robinson* Lord Reed explained that when a pleaded case falls within an already-established category of duty it is "*unnecessary and inappropriate*" to apply the tripartite *Caparo* test in order to determine whether a duty of care exists (§§26-27). Lord Mance likewise explained that there are certain "*established categories*" of case where "*the latter two criteria*" (i.e. proximity and fairness, justice and reasonableness) "*are at least assumed*" and therefore do not need to be addressed by the court (§83).

47. In *Vedanta* Lord Briggs held that the claimants' case against the parent company "*was not a case of the assertion, for the first time, of a novel and controversial new category of case for the recognition of a common law duty of care*" (§60). A claim that a parent company

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19 The parties and the Court of Appeal did not have the benefit of the Supreme Court's judgment in *Robinson v Chief Constable of West Yorkshire* [2018] AC 736, which was delivered on 8 February 2018 (just 24 hours before the Court of Appeal handed down its embargoed judgment to the parties).

owes a duty of care in respect of harm caused by the acts of its subsidiary is not "*a novel category of common law negligence liability*". Accordingly, the courts below had been wrong to approach the duty of care issue through the tripartite *Caparo* framework (§56). It follows that the analytical framework adopted by the Court of Appeal in the present case was (through no fault of the court or the parties) wrong.

48. Standing back, the cumulative effect of these errors was that rather than recognising that there is "*nothing special or conclusive*" about the parent-subsidiary relationship and that there is "*no special doctrine in the law of tort*" and "*no added level of rigorous analysis*" required for parent company negligence claims (as *Vedanta* establishes), the majority of the Court of Appeal approached the duty of care issue on the basis that special rules – and a heightened threshold of arguability – apply to such claims. To meet that heightened threshold, the Appellants would have had to provide comprehensive and conclusive evidence – at an interlocutory stage prior to disclosure – of RDS "taking control" of or intervening in SPDC's day-to-day operations.

49. The majority's approach is irreconcilable with *Vedanta*. The Court of Appeal effectively excluded *Vedanta Routes 2 & 4* as possible bases for a duty of care and set an inappropriately high threshold for establishing an arguable case under *Vedanta Routes 1 & 3*. As a result, significant evidence was ignored or dismissed. This was wrong in principle and, if uncorrected, will leave the case law in a confused and contradictory state.

50. Since the Court of Appeal's analysis was vitiated by the errors of law summarised above, it follows that the Supreme Court must make its own assessment of whether, applying the legal principles summarised at §§16-29 above, the Appellants have an arguable case that RDS owed them a duty of care.

D. <u>THE APPELLANTS' CASE ON WHY RDS OWES THEM A DUTY OF CARE</u>

51. In overview, the Appellants submit that they have (at least) a strongly arguable case that RDS owes them a duty of care under each of *Vedanta Routes 1 - 4*. The Appellants' statements of case were produced in 2015/2016 without the benefit of the Supreme Court's authoritative clarification of the law in *Robinson* and *Vedanta*. Notwithstanding this, both the pleaded duty and the material relied upon in support

of that duty in the Particulars of Claim are easily assimilated within that clarified framework.

Vedanta Route 1 [20]

52. The evidence establishes that RDS had arguably taken over the management of relevant activities of SPDC either "*in place of or jointly with*" SPDC's own management. In particular, RDS had taken over (either solely or jointly with SPDC) the management of the following aspects of SPDC's operations:

    (1) construction and maintenance of pipelines and related infrastructure;

    (2) pipeline security and prevention/detection of "bunkering";

    (3) oil spill detection; and

    (4) oil spill response and remediation.

53. Each of (1)-(4) is directly causative of the harm that the Appellants' communities have suffered as a result of the numerous and substantial leaks of oil from SPDC's pipelines and associated infrastructure (including leaks caused by "bunkering"), and the failure to clean up and remediate the resulting oil pollution.

54. Moreover, the evidence shows that RDS exerts substantial direct control over SPDC's funding and expenditure. In *Chandler v Cape* [2012] 1 WLR 3111 (which was endorsed and explained in *Vedanta* at §§49, 52, 56, 59) Arden LJ held that where "*the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues*" this will support the existence of a duty of care (§80).

55. Accordingly, the Appellants' case falls squarely within *Vedanta Route 1*.

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[20] See, by way of non-exhaustive examples, Bille Particulars of Claim at **§62** ("*The First Defendant's duty of care…arose as a result of…the high level of control and direction that the First Defendant exercised at all material times over the operations of the Second Defendant and its compliance with applicable health, safety and environmental standards*"); **§67** ("*The First Defendant exercised a high degree of control, direction and oversight in respect of the Second Defendant's pollution and environmental compliance and the operation of its oil infrastructure in Nigeria…*"); **§68** ("*The First Defendant exercised significant control over the specific areas of the Second Defendant's business and operations that are of particular relevance to the Claim…*"); **§70** ("*the First Defendant exerts significant control and oversight over the Second Defendant's business including in respect of security, pipeline integrity and compliance with its environmental and regulatory obligations…The First Defendant carefully monitors and directs the activities of the Second Defendant...*") **[Appendix 2A/13/364-373]**.

Vedanta Route 2 [21]

56. The evidence also demonstrates that RDS had promulgated extensive mandatory group-wide policies, standards and guidelines with which SPDC was expected to comply as a matter of course. This included policies, standards and guidelines concerning (amongst other things):

    (1) health, safety, security and environmental standards;

    (2) the design, installation, maintenance and monitoring of oil pipelines and infrastructure; and

    (3) oil spill prevention, detection and remediation.

57. All three members of the Court of Appeal expressly accepted that RDS had done this:

    (1) Simon LJ acknowledged that RDS had established "*a centralised system*" involving "*consistent mandatory standards*" and "*mandatory requirements*" which "*were mandatory across all Shell Group companies*"(CoA §121); that it had promulgated a health, safety, security and environmental control framework which provided "*guidance, based on the centralised accumulation of a wide range of expertise and experience, and which is then made available to its subsidiaries*" (CoA §123); and that RDS had imposed a "*standardisation of policies and practices*

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21 See, by way of non-exhaustive examples, Bille Particulars of Claim at **§74(a)** ("*The First Defendant has developed detailed policies, frameworks and rules concerning health, safety and environmental protection across the entire Shell Group*"); **§74(c)** ("*The First Defendant has created a dedicated Projects & Technology department within the Shell Group, which is tasked with providing advice and services to the Shell Group's operating units, including the Second Defendant*"); **§67(a),(c)** (extensive reliance on RDS's "*global policy for Health, Security, Safety and Environment (HSSE) that the First Defendant [RDS] applies to its subsidiaries around the world*" and "*The First Defendant's Commitment and Policy on Health, Security, Safety, the Environment and Social Performance*"); **§67(i)** ("*The First Defendant lays out standards for all of its assets, facilities and infrastructure across the Shell Group, and assumes responsibility for ensuring that best practice is implemented and that unplanned releases of hydrocarbons are prevented*"); **§67(j)** ("*The First Defendant also makes specific provisions and sets specific standards for dealing with and responding to oil spills across its operations. The First Defendant's HSSE and SP control framework includes specific manuals on emergency response and spill preparedness*"); **§77(a)** ("*the detailed guidance and policies established by the First Defendant*" which "*demonstrate the overarching control, management and oversight that the First Defendant exerts over its subsidiaries' compliance with health, safety and environmental standards and their obligations to local communities*") **[Appendix 2A/13/365-390]**.

across all the operations and in all the countries in which the Shell Group operated" (CoA §129).

(2) The Chancellor found that the documents "*show that RDS laid down detailed policies and practices as to management, oversight and engineering which they expected their subsidiaries and joint ventures to follow*" (CoA §195). He added that RDS had promulgated "*guidance based on the centralised accumulation of a wide range of expertise, experience and best practice*" (CoA §198) and had created "*mandatory policies, standards and manuals which applied to SPDC*" and which were "*quite specific at an engineering level*". RDS "*expected SDPC to apply the standards it set*" and required "*a system of supervision and oversight*" (CoA §205).

(3) Sales LJ observed that RDS had promulgated "*mandatory instructions*" and "*a large number of standards or DEPs to be adhered to by all group companies in their operations, including DEPs which cover the principal aspects of the operations of SPDC in managing the pipeline and related facilities*" (CoA §§159, 161, 172(6)).

58. In addition to those group-wide policies, standards and guidelines, RDS was also responsible for overseeing the provision of detailed, technical Nigeria-specific support and advice to SPDC, including advice in relation to the design, construction and maintenance of SPDC's oil pipelines in the Niger Delta and the processes for cleaning up oil spilled from those pipelines. The United Nations Environmental Programme has criticised the advice provided to SPDC concerning oil spill remediation as defective.[22]

59. It is clear that:

(1) SPDC was expected to comply with both the group-wide policies, standards and guidelines and the Nigeria-specific support and advice when designing, operating and maintaining oil pipelines and installations in the Appellants' communities, including in respect of clean-up methodology; and

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[22] See paragraphs 112 to 114 below.

(2) there have been numerous large oil spills from those pipelines and installations which have not been adequately cleaned up, and which have caused severe damage to the local environment.

60. It follows that it is at least strongly arguable that those oil spills were the consequence of inadequacies or defects in the mandatory policies, standards and guidelines and/or the Nigeria-specific support and advice promulgated by RDS, which were implemented as of course by SPDC. The Appellants therefore have a real prospect of establishing a duty of care under *Vedanta Route 2*.

Vedanta Route 3 [23]

61. In addition to promulgating arguably defective group-wide mandatory policies, standards and guidelines (*Vedanta Route 2*), RDS has also "*take[n] active steps, by training, supervision and enforcement, to see that they are implemented*" by SPDC (*Vedanta Route 3*). Indeed, the taking of active steps to implement those policies, standards and guidelines is inherent in their avowedly "*mandatory*" character. The active steps taken by RDS included (but were not limited to):

(1) RDS's establishment and oversight of a Process Safety & HSSE & SP Controls Assurance team, which provides "*independent assurances as to the effectiveness of HSSE&SP Controls, including Process Safety Controls*".[24] As Sales LJ correctly observed, "*this appears to contemplate scope for an assurance team acting for ExCo and/or the CSRC, as bodies representing RDS, to take action on the ground if an operating company is not being effective in implementing the standards itself*" (CoA §163).

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[23] See, by way of non-exhaustive examples, Bille Particulars of Claim at **§67(b)** ("*The First Defendant actively monitors its subsidiaries' performance and compliance with the standards it has promulgated*"); **§67(e)** ("*the First Defendant has established a Corporate and Social Responsibility Committee which is responsible for establishing and ensuring compliance with minimum health, safety and environmental protection standards throughout all of its subsidiaries*"); **§67(f)** ("*The First Defendant is responsible for monitoring compliance by its subsidiaries with its Business Principles and Standards… The First Defendant carefully monitors its subsidiaries to ensure their compliance with Shell Group standards and policies*"); **§67(g)** ("*Since the First Defendant's executive remuneration scheme depended on the sustainable development performance of the Second Defendant, it is to be inferred that the First Defendant's executives exert significant control over the Second Defendant's compliance with sustainable development standards (including environmental and pollution control standards)*"); **§70** ("*The First Defendant carefully monitors and directs the activities of the Second Defendant and has the power and authority to intervene if the Second Defendant fails to comply with the Shell Group's global standards*") **[Appendix 2A/13/365-373]**.

[24] RDS Control Framework, p.10 **[Appendix 2E/55/1574]**

(2) RDS's establishment and oversight of "*Shell Internal Audit*", which conducts audits and investigations into the design and operation of risk management and internal controls throughout RDS's subsidiaries. [25]

(3) RDS's creation of a system of "*Assurance Committees*" and "*Assurance Letters*" which enable the RDS ExCo, RDS CEO and RDS Board to monitor subsidiaries' compliance with the mandatory requirements and controls established by RDS, and to identify steps required to remedy any compliance failings.[26]

(4) The role of the RDS Corporate and Social Responsibility Committee ("**RDS CSRC**"), which conducts "*regular in-depth reviews*" (including visiting subsidiaries' operational sites) to assess the implementation of RDS's mandatory policies, requirements and standards; "*review[s] and assess[es] management's response to audit findings*"; and "*review[s] the standards, policies and conduct of the company relating to HSSE&SP and to the safe and environmentally responsible operation of the Company's facilities and assets*" (see paragraph 92(1)-(2) below).

(5) The provision of training to employees of RDS's subsidiaries (including through the "*Shell Open University*" established by RDS) to ensure implementation of RDS's group-wide mandatory standards, policies and requirements. [27]

62. It follows that the Appellants have a strongly arguable case that RDS owes them a duty of care pursuant to *Vedanta Route 3*.

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25 *Ibid.*

26 The Respondents have been ordered to disclose various audit reports and Assurance Letters in the Dutch proceedings. The claimants in those Dutch proceedings place heavy reliance on those internal documents. As explained above, the Respondents have refused to disclose these documents to the Appellants in the present proceedings.

27 Shell HSSE & SP Control Framework, p.11 **[Appendix 2H/91/2833]**

Vedanta Route 4 [28]

63. As set out further below, RDS has also made many public representations concerning the high degree of direction and control it exercises over its subsidiaries' operations, their compliance with minimum health, safety and environmental standards, and its "industry-leading" systems for preventing and remedying oil spills caused by its operations in Nigeria and elsewhere. Those public representations are at least arguably capable of establishing a duty of care under *Vedanta Route 4*.

E. EVIDENCE SUPPORTING EXISTENCE OF AN ARGUABLE DUTY OF CARE

SOURCES OF EVIDENCE RELIED ON BY THE APPELLANTS

64. The Appellants' case that RDS arguably owes them a duty of care is based on a broad range of detailed evidence drawn from multiple different sources including both internal and external corporate documents, first-hand testimony from individuals who have worked at the headquarters of RDS and SPDC, and independent reports, decisions and judgments about the Shell Group. The evidence includes (but is not limited to):

    (1) Internal RDS documents which (a) set out the form, scope and extent of RDS's executive direction and control over SPDC; (b) describe RDS's promulgation, supervision and enforcement of a wide array of mandatory standards, policies and prescriptive technical requirements with which SPDC was required to comply; and (c) describe the systems and processes established by RDS to enforce SPDC's compliance with those mandatory standards, policies and requirements.

    (2) Corporate documents published by RDS including (a) RDS's Annual Reports; (b) RDS's Sustainability Reports; (c) the Terms of Reference for the RDS CSRC; and (d) published statements concerning the Shell Group's procedures for oil

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[28] See, by way of non-exhaustive examples, Bille Particulars of Claim at **§77(b)** ("*The First Defendant's public statements that it exercises a high degree of control over its subsidiaries' compliance with sustainability and environmental standards. The First Defendant has also stated publicly that its research and development to increase its knowledge and expertise is for the benefit of its global operations*"). See also the specific public statements by RDS quoted at **§§67(a)-(f),(i)-(l), 74(d),(g)-(h) [Appendix 2A/13/365-390]**.

spill prevention, response and remediation, which contain numerous statements about the extent of RDS's control over its subsidiaries and its creation and enforcement of mandatory group wide health, safety, security and environmental standards.

(3) Witness evidence from three former senior employees with a combined total of half a century's experience working for the Shell Group (including one individual who worked at RDS' headquarters and one individual employed at SPDC's headquarters in Nigeria). This evidence provides a first-hand account of how (a) RDS directly intervened in and controlled important aspects of SPDC's operations; and (b) the manner and extent of RDS's promulgation and enforcement of mandatory policies, standards and technical guidance which SPDC was required to comply with.

(4) Evidence from Professor Jordan Siegel, who conducted a detailed analysis of thousands of pages of internal documents concerning the relationship between SPDC and its parent company in previous litigation in the US, and who provided a witness statement in these proceedings summarising and updating those conclusions (including conclusions that SPDC is subject to "*an unusually stringent regime of control*" and "*a very high degree of control*" by its parent company and is "*unambiguously an agent of*" its parent).

(5) A report conducted by the United Nations Environment Programme into oil pollution in the Niger Delta which shows that SPDC's failure to carry out effective oil spill remediation was the result of it following defective guidance/instructions provided by a centralised department established by RDS.

(6) Government cables and depositions in US legal proceedings evidencing RDS's direct involvement in, and its direct control over, important aspects of SPDC's operations in Nigeria (including pipeline security and health, safety, security and environmental risks).

(7) Decisions/judgments (a) of the European Commission and the European Court of Justice which contain findings about the high degree of control and influence exercised by the parent company of the Shell Group over its subsidiaries; and (b) of the Dutch Court of Appeal, which expressly held that

individuals who live in the vicinity of SPDC's oil pipelines in the Niger Delta do have an arguable case that RDS owed them a common law duty of care.

65. As the table at **Annex 1** shows, the evidence relied on by the Appellants is very much more extensive and detailed than the limited evidence before the Supreme Court in *Vedanta*. In particular, the Appellants have adduced several categories of evidence that did not exist at all in *Vedanta*. In *Vedanta* Lord Briggs stated that the small number of corporate documents published by the parent company were "*sufficient on their own*" to establish that it was "*well arguable*" that the parent company owed a duty of care to the claimants (§61). The arguability of the duty of care in the present case is therefore *a fortiori* the position in *Vedanta*.

ANALYSIS OF THE CATEGORIES OF EVIDENCE RELIED ON BY THE APPELLANTS

66. Each of the seven categories of evidence referred to in paragraph 64 above is addressed briefly below.

(1) INTERNAL RDS DOCUMENTS

67. During the proceedings before the Court of Appeal, the Appellants acquired copies of two internal RDS documents which are not publicly available and which provide a significant insight into the extent of RDS's direction, control and oversight over its subsidiaries such as SPDC and the existence of detailed mandatory group-wide operating guidelines and standards. Only a five-page extract of one of these documents had been disclosed by the Respondents.[29] Apart from that extract and the Joint Operating Agreement for the SPDC joint venture no other internal documents were disclosed by the Respondents. The Respondents' witnesses knew of but failed to address either of the two important internal documents that emerged during the Court of Appeal hearing in any meaningful way in their evidence. However, they provide powerful support for the existence of an arguable duty of care under *Vedanta Routes 1, 2 & 3*.

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29 A five-page extract from the 220+ page HSSE Control Framework **[Appendix 2F/67/1971-1975]**

(i) RDS Control Framework

68. As would be expected, the Shell Group corporate structure is complicated and comprises a large number of entities, some of which are independent legal personalities and some of which are not. The precise group structure is not in the public domain or known to Appellants, but considerable further light was thrown on it during the proceedings before the Court of Appeal when a former SPDC employee provided the Appellants with a copy of the previously undisclosed "*Royal Dutch Shell plc Control Framework*" ("**RDS Control Framework**").

69. The RDS Control Framework is an internal RDS document which sets out "*the single overall control framework that applies to all Shell companies, i.e. Royal Dutch Shell plc and all companies in which Royal Dutch Shell plc either directly or indirectly has a controlling interest*".[30] It is an important document, not least because it evidences – to a much greater degree than was previously in the public domain – the extent to which RDS as a legal personality is responsible for a significant number of entities within the group that are not themselves legal personalities, and whose actions are relevant to the manner in which SPDC conducts its environmentally harmful operations. Indeed, Simon LJ explained that the document "*plainly assists the claimants*" since:

> "*It is clear from the Shell control framework that the Shell group is organised both through legal entities (parent, holding and operating companies) and on business and function lines. Thus, the legal and human resources functions might operate across company lines; and, materially for present purposes, so might the upstream business (oil production and supply).*" (CoA §118)

RDS has deliberately structured the Shell Group in a way that enables RDS to direct, control and intervene in the management of subsidiaries' operations

70. As its name suggests, the RDS Control Framework provides an overview of how the Shell Group is organised and how RDS controls its subsidiaries. It demonstrates that RDS has deliberately structured the Shell Group in a manner that enables RDS to direct, control and intervene in the management of its subsidiaries' operations. For example:

    (1) **RDS has organised the Shell Group along "Business" and "Function" lines, which are not legal entities, and which are directly accountable to RDS** – As

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30 RDS Control Framework, p.3 **[Appendix 2E/55/1567]**

Simon LJ explained, the RDS Control Framework explains that the Shell Group "*internally organises its activities principally along Business and Function lines*". These are not legal entities but rather "*portfolios of activities and responsibilities operating according to common objectives and strategies with formally delegated organisational mandates*".[31] In particular:

(a) Businesses: A "*Business*" is "*An internal organisation charged with managing a part of Shell's portfolio of investments in accordance with a common set of objectives and strategies*". There are four "*Businesses*", namely (i) "*Upstream*", (ii) "*Integrated Gas & New Energies*", (iii) "*Downstream*" and (iv) "*Projects & Technology*". ("*Upstream*" includes exploration and extraction of oil.) Each "*is led by a Business Head*" who is "*An Executive Committee member nominated to head a Business*" and who is therefore "*accountable to the [RDS] CEO for the performance of their Business*".[32]

(b) Functions: These are "*internal organisation[s]…that provide[] a combination of functional guidance and services to Businesses and other Functions*". They have "*an executive role*" and "*assist the CEO and the Executive Committee by providing functional direction, support and leadership to Shell and provide services to the Businesses and other Functions*". The Heads of the Functions are "*accountable to the CEO*".[33]

(c) In addition, there are further functional areas which "*address matters which present Group wide risks*" and "*Technical Functions*" which address "*technical risks*". These include "*Process Engineering*", "*Safety & Environment*" and "*Upstream Production & Wells*".[34] The heads of the Technical Functions are accountable for the "*coordination of the effective deployment and development of Shell's technical professionals across Businesses and geographies.*"[35]

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31 RDS Control Framework, p.13 **[Appendix 2E/55/1577]**

32 *Ibid*, pp. 13 & 18 **[Appendix 2E/55/1577 & 1582]**

33 *Ibid,* pp. 13 & 19 **[Appendix 2E/55/1577 & 1583]**

34 *Ibid,* p. 14 **[Appendix 2E/55/1578]**

35 RDS Control Framework, p. 14 **[55/1578]**. Consistent with this, Sales LJ accepted Mr Sticco's evidence that centralised Shell staff from these departments "*were pulled off to different countries and operating companies to advise on particular projects or issues*" (CoA §156).

(2) **RDS exercises central control over the entire Shell Group, including all of the "Businesses" and "Functions", through the RDS ExCo** – The RDS ExCo is "*A committee headed by the CEO comprising all the Business and Function Heads*".[36] The RDS ExCo operates "*under the direction of the CEO*" and is "*responsible for identification and evaluation of risks for consideration by the Board*", "*implementation of Board policies on risk control,*" "*management of risks in accordance with the Board approved system and policies*" and "*the safe condition and environmentally responsible operation of Shell's facilities and assets*". It is also "*supported by a number of committees that provide oversight and guidance on specific matters*".[37]

(3) **RDS has delegated authority to a variety of individuals, committees, Businesses and Functions** – The RDS Control Framework explains that there is "*an integrated, consistent process to delegate authority from the Royal Dutch Shell Plc Board*" to "*organisations, individuals and committees*". This includes delegating authority to individual staff "*as members of a Business or Function (organisational authorities)*", as distinct from in their capacity "*as employees of a particular Shell legal entity (corporate authorities)*". Whilst the legal entities are required to take any "*formal binding decisions*", "*Organisational approval, as a general rule, precedes corporate approval.*" In other words, the Business or Function line generally provides advice, consent and approval <u>before</u> the formal approval from a particular legal entity such as SPDC.[38] The numerous Executive Vice Presidents ("**EVPs**") and Vice Presidents ("**VPs**") who have responsibility for particular regions (such as Sub-Saharan Africa) or departments (such as HSSE) derive their "*organisational authority*" from RDS.

(4) **Pursuant to this framework, the RDS Chief Executive and RDS ExCo are responsible for the safe operation of subsidiaries' facilities and assets** – The RDS Control Framework explains that the RDS Board is responsible for the existence of "*a sound risk management and internal control system and annually reviews the effectiveness of the Shell Control Framework; the level of risk exposure*

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36 *Ibid,* p. 19 **[Appendix 2E/55/1583]**

37 *Ibid,* p. 12 **[Appendix 2E/55/1576]**

38 *Ibid*, p. 17 **[Appendix 2E/55/1581]**

across the Shell Group; and the condition and operation of Shell's facilities and assets".[39] In particular:

(a) The "*Principal CEO responsibilities*" of RDS's CEO expressly include "*Management of Asset Integrity and Process Safety*".[40]

(b) As noted above, the RDS CEO and RDS ExCo are "*responsible for…the safe condition and environmentally responsible operation of Shell's facilities and assets*".

(c) In addition, the Projects and Technology Business ("**P&T**") – which is directly accountable to the RDS CEO and RDS ExCo – is "*responsible for providing functional leadership across Shell in the areas of safety, environment and sustainable performance*". To this end, it "*provides technical services and technology capability covering both upstream and downstream activities*".[41] Within P&T are "*functional areas*" including "*Safety*" and "*Environment*" that "*address matters which present Group wide risks through the establishment of appropriate standards, practices, support and oversight.*"[42]

RDS's promulgation of extensive and detailed mandatory policies, standards and technical requirements

71. The RDS Control Framework makes it clear that RDS has promulgated extensive and detailed group-wide policies, standards and technical requirements, which SPDC and other subsidiaries are required to comply with. This is relevant to the Appellants' case on *Vedanta Routes 1, 2 & 3*. In particular, the RDS Control Framework reveals the existence of an extensive, multi-tiered system of prescriptive mandatory requirements. They include:

(1) **Mandatory "*Group Standards*"** – The RDS Control Framework explains that:

> ***"Group Standards** are adopted for matters that present significant Group-level risks or matters that are subject to external stakeholder expectations and*

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39 *Ibid*, p. 11 **[Appendix 2E/55/1575]**

40 *Ibid*, p. 12 **[Appendix 2E/55/1576]** "*Process Safety*" is defined in RDS' 2014 Sustainability Report as "*making sure the right precautions are in place to prevent unplanned releases of hydrocarbons and chemicals.*" **[Appendix 2E/61/1623]**

41 RDS Control Framework, p. 14 **[Appendix 2E/55/1578]**

42 *Ibid*.

external disclosures. They also establish mandatory rules on how to comply with legal and regulatory requirements and how to operate in accordance with the Shell General Business Principles. They apply across all of Shell's activities and are mandatory for all Shell companies. Authority for new Group Standards (and substantial changes to these) has been delegated to the Chief Executive Officer (CEO), except for the Finance Standards for which authority has been delegated to the Chief Financial Officer (CFO)."[43]

(2) **Mandatory "*Operating Standards*"** – The document further explains that the mandatory "*Group Standards*" are supplemented by a more detailed set of mandatory standards which govern matters at an operational level:

> ***"Operating Standards*** *define mandatory rules that are needed in addition to the Group Standards, to manage significant risks encountered in specific business activities. These Standards are approved by the relevant Business Head(s) or one level below and are mandatory for staff involved in the specific business activity."*[44]

(3) **Mandatory "*Manuals*" -** In addition to those two sets of mandatory standards, there are also "*Manuals*" which contain "*more detailed mandatory instructions*" on how to comply with those mandatory standards:

> ***"Manuals*** *provide more detailed mandatory instructions on <u>how to implement</u> Group or Operating Standards or other Foundation components. Guidance with non-mandatory instructions or documentation like good practice, templates and tools assist staff to carry out their duties in compliance with applicable Standards and Manuals."*[45]

(4) **Mandatory "*Technical Practices*"** – There are also mandatory "*Technical Practices*" which contain prescriptive technical requirements governing the design, engineering, construction and operation of oil infrastructure:

> *"In the technical area, the Technical Practices establish requirements for all design engineering and construction activities as well as for the operation of assets and wells. The Technical Practices are approved by the relevant Technical Function Head or Global Discipline Head.*
>
> *Technical requirements related to Process Safety are mandatory for all projects, well activities and asset operations."*[46]

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43 *Ibid*, p. 6 **[Appendix 2E/55/1570]**

44 *Ibid*.

45 *Ibid* (emphasis added)

46 *Ibid*, p. 6 **[Appendix 2E/55/1570]**

RDS's active supervision and enforcement of mandatory policies, standards etc.

72. The RDS Control Framework also makes it clear that RDS has established multiple systems and reporting lines designed to enable RDS to closely supervise and enforce subsidiaries' compliance with the mandatory group-wide standards, requirements and practices referred to above. This provides significant support for the Appellants' case on *Vedanta Route 3.* Those systems and reporting lines include:

    (1) **Process Safety & HSSE & SP Controls Assurance Team** – The "*Process Safety & HSSE & SP Controls Assurance Team*" is mandated by the RDS CSRC to "*provide[] independent assurance on the effectiveness of the HSSE&SP Controls, including Process Safety Controls*".[47]

    (2) **Shell Internal Audit** – The "*Shell Internal Audit*" unit is mandated by the RDS Board's Audit Committee to provide "*the Executive Committee, the Audit Committee and ultimately the Board with independent assurance on the design and operation of the system of risk management and internal control*". It "*investigates ethics and compliance incidents*" and reports any "*significant incidents*" to RDS Board Committees (including the RDS ExCo).[48]

    (3) **Business and Function Assurance Committees** – "*Each Business and Function has one or more Assurance Committees*" which are responsible for "*plan[ning] for and oversee[ing] the execution of self assessment and independent assurance activities*" which are then used to "*assess the adequacy of their system of risk management and internal control*" and to "*ensure that identified weaknesses are resolved*".[49]

    (4) **Business Assurance Letters sent to RDS Chief Executive, RDS ExCo and RDS Board** – Every year "*each Business and Function Head submits an Assurance Letter to the CEO confirming the level of compliance of their operations with all elements of the Shell Control Framework*". The content of those letters is then provided to the RDS ExCo, the RDS Audit Committee and the RDS Board "*as*

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[47] *Ibid*, p. 10 **[Appendix 2E/55/1574]**

[48] *Ibid*.

[49] *Ibid*.

part of their annual review of Shell's system of risk management and internal control".[50]

73. RDS's establishment of these systems of close oversight and supervision cannot be reconciled with the Chancellor's assertion that **"***RDS said that there should be a system of supervision and oversight, but left it to SPDC to operate that system. It did not have the wherewithal to do anything else.***"** (CoA §205)

(ii) **RDS HSSE Control Framework**

74. In addition to the RDS Control Framework, on the final day of the hearing before the Court of Appeal the Respondents were required to disclose a copy of the "*Shell HSSE & SP Control Framework*" ("**HSSE Control Framework**") pursuant to CPR 31.14. According to its terms, this document was originally published in 1997 "*and updated by the Executive Committee December 2009*".[51]

75. Like the RDS Control Framework, the contents of the internal HSSE Control Framework support the Appellants' case under *Vedanta Routes 1, 2 & 3*. In particular, it provides further insight into the extent of the detailed control which the RDS Board exerts over subsidiaries' health, safety and environmental practices; the extent of the mandatory group-wide policies and requirements which RDS has promulgated; and the complex and extensive systems RDS has put in place to supervise and enforce subsidiaries' compliance with them.

76. The HSSE Control Framework contains prescriptive and detailed requirements which are intended (amongst other things) to ensure that, "*Assurance is provided to the Board of Royal Dutch Shell plc that HSSE & SP Controls, including Process Safety Controls, are effective.*"[52]

Mandatory Design Engineering Practices

77. The HSSE Control Framework lists a significant number of mandatory "*Design Engineering Practices*" ("**DEPs**") including more than 170 "*DEPs with Mandatory*

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50 *Ibid*, p. 10 **[Appendix 2E/55/1574]**

51 HSSE Control Framework, p. 1 **[Appendix 2H/91/2823]**

52 *Ibid*, p. 2 **[Appendix 2H/91/2824]**.

Process Safety Requirements".[53] The DEPs listed in the HSSE Control Framework contain mandatory, detailed and prescriptive technical specifications as to how operating companies such as SPDC should undertake specific technical practices and conduct specific operations.[54] Examples of two of these DEPs (one of which is merely a list of the available DEPs) are contained in the Appendix.

78. Three particular points bear emphasis in respect of DEPs:

(1) **RDS was ultimately responsible for the DEPs** – As Simon LJ explained, in 2009 "*a new business division of RDS, projects and technology ("P&T") was set up to centralise the mandatory design and engineering practices ("DEPs") which governed, among other things, all relevant aspects of pipeline integrity and leak detection, down to the detail of the welds that had to be used. P&T was headed by a member of ExCo and was to serve "all of Shell's businesses globally"*" (CoA §101).

(2) **SPDC was required to comply with the DEPs** – As Simon LJ explained, "*SPDC was required to comply with the DEPs which also formed part of the HSSE & SP control framework that was under the ultimate control and supervision of RDS, in the construction of, operation and maintenance of its pipeline and other oil infrastructure*" (CoA §102).

(3) **The DEPs are directly relevant to the harm the Appellants have suffered** – As Sales LJ noted, the DEPS "*includ[e] DEPs which cover the principal aspects of the operations of SPDC in managing the pipeline and related facilities*" (CoA §159). They are relevant to the Appellants' claims concerning the defective construction and maintenance of the pipelines in the Appellants' communities. For example, the content of the following named DEPs is directly relevant to those issues: (a) "*Metallic materials – Prevention of brittle fracture in new assets*"; (b) "*Piping Classes – Basis of Design*"; (c) "*Piping Classes – General Requirements*"; (d) "*Piping Classes – Exploration and Production*"; (e) "*Hot-tapping on pipelines, piping and equipment*"; (f) "*Pipeline engineering*"; (g) "*Riser design*"; (h) "*Design of*

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[53] *Ibid*, pp. 109-114 **[Appendix 2H/91/2931-2936]**. The HSSE Control Framework states at p. 115 that: "*Avoiding a major Process Safety-related Incident within our Asset base is a priority and requires a Shell wide approach.*" **[Appendix 2H/91/2937]**

[54] Indeed, the Respondents' witness, Mr Anietie, states that DEPs "*are designed to define guidance and minimum requirements for the design, construction and operations of oil gas facilities for the Shell Group*" (witness statement of Jeremiah Anietie at §25 **[Appendix 2D/45/1404]**).

multiple-pipe slug catchers"; (i) "*Design of pipeline pig trap systems*"; (j) "*Control valves – Selection, sizing and specification*"; (k) "*Alarm management*"; (l) "*Selection of materials for life cycle performance (upstream equipment) – materials selection and corrosion management*"; (m) "*Welding of pipelines and related facilities*"; (n) "*Hazard and operability (HAZOP) study*"; (o) "*Overpressure and underpressure – Prevention and production*"; (p) "*Emergency depressuring and sectionalizing*".[55]

Security of pipelines and installations

79. The HSSE Control Framework demonstrates that the centralised "*Corporate Affairs Security*" department at RDS's headquarters in The Hague is a significant repository of expertise and control over subsidiaries' security standards, including the design and safeguarding of pipelines and pipeline infrastructure. For example, the "*Security Manual*" sets out various requirements which the relevant "*Country Chair*" must comply with. These requirements include (a) *"Develop security plans with the support of Corporate Security"*; (b) *"Review and approve the country Security Threat Level developed by Corporate Security"*; and (c) "*Execute the country security Risk management plan in line with the country Security Threat Level."*[56]

80. The HSSE Control Framework also explains that the VP Corporate Security (the head of Corporate Security in the Hague) must "*Establish and maintain protocols for the use of force, security management, threat identification and security Risk Assessment and Mitigation*" and also "*Conduct and keep current the Country Security Threat Assessments (CSTAs) and country Security Threat Level*".[57] None of these "*protocols*" have been disclosed by the Respondents.

81. Accordingly, it can be seen that the centralised corporate affairs security department plays a critical role in both (a) developing country-specific security plans and in assessing the level and nature of the risks which those plans must be tailored to address; and (b) advising on the appropriate use of particular security responses in particular operational contexts.

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[55] HSSE Control Framework, pp. 109-114 **[Appendix 2H/91/2931-2936]**. An additional list of DEPs (running to a total of 50 pages) is at **[Appendix 2F/70/2007-2058]**. Many of the DEPs listed there are clearly relevant to this claim.

[56] HSSE Control Framework, p.158 **[Appendix 2H/91/2980]**

[57] *Ibid*

Emergency oil spill response

82. According to the HSSE Control Framework, the Vice-President HSE Technology (who acts with organisational authority delegated by RDS) is accountable for establishing and maintaining "*the training frequency and content for Incident management teams that support the Company's regional and Company- wide Emergency Response efforts, such as the Global Support Network (GRSN)*".[58] They must also "*Have the Oil Spill Expertise Centre (OSEC) (for plans involving spills to water) or the Centre of Expertise for Emergency Response (CEER) approve alternative Emergency Response Plans to mitigate Hazards at Businesses that are unable to meet*" particular specified requirements. Further, the "*Business Leader*" (acting with delegated organisational authority) must "*Establish, maintain and exercise spill response plans*".[59] The Business Leader is also accountable for "*establish[ing] and maintain[ing] country, regional or global Emergency Response Plans and Emergency Response centres (including back-up centres) required to meet Business needs*".[60]

83. The HSSE Control Framework also demonstrates how closely senior RDS officials monitor oil spills. For example, in the event of high risk incidents, including in the event of an oil spill over 1,000 litres (6 barrels) in a sensitive area,[61] the relevant member of the RDS ExCo member and the EVP for Safety and Environment ("**EVP SE**") must be notified within 24 hours.[62] The EVP SE sits within the P&T department and is the "*Group functional head of Safety and Environment, with direct access to the CEO*."[63]

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58 *Ibid,* p.39 **[Appendix 2H/91/2861]**

59 *Ibid,* p.51 **[Appendix 2H/91/2873]**

60 *Ibid,* p.38 **[Appendix 2H/91/2860]**

61 As established in the HSE Manual, '*Overview Hazards and Effects Management Process*' (referred to in the Appellants' Skeleton Argument on Appeal at §34(3) **[Appendix 2A/3/56])**

62 HSSE Control Framework, p.59 **[Appendix 2H/91/2881]**

63 Update on Structural Changes **[Appendix 2E/52/1554]**. Additionally, for significant incidents, "*Investigation Reports*" must be sent to the Head of the Business and the EVP SE within one month of the incident. The Business Head then "*must* conduct *the [Significant Incident Review] Meeting within 3 months of the incident.*" The Business Head then "*must conduct the [Significant Incident Review] Meeting within 3 months of the incident.*" Incidents must also be logged in the "*Fountain Incident Management*"[63] which is "*an ICT system that is used for the management of environmental data within Shell.*" (see HSSE Control Framework **[Appendix 2H/91/2879-2881]**).

Specific manual on "Implement[ation]" of mandatory requirements

84. RDS's HSSE Control Framework includes an entire manual entitled *"Implement"* whose purpose is *"to implement the Shell HSSE & SP Control Framework requirements".* Under the manual, staff are assigned responsibilities for (a) assessing gaps between current practices and HSSE Control Framework requirements and implementing requirements as soon as practicable, (b) logging instances where compliance cannot be achieved, (c) establishing controls to verify compliance with HSSE Control Framework requirements, and (d) intervening where non-compliance is observed.[64]

Centralised control and imposition of mandatory standards on joint ventures

85. The HSSE Control Framework requires mandatory standards to be imposed on RDS's wholly-owned subsidiaries such as SPDC and joint ventures to which subsidiaries are party. It contains a specific manual concerning "*Joint Venture HSSE & SP Management*". [65] This lays down prescriptive requirements which apply to "*Shell Operated Ventures (SOVs)*" such as the SPDC joint venture in Nigeria. This includes an express requirement to "*apply Shell's policies and standards comprising [a] The Shell Commitment and Policy on HSSE & SP and Shell Group Standards for HSSE & SP' and [b]"The Shell HSSE & SP Control Framework manuals and specifications*". The HSSE Control Framework states that, "*The Shell Shareholder Representative is Accountable for*" those requirements. [66] The "*Shareholder Representative*" is "*An internal Shell organisational appointment by the relevant Business or Function to govern Shell's investment in the Joint Venture <u>on behalf of the ultimate Shell shareholder, Royal Dutch Shell</u>*".[67]

Monitoring, auditing and enforcing compliance with mandatory requirements

86. RDS does not simply monitor and audit its subsidiaries but delegates responsibility for ensuring that any audit recommendations are implemented and identified problems are resolved. As the HSSE Control Framework sets out:

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64 HSSE Control Framework, p.55 **[Appendix 2H/91/2877]**

65 *Ibid,* pp. 29-32 **[Appendix 2H/91/2851-2854]**

66 *Ibid,* pp. 30-31 **[Appendix 2H/91/2852-2853]**

67 HSSE Control Framework Glossary **[Appendix 2H/92/3085]**

(1) Business Heads (including the Head of Upstream within which SPDC sits) are accountable for *"establish[ing] a governance structure for HSSE & SP in the Group to show who is responsible for: monitoring HSSE & SP performance; leading HSSE & SP continuous improvement plans; managing the HSSE & SP skillpool; and approving the Shell HSSE & SP Control Framework."*[68]

(2) Business Leaders are required to *"take corrective actions where HSSE Controls*[69] *are not working effectively"*[70], lead and take part in HSSE & SP activities to *"demonstrate visible and felt HSSE&SP leadership"*, *"lead by example by intervening during day-today operations"* and *"hold individuals accountable for their HSSE & SP behaviours and performance."* [71]

(3) The Vice President for HSSE&SP must "*monitor the follow-up of actions from Group Independent HSSE&SP Audits, Business level HSSE&SP Audits and HSSE&SP Self-Assessments <u>until they are implemented and closed out</u>.*"[72]

(2) DOCUMENTS PUBLISHED BY RDS

87. RDS has published various corporate documents which demonstrate that the RDS Board, RDS ExCo, RDS CSRC and RDS CEO exert a high degree of control and oversight over RDS's subsidiaries, including in relation to subsidiaries' compliance with health, security, safety and environmental standards. Extracts from some of those documents are set out at paragraphs 67 – 74 of the Bille Particulars of Claim[73] and paragraphs 89 – 93 of the Ogale Particulars of Claim[74], which the Court is respectfully requested to read in full. This evidence supports the Appellants' case under each of *Vedanta Routes 1 - 4*.

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68 HSSE Control Framework, p.33 **[Appendix 2H/91/2855]**

69 The expression "Controls" is defined in the Glossary to the HSSE Control Framework as *"in the context of Managing Risk a type of Barrier that is a means of preventing an incident"* **[Appendix 2H/92/3052]**

70 *Ibid*, p.5-6 **[Appendix 2H/91/2827-8]**

71 HSSE Control Framework, pp. 5-6 **[Appendix 2H/91/2827-8]**

72 *Ibid*, p. 84 **[Appendix 2H/91/2906]** (emphasis added)

73 **[Appendix 2A/13/365-388]**

74 **[Appendix 2A/11/232-247]**

(i) <u>Published statements describing and reflecting RDS's control over subsidiaries' operations and HSSE performance</u>

88. According to RDS's published corporate literature:

(1) **RDS's CEO and RDS ExCo have overall responsibility for HSSE performance** – The "*overall accountability for sustainability within Shell lies with the Chief Executive Officer (CEO) and the Executive Committee*". They are assisted by "*the Health, Safety, Security, Environment and Social Performance (HSSE &SP) Executive team, chaired by our CEO, which <u>shapes, drives and assesses how we manage our performance in these areas</u>.*"[75] Additionally, RDS's 2009 Sustainability Report explains that the HSSE & SP Executive is supported by HSSE & SP global teams and specialists who are responsible for "*implementing policies and standards, and improving sustainability performance*." [76]

(2) **RDS ExCo remuneration is dependent upon sustainability performance of RDS's subsidiaries in Nigeria** – RDS's Sustainability and Annual Reports indicate that the remuneration of members of the RDS ExCo depends in part upon the sustainability performance of RDS's subsidiaries in Nigeria, and is expressly linked to the volume of operational oil spills. [77] As Sales LJ correctly observed, since "*part of the remuneration of members of ExCo was linked to their success in controlling environmental damage*" it "*is arguable that they would have been personally interested in ensuring that they could exert effective executive control in managing that risk*" (CoA §162). Indeed, these renumeration conditions would not have been put in place or accepted by RDS's directors if they were unable to influence sustainability performance and operational spills in Nigeria.

89. RDS has made multiple public representations concerning the high degree of direction and control it exercises over its subsidiaries' operations' compliance with minimum health, safety and environmental standards. To give two illustrative examples:

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75 Extract from RDS Sustainability Report 2014, p.11 **[Appendix 2E/61/1621]**

76 Extract from RDS Sustainability Report 2009, p.6 **[Appendix 2E/60/1607]**

77 See, for example, the RDS Annual Report 2015, p.93 **[Appendix 2E/63/1767]**

(1) RDS has published a "*Commitment and Policy on Health, Security, Safety, the Environment and Social Performance*" which proclaims that: "*The Shell Commitment and Policy on Health, Security, Safety, the Environment and Social Performance applies across Shell and is designed to help protect people and the environment... Our commitment and policy reflects the integrated way we work across Shell in the areas of health, security, safety, the environment (HSSE) and social performance (SP). All Shell companies, contractors and joint ventures under our operational control must manage HSSE and SP in line with the commitment and policy*". [78]

(2) RDS's website contains a "*Governance, controls and assurance*" section which states that RDS "*expect[s] every Shell company to follow our environmental and social standards and practices when operating. We define who is responsible for applying these standards and we monitor performance… The Shell General Business Principles, Code of Conduct and our Commitment and Policy on Health, Safety, Security and Environment (HSSE) and Social Policy (SP) apply to all Shell companies and joint ventures we control. We also have a set of more detailed mandatory standards and manuals covering social and environmental topics, with requirements that apply to all Shell companies*".[79]

(ii) Published statements regarding RDS's promulgation, supervision and enforcement of mandatory environmental standards and manuals

90. As noted in the Particulars of Claim, RDS has published materials which explain that it has produced "*a set of mandatory standards and corresponding manual that apply to every Shell company*" which are intended "*to manage the impact of our operations on the environment and society*".[80] The RDS Sustainability Report 2014 likewise explains that "*everyone must comply*" with mandatory standards which "*describe what is*

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[78] See §89(d) of the Ogale Particulars of Claim **[Appendix 2A/11/233]** and §67(c) of the Bille Particulars of Claim **[Appendix 2A/13/366]**

[79] See §89(b) of the Ogale Particulars of Claim **[Appendix 2A/11/232-233]** and §67(b) of the Bille Particulars of Claim **[Appendix 2A/13/365-366]**

[80] See the Ogale Particulars of Claim at §89(a)-(b) **[Appendix 2A/11/232-233]** and the Bille Particulars of Claim at §67(a)-(b) **[Appendix 2A/13/365-366]**

required to maintain the safety of facilities that we operate, throughout their life cycle from design, construction and operation to decommissioning".[81]

91. RDS's website explains that the Chief Executive of RDS is responsible for ensuring that subsidiaries comply with RDS's mandatory business principles and standards, and that he is assisted in this by a dedicated "*Shell Internal Audit*" team:

> "***Assurance - monitoring compliance***
>
> *The heads of our businesses and functions report to the Chief Executive at the end of each year on how they have applied our Business Principles and standards.*
>
> *If they have not met requirements they must explain what they are doing to achieve this.*
>
> *A single overall control framework for Shell and its subsidiaries is designed to manage the risk of failure to achieve business objectives and fulfill Shell's external obligations and commitments. Shell Internal Audit delivers audits and investigations to provide independent assurance on the control framework, as well as the design and operation of the risk management system and internal controls. Ethical and legal incidents are reported to the Executive Committee and to the Audit Committee. We regularly audit the HSSE management systems at our facilities. Our process safety specialists do dedicated safety audits."* [82]

92. RDS has also published materials which describe and emphasise the RDS CSRC's broad remit to monitor and oversee compliance with mandatory standards and requirements set by RDS. For example:

    (1) **Terms of reference of the RDS CSRC** – The published terms of reference for the RDS CSRC state that its functions include (a) "*review[ing] the standards, policies and conduct of the Company relating to HSSE&SP and to the safe condition and environmentally responsible operation of the Company's facilities and assets*"; (b) "*monitor[ing] the effectiveness of the HSSE&SP risk based internal control system and hav[ing] access to any audit, incident and investigation report it considers relevant*"; and (c) "*review[ing] and assess[ing] management's response to audit findings and recommendations*".[83]

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81 RDS Sustainability Report 2014, p.13 **[Appendix 2E/61/1623]**

82 See Ogale Particulars of Claim, §89(g) **[Appendix 2A/11/235]** and Bille Particulars of Claim, §67(f) **[Appendix 2A/13/367-368]**

83 **[Appendix 2E/53/1562]**

(2) **Compliance reviews/audits by the RDS CSRC** – RDS's 2009 Sustainability Report explains that the RDS CSRC "*assesses our policies and performance with respect to our Business Principles, Code of Conduct, HSSE & SP standards and major issues of concern on behalf of the Board of Royal Dutch Shell*".[84] According to RDS's 2014 Sustainability Report, the CSRC conducts "*regular in-depth reviews of key parts of our business*", including carrying out site visits, to "*help assess whether we are putting our standards into practice*". The CSCR is said to play a "*crucial role in governance by reviewing sustainability performance*".[85]

(3) **Compliance audits conducted by HSSE & SP Assurance team** – According to RDS's 2014 Sustainability Report, there is a dedicated HSSE & SP Assurance team which has "*a mandate from the CSRC*" and which "*provides independent assurance on the effectiveness of the Group's HSSE & SP controls. This includes testing the compliance with the HSSE & SP Control Framework…and develop[ing] and execut[ing] an assurance programme of compliance audits that covers a variety of risks identified at assets and projects.*"[86]

(iii) <u>Published statements regarding RDS's control over subsidiaries' emergency oil spill response</u>

93. RDS's own published documents emphasise the extensive steps it claims to take to prevent, mitigate and remediate oil spills caused by its subsidiaries' operations. For example:

(1) An RDS publication entitled "*Oil Spill Emergency Response*" states that "*All Shell companies, contractors and joint ventures under our control must manage HSSE and SP in line with*" the RDS "*Commitment and Policy on HSSE & SP*". It goes on to say that: "*To help our staff and contractors to put the Commitment and Policy into practice we launched the Shell HSSE & SP Control Framework in 2009. It is a single, mandatory source for rules covering areas such as emergency response.*" It further explains that RDS has established "*a multi-business oil and chemical spill advisory group (MOSAG) that is responsible for developing and promoting advice on the mitigation and control of pollution risk. The group provides advice and guidance to*

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84 Extract from RDS Sustainability Report 2009, p.6 **[Appendix 2E/60/1607]**

85 RDS Sustainability Report 2014, p.11 **[Appendix 2E/61/1621]**

86 *Ibid.*

Shell companies based on international conventions." Further, "*operating units*" are required to "*organis[e] and execut[e] spill response in line with MOSAG guidelines*" and "*Standalone audit and assurance programmes are in place to monitor compliance with Shell requirements*".[87]

(2) The Oil Spill Emergency Response publication states that RDS "*work[s] to prevent incidents that may result in spills of hazardous substances. This means making sure our facilities are well designed, safely operated, and properly inspected and maintained. It also involves an effective oil spill emergency response capability. We plan, prepare and practice our emergency response to incidents to mitigate the consequences to people and the environment.*" [88] Further, "*Our ability to manage oil spills has been enhanced by our global response network that can attend to an oil spill anywhere in the world. We also have a global centre that tests our oil spill response capabilities.*" [89]

(3) RDS's 2015 Annual Report states that, "*Our global standards and operating procedures define the controls and physical barriers we require to prevent incidents… We regularly inspect, test and maintain these barriers to ensure they meet our standards. We also routinely prepare and practise our emergency response to potential incidents such as an oil spill or a fire… In the event of a loss of containment such as a spill or a leak, we employ independent recovery measures to prevent the release from becoming catastrophic.*"[90]

(4) RDS's website states: "*We have built an industry-leading capability in preventing spills and in our readiness to respond to any that occur. We regularly test our plans and preparedness, and take part in large-scale joint exercises with other industry partners, government agencies, scientists and oil spill experts. We are constantly prepared to mobilise people and equipment around the world and we continuously fund and conduct research and development in the areas of oil spill response.*" [91]

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87 Oil Spill Emergency Response **[Appendix 2F/69/2000-2001]**

88 *Ibid.* **[Appendix 2F/69/1999]**

89 RDS Sustainability Report 2014, p.13 **[Appendix 2E/61/1623]**

90 RDS Annual Report 2015, p.53 **[Appendix 2E/63/1727]**

91 See Ogale Particulars of Claim, §93(f) **[Appendix 2A/11/246-247]** and Bille Particulars of Claim, §74(g) **[Appendix 2A/13/388]**

(iv) Published materials showing SPDC's environmental performance and failings receive a uniquely high level of attention from RDS

94. RDS's published materials show that SPDC is the subject of uniquely high parent company attention within the Shell Group. For example:

    (1) Nigeria is the only country for which country-specific environmental or social data is provided under any metric in RDS's annual Sustainability Reports. The environmental data published in those reports distinguishes between environmental data concerning oil spills and flaring incidents in "*Nigeria*" and the "*Rest of World*".[92] The data shows that in recent years the volume of oil spilled from SPDC's infrastructure in Nigeria has been up to eight times the volume spilled by all other Shell Group operating companies combined.

    (2) In the section of the RDS 2015 Annual Report dealing with oil spills, Nigeria is the only country that is discussed.[93] Further, while the Shell Group has operating and service companies in more than 100 countries, Nigeria is the only country which in 2015 was both (a) the subject of specific review and discussions by the RDS CSRC; and (b) the subject of specific "*reports and presentations*" to the RDS Board.[94]

95. The Court of Appeal expressly accepted that documents such as this showed that SPDC "*was…special because it had particular problems and was particularly important from an economic perspective*" (CoA §195, per the Chancellor); that "*there were concerns about the security of SPDC's operations in Nigeria and that this concern was expressed at a high level*" (CoA §125, per Simon LJ); and that, "*losses due to oil spillage in Nigeria were singled out*" and "*equated to major revenue losses for the Shell group and major reputational damage*" meaning that RDS "*had a particularly strong interest in ensuring that the management of the pipeline and facilities was conducted effectively…and thus was strongly motivated to be proactive in assuming control of the operational decisions about how to manage the risk of oil loss and spillage from them*" (CoA §162, per Sales LJ).

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92 RDS Sustainability Report 2014, p.52 **[Appendix 2E/61/1662]**

93 RDS Annual Report 2015, p.56 **[Appendix 2E/63/1730]**

94 *Ibid,* pp.71-72 **[Appendix 2E/63/1745-1746]**

(3) EVIDENCE FROM FORMER SPDC AND SHELL GROUP EMPLOYEES

96. The Appellants adduced witness statements from three former senior Shell employees with a combined total of 50 years' employment in the Shell Group. The Court may recall that, by contrast, in *Vedanta* the Claimants were only able to rely on a single witness statement of a "*middle manager*" in the Zambian subsidiary, Mr Kakengela, as to his impression of the role of the parent company. The evidence of the three former employees provides detailed, first-hand support for the existence of a duty of care under *Vedanta Routes 1, 2 & 3*.

Rebecca Sedgwick (former SPDC employee)

97. Ms Sedgwick is a former employee of SPDC. Between 2006 and 2012 she worked in Nigeria as a member of SPDC's security department, including as SPDC's Security Control Centre Lead.[95] She therefore has extensive first-hand knowledge of SPDC's systems and operations, including in particular the high degree of oversight, guidance and control exercised over SPDC by RDS, and RDS's promulgation and enforcement of detailed guidelines and policies relating to pipeline security.

98. In relation to *Vedanta Route 1* (control of SPDC's management) Ms Sedgwick's evidence explains:

    (1) **RDS tightly controls SPDC, which has limited autonomy** – Ms Sedgwick explains that, "*SPDC is a lucrative … but extremely sensitive part of RDS' business and, as a result, RDS adopts a centralised and controlled approach to SPDC.*" In particular, "*Although SPDC is structured as a separate company with its own Managing Director, in reality SPDC has limited autonomy and key decisions on sensitive issues such as HSSE are in fact taken by senior management external to SPDC.*" In this regard, "*The SPDC Managing Director's position is effectively a puppet role; all key HSSE decisions regarding SPDC are made by the Head of Upstream International*" (who is a member of the RDS ExCo). In short, SPDC "*is subject to detailed control and direction from the very top*".[96]

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95 Ms Sedgwick's husband also worked as an engineer for SPDC between 2013 and 2016 (see her witness statement at §2) **[Appendix 2C/41/1228]**

96 Witness statement of Rebecca Sedgwick, §12 **[Appendix 2C/41/1230-1231]**

(2) **RDS exerts direct control over SPDC's operational security** – All "*security at the Shell Group was organised via a centralised security department known as 'Corporate Security' that was run out of RDS's headquarters at The Hague. This department had oversight and control of security matters in SPDC*" and "*reported directly to the RDS CEO and Executive Committee*".[97] In this regard, "*senior Shell management in RDS's headquarters watched SPDC's security department like hawks*".[98] Decisions whether to evacuate SPDC staff and to shut down SPDC's pipelines were taken by the Executive Vice-President for Sub-Saharan Africa (who reported directly to a member of the RDS ExCo) in conjunction with a member of the RDS ExCo.[99] Similarly, "*All key appointments within SPDC's security department had to be approved by RDS's centralised security department in The Hague, including the head of SPDC's security department*".[100]

(3) **RDS established a Security Information Network Centre ("SINC") to monitor, manage and control security risks involving SPDC** – The SINC was established "*by RDS's Corporate Security department in The Hague in response to the deteriorating security situation in Nigeria…Any threat or perceived threat to SPDC's staff or infrastructure was recorded at SINC. This information was then channelled back to The Hague and SPDC via reports from my team at SINC.*"[101] Ms Sedgwick was the SINC Operations Lead and "*personally prepare[d] a weekly security assessment*" which was sent to "*RDS's CEO at the time and senior managers…based at RDS's headquarters*" (including a member of the RDS ExCo).[102] Reports were made to RDS' headquarters "*on a daily, if not an hourly, basis on security issues affecting SPDC.*"[103] In the event of a major security incident, Ms Sedgwick prepared an "*early warning report*" which would be sent to a member of the RDS ExCo and, in certain circumstances, "*directly to RDS's CEO*".[104]

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97 *Ibid*, §14 **[Appendix 2C/41/1231]**
98 *Ibid*, §21 **[Appendix 2C/41/1233]**
99 *Ibid*, §11 **[Appendix 2C/41/1230]**
100 *Ibid*, §16 **[Appendix 2C/41/1231]**
101 *Ibid*, §17 **[Appendix 2C/41/1232]**
102 *Ibid*, §21 **[Appendix 2C/41/1233]**
103 *Ibid*, §27 **[Appendix 2C/41/1235]**
104 *Ibid*, §21 **[Appendix 2C/41/1233]**

(4) **RDS exercised tight control/veto rights over SPDC's expenditure on oil spill prevention and remediation measures** – RDS made it clear to SPDC that "*the RDS Board would not sanction significant expenditure*" on oil spill remediation unless the other joint venture partners first paid their share of the clean-up costs. As a result, "*communities which have been dramatically polluted by SPDC oil have had to wait for clean-up for many years, sometimes decades, due to RDS' unwillingness to pay for the clean-up costs*". Similarly, when SPDC's engineers wanted to take certain engineering measures to prevent oil theft from pipelines, "*SPDC was unable to implement their proposals without guidance and budgetary approval from senior management at RDS*".[105]

99. In relation to *Vedanta Routes 2 and 3* (promulgation and enforcement of mandatory policies and guidelines) Ms Sedgwick's evidence explains:

(1) **RDS promulgated mandatory security standards and policies for SPDC** – SPDC was "*required to adhere to the specific standards and practices that had been put in place by the Corporate Security Department*" in the Hague. This included the mandatory use of "*specific Shell global templates to prepare our reports and risk assessments*".[106] In addition, there were "*specific Shell Group standards which prescribed how security inspections should be carried out at SPDC's pipelines and infrastructure and how frequently*".[107] The "*guidance on security issues was detailed and specific and could only be departed from with permission from management external to SPDC…The same principle applied in relation to guidance on environmental issues, oil spill response and clean-up and pipeline integrity*". Similarly, "*The detailed Group standards, policies and procedures could only be deviated from with approval from management external to SPDC*".[108]

(2) **RDS's closely monitored and enforced SPDC's compliance with mandatory standards and policies** – SPDC's "*compliance*" with mandatory standards was "*closely monitored by The Hague [where RDS's headquarters are located] through a system of regular and detailed audits*" including audits of "*security, HSSE, pipelines and production*". If any points of concern were identified during the audits,

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105 *Ibid*, §§45, 47, 50 **[Appendix 2C/41/1240-1242]**

106 *Ibid*, §33 **[Appendix 2C/41/1237]**

107 *Ibid*, §34 **[Appendix 2C/41/1237]**

108 *Ibid*, §51 **[Appendix 2C/41/1242]**

"*SPDC would be required to prepare follow up reports to Corporate Security to demonstrate that these issues had been resolved*". Similarly, if a serious security incident occurred, senior management from the Corporate Security department in The Hague would travel to Nigeria "*to assess the situation and to propose follow up measures*".[109]

100. On the basis of her first-hand experience of SPDC's relationship with RDS, Ms Sedgwick is clear that, "*the key decisions which have caused such appalling environmental difficulties in the Niger Delta have been made in The Hague and London by RDS, not by SPDC in Port Harcourt*".[110] Ms Sedgwick also states that she has "*spoken to other former employees of SPDC who have indicated that they may also be willing to give evidence against Shell should this case proceed to trial*".[111] Sales LJ correctly stated that Ms Sedgwick's "*credible*" evidence "*provides a material degree of support*" for the Appellants' case (CoA §167).[112]

Gene Sticco (former employee at RDS's headquarters)

101. Mr Sticco held a management role in corporate affairs at RDS's head office in The Hague for six years between 2003 and 2009. He provided a witness statement which contains first-hand evidence of the extent of RDS's control over SPDC and RDS's creation and enforcement of mandatory group-wide policies, standards and guidelines which SPDC was required to comply with.

102. In relation to *Vedanta Route 1*:

(1) **RDS ExCo's intervention in SPDC's operations** – Mr Sticco describes how there was "*interaction and consultation between SPDC and the Hague, leading all the way to the Executive Committee, in particular when it came to significant issues in Nigeria, such as HSE, security, government affairs and ensuring that SPDC*

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109 *Ibid*, §§35-36 **[Appendix 2C/41/1237-1238]**

110 *Ibid*, §51 **[Appendix 2C/41/1243]**

111 *Ibid*, §7 **[Appendix 2C/41/1229]**

112 The Chancellor also stated that there was "*no reason to think that what she says is not reasonably credible*". However he erroneously dismissed its relevance on the basis that it "*is not supported by the documentary evidence*" (which in fact it was) and on the basis that one of SPDC's witnesses had stated (in a contested and untested witness statement) that Ms Sedgwick was a "*relatively junior employee*" who was "*removed from decision-making processes*" at SPDC (CoA §§177, 202).

retained its licence to operate. These issues in Nigeria were all firmly on the agenda of the E&P Executive Committee member."[113]

(2) **Direct control and special treatment of SPDC by RDS** – The RDS ExCo regarded Nigeria as one of the two "*highest risk countries in the Group*". As a result, "*these countries were seen as a priority for the corporate affairs department. For example, I know that intelligence about the security situation in Nigeria was regularly provided to senior executives in the Shell Group, including those on RDS's Executive Committee*".[114] The Regional Manager of the Sub-Saharan Africa region "*had a particular focus on SPDC's operations, and unusually had a direct line to Malcolm Brinded, the Executive Committee member for E&P. This was unique as far as any Regional Manager went, in that the Sub-Saharan Africa Regional Manager had a direct relationship and regular contact with a member of the Executive Committee. This Regional Manager was based in Nigeria, but came back regularly to the Hague, and also travelled to London quite often. The special treatment granted to this Regional Manager was because SPDC was seen as a particularly risky country and so attracted particular attention from Malcolm Brinded*". In addition, the Regional Manager could go "*directly to the head of SPDC and tell him what the Executive Committee wanted to see happen*".[115]

103. In relation to *Vedanta Routes 2 and 3*:

(1) **RDS's promulgation of mandatory standards which bind SPDC** – Mr Sticco explains that in around 2005 "*the Executive Committee determined that the Group was going to conduct business based on uniform standards throughout the whole Group. The Executive Committee directed that these standards be created and then signed off on them.*" Those "*uniform standards and guidelines*" were "*cascaded down from the Executive Committee*" and "*all of the companies within the Shell Group were obliged to adopt*" them. In particular, since SPDC's joint venture is one "*over which the Shell Group has operational control*" it follows that "*the Group's global standards and systems apply automatically to it*".[116]

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113 Witness Statement of Gene Sticco, §27 **[Appendix 2C/38/1204]**

114 *Ibid*, §23 **[Appendix 2C/38/1204]**

115 *Ibid*, §18 **[Appendix 2C/38/1202]**

116 *Ibid*, §§8-9 **[Appendix 2C/38/1199-1200]**

(2) **RDS's promulgation of detailed manuals containing mandatory requirements which bind SPDC** – Mr Sticco explains that the mandatory standards promulgated by RDS were accompanied by "*a detailed manual about how to implement each set of standards*". This included "*manuals about how to implement the uniform standards for HSE and security*". These manuals were "*detailed and comprehensive*". As a result, "*all of the operating companies across the Shell Group knew exactly what was expected of them and how to go about achieving this*". In addition to those standards and requirements, "*Practical guidance was also provided*" to operating companies. [117]

(3) **RDS's systems to ensure implementation of mandatory standards by subsidiaries such as SPDC** – Mr Sticco describes how RDS both "*set standards for the whole group*" and "*ensured that there were the structures and personnel in place to implement these standards*". [118] From 2005 onwards the corporate affairs team was "*proactive in ensuring that global standards were properly implemented*".[119] Mr Sticco was "*directly involved*" in "*the introduction of mandatory universal standards*" and "*devis[ing] a system to ensure the standards were effectively implemented*".[120] Operating companies such as SPDC were "*required to report on the implementation of the new systems and standards*".[121] In addition, "*RDS also received regular feedback, including through the audit process and the various lines of reporting to Executive Committee members, as to whether the Group's global standards were being implemented, and acted to deal with any shortcomings or non-compliance.*"[122]

(4) **Provision of training on mandatory standards** – The "*Shell Open University*" is "*a dedicated training organisation for Shell Group staff" in* the Netherlands. It provides "*training*" on the mandatory standards "*for people across the Shell Group, including for those people who were due to become HSE Managers across the operating companies*". In addition, there was "*specific training in the new Shell*

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117 *Ibid*, §10 **[Appendix 2C/38/1200]**
118 *Ibid*, §28 **[Appendix 2C/38/1205]**
119 *Ibid*, §11 **[Appendix 2C/38/1200]**
120 *Ibid*, §12 **[Appendix 2C/38/1201]**
121 *Ibid*, §20 **[Appendix 2C/38/1203]**
122 *Ibid*, §28 **[Appendix 2C/38/1205]**

global standards for all of the Regional Managers (in HSE, Security or the other specialist areas that had a Regional Manager) at a large meeting at the Hague".[123]

104. Sales LJ correctly observed that Mr Sticco was "*well placed to observe how RDS (acting in particular by ExCo) became involved with and in practice sought to control to a material degree the management of the pipeline and its security*" and that the RDS Control Framework (which did not emerge until after Mr Sticco had provided his witness statement) "*tends to corroborate Mr Sticco's general account of management structures in the group*" (CoA §154). Sales LJ added that Mr Sticco's evidence "*support[s] a case that there was a pattern of distribution of expertise and control in relation to the handling of the risk of oil spills in the Niger Delta which is arguably capable of meeting the criteria for imposition of a duty of care*" (CoA §165).

Paddy Briggs (former Shell Group employee)

105. Paddy Briggs worked for the Shell Group for 38 years. He held a range of senior strategic, commercial and communications roles, worked in over 60 countries on behalf of the Group and served as a trustee director of the £13.5bn Shell Pension Fund between 2010 and 2014. Mr Briggs provided a witness statement which demonstrates that the Shell Group has a highly centralised management and oversight structure which is designed to maximise parent company control and supervision over subsidiaries such as SPDC. For example:

    (1) **High level of control exercised over Shell Group subsidiaries by the predecessor to the RDS ExCo** – The Committee of Managing Directors ("**CMD**") is the immediate predecessor to the RDS ExCo. Mr Briggs explains how the CMD had "*ultimate executive responsibility*" and "*took a particular interest*" in "*issues such as HSE and reputation management*".[124] Moreover, towards the end of his time working for the Group "*there was more tightening and undoubtedly more centralisation*" and the power of operating companies "*was deliberately reduced as part of the centralisation policy*". In particular, "*The technical,*

123 *Ibid*, §§14-15 **[Appendix 2C/38/1201]**

124 Witness statement of Paddy Briggs, §7 **[Appendix 2C/37/1185]**

commercial and environmental direction for E&P [exploration and production] comes from the Hague office".[125]

(2) **Parent company's particularly tight supervision and control of SPDC's operations** – Mr Briggs explained that, "*anything significant in SPDC's operation would be put to the CMD [Committee of Managing Directors]*" which had "*almost untrammelled power*".[126] In this regard, "*Nigeria was seen as a hot potato.... Not only is there the financial scale of the Nigerian operation, it is also a delicate political and environmental operation and there is the huge reputational risk and significance of Nigeria... The financial, political, and reputational significance of Nigeria means that it could be in the top one or two concerns of the CMD amongst all of Shell's global activities.*"[127] Accordingly, RDS's head office in The Hague will "*closely monitor [the] performance*" of SPDC in respect of HSSE matters and "*will require that all significant HSSE incidents are promptly and completely reported*". Accordingly, "*even comparatively minor events (a small to medium oil spillage for example) will be immediately reported so that the best remedial action, based on Shell's global experience, can be taken*".[128] In particular, it is "*beyond dispute…that such matters as HSSE policy and even the way the application of this policy works out in practice would have the active involvement of Shell leaders in The Hague at the highest level*".[129]

(4) EVIDENCE OF PROFESSOR JORDAN SIEGEL

106. Professor Siegel produced an expert report in litigation in the United States involving RDS's immediate predecessors as SPDC's parent companies.[130] That report contains a detailed analysis of the relationship between SPDC and its parent companies following a thorough review of depositions given by Shell Group employees and an analysis of "*thousands of pages of internal documents that document*

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125 *Ibid*, §§22, 24 **[Appendix 2C/37/1189, 1190]**

126 *Ibid*, §§29, 31.1.2 **[Appendix 2C/37/1191, 1192]**

127 *Ibid*, §§28, 29 **[Appendix 2C/37/1191]**

128 *Ibid*, §32.1.3 **[Appendix 2C/37/1193-1194]**

129 *Ibid*, §32.1.5 **[Appendix 2C/37/1195]**

130 Prior to 2005, the Shell Group had two parent companies (one English and one Dutch) which were "unified" in 2005 to create one single parent company, RDS."

the management relationships among these Royal Dutch/Shell entities".[131] According to Prof. Siegel, that material demonstrated that:

> *"The Royal Dutch/Shell Group of Companies tightly controls its Nigerian subsidiary, SPDC. This control comes in the form of monitoring and approving business plans, allocating investment resources, choosing the management, and overseeing how the subsidiary responds to major public affairs issues."* [132]

107. Prof. Siegel further explained that the internal documents he had seen established that, "*SPDC, clearly acts in the interest of the parent company and does not act on its own*" and that this "*differentiates Royal Dutch/Shell from numerous multinationals around the world where the local manager effectively runs an autonomous business*".[133] Indeed, "*in contrast to many oil companies around the world*", the Shell Group is "*highly vertically integrated*". In particular, he explained that, "*Royal Dutch/Shell is clearly in control of SPDC*" because it is "*shown through internal documents to hold and exercise decisive influence on the strategic and organizational choices that the subsidiary makes*".[134]

108. The "*managers of…SPDC, clearly appear to accept that they are hired to work on behalf of the Royal Dutch/Shell Group of Companies*". In particular, through a combination of "*its organizational structure, resource allocation process, and other managerial oversight, the Royal Dutch/Shell Group of Companies exercises a very high degree of control over the important subsidiary SPDC*" and applies "*an unusually stringent regime of control*". Accordingly, it was clear that, "*SPDC is unambiguously an agent of the principals at the Committee of Managing Directors and parent companies that sit at the top of the Royal Dutch/Shell Group of Companies*".[135]

109. Prof. Siegel provided a witness statement in these proceedings containing a detailed explanation of the evidential basis for those observations. He summarised various corporate documents that post-dated his 2008 report and explained that, "*there has been no material change in the senior management of the Shell Group's ability to tightly control SPDC*" since that report.[136] He confirmed that the role of the RDS ExCo is

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131 Wiwa Plaintiffs' Expert Report of Professor Jordan I. Siegel, §11 **[Appendix 2F/73/2070]**

132 *Ibid,* §11(1) **[Appendix 2F/73/2070]** (emphasis added)

133 *Ibid,* §11(2) **[Appendix 2F/73/2070-2071]**

134 *Ibid,* §§ 16, 23 **[Appendix 2F/73/2073, 2075]**

135 *Ibid,* §11, 34 **[Appendix 2F/73/2071, 2088]**

136 Witness statement of Professor Jordan Siegel, §66 **[Appendix 2C/36/1180]**

"*fundamentally the same*" as the predecessor Committee of Managing Directors. There are "*numerous reporting lines from SPDC to the Executive Committee, which ensures that it is kept informed of the operational and business activities of SPDC*". RDS also "*oversees centralised groups of technical expertise who provide assistance and oversight to… SPDC*" and "*provides its subsidiaries with detailed and comprehensive HSSE standards and guidelines, developed at the direction and supervision of the Executive Committee*". It also "*has a multi-layered reporting, assurance and audit system, which allows it to closely monitor the compliance of its operating companies with the Shell Group's HSSE policies and standards*".[137]

110. The majority of the Court of Appeal disregarded the entirety of Prof. Siegel's evidence on the basis that it was "*inadmissible*" opinion evidence (CoA §§75, 204). This is wrong. As Sales LJ correctly observed, Prof. Siegel was not relied on as "*an expert regarding Shell's control systems*". Rather, he is "*a witness of fact who can say that he has inspected a large number of confidential Shell management documents and that they show a high level of functional control exercised by the centre over SPDC*" (CoA §169). In this regard, Prof. Siegel's evidence was both "*in line with…and corroborated by, the emergence of the Shell control framework and the HSSE & SP control framework*" and "*goes some way to show that there is a very real prospect that highly relevant documents, which may well be supportive of the claimants' case, will be forthcoming on disclosure if the action proceeds*" (CoA §169).

111. Prof. Siegel's evidence provides compelling support for the Appellants' case under *Vedanta Routes 1 - 3* (in particular *Vedanta Route 1*). Moreover, when determining whether there is a real prospect of the claimants establishing at trial that RDS exercises a high degree of control over SPDC, it is clearly relevant that a neutral third party who has seen "*thousands of pages*" of undisclosed internal corporate documents[138] has provided sworn evidence that the undisclosed material shows that RDS exercises a "*very high*" and "*unusually stringent*" degree of control over SPDC, and that SPDC is "*unambiguously an agent of*" RDS.

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137 *Ibid*, §66 **[Appendix 2C/36/1181]**

138 According to Prof. Siegel's report, the undisclosed material included **81** "*Corporate Structure Documents*"; **29** "*Accountant Documents regarding Corporate Structure*"; **13** "*Depositions regarding Corporate Structure*"; **14** "*Business Plans and Reports*"; and **33** "*International Public Relations documents*" **[Appendix 2F/73/2100-2107]**.

(5) UNITED NATIONS REPORT INTO OIL POLLUTION IN THE NIGER DELTA

112. The Appellants' case under *Vedanta Routes 1 – 3* is further strengthened by a report on oil pollution in the Niger Delta published in 2011 the United Nations Environment Programme ("**UNEP Report**").[139] This stated (amongst other things) that, *"SPDC is backed up technically by Shell which provides a broad policy framework with corporate guidelines and specific technical assistance through Shell Global Solutions"*.[140] Shell Global Solutions ("**SGS**") is part of the P&T Business (which, as explained above, is an internal "*organisation*" which is both headed by a member of, and directly accountable to, the RDS ExCo). SGS provides expertise and assistance to operating companies, as well as preparing and producing the group-wide DEPs.[141]

113. According to the UNEP Report, SPDC's *'Oil Spill Clean-Up and Remediation Procedure'* was based on an SGS report entitled *"Framework for Risk Management of Historically Contaminated Land for SPDC Operations in the Niger Delta"*. The SGS report was intended to apply to the specific and unique circumstances of the Niger Delta and advised SPDC that *"any spills in the Niger Delta will migrate predominantly along the ground surface"*. However, UNEP found that *"this basic premise of limiting remediation to the surface soil is not sustainable"* and recommended that "*Shell Global Solutions' guidance note… need[s] to be revised…"*[142] The UNEP Report therefore makes clear that SPDC's approach to the clean-up of oil spills was ineffective because of its reliance on SGS's flawed technical advice.

114. SGS also advised SPDC of the specific remediation method that should be used at oil spill sites in Nigeria. The UNEP Report set out that *"Shell Global Solutions endorsed the RENA approach. Hence it is SPDC's preferred procedure and 100 per cent of oil spill remediation in Ogoniland has been undertaken using the RENA approach."* UNEP's

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[139] United Nations Environment Programme, "*Environmental Assessment of Ogoniland*" **[Appendix 2G/90/2257-2518]**. For the relevant section on *"SPDC's practices and performance"*, see pp. 142-151 **[Appendix 2G/90/2400-2409]**.

[140] UNEP Report, p.142 (emphasis added) **[Appendix 2G/90/2400]**

[141] SGS has carried out previous analyses which have identified critical failings in SPDC's infrastructure. For example, SGS assessed SPDC's pipelines in 2000 and found that "*the remaining life of most of the SPDC oil trunklines is more or less non-existent or short, while some sections contain major risk and hazard*." **[Appendix 2G/88/2251]** SGS carried out further integrity assessments in 2001 and recommended *"immediate replacement of two… trunk lines one of which is the Nembe Creek to Cawthorne Channel Trunkline [NCTL] on account of technical integrity and evacuation capacity restraints."* **[Appendix 2G/84/2188]**. The NCTL, the pipeline running through Bille, was not replaced until years later.

[142] UNEP Report, pp. 143-145 **[Appendix 2G/90/2401-2403]**

Report heavily criticised this approach and recommended that it should be discontinued, saying *"the RENA process is failing to achieve either environmental clean-up or legislative compliance."*[143] On this evidence alone, it follows that RDS and SPDC arguably have joint responsibility for the inadequate clean-up of SPDC oil pollution sites, a central part of the Appellants' claims.

(6) GOVERNMENT CABLES AND DEPOSITIONS EVIDENCING THE INVOLVEMENT OF RDS IN SPDC'S OPERATIONS

The "Pickard" cables

115. The Appellants' case under *Vedanta Routes 1 to 3* derives further support from the contents of US diplomatic cables which describe how a senior Shell employee, who reported and was directly accountable to a member of the RDS ExCo, intervened directly in SPDC's operational affairs and management. One of those cables describes how the Shell Group's Executive Vice-President of Sub-Saharan Africa,[144] Ann Pickard, had "*launched both a comprehensive reorganization of [SPDC] and Shell's security apparatus*". It went on to explain that, "*Discussing Shell Nigeria's internal operation Pickard outlined two serious re-organization efforts. First, she planned a large-scale re-organization of [SPDC], Shell's flagship joint-venture company, responsible for most Shell production in Nigeria. However, SPDC has not been meeting Shell's international performance benchmarks, and Pickard saw the deficit as being a fillip for substantial organizational reform… Pickard pointedly said that she was reorganizing Shell security for 'performance reasons', placing four well-trusted and direct-report expatriates in charge, to ensure that pertinent information gathered on the ground finds its way to her desk*".[145]

116. Sales LJ correctly observed that this was "*evidence derived from a senior Shell group officer (the authenticity of which has not been denied by RDS) which shows the central management of the group (ie RDS, acting by ExCo) taking a very close interest in the*

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143 *Ibid*, p.145 **[Appendix 2G/90/2403]**

144 According to an internal Shell document setting out leadership roles and responsibilities, "*The EVP Sub-Saharan African will manage an integrated business unit comprising the existing… Africa operations… and JVs. It will include capability for development, wells, minor projects, production and asset management and stakeholder management.*" **[Appendix 2E/52/1550]**

145 Wikileaks cable, "*Shell aims for a year-end Production Start for Forcados, Western Delta*", 26 July 2006 **[Appendix 2G/81/2166, 2168]**

management of the pipeline and asserting its own ability to control how SPDC conducts its operational management". The evidence "*supports the claimants' case that group central management (including in particular RDS's CEO and ExCo) was motivated to intervene to control the management of SPDC's affairs, had the ability to do so and actively intended to do so*" (CoA §164).

<u>Depositions from senior Shell and SPDC executives</u>

117. In 2007 litigation took place in the US concerning allegations that the Shell Group had misstated SPDC's oil reserves in Nigeria. Depositions were taken from several senior Shell Group executives and their evidence demonstrated that the Shell Group's senior management exercised considerable control and oversight over SPDC. For example, the Shell Group's Global Chief Petroleum Engineer described the establishment of a "*Nigeria Seamless Team*" that arranged "*collaboration*" between staff in the Netherlands and "*their opposite numbers in SPDC*". The "*collaboration*" resulted in the production of "*a lot of HSE made especially for Nigeria*" and measures designed to improve SPDC's "*asset integrity*".[146]

118. The depositions also reveal the financial control exerted by RDS over its operating subsidiaries. Funds are allocated based on the overall strategy of RDS and operating companies are required to "*fight for capital allocation*".[147] Budgetary approval for significant projects, such as a major clean-up of historical oil spills or the replacement of a pipeline (both of direct relevance to these claims), requires the approval of the RDS ExCo.

(7) JUDGMENTS CONCERNING THE SHELL GROUP CORPORATE STRUCTURE AND THE ROLE OF THE PARENT COMPANY WITHIN THE SHELL GROUP

<u>Decisions/Judgments of the European Commission and CJEU</u>

119. The European Commission and the Court of Justice have previously rejected arguments by RDS concerning the relationship of control and direction that existed between Shell's parent companies and their subsidiaries:

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146 Extract from deposition of Ian Percival, 9 February 2007 **[Appendix 2F/78/2141-2142]**

147 Extract from deposition of Gordon Parry, 12 September 2006 **[Appendix 2F/74/2115]**

(1) In *Re Dutch Bitumen Cartel* [2007] 5 CMLR 9 the European Commission held that the Committee of Managing Directors ("**CMD**") – which was the immediate predecessor to the RDS ExCo – "*was at the centre of the decision making process in the Shell Group and ultimately steered the conduct of the subsidiaries of the group*" (§216).

(2) The CJEU subsequently found that the CMD was "*responsible for coordinating the operational activity and the governance of all the group companies*" and "*played a decisive role*" within the Group. It described the "*hierarchical organisation*" of the Shell Group and held that the parent company "*in fact exercised <u>decisive influence</u> over [the subsidiary's] conduct*" (*Shell Petroleum NV v European Commission* [2012] 5 CMLR 22 at §73).

120. Although these European decisions concern breaches of competition law[148] before RDS became the sole parent company of the (even more centralised[149]) Shell Group, they are nonetheless instructive because they demonstrate that (a) RDS's immediate predecessor exercised "*decisive*" control over its subsidiaries' operations; and (b) the Shell Group has previously unsuccessfully tried to avoid findings of parent company liability by mischaracterising the role and functions of the companies at the apex of the group.

<u>Judgment of Dutch Court of Appeal concerning RDS duty of care issue</u>

121. Shortly before the hearing before the High Court, the Dutch Court of Appeal held (applying English common law principles) that it was arguable that RDS owed a common law duty of care to residents of communities in the Niger Delta who suffer harm as a result of SPDC's operations there (*Dooh & others v RDS and SPDC* [2015] C/09/365482). RDS's own solicitors have stressed that the factual and legal issues in the Dutch proceedings are "*essentially the same*" as the issues against RDS in the

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148 The Appellants recognise, of course, that the legal issues determined by the Commission and concerned matters of EU competition law, not domestic tort law. The <u>factual</u> findings of the Commission and CJEU do, however, support the Appellants' case.

149 The Appellants have adduced evidence which explicitly stated that the purpose and effect of the unification in 2005 was to simplify decision-making at the top of the Shell Group, and to allow the new parent company, RDS, to exert greater control over its subsidiaries than its predecessors had exercised (see witness statement of Gene Sticco at §8 **[Appendix 2C/38/1199]** and witness statement of Professor Siegel at §§34-35 **[Appendix 2C/36/1172]**). The Respondents did not challenge that evidence before the High Court or Court of Appeal (see Appellants' skeleton argument for the Court of Appeal hearing **[Appendix 2A/3/66]**).

present proceedings.[150] Despite this, and despite the Appellants expressly relying on the Dutch judgment in support of their contention that they have a real prospect of establishing that RDS owes them a duty of care, the courts below struck out the Appellant's claims without making any reference to that judgment.

F. UNDISCLOSED DOCUMENTS WHICH ARE LIKELY TO PROVIDE FURTHER SUPPORT FOR THE EXISTENCE OF A DUTY OF CARE

122. In his dissenting judgment, Sales LJ explained that, "*there is a very real prospect that highly relevant documents, which may well be supportive of the claimants' case, will be forthcoming on disclosure if the action proceeds*" (CoA §169) and that, "*there is a very real – and far more than a speculative – possibility that documents will emerge on disclosure which will provide substantial support for their case at trial*" (CoA §171). That conclusion was correct for the reasons set out below.

123. **First**, the detailed RDS Control Framework – which only emerged as a result of a whistle-blower coming forward shortly before the Court of Appeal hearing – indicates that there are a significant number of other internal documents which are likely to be highly material to any assessment of the true nature of the relationship between RDS and SPDC, and RDS's role in promulgating and enforcing group-wide safety and environmental policies, but which have not yet been disclosed. To give seven illustrative examples:

    (1) **Annual Business Assurance Letters and Reports submitted to RDS ExCo, RDS Board and RDS Audit Committee** – As explained at paragraph 72(4) above, the RDS Control Framework explains that every year each Business and Function head must submit "*an Assurance Letter*" to the CEO confirming the level of compliance with the Shell Control Framework. A summary of those letters is then included in reports considered by the RDS ExCo, RDS Audit Committee and RDS Board.[151] In *Dooh v RDS and SPDC* (2015) the Dutch Court of Appeal ordered RDS and SPDC to disclose relevant business assurance letters on the basis that those letters may be "*material in assessing how supervision*

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[150] Respondents' response to the letter of claim in the Bille Proceedings and Respondents' response to the letter of claim in the Ogale Proceedings (referred to at §9(4) of the Appellants' skeleton argument before the Court of Appeal **[Appendix 2A/3/50]**.)

[151] RDS Control Framework, p. 10 **[Appendix 2E/55/1574]**

was implemented and how relevant information was shared with the parent company".[152]

(2) **Audit reports concerning SPDC** – The RDS Control Framework explains that: "*Shell Internal Audit, through its mandate from the Audit Committee, provides the Executive Committee, the Audit Committee and ultimately the Board with independent assurance on the design and operation of the system of risk management and internal control... Significant issues are reported to the Business Integrity Committee, the Audit Committee, the Executive Committee and other senior executives.*"[153] In *Dooh* the Dutch Court of Appeal ordered RDS and SPDC to disclose (i) the "*internal Asset Integrity Audit evaluating the technical integrity and – where relevant – the operational integrity of the pipelines*"; (ii) the "*HSE audit…evaluating SPDC's Emergency and Oil Spill response procedures applying to the pipelines*"; and (iii) the "*audit results and remedial action plans (findings, recommendations and approval and closeout of actions) documented on the basis of those audits*". Disclosure of these documents was ordered on the basis that they may be "*material*" to the court's assessment of "*how supervision was implemented*" and how "*relevant information was shared with [RDS]*".[154]

(3) **Mandatory Technical Practices** – As explained at §71(4) above, the RDS Control Framework also refers to the existence of prescriptive "*Technical Practices*" which are "*Technical requirements for all design engineering and construction activities as well as for the operation of assets and wells*" and which are "*mandatory for all projects, well activities and asset operations*".[155]

(4) **Manuals setting out corporate authorities and organisational authorities** – The RDS Control Framework explains that the "*principal corporate authorities*" that govern the relationship between RDS and its subsidiaries are contained in (amongst other documents) the "*Royal Dutch Shell plc or Other Corporate Authority Manuals*". Similarly, the "*principal organisational authorities*" are

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152 *Dooh & others v RDS and SPDC* [2015] C/09/365482 at §6.10(c)

153 RDS Control Framework, p. 10 **[Appendix 2E/55/1574]**

154 *Dooh & others v RDS and SPDC* [2015] C/09/365482 at §6.10(b)

155 RDS Control Framework, p.6 **[Appendix 2E/55/1570]**

contained in "*the Royal Dutch Shell, Business or Functional Manual of Organisational Authorities*".[156]

(5) **Statement on Risk Management** – The RDS Control Framework refers to a "*Statement on Risk Management*" which "*applies to all Business, Functions and Business Units and to all activities that they undertake. This includes opportunity development, project execution and day-to-day operations*".[157] The statement is accompanied by "*Group-wide instructions for its implementation*".[158]

(6) **Control Registers** – The RDS Control Framework refers to the existence of "*Controls*" which are "*continuous, structured activities or mechanisms that help ensure that Businesses and Functions achieve their objectives, including compliance with legal and regulatory requirements*". It adds that, "*The controls on which management places reliance, the frequency of execution, the ownership for their design and staff responsibilities for their operation, are described in designated control registers.*"[159]

(7) **Documents produced by the Process Safety & HSSSE & SP Controls Assurance team** – As noted above, the RDS Control Framework explains that, "*The Process Safety & HSSE & SP Controls Assurance team...provides independent assurance as to the effectiveness of the HSSE&SP Controls, including Process Safety Controls*" (see §72(1) above). This "*independent assurance*" process will inevitably involve the production of documents reflecting the knowledge and intervention of RDS in HSSE&SP matters at SPDC.

124. **<u>Second</u>**, in addition to the undisclosed documents referred to at (1) to (7) above, a wide range of other undisclosed documents are highly likely to be relevant to the contested factual issues. They include:

(1) Management agreements between RDS, SPDC's holding companies and SPDC.

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156 *Ibid*, p. 17 **[Appendix 2E/55/1581]**

157 *Ibid*, p. 8 **[Appendix 2E/55/1572]**

158 *Ibid*, p. 5 **[Appendix 2E/55/1569]**

159 *Ibid*, p. 9 **[Appendix 2E/55/1573]**.

(2) Minutes of meetings of the RDS ExCo, the RDS CSRC and the RDS HSSE & SP Executive team relating to the health, safety, security and environmental risks and impacts of SPDC's operations.

(3) The RDS ExCo's Country Reports for Nigeria (which are produced annually).

(4) HSSE&SP performance reporting data on Nigerian operations which is reported to RDS ExCo, RDS CSRC and/or RDS Board.[160]

(5) Nigeria-specific technical directions and guidance concerning HSSE matters, including guidance promulgated under the auspices of the P&T department concerning pipeline integrity and oil spill clean-up and remediation.

(6) SPDC's annual business plans and budgets, and RDS's approvals or modifications of these plans and budgets.

(7) The full range of detailed technical standards and guidelines that relate directly to live issues in this litigation, including in relation to (a) interference with pipelines; (b) pipeline leak detection; (c) pipeline repairs; (d) oil spill recovery methods; and (e) oil spill trajectory models.

(8) SPDC's "*Oil Spill Contingency Plan*", the "*SCiN [Shell Companies in Nigeria] Oil Spill Contingency Plan*", "*SCiN Emergency Response Management Manual*" and "*SCiN Crisis Management Manual*", "*SPDC Site – Specific Emergency Response Procedures*" and "*The HSSE policies applicable to SPDC's operations in the Niger Delta*".[161]

(9) Documents identified as important in the UNEP Report, including "*SPDC Corporate Oil Spill Response, Clean-up and Remediation Manual*", "*Overview of Process and Standards for Oil Spill Clean-up and Remediation*" and the "*specific advisories issued by Shell Global Solutions and which form the basis of SPDC internal procedures*", including "*Framework for Risk Management of Historically Contaminated Land for SPDC Operations in Niger Delta*", "*Framework for Risk*

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160 See "*Performance Monitoring and Reporting*" at p. 60 of the HSSE Control Framework **[Appendix 2H/91/2882-2883]**

161 The existence of these documents are referred to in the first witness statement of SPDC's Managing Director, Osagie Okunbor (see §42 and figure 1) **[Appendix 2C/32/961-962]**

Management of Historically Contaminated Land for SPDC Operations in Niger Delta: Mangroves and other Swamp Areas" and the "*Remediation Management System*".[162]

(10) Documents and records relating to the establishment and operation of the "*Oil Spill Expertise Centre*", "*the Centre of Expertise for Emergency Response*" and "*Emergency Response centres*" and copies of the relevant "*Emergency Response Plans*" (see §82 above).

(11) RDS Corporate Security's "*protocols for the use of force, security management, threat identification and security Risk Assessment and Mitigation*", Country Security Threat Assessments (CSTAs) and country Security Threat Levels (see §80 above).

(12) Details of and documents referring to specific technical assistance, in particular with regard to the construction and maintenance of pipelines and oil spill clean-up and remediation, provided to SPDC by RDS' Safety and Environment functional area and the Technical Functions.[163]

(13) Correspondence passing between SPDC management and RDS concerning relevant aspects of SPDC's operations, including with respect to the risk or occurrence of oil spills and the prevention, mitigation and remediation of such spills.

125. This is therefore a paradigm example of a case where, like *Vedanta,* it is "*blindingly obvious"* that whether RDS exercises a degree of control over material aspects of SPDC's operations sufficient to establish a duty of care to the Appellants will "*depend heavily upon the contents of documents internal to each of the defendant companies, and upon correspondence and other documents passing between them, currently unavailable to the claimants, but in due course disclosable*" (per Lord Briggs in *Vedanta* at §44).

G. <u>EVIDENCE OF THE RESPONDENTS' WITNESSES CANNOT BE ACCEPTED AT FACE VALUE AND IS CONTRADICTED BY THE DOCUMENTS</u>

126. The Respondents' case on the duty of care issue is based almost entirely on untested witness statements from senior executives of RDS and SPDC. Those individuals

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162 UNEP Report, p. 85 **[Appendix 2G/90/2343]**

163 See RDS Control Framework, p. 14 **[Appendix 2E/55/1578]**

cannot on any view be regarded as independent and unbiased witnesses. Despite this, the Chancellor stated that the Respondents' evidence was *"not really capable of challenge"* (CoA §205).

127. Further, there are several features of that witness evidence – which contained verbatim replications of the same descriptions across multiple statements – which demonstrate why there is (at least) a real prospect of the Appellants establishing at trial that the evidence of the Respondents' witnesses is (at least) materially inaccurate and misleading.

128. **First**, there are key omissions in the Respondents' witness evidence. For example, despite the central role of the RDS ExCo, none of the Respondents' witnesses made any reference to the RDS ExCo in their initial evidence in support of the Respondents' jurisdictional challenges. Nor do any of the Respondents' witness statements contain any reference to (a) the "*Oil Spill Expertise Centre*"; (b) the "*Centre of Expertise for Emergency Response*"; (c) "*Emergency Response Plans*"; or (d) "*Emergency Response centres*" – all of which are referred to in the HSSE Control Framework. Sales LJ correctly observed that, "*the witnesses deployed by RDS to explain the operational workings of the Shell group and SPDC did not deal with*" the RDS Control Framework and the HSSE Control Framework and "*did not explain clearly and with precision how the management structures described in those documents were in practice implemented by ExCo and were in practice taken into account by SPDC*" (CoA §168).

129. **Second**, the documents and fresh evidence that emerged before the Court of Appeal directly contradict the account of the relationship between RDS and SPDC provided by the Respondents' witnesses. To give four illustrative examples:

    (1) **Promulgation of detailed Group-wide mandatory health and safety instructions** – The witness statements of RDS's Company Secretary, Mr Brandjes, and SPDC's Managing Director, Mr Okunbor, both contained an identically-worded passage which stated that the Shell Group Health, Safety, Security and Environmental (HSSE) Framework "***does not*** *prescribe "how" an operating unit should manage risks or the specific operational steps that should be taken in this regard*" (emphasis original).[164] Mr Okunbor also described the Shell

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164 First witness statement of Michiel Brandjes, §45 **[Appendix 2C/33/1001]** and first witness statement of Osagie Okukbor, §40 **[Appendix 2C/32/960]**

Group's HSSE policies as "*skeletal*" and "*brief and high-level*".[165] However, these assertions are directly contradicted by the RDS Control Framework, which explains that the HSSE Framework includes manuals with *"more detailed mandatory instructions on how to implement Group or Operating Standards or other Foundation components.... In the technical area, the Technical Practices establish requirements for all design engineers and construction activities as well as for the operation of assets and wells*".[166]

(2) **RDS' responsibility for health, safety, security and environmental performance** – Mr Brandjes stated that the Appellants' pleaded claim that RDS exercised a high degree of control, direction and oversight in respect of SPDC's pollution and environmental compliance "*is at odds with the reality of the Shell Group of companies, in which responsibility for health, safety, security, environment and social performance vests with each of the companies that make up the Shell Group*".[167] As noted at §70(4) above, however, the RDS Control Framework explicitly states that: "*The CEO and the Executive Committee under the direction of the CEO are responsible for...the safe condition and environmentally responsible operation of Shell's facilities and assets*".

(3) **SPDC's alleged autonomy over oil spill clean-up and security** – SPDC's Remediation and Oil Spill Response Manager, Andrew Lee, stated that: "*SPDC does not rely on RDS or any other Group company to respond to oil spills, to carry out repairs or to effect remediation. Those activities are carried out entirely by my team in accordance with procedures developed and implemented by SPDC.*"[168] In contrast, Ms Sedgwick describes out how "*Shell's Upstream International Environment Manager, Emma FitzGerald, was closely involved with formulating and monitoring SPDC's clean-up policy. When there were major spills Emma flew out to Port Harcourt to provide assistance and guidance to SPDC.*" Mr Lee's assertions are also contradicted by Shell's internal and public documents which assert that oil spill response is dealt with on a global basis (see e.g. paragraphs 82 - 83 above).

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165 First witness statement of Osagie Okunbor, §§37, 39 **[Appendix 2C/32/958-959]**

166 RDS Control Framework, p.6 **[Appendix 2E/55/1570]** (emphasis added)

167 First witness statement of Michiel Brandjes, §28 **[Appendix 2C/33/994]**

168 Witness statement of Andrew Lee, §40. (This is not in the Appendix but was cited in the Appellants' written submissions before the Court of Appeal: see §19(3) at **[Appendix 2A/6/139]**.)

(4) **SPDC's alleged autonomy over pipeline security** – Similarly, in relation to SPDC's security, the Respondents' solicitor stated that: "*SPDC has its own security team and does not rely on RDS or any other parts of the Shell Group for security*."[169] In contrast, Ms Sedgwick, a former member of SPDC's security department, not only described the significant involvement of Shell Group security specialists in SPDC's security operation, she also described how in the event of a serious security incident, "*Senior management from the Corporate Security department in The Hague would fly out to Port Harcourt to assess the situation and to propose follow up measures*." Similarly, Ms Sedgwick explains that: "*[t]here was no question of developing security standards and protocol…without the guidance and approval of the Corporate Security Department in The Hague*" and that, "*we were not allowed to deviate from these standards and guidelines without the approval of the Head of Corporate Security*".[170] Ms Sedgwick's account is supported by the HSSE Control Framework, which was only disclosed after she provided her witness statement.

130. **<u>Second</u>**, the evidence of RDS's witnesses is also contradicted by various documents published by RDS. A table comparing that witness evidence with RDS's published material is in the Appendix.[171]

131. **<u>Third</u>**, the need for caution before accepting the untested evidence of the Respondents' own employees is particularly acute in light of the matters addressed in the application to intervene by Corner House Research, which explains that evidenced adduced by the Controller of RDS in ongoing criminal proceedings against RDS in Italy "*offers powerful support for the analysis of Sales LJ in his dissenting judgment*" and "*undermines the analysis of the majority*".[172]

132. As the Intervention explains, the Italian evidence establishes (amongst other things) that contrary to the picture of complete operational autonomy painted by SPDC, "*significant business decisions were taken by centralised management first and only later formally approved by the national subsidiaries*". In this regard, "*it was the centrally managed "businesses" which took decisions of importance operating under delegated*

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169 Second witness statement of Conway Blake, §52.9 **[Appendix 2D/42/1271]**

170 Witness statement of Rebecca Sedgwick, §§32, 33, 36 **[Appendix 2C/41/1237-1238]**

171 See **[Appendix 2B/17/667-681]**

172 Written Intervention on behalf of Corner House Research, §4

authority from the RDS Board" and these decisions were only later followed by a "*de jure formal approval process*" by the relevant subsidiaries.[173] This is starkly at odds with the evidence of RDS's witnesses in these proceedings.

133. **Fourth**, the CJEU has previously noted that factual assertions regarding the internal structure and management of the Shell Group were "*not supported by any probative evidence*", and cast doubt on the credibility of witness evidence by a senior Shell Group employee (*Shell Petroleum NV v European Commission* [2012] 5 CMLR 22 at §§71 and 162). SPDC's probity and litigation conduct has also been the subject of trenchant criticism by the Nigerian courts.[174] These findings and criticisms reinforce the need for caution regarding the accuracy of RDS and SPDC's witness evidence.

CONCLUSION

134. For the reasons set out above, the appeals should be allowed on the basis that:

(1) The majority of the Court of Appeal determined the RDS duty of care issue on the basis of an erroneous approach to the applicable legal principles which is incompatible with the Supreme Court's unanimous judgment in *Vedanta*.

(2) Applying the principles authoritatively expounded in *Vedanta*, the Appellants have (at least) a real prospect of successfully establishing at trial that RDS owed them a duty of care as a result of:

(a) RDS's intervention in the operational management of SPDC (*Vedanta Route 1*);

(b) RDS's promulgation of advice and mandatory group-wide policies, standards and guidelines concerning various health, safety, security and environmental matters which were defective (*Vedanta Route 2*) and/or

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173 *Ibid*, §29.

174 By way of example only, appellate courts in Nigeria have recently described appeals and applications by SPDC as "*absolutely frivolous in the extreme*"; "*a really hopeless appeal, which should not have been brought in the first place*" and which was "*probably a tactic to delay the trial of the case*"; "*a very needless appeal*" which was "*devoid of merit*"; and a "*grossly incompetent*" application which was part of a "*game of frivolity and delay*" (see *SPDC v X.M. Federal* (2006) and *SPDC v Miller* (2013) LPELR-22872 (CA)). The Nigerian Court of Appeal has expressed concern at the "*amazingly curious*" fact that SPDC had briefed its lawyers with "*detailed information of a judgment yet to be delivered*" in a claim against SPDC worth over US$1 billion (*Ajuwa v SPDC* (2008)).

which RDS took active steps to ensure were implemented by SPDC (*Vedanta Route 3*); and/or

(c) RDS having held itself out as exercising a high degree of supervision and control over SPDC (*Vedanta Route 4*).

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Annex 1: Comparison of evidence in *Vedanta* and *Shell* appeals

Category of evidence	Evidence cited in *Vedanta* judgment	Evidence before the Court in *Shell*
A: Published materials	(1) Annual Reports and Sustainability Reports *(See Vedanta at §§ 55, 58, 61)*	(1) Annual Reports and Sustainability Reports **[Appendix 2E/57-63/1589]** (2) Oil Spill Emergency Response document **[Appendix 2F/69/1999]**
B: Internal documents	(1) Management services agreement and shareholder agreement *(See Vedanta at §§55, 58, 61)*	(1) RDS Control Framework **[Appendix 2E/55/1565]** (2) HSSE Control Framework, setting out the HSSE control, assurance, support and accountability mechanisms within the Group **[Appendix 2H/91/2819]** (3) A selection of HSSE Manuals and Standards **[Appendix 2F/64-72/1781]** (4) A Design Engineering Practice (technical manual) and list of other potentially relevant DEPs **[Appendix 2F/68 & 70/1977 & 2007]** (5) Update on relevant structural Shell Group changes **[Appendix 2E/52/1549]**
C: Witness evidence	(1) Statement from Mr Kakengela, "*middle manager*" at subsidiary *(See Vedanta at §§55, 58, 61)*	Statements from: (1) Ms Sedgwick, SPDC security lead **[Appendix 2C/41/1227]** (2) Mr Sticco, corporate affairs manager at head office **[Appendix 2C/38/1197]** (3) Mr Briggs, senior global strategic, commercial and communications roles **[Appendix 2C/37/1183]**
D: Judgments	(1) Interlocutory Irish High Court decision in employment dispute concerning Vedanta's Irish subsidiary *(See Vedanta at §58)*	(1) Decision of the European Commission (*Re Dutch Bitumen Cartel* [2007] 5 CMLR 9) (2) Judgment of the CJEU about the control exercised by the parent of the Shell Group over its subsidiaries (*Shell Petroleum NV v European Commission* [2012] 5 CMLR 22)

		(3) Judgment of the Dutch Court of Appeal that RDS owes an arguable duty of care to Nigerian claimants who suffer harm from oil spills from SPDC pipelines (*Dooh & others v RDS and SPDC* [2015] C/09/365482) (4) Evidence from an independent academic who reviewed thousands of pages of internal Shell documents for the purpose of providing expert evidence about the nature and degree of parent company control over SPDC in unrelated proceedings **[Appendix 2C/36/1163] & [Appendix 2F/73/2065]**
E: Other material	N/A	(1) Depositions in US litigation from senior Shell managers about how Shell interacts with its Nigerian operations **[Appendix 2F/74-78/2109]** (2) Official cables with information about how RDS intervenes in SPDC's operations **[Appendix 2G/81-83/2165]** (3) Impact Assessment Report for the main Bille pipeline **[Appendix 2G/84/2187]** (4) Management presentations **[Appendix 2G/86-87/2195]** (5) Report by the United Nations Environment Programme with evidence about guidance and advice provided to SPDC on clean-up **[Appendix 2G/90/2257]**