The Registrar of the Supreme Court
The Supreme Court of the United Kingdom
Parliament Square
London
SW1P 3BD

RE: Rule 15 submission to the Supreme Court by Concerned Academics and Practitioners regarding *Okpabi and others v Royal Dutch Shell Plc and another* UKSC 2018/0068.

4 May 2018

Dear Lord and Lady Justices

As academics and practitioners with experience of the issues raised in the case of *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191 (*Okpabi*), we write in support of the application to the Supreme Court for leave to appeal.

The *Okpabi* decision has international significance as (1) the jurisprudence of UK courts continues to inform the development of the duty of care in other states;[1] and (2) there is a global, on-going discussion of the legal standards for the duty of care between a parent company and individuals impacted by its subsidiary, which this case will inform. The Court of Appeal's judgment causes uncertainty in several areas, which require clarification if the principles established in this case are to serve as clear and adequate guidance for the resolution of similar cases in the future and if, in turn, these principles will effectively guide corporate practice in the UK and abroad.

Both the reasoning of the Court of Appeal and the potential impact of the judgment on the on-going construction and distribution of responsibility in the corporate groups warrant a review of this case. In this letter, we briefly address these two issues, focusing on the lack of clarity about the precedent established by the Court of Appeal and the damage that this uncertainty can do to future practice.

The Quality and Clarity of the Precedent Established

There are three areas in which the Court's judgment does not provide sufficient clarity for potential parties to litigation: (1) the relationship between *Okpabi* and its precedent, *Chandler v Cape plc* [2012] 1 WLR 3111; (2) the standards for establishing control by a parent over a subsidiary in corporate groups that deviate from the traditional parent-subsidiary relationship; and (3) the relevance of international standards in developing a duty of care.

The Relationship between *Chandler* and *Okpabi*

The *Okpabi* decision breaks significantly from the precedent set in *Chandler* and leaves uncertain the standards by which a parent company may assume a duty of care. In the two cases, the Court of Appeal formulated different if overlapping tests for deciding the circumstances in which the duty of care can arise between a parent company and individuals impacted by the operations of the parent's subsidiaries. The decision in *Okpabi* excludes grounds recognized in *Chandler* as establishing the duty of care. The difference is most significant in the analysis offered of the treatment of the element of parental 'control.' Whereas control by the parent company is one of the bases on which the duty can arise in *Chandler*, it is not a necessary element. Advice given by a parent possessing the requisite levels of expertise can

[1] See, e.g., *Garcia v. Tahoe Resources Inc*., 2017 BCCA 39 – CanLII; *Yaiguaje v. Chevron Corporation*, 2015 SCC 42, [2015] 3 S.C.R. 69; *Ododo Francis v. ENI and Nigerian Agip Oil Company* (NAOC); *Friday Alfred Akpan et al v. Shell*, Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3587.

also, in certain circumstances, engage a duty of care. The reasoning in *Okpabi*, on the other hand, indicates that control is in fact necessary to engage the duty, and that advice in the form of operating guidelines, for example, cannot do so. The difference between the two tests creates in practice a chasm into which numerous types of claims may fall.

For the Court in *Chandler*, it was '…appropriate to find that Cape assumed a duty of care either to *advise* Cape Products on what steps it had to take … or to *ensure* that those steps were taken. The scope of the duty can be defined in either way' (at para 78, emphasis added). The Court of Appeal in *Okpabi*, on the other hand, asserts that 'for a duty of care to arise … in line with the analysis in *Chandler v Cape Plc* …it would be *necessary* to establish that the parent had taken control (or joint control) of the relevant operations in a much more direct and substantial way' (at para 140, emphasis added). The Court determined that 'No duty of care on the part of the standard-setting parent company would arise' where a parent does not control an operation or have *'direct responsibility for practices or failures*' but instead only issues mandatory policies as group-wide operating guidelines (at paras 127, 140, emphasis added).

The corporate advisory policies dismissed in *Okpabi* as capable of grounding a duty of care are precisely the advisory policies included as a means of discharging the duty of care in *Chandler*. The Court of Appeal did not engage with the *Chandler* criteria focused on levels and types of influence other than direct or substantial control. It did not establish clear reasoning or guidance for the break from *Chandler*. Nor did it examine the consequences of this break. As such, the *Okpabi* judgment leaves the law unpredictable for potential claimants, multinational corporations and their subsidiaries. Given the impact of each position on future cases and business practice, clarity from the Supreme Court is needed.

Approaching Control Carefully

The Supreme Court should also take this opportunity to consider whether the criteria for establishing control articulated by the *Okpabi* decision are appropriate for the variety of means of operation and parent-subsidiary relationships that a large multinational company can establish. The parent-subsidiary relationship has traditionally been a vertical design, with each new subsidiary establishing an independent operation and either a new tier within the group's structure or a new branch of an established tier. The Court of Appeal judgment appears to treat Royal Dutch Shell's (RDS) relationship with its subsidiaries as such an operation (para.196). It does this despite recognizing that RDS has structured its operations both vertically and horizontally, organized 'both through legal entities … and on Business and Function lines' so that issues like legal compliance and human resources are not necessarily contained in each entity but exist across operations (para 118). Determining the elements for control in light of this mixed-approach to corporate group management needs careful consideration that is not found in the Court of Appeal judgment. The outcome of the inquiry may ultimately result in the same point in any given case, but our concern is that the Court of Appeal's approach to the parent-subsidiary relationship does not reflect the practice of multinational corporations like RDS. This raises the danger that the legal elements for duty of care are out of step, inapplicable, and/or inappropriate for new approaches to corporate governance. Elements in the law, particularly when related to issues of corporate governance, need to be responsive to factual realities and not theoretical models. All parties would therefore benefit from the Supreme Court's consideration of whether the nature and structure of a group affects the parent's liability, and if so how, when and why.

Relevance of International Standards

The Court of Appeal judgment suggests that international standards regarding corporate social responsibility are irrelevant to establishing a duty of care (paras 130-131). The judgment does not elaborate any further on the reasoning for this conclusion. The UN Guiding Principles on Business and Human Rights have been embraced by the UK Government as indicative of the standard of conduct

expected of corporate actors.[2] International standards such as these can be useful in delineating the expected conduct of businesses, and their managers or directors, when carrying out their operational duties. We realize that the Court may, in certain circumstances, find these standards irrelevant for establishing a duty of care but at other times such international benchmarks are necessary for establishing expected conduct. We think greater clarity is needed regarding when and how international standards can, do, and should contribute to an analysis of the existence of a duty of care and/or conduct that gives rise to a breach of an existing duty.

Potential Impact:

Finally, we would like the draw the Court's attention to the potential impact of this case on the on-going discussions, domestically and internationally, of the appropriate distribution of risk and responsibility within corporate groups. There have been rapid international developments that call into question the traditional approach to parent-subsidiary control. Increasingly, scholars, states, and others are asserting that the parent and the home state may hold responsibilities or obligations to address impacts on third parties simultaneously with, and parallel to, the subsidiary and host state. States and their courts are reconsidering what it means to be 'fair, just and reasonable' when distributing expectations and duties of care within multinational corporations.

This case offers an important statement from the UK courts on these issues. We believe Supreme Court should take this opportunity to address the discussion and debate so that English- and Welsh-based multinational corporations, and those impacted by their operations, have clarity over the distribution of risks and duties within a corporate group.

[2] 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights,' May 2016, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf.

Yours sincerely,

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