IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2018/0068**

ON APPEAL FROM THE COURT OF APPEAL (E&W) (CIVIL DIVISION)

(Sir Geoffrey Vos C, Sales and Simon LJJ)

[2018] Bus LR 1022, [2018] EWCA Civ 191

B E T W E E N:

OKPABI and others

Appellants

-and-

(1) ROYAL DUTCH SHELL PLC
(2) SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED

Respondents

-and-

CORNER HOUSE RESEARCH

Proposed Intervener

WRITTEN INTERVENTION ON BEHALF OF CORNER HOUSE RESEARCH

A. Introduction

1. Corner House Research ("Corner House") invites the Supreme Court to give it permission to intervene under Rule 26. Permission is not sought for oral submissions. The Court is asked to waive the prescribed fee. Corner House's solicitors and counsel are acting *pro bono* and Corner House has extremely limited means.

2. The Appellants have consented to the application to intervene, providing it is limited to written submissions. The Respondents object. The objections are dealt with below.

3. To assist the parties, this document sets out Corner House's proposed intervention in full. No further written case is proposed.

4. The purpose of the proposed intervention is to draw to the Supreme Court's attention evidence that has been recently served by Royal Dutch Shell plc ("RDS") in other

litigation. The material undermines the analysis of the majority and supports the analysis of Sales LJ, who dissented in the Court of Appeal.

B. The proposed intervener

5. Corner House is a UK-based not-for-profit organisation. It supports democratic and community movements for environmental and social justice through research, education and campaigning. Corner House has a particular interest in promoting corporate accountability for environmental harm and corruption.

6. Corner House has been investigating allegations of corruption relating to RDS's operations in Nigeria for several years[1].

7. Corner House is a responsible litigant and intervener. It rarely participates in litigation and only ever does so in cases of the highest public importance. See, in particular, *R (Corner House Research) v Export Credits Guarantee Department* [2005] 1 WLR 2600 (Court of Appeal) which remains the leading case on protective costs orders and anti-bribery standards for public bodies and *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 (House of Lords), which also concerned bribery and corruption in the BAE/Saudi 'Al Yamamah' arms deal.

C. The Milan Proceedings

8. There is extensive litigation around the world relating to RDS's Nigerian operations. Much of it relates to an offshore Nigerian oil field known as OPL 245. The background to the allegations of bribery in relation to OPL 245 is set out in the recent judgment of the Court of Appeal in *JP Morgan Chase Bank NA v Federal Republic of Nigeria* [2019] EWCA Civ 1641.

9. There are also criminal proceedings against RDS about OPL 245 in Milan (*Public Prosecutor v Eni Spa, Royal Dutch Shell and others* (the "**Milan Proceedings**")). The proceedings are part-heard before the 7th Sezione Penale of the Milan Tribunal.

[1] See, for example, http://www.thecornerhouse.org.uk/resource/secrecy-order-lifted-legal-challenge-corrupt-nigerian-oil-deal-opl-245

10. As a result of its attendance and monitoring of the ongoing Milan Proceedings, Corner House has identified that the evidence adduced by RDS's witness about the practical operation of the Shell Control Framework offers powerful support for the analysis of Sales LJ in his dissenting judgment.

11. Accordingly, on 17 March 2020 Corner House obtained authorisation from the President of the 7th Sezione Penale of the Milan Tribunal to be given access to certain documents relied upon by RDS in the Milan Proceedings and to rely on those documents in this application.

12. The Milan Tribunal is aware of Corner House's intention to apply to intervene in this appeal and to do so by relying on documents from the Milan Proceedings, including witness statements submitted by RDS. Permission to obtain and use the documents was sought from the Milan Tribunal on this express basis.

13. On the basis of the permission granted by the Milan Tribunal, the Public Prosecutor in the Milan Proceedings provided Corner House with the documents pursuant to Article 116 of the Italian criminal procedure code.

14. The purpose of the proposed intervention is to draw this material to the attention of the Supreme Court. The material relied on could not have been available below: it post-dates the judgment of the Court of Appeal.

D. Judgment of the Court of Appeal

15. The issue of control by RDS over its subsidiaries is central to the appeal to the Supreme Court. In the judgment of the Court of Appeal, the majority held that the claim against RDS would be dismissed, on the basis that *inter alia:*

> "*I do not think that the evidence supports the contention that RDS had a high level of involvement in the direction and oversight of SPDC's (day-to-day) operations. SPDC's evidence, which was not really capable of challenge, pointed in the other direction*." In particular, "*control rested with SPDC which was responsible for its own operations… there was no real evidence to show that these practices were imposed even if they were described as mandatory. There would have needed to be evidence that RDS took upon itself the enforcement of the standards, which it plainly did not*". (Sir Geoffrey Vos C at [205])

16. Simon LJ held at [124] that the "*Shell Control Framework*" relied on by the Claimants in the Court of Appeal "*does not indicate the exercise of any degree of control or amount to control*".

17. In contrast, in his dissenting judgment, Sales LJ concluded at [155] that "*it is at least arguable… that the management structures of the group were intended to allow the exercise of executive power from group central management, in the form of the CEO and ExCo of RDS, down to the practical operations of the operating companies in each Business*". He concluded further at [157] that "*it is arguable that RDS is conscious that it has the practical means of asserting executive power from the centre of the group to control at least some aspects of management of operating companies and that RDS has the will and intention to do so*" [157].

18. The Court of Appeal was considering a strike-out application, not an appeal following a trial. The new evidence relied on in this application goes to whether RDS's conduct and procedures support Sales LJ's view that it was arguable that practical executive power from the centre could be exercised, and that RDS had the will and intention to do so.

E. Witness statement of Martin ten Brink in the Milan Proceedings

19. The evidence in the Milan Proceedings includes a witness statement of Martin ten Brink of Shell. The statement is dated 30 August 2019. The statement post-dates the judgment of the Court of Appeal.

20. Mr ten Brink is the Controller of RDS. The Controller is "*one of the senior finance positions in RDS reporting directing to the Chief Financial Officer of the company*" [4]. His duties included "*act*[ing] *as the custodian of the Shell Control Framework*" [5] and he is therefore uniquely well positioned to describe its practical operation and effect, and whether the analysis of the Control Framework reached by the majority or the dissenting judge in the Court of Appeal is to be preferred. Mr ten Brink notes in his statement that he has "*deep knowledge of the Group's structure and processes*" [7].

21. First, Mr ten Brink confirms that ExCo acted on behalf of RDS ("*the Board delegated the executive management of RDS to the CEO and, under the CEO's direction, to the members of the Executive Committee*" [23]). This statement supports the conclusion of all members of the

Court of Appeal that the actions of ExCo were attributable to RDS, contrary to the findings of the judge at first instance.

22. Secondly, there is a detailed explanation of the role of ExCo, the CEO and the centralised management structure of RDS. This structure extended to practical matters such as "*the safe condition and environmentally responsible operation of RDS's facilities and assets*" [24] and "*the operational management of the Group and the business enterprises connected with it*" [23]. As is apparent, these are not simply references to RDS as a holding company, but also to its operational subsidiaries. Indeed "*Group*" is defined in Mr ten Brink's witness statement as including "*RDS itself and the companies in which RDS directly or indirectly owns a majority of the shares*" [1].

23. Thirdly, there was no limit on the activities of ExCo and the centralised management structure of RDS under it. It would consider all "*topics of material relevance for the Group*" (i.e. including subsidiaries of RDS) [26]. There was "*no formal definition of what was materially relevant in the context of the EC and the Board, as this depended on the topic, its financial or reputational context… in general… only matters of overall strategic or reputational importance to the Group as a whole made it onto the agenda of the EC and Board*" [27].

24. Fourthly, and most importantly, Mr ten Brink explains the relationship between the "*businesses*" within the centralised management structure operating under the RDS board, and the individual country corporate vehicles referred to in the Control Framework. In particular:

    a) Shell's oil extraction operations formed its "*Upstream business"* [30].

    b) The Upstream International Director was a member of ExCo [25].

    c) The Director was "*accountable to the CEO for the performance of that Business*" [30].

    d) This "*Business Head had several Executive Vice Presidents ("EVPs") reporting directly to him and who were accountable for the performance of their Business Unit(s)… The Business Head and the EVPs were part of the Upstream International Leadership Team ("UILT"). Other members of the UILT were representatives of the Functions*" [30].

Further, "*Business and Function line management was supplemented by executives with country, regional and cross-Business/Function co-ordination roles.*" [33].

e) Mr ten Brink also notes that there is an EVP for health and safety and sustainability, who is part of the "*HSE & Sustainability International Leadership Team*" [64].

f) Decisions would be implemented through specific legal entities with "*its own properly constituted management* [which] *must take the operational decisions necessary to run its business"* [40].

25. The extent of this centralised management structure does not appear to have been fully presented in evidence below. In addition, as Mr ten Brink candidly accepted, although subsidiaries take operational decisions to run their ordinary business operations, the practical reality was that:

> "*Group companies are, of course, not wholly detached from the Group or its requests. A parent company has the right, and in some cases the duty, to exert legitimate control over its wholly owned subsidiaries. Accordingly, the group could appropriately establish certain mandates, strategy and tactical decisions for the Group enterprise as a whole, without unduly impairing the separate legal or fiscal status of the subsidiaries. Mandates or decisions made by the Board of RDS or its management were not acts of the subsidiaries' boards or management. Neither the Board nor the EC of RDS could act in place of or on behalf of the boards or management of the subsidiaries. However, the Group could request (and in some cases insist) that the subsidiaries implement mandates or decisions on matters of Group-wide importance, including organisational change*" [41].

and thus

> "*if… the Group request was both a legitimate request for a shareholder to make (for example… a request dealing with compliance matters… or Group-wide strategy but not a request detailing the daily operations of the subsidiary… and did not conflict with… fiduciary duties… then the subsidiary did have an obligation to implement the request of the shareholder*" [42].

26. Further, Mr ten Brink explains that the day-to-day reality was that "*as a general rule, organisational approval preceded corporate approval*" [45].

27. This "*general rule*" is said by RDS to have been in evidence in the proceedings below (albeit that no reference has been given). But Mr ten Brink then expanded on what this

meant practically: "*the authority grant to perform certain actions or duties within Shell's organisational structure*" which "*originate from the RDS Board delegated through the Business/Function organisational structure*" and which are "*given to individuals in their capacity as members of a Business/Function*" precede the "*legal authority to commit and execute business transactions in the name of the legal entity*" under "*local law"* by a "*legal entity's board*" [45].

28. Thus, as would be expected in a large multinational company, important business decisions were taken through the chain of delegated authority originating with the RDS board, down to ExCo, the Upstream International Director and the Upstream "*business*" management. Once a decision had been taken, it would subsequently be approved by the appropriate national legal entity [50-51]. The centralised management did not act in place of the boards of the subsidiaries. But in practice the centralised businesses could request (and where necessary and lawful, insist) on their instructions being implemented by the boards of the subsidiaries.

29. Finally, Mr ten Brink gives a practical example of how significant business decisions were taken by centralised management first and only later formally approved by the national subsidiaries. In the OPL 245 transaction:

    a) "*Following communications between the Executive Director of Upstream International (Malcolm Brinded), the General Counsel of Upstream International (Keith Ruddock), the Executive Vice President of Finance for Upstream International (Martin Wetselaar), and other business and functional managers at Shell, Wetselaar proposed drafting a P[roposal to] C[ommence] N[egotiations] to formalize the negotiations.*" [67]

    b) Later, "*the Nigeria-based business, legal, and finance Functional teams prepared a PCN, which the EVP Upstream for Sub-Saharan Africa (Ian Craig) then submitted to the senior Upstream International and functional management.*" [68].

    c) The Nigerian subsidiaries were only involved after the deal had been finalised. "*Once organisational approval for the OPL 245 Agreements was obtained through the G[roup[I[nvestment] P[roposal], separate corporate approval from the relevant Group companies were solicited. Two Group companies were involved: (1) SNUD, with its*

statutory seat in Nigeria and (2) Shell Nigeria Exploration and Production Company Limited ("SNEPCo"), also with statutory seat in Nigeria… Upon formalization of the GIP and the subsequent agreement by the team reached during the negotiations based on the organizational authority, authorized representatives of SNUD and SNEPCo signed the OPC 245 Agreement." [77].

d) In practice it was the centrally managed "*businesses*" which took decisions of importance operating under delegated authority from the RDS Board. The *de facto* decision was then followed by a *de jure* formal approval process of committing a particular subsidiary to a legal obligation.

30. Accordingly, Mr ten Brink's witness statement provides strong support for the position as Lord Justice Sales inferred it – there is in practice (and as a minimum) joint control by RDS of significant business decisions and issues of reputational concern through a scheme of centralised delegated authority alongside its subsidiaries.

31. Joint control extends beyond imposing policies or group standards to the practical running of the business. And organisational control preceded any corporate approval process. Mr ten Brink confirms the conclusion of Lord Justice Sales that "*RDS is conscious that it has the practical means of asserting executive power from the centre of the group to control at least some aspects of management of operating companies and that RDS has the will and intention to do so*" [157]. Mr ten Brink gives a practical example involving Nigeria of exactly that – OPL 245.

32. Mr ten Brink's witness statement is attached to these submissions. The exhibits to his statement are voluminous and have been made available to the parties electronically.

F. Respondents' Objections

33. RDS object to the proposed intervention. A copy of the letter from Debevoise & Plimpton LLP setting out reasons for the objection is attached. The following points are made:

a) RDS submit that some of the points which can be taken from Mr ten Brink's witness statement were made by the Appellants below. No doubt this is correct.

But the issue is not whether the Appellants raised similar points below, but whether they had access to evidence prepared on behalf of a senior officer of RDS which was supportive of their position.

b) "*The evidence referred to in your letter raises nothing new, and in particular nothing that was not squarely before the Court of Appeal when it decided this case*". This is incorrect. Mr ten Brink is the RDS "*custodian*" of the Control Framework, with "*deep knowledge of the Group's structure and processes*", but did not give evidence below. His evidence:

   i) accepts that ExCo's actions are attributable to the RDS Board, a matter which was in dispute in the present proceedings;

   ii) sets out in detail exactly how Shell's centralised management structure operates in respect of (a) the "*Upstream*" business; and (b) in matters involving Nigeria;

   iii) explains, using a Nigerian example, in practical terms, how decisions were taken within the centralised management structure reporting to the RDS board and only then approved by the subsidiary businesses; and

   iv) makes clear that unless it would be unlawful, the directors were expected (and where appropriate, required) to follow RDS's instructions issued via the centralised management structure.

c) Although some passages of Mr ten Brink's evidence reflect the Control Framework, the above material was not before the Court of Appeal. Nor was it explained by a senior RDS witness in terms which are supportive of the analysis of the minority in the Court of Appeal.

d) In addition, Debevoise & Plimpton seek to suggest that the OPL 245 case is very different because it directly involved the RDS board. They say "*that witness statement was produced in separate and unconnected proceedings in the Italian courts in order to explain the internal corporate decision-making process behind an investment*

worth hundreds of millions of US dollars. Transactions of that size require the approval of the RDS Board of Directors. There is nothing unusual about that and it is entirely consistent with RDS's evidence in the Okpabi proceedings": In fact, transactions involving "*hundreds of millions of US dollars*" do not go the RDS Board, which is only involved in transactions over $1 billion. Mr ten Brink accepts this at [75]:

> "*The investment threshold for board support for GIPs [Group Investment Proposals] was USD 1 billion. The OPL 245 Agreements did not meet that threshold and therefore the GIP did not require Board support and was within the authority level of the CEO. The OPL 245 GIP therefore did not require discussion with, or a decision by, the Board of RDS.*"

34. Finally, the Respondents complain about the timing of this application. The complaint is unfounded. Corner House has followed the timetable for intervention in PD 6.9.3 and has therefore made this application over 8 weeks before the hearing date. The application to intervene is brief and self-contained. Corner House does not intend to provide a further written case, unless the Court would find that useful. The application was made promptly once Corner House had obtained permission from the Milan Tribunal to use the evidence relied on above. The parties appear to have sufficient time to deal with these points in their written cases.

35. The appeal is listed for 1 day. To avoid using the time available to the parties, permission is not sought for oral submissions.

BEN JAFFEY QC

Blackstone Chambers

HAUSFELD & CO LLP

27 April 2020