THE ERRANT CHILD: ENVIRONMENTAL LIABILITY OF PARENT COMPANIES FOR THE INFRACTIONS OF THEIR SUBSIDIARIES IN NIGERIA♦

Abstract

The oil industry is integral to the Nigerian economy as it is responsible for most of the country's foreign exchange earnings. The Nigerian government has therefore for several decades provided protection for the oil industry due to its importance to the economy and this has resulted in a myriad of legal and regulatory infractions by operators during the exploration and production processes in the industry. Despite the fact that Nigeria is oil rich, the Niger Delta region of the country which is chiefly the area from which oil is derived, is home to some of the poorest communities and people in the country and over the years they have persistently complained about oil spills, pollution, gas flaring and having a lower quality of life. However, accessing justice has proven to be a mirage to many who have been negatively impacted by the operations of the oil industry. This paper canvasses options for aggrieved individuals and bodies seeking justice in other jurisdictions via the parent companies of multinational companies operating in the Nigerian oil industry.

Keywords: Parent-Subsidiary Liability, Environmental Protection, Environmental Damage, Pollution, Oil & Gas, Nigeria.

1. Introduction:

Since the 20th Century, oil has been regarded as an essential commodity and according to Jessica Marshall, it is a fundamental building block of our modern world.[1] Yergin states that we have gone through a century in which every facet of our civilization has been transformed by the modern and mesmerizing alchemy of petroleum.[2] Nigeria is an oil producing country. It is the largest producer of oil on the African continent and holds the largest natural gas reserves in Africa.[3] Nigeria is the largest oil producing country on the African continent and derives most of its foreign earnings from its oil industry. Despite the fact that Nigeria reaps huge financial benefits from its natural resources, the country flares huge amounts of gas. Furthermore, there are reports that show that hundreds of oil spills occur in Nigeria yearly.[4] Thus, within the Nigerian oil and gas industry, there is a recurring problem of pollution. Due to the perennial pollution problem that has become attendant with the exploration and production of oil in Nigeria, many communities and individuals within the Niger Delta region constantly complain of the destruction of their communities and means of livelihood by the activities of oil companies in that region.[5] The manner in which operations are carried out in Nigeria by multinational oil companies varies and lacks uniformity when viewed in comparison with operations in developed countries like the United States of America, Canada, United Kingdom and countries which make up the European Union.[6]

2. Regulatory Challenges within the Nigerian Oil Industry

Numerous laws, regulations and policies have been put in place to regulate the oil industry in Nigeria.[7] However, there are much more stringent laws and regulations in developed countries than there are in developing countries like Nigeria where many multinational oil companies conduct a large percentage of their production and exploration activities.[8] The

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[1] Jessica Marshall, 'Who Needs Oil?' (2007) 195 [2611] New Scientist at Pg. 28.

[2] Daniel Yergin, *The Prize: The Epic Quest for Oil Money and Power* (New York: Simon & Schuster, 1991) at Pg. 788.

[3] U.S. Energy Information Administration, *Nigeria* <https://www.eia.gov/international/content/analysis/countries_long/Nigeria/NigeriaCAXS_2020.pdf> (25 June 2020) Pg. 3.]. (Last accessed on 30/03/2023).

[4] Amnesty International, *Bad Information: Oil Spill Investigations in the Niger Delta* (London: Amnesty International Publications, 2013) Pg. 10. Also, Amnesty International, *On Trial: Shell in Nigeria, Legal Actions Against the Oil Multinational* (London: Amnesty International Ltd., 2020) Pg. 5.

[5] Rebecca Ratcliffe, '''This place used to be green'': the brutal impact of oil in the Niger Delta', (6 December 2019) <https://www.theguardian.com/global-development/2019/dec/06/this-place-used-to-be-green-the-brutal-impact-of-oil-in-the-niger-delta> (Last accessed on 17/03/2023).

[6] Gabriel Eweje, 'Environmental Costs and Responsibilities Resulting from Oil Exploitation in Developing Countries: The Case of the Niger Delta of Nigeria' (2006) *Journal of Business Ethics*, Vol. 69, No. 1, 27 at 30-31. Also, BBC News, 'Nigeria oil spills 'spark environmental genocide'' (01 November 2019) <https://www.bbc.com/news/av/world-africa-50265157> (Last accessed on 17/03/2023).

[7] For example, the Petroleum Act, the Nigerian National Petroleum Corporation (NNPC) Act, the National Oil Spills Detection and Response Agency (NOSDRA) Act, the Environmental Impact Assessment (EIA) Act, the Oil Pipelines Act, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) etc.

[8] For example, since 1989, United States oil companies have invested more capital in foreign countries than they have done within the United States. According to Joshua Karliner, '…as recently as 1990 Chevron spent a majority of its exploration and production [outlays] in the United States, by 1996 it was spending a full 61 percent of this capital abroad.' [See Karliner, J., The Corporate Planet: Ecology and Politics in the Age of Globalization (United States of America: Sierra Club Books, 1997) Pgs. 80-81].

requirements for high environmental standards which apply in developed countries like the United Kingdom and the United States of America are often not replicated in these developing countries as many of them depend heavily on the foreign investment generated by the oil corporations and therefore do not have the independent financial wherewithal to make these corporations comply with such high environmental standards.[9] This is the case even where there have been attempts by such countries to enact laws and/or make regulations which should ensure that the oil corporations conduct their activities to standards applicable in their home countries.[10] Essentially In a bid to attract foreign investment, the legislation and regulations enacted by many developing countries are less stringent than they would ideally prefer to have in place.[11] The argument has been made that the adoption of less stringent laws and regulations by one country[12] would lead to other nations taking independent decisions[13] to make their own jurisdiction investment-favourable by the adoption of lax legislation and policies because of the fear that they will suffer serious competitive disadvantage by adopting the more stringent requirements.[14] This competitive process has been referred to as the race to the bottom.[15] There is no more compelling indication of the extent to which Nigeria may be said to be winning this unenviable race than the statement released by the late Ken Saro-Wiwa, who was a spokesman for the Movement for the Survival of the Ogoni People (MOSOP).[16] He stated in 1992 that the Shell Petroleum Development Company has been flaring gas at some of its sites in Nigeria for twenty-four hours each day for the previous thirty years.[17] Nigeria's stance with regards to gas flaring is visible when one considers that by virtue of the Associated Gas Re-injection Act,[18] gas flaring has been outlawed in Nigeria since 1984, but still continues in Nigeria till this day by virtue of exemptions granted by the Petroleum Minister. The recent Petroleum Industry Act 2021 also prohibits the flaring of gas in Nigeria, yet gas flaring continues. The grant of exemptions which enable oil companies to continue flaring gas is evidence of the race to the bottom as the country yields to the pressure of the oil companies in a bid to keep oil production up and foreign earnings flowing.[19]

Over the years, several lawsuits have been filed in various courts by individuals and communities adversely affected by the operations of oil companies in the Niger Delta region of Nigeria. However, evidence shows that there are numerous challenges encountered by these individuals and communities in bringing actions against multinational companies in Nigerian courts. Even when it appears that they have a genuine cause of action, there is no guarantee that their suits will have positive outcomes for them. For instance, in *J. Chinda & Ors v Shell B.P. Petroleum Company of Nigeria Limited*,[20] the court acknowledged that the plaintiff had suffered damage to their property as a result of the defendant's flare set, but since the claim was brought under the head of nuisance, the court did not find in favour of the plaintiff as it held that they could not prove that the defendant had been negligent in the management and control of the flare set. Similarly, in *R. Mon and B.*

[9] Alan Neff, 'Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act' *(1990) Ecology Law Quarterly*, Vol. 17 No.3 pgs. 447 – 537 at 492.

[10] With reference to Nigeria, the case of *Gbemre v Shell Petroleum Development Company of Nigeria Limited & Others* **(**Unreported Suit No. FHC/CS/B/153/2005) clearly shows that issues of compliance by the companies, enforcement by the Nigerian government and/or the relevant agencies as well as institutionalised corruption are serious factors that hamper the implementation of such laws.

[11] See Richard B. Stewart, 'Environmental Regulation and International Competitiveness' (June 1993) *The Yale Law Journal*, Vol. 102, No. 8, Pg. 2039 at pg. 2058.

[12] For the purpose of this work, the country referred to is a developing country in need of foreign investment which is doing all it can to make its jurisdiction attractive enough to attract the requisite foreign investment.

[13] Though independent, these decisions are often made based on the laws adopted in other nations that would impact the investments which would be made by foreign investors in their country. Thus, there is a competition among countries as to who has the most favourable regulatory mechanism which would attract foreign investment.

[14] See Richard B. Stewart, 'Environmental Regulation and International Competitiveness' (June 1993) *The Yale Law Journal*, Vol. 102, No. 8, Pg. 2039 at pg. 2058.

[15] See Richard L. Revesz,'Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rationale for Federal Environmental Regulation', (1998) 68 N.Y.U. L. Rev. Pg. 1210. See also Richard L. Revesz, P. Sands and R.B. Stewart, (Eds.), *Environmental Law, the Economy and Sustainable Development* (Cambridge: Cambridge University Press, 2000), Pg. 37.

[16] The Movement for the Survival of the Ogoni People is a pressure/human rights group set up to protect the rights and protest against injustices meted out to the people of Ogoni land as a result of the oil exploration and exploitation activities carried out within their region.

[17] Kenule Saro-Wiwa, 'Statement of the Ogoni People to the Tenth Session of the Working Group on Indigenous Populations', Palais des Nations, Geneva, 28 July 1992; See Also, 'The Environmental and Social Costs of Living Next Door to Shell' [http://oloibiri.blogspot.com/2004/10/environmental-and-social-costs-of.html] (Last accessed on 30/03/2023).

[18] Cap A25 Laws of the Federation of Nigeria 2004. Section 3.

[19] Petroleum Africa, 'Industry says impossible to comply with court ruling' (17 November 2005), <http://www.petroleumafrica.com/en/newsarticle.php?NewsID=818&PHPSESSID=b13487e84871c4bd149bc00f34894e63>. (Last visited on 12/05/2023); Also, Ahemba, T., **'Nigeria can't stop flaring right now, industry says' (16 November 2005)** *Planet Ark World Environmental News*, <http://www.planetark.org/dailynewsstory.cfm/newsid/33493/story.htm> **(Last visited on 12**/05/2023**).**

[20] See O. Adewale, 'Judicial Attitude to Environmental Hazards in the Nigerian Oil Industry', in *The Petroleum Industry and the Nigerian Environment*, Proceedings of the 1985 Seminar, Department of Petroleum Resources (Environmental Planning and Protection Division).

Igara v Shell B.P. Petroleum Company of Nigeria Limited,[21] the plaintiffs brought an action for damage to their fishpond which was caused by the defendant. They sought compensation in the sum of Two Hundred Thousand Naira.[22] The court agreed that the defendants were liable for the damage caused to the plaintiffs' pond, but awarded the plaintiffs only Two Hundred Naira. In *Allar Irou v Shell BP Petroleum Development Company*,[23] the plaintiff brought a suit against Shell BP praying the court (amongst other reliefs) for an injunction to stop the defendant from further carrying out the acts which was causing pollution to his land and fish pond. The judge decided not to grant the injunction sought holding that the refusal was expedient on socio-economic grounds.[24] The court stated that to grant the injunction would amount to asking the defendant to stop operating in the area… and cause the stoppage of a trade… mineral which is the main source of the country's revenue.[25] In *Oronto Douglas v Shell Petroleum Development Company Ltd & 5 Ors*,,[26] the plaintiff, as an environmental protection activist, brought an action, before the Federal High Court, seeking a compliance with the provisions of the Environmental Impact Assessment Act by the Defendants regarding a Liquefied Natural Gas project. The court held that the plaintiff had *locus standi* to institute the action since he had not shown evidence of any direct injury caused to him or failed to show that his right was affected or that he suffered injury over the generality of the people. The court stated that, The action is frivolous and the plaintiff a busy body should not be allowed to bring the court into contempt and ridicule. The court refused to avert its mind to the justice of the case or the fact that the defendants had refused to adhere to and breached the provisions of a valid subsisting law.

Furthermore, oil companies which are sued as defendants in Nigeria are notoriously known to engage in delay tactics which are geared towards frustrating the plaintiffs or causing inordinately long and protracted lawsuits. For instance, in the case of *Gbemre v Shell Petroleum Development Company Nig. Ltd & Ors*,,[27] the trial judge was forced to adjourn the matter for judgement after the first Defendant (Shell) kept bringing interlocutory applications and refused to proceed with its defence of the suit. Furthermore, the case of *Shell Petroleum Development Company Nig. Ltd & Anor v X. M. Federal Limited & Anor*[28] shows a clear example of methods used by multinational oil companies that have been sued to frustrate the plaintiffs. This was a case initially filed in the Lagos Judicial Division of the Federal High Court on the 26th July 1995, Shell brought an application which was dismissed in June 1996. Shell brought another application in January 1997 which was also dismissed, and Shell appealed this ruling to the Court of Appeal, which also dismissed the appeal in 2003. The Court of Appeal held that ...the defendants are merely chasing shadows here rather than substance. They appear to be clinging to technicality at the expense of justice.[29] A further appeal was made to the Supreme Court and the decision of the Supreme Court was delivered on the 14th of July 2006.[30] The Supreme Court referred to Shell's appeal as frivolous[31] and stated, it is very clear... that this is a very needless appeal.[32] Unfortunately, courts can only award costs against parties who employ frivolous time wasting tactics and in Nigeria, the courts are conservative in their awards of costs against erring or unsuccessful parties in a suit. The costs usually awarded often do not reflect the cost expended by the parties in either the prosecution or defence of a suit and have little bearing on the time, resources and energy expended by the parties.[33]

In addition to the issues raised above, there is the troubling trend of lack of compliance by oil companies and the government with the judgements, rulings, and orders of courts in Nigeria. In *Gbemre v Shell Petroleum Development Company Nig. Ltd & Ors*,,[34] the court delivered a judgement in which it ordered that all routine flaring of gas in Nigeria must stop. The oil company, the regulator and the Federal Government, which were all defendants in the suit ignored the judgement, and routine gas flaring continues in Nigeria to this day. After the Gbemre judgment, the weak political will of the Nigerian Government with regards to stopping routine flaring could be discerned from the statement of Mr. Emmanuel Agbegir who was a spokesman for the Nigerian Minister for Petroleum. Speaking about the court order, he said, Certain situations are just

[21] (1970-1972) 1R.S.L.R. 71.
[22] This was the equivalent of approximately Two Hundred and Eighty Thousand Dollars back then. Source: FX Top, 'Historical Converter' <https://fxtop.com/en/historical-currency-converter.php> (Last accessed on 17/03/2023).
[23] Unreported. Suit No. W/89/71 of the High Court holden in Warri, 26th of November 1973.
[24] T.O. Ilegbune, 'Environmental Regulation and Enforcement', in *Environmental Law and Policy*, O.A. Osunbor, S. Simpson and O. Fagbohun (eds.) (Lagos: Lagos Law Centre of the Lagos State University, 1998). Pg. 221.
[25] Emphasis supplied. See Muhammed Tawfiq Ladan, 'A Critical Appraisal of Judicial Attitude Towards Environmental Litigation and Access to Environmental Justice in Nigeria', [A Paper Presented at the 5th IUCN Academy Global Symposium] (Rio De Janeiro: 31st May – 6th June, 2007) at Pg. 33.
[26] Unreported Suit No. FHC/2CS/573/93. Ruling was delivered on the 17th February 1997.
[27] Unreported Suit No. FHC/CS/B/153/2005.
[28] [2006] 7 S.C (Pt II) 27; or [2006] 16 NWLR (Pt.1004) 189.
[29] Per Oguntade, JCA (as he then was).
[30] This was approximately 11 years after the substantive suit was originally instituted, yet the substantive matter had not been heard/tried.
[31] Per Ikechi Francis Ogbuagu, JSC.
[32] Per Walter Samuel Nkanu Onnoghen, JSC.
[33] *Gbemre*, ibid.
[34] Supra.

impossible. To immediately stop flaring would mean a complete shut down of oil production and I don't think that would be in Nigeria's interest.[35]

Another case which shows that court orders are often treated with levity is the case of *Ijaw Aborigines of Bayelsa State v. Shell I*,[36] wherein the Federal High Court holden in Port Harcourt on the 24th of February 2006, ordered Shell Petroleum Development Company to pay the sum of $1.5 billion to the Ijaw people in the Delta region of Nigeria. These people make up many communities which have been affected by pollution which has occurred as a result of the activities of Shell and the compensation was for the environmental degradation of their communities since 1956. Shell refused to pay and instead appealed the decision. It must be born in mind that the order that Shell pays the above stated damages l was initially made by the Nigerian House of Representatives after Shell and the Ijaw community had submitted themselves for the settlement of the dispute before the House. Shell refused to abide by the decision of the House of Representatives and subsequently the Nigerian Senate after looking into the matter re-affirmed the decision that Shell should pay the $1.5 billion damages to the Ijaw people. Shell still refused to pay and the Ijaw feeling frustrated filed an action against Shell at the Federal High Court which also decided that Shell should pay the damages. Shell did not obey the judgement but decided to appeal and applied for a stay of execution of the judgement. In addressing this application, the court ordered Shell to pay the $1.5 billion to the Central Bank of Nigeria (which was a neutral party) until the determination of the appeal, but Shell still refused to obey the order of court. It is clear that within Nigeria, litigants face issues and problems relating to access to justice, delay in obtaining justice, exorbitant costs to the attainment of justice, enforcement of judgements and compliance with the law and rulings of court. The question which therefore needs to be asked is whether anything can be done immediately which will have the effect of ensuring that operators within the oil and gas industry are at least made to comply strictly with the standards[37] set by the laws and regulations in the developing countries in which they operate,[38] and where they fail to comply or are in clear breach of set laws and regulations, they are held accountable in a timeous manner.[39]

Bearing the foregoing in mind, it is therefore the intention of this article to examine the issues of the liability which can be incurred or attached to a parent company for the wrong doings of its subsidiary. Thus, there shall be a look at whether one company can be held liable and accountable for the actions of another company on the basis that there is a legal relationship because they form part of a group.[40] Given the problems identified previously with access to justice and enforcing judgements against oil companies in Nigeria, an important aspect of this discussion will be the possibility of raising actions against parent companies in other jurisdictions where the courts may be willing to countenance the possibility attaching liability to these parent companies for the actions of their subsidiaries in another jurisdiction.

3. The Concept of the Liability in the Parent and Subsidiary Company Structure

Many of the oil exploration and production companies which operate in developing countries have parent companies that have been set up or are incorporated in developed countries.[41] These oil companies in developing countries are either wholly owned or majority owned subsidiaries of their foreign parent companies, thus forming part of what is usually a group of companies or a conglomerate. These companies which have branches or subsidiaries in different countries are commonly referred to interchangeably as Multinational Corporations (MNCs) or Transnational Corporations (TNCs).[42] In company affairs, it is ordinarily the case that any company which holds the majority of the controlling shares[43] in another company is the parent company of that company as the company holding majority shares usually can effectively exercise material influence over the manner in which the second company is run and the way its operations are carried out. The company with the controlling shares can by virtue of its majority stake influence and inform decisions which will affect and shape the running of the second company. Thus, the legal position, rights and obligation of the company holding majority shares with

[35] Petroleum Africa, ibid.
[36] Unreported. Suit No. FHC/YNG/CS/3/05. Judgment delivered by Justice Okechukwu Okeke, Federal High Court Port Harcourt, Rivers State on 24 February 2006.
[37] No matter how low, inadequate or dissatisfactory they may be.
[38] And where possible, a higher standard. This is especially important because of the adverse long term and many times irreversible damage that can occur (and in fact has occurred) to the environment as a result of the low standards employed and applied by these companies when carrying out their operations in developing countries.
[39] Such that where there are any victims affected by their actions or omissions, such victims are not denied justice as a result of bureaucratic delays in seeking and achieving relief. Also, so that any actions carried out in breach of the legislative and regulatory regimes governing the oil and gas industry can be properly nipped in the bud and brought to an early end.
[40] Either as parent and subsidiary, or sister company.
[41] E.g., Shell, Chevron, ExxonMobil, Texaco, TotalfinaElf etc.
[42] Or Multinational/Transnational Companies. Peter T. Muchlinski defines the Multinational Enterprise as 'a firm that engages in direct investment outside its home country.' He chooses to use the term 'enterprise' over 'corporation' or even company. Transnational Corporation has been stated by Muchlinski to be a term which covers 'all types of cross-border business associations that engage in direct investment as opposed to portfolio investment or cross-border trade.' See Peter T. Muchlinski, *Multinational Enterprises & the Law*, (Oxford: Oxford University Press, 2007) at Pgs. 5-6.
[43] Over fifty percent of the share capital of the other company.

regards to the second company is one which usually has to be judged on a case-by-case basis to determine the extent of the exercise of influence it brings to bear over the other company.[44] Under Nigerian law, the 2020 Companies and Allied Matters Act (CAMA)[45] specifies what a holding company and what a subsidiary is. By virtue of Section 381 –

(1) Subject to subsection (4) of this section, a company shall for the purposes of this Act be deemed to be a subsidiary of another company if the company –

(a) is a member of it and controls the composition of its board of directors;

(b) holds more than 50% in nominal value of its equity share capital; or

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

(5) For the purposes of this Act –

(a) a company is deemed to be the holding company of another, if the other is its subsidiary; and

(b) a body corporate is deemed to be the wholly-owned subsidiary of another, if it has no member except that other and that other's wholly owned subsidiaries are its or their nominees.

The corresponding provisions in the United Kingdom are contained in sections 1159[46] and 1162[47] of the Companies Act 2006 which provides for subsidiary and holding companies (and undertakings). Section 1159 of the United Kingdom's 2006 Companies Act states as follows –

(1) A company is a subsidiary of another company, its holding company, if that other company —

(a) holds a majority of the voting rights in it, or

(b) is a member of it and has the right to appoint or remove a majority of its board of directors, or

(c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it, or if it is a subsidiary of a company that is itself a subsidiary of that other company.

(2) A company is a wholly-owned subsidiary of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.

(4) In this section… company includes any body corporate.

Section 1162 of the same Act also states as follows –

(1) This section (together with Schedule 7)[48] defines parent undertaking and subsidiary undertaking for the purposes of the Companies Acts

(2) An undertaking is a parent undertaking in relation to another undertaking, a subsidiary undertaking, if—

(a) it holds a majority of the voting rights in the undertaking, or

(b) it is a member of the undertaking and has the right to appoint or remove a majority of its board of directors, or

(c) it has the right to exercise a dominant influence over the undertaking—

(i) by virtue of provisions contained in the undertaking's articles, or

(ii) by virtue of a control contract, or

(d) it is a member of the undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking.

(3) For the purposes of subsection (2) an undertaking shall be treated as a member of another undertaking—

(a) if any of its subsidiary undertakings is a member of that undertaking, or

(b) if any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings.

(4) An undertaking is also a parent undertaking in relation to another undertaking, a subsidiary undertaking, if—

(a) it has the power to exercise, or actually exercises, dominant influence or control over it, or

(b) it and the subsidiary undertaking are managed on a unified basis.

(5) A parent undertaking shall be treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings; and references to its subsidiary undertakings shall be construed accordingly.

(6) Schedule 7 contains provisions explaining expressions used in this section and otherwise supplementing this section.

[44] See the decisions in the cases of *Stora Kopparbergs Bergslags v Commission* (Case 286/98, [2000] ECR I-9925) and *Akzo Nobel NV v Commission* (Case C- 97/08) in which the courts used different criteria in coming to their respective decisions. (Both cases are discussed more extensively infra).

[45] This is a very new Act. Its provisions are similar to the provisions of the preceding Companies and Allied Matters Act of 1990 (Chapter 59 Laws of the Federal republic of Nigeria 1990).

[46] This section covers holding and subsidiary companies.

[47] This section covers parent and subsidiary undertakings.

[48] Schedule 7 deals with supplementary provisions regarding rights of parent and subsidiary undertakings.

Parent companies under the law have identical powers that majority shareholders or owners have in relation to their subsidiaries. This means that the parent company has the right to appoint and remove the board of directors of the subsidiary company. A company's board of directors are responsible for managing the affairs of the company and the directors elect officers who are responsible for the day to day running of the company and for executing the policies that the board of directors makes.

The courts have in certain instances attributed the actions and liability of a subsidiary company to a parent company when it has been sufficiently established that the actions of the subsidiary company are so closely controlled or directed by the parent company that the subsidiary can be regarded as just being an agent who has carried out the instruction of the parent company. With regards to this, the case of *Smith, Stone and Knight Ltd v Birmingham Corporation*[49] is instructive. This was a case involving the compulsory acquisition of landed property by Birmingham Corporation. Though the property was owned by Smith, Stone and Knight Ltd., it was occupied by Birmingham Waste Co. Ltd., which carried out its business there. Birmingham Waste Co Ltd. was a subsidiary of Smith, Stone and Knight Ltd., and according to the plaintiff (Smith Stone), this said business was carried out by Birmingham Waste Co. Ltd. for and on behalf of the plaintiff. Under Section 121 of the Lands Clauses Consolidation Act 1845, Birmingham Corporation could compulsorily acquire the land without the need to pay the occupier any compensation where such occupier has no greater interest than a tenancy not exceeding one year in the property to be compulsorily acquired. The pertinent issue to be determined between the parties was whether the subsidiary (Birmingham Waste Co. Ltd.) was carrying on the business as the parent company's (Smith, Stone and Knight Ltd.) business or as its own because if it was found to have been conducting the business on its own behalf, neither it nor its parent company would have been entitled to compensation for disturbance of the business that was conducted on the property which was being compulsorily acquired, as the Birmingham Waste Co. Ltd would have been merely an occupier of the property without any greater interest. On the other hand, should it have been decided that the subsidiary was conducting the business as the business of the parent company, Birmingham Corporation would be required to pay compensation to the parent company for disturbance as the loss for disturbance to the business would really have been incurred by the parent company and not the subsidiary. In this case, Atkinson, J., had to make a decision on the question of whether the subsidiary was carrying on the business as the company's business or as its own....[50] In coming to a decision, he found that there are six pertinent points[51] which are relevant to determining the question.[52] These points are as follows –

- Were the profits treated as the profits of the parent company?
- Were the persons conducting the business appointed by the parent company?
- Was the parent company the head and the brain of the trading venture?
- Did the parent company govern the adventure, decide what should be done and what capital should be embarked on the venture?
- Did the parent company make the profits by its skill and direction?
- Was the parent company in effectual and constant control?

Atkinson, J., found that all these questions could be answered in the affirmative and therefore found in favour of the claimants (Smith, Stone and Knight Ltd.) and set aside the interim award made at arbitration. Using the points set out above, Smith, Stone and Knight Ltd. were thus entitled to compensation for disturbance of business. It was his Lordship's opinion that Birmingham Waste Co. Ltd. was an agent or a tool of Smith, Stone and Knight Ltd.[53] The case of *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*[54] shows another example of when the courts have lifted the corporate veil to come to a decision as to whether a parent company and its subsidiary company can be treated as a single entity. In this case, the court adumbrated the theory of the Single Economic Unit in coming to the decision that the parent

[49] [1939] 4 All ER 116. (This case is also known as *Smith, Stone and Knight Ltd v Mayor, Aldermen and Citizens of the City of Birmingham*).
[50] The *Smith, Stone and Knight Ltd* case. Supra at Pg. 121.
[51] Or questions.
[52] i.e. Who was really carrying on the business? (See Pg. 121).
[53] Though the decision in this case has been followed by a few other cases (e.g. see *Sierra Leone v Davenport* [2003] EWHC 2769.), it is only of persuasive authority or of limited binding authority as it was a case decided by a lower court.
[54] [1976] 1 WLR 852. This case was brought before the Court of Appeal from a decision taken by the Lands Tribunal. It relates to the compulsory acquisition of property by the Tower Hamlets Council which resulted in the parent company's loss of business. It must however be stressed here that in a few subsequent cases (e.g. *Woolfson v Strathclyde Regional Council* [1978] SLT 159 and *Adams v Cape Industries PLC* [1990] Ch 433), the decision in the DHN Food case has been distinguished, qualified and treated with caution. However, it has not been overturned and thus can be argued that it is still good law. It must however be acknowledged that not everyone agrees that the position as stated in the DHN Food case is still good law e.g. Simon Goulding in his book *Company Law* states that 'To the extent that DHN might have been construed as authority for the proposition that the courts can generally treat closely connected companies in a group as one economic entity, ignoring their separate legal personalities, it must be conceded that the decision is no longer good law.' (See Simon Goulding, *Company Law* (London: Cavendish Publishing Limited, 1999) at Pg. 77).

company should be compensated for loss of its business under a compulsory acquisition order.[55] Lord Denning, M.R., who delivered the lead judgment in the case, allowed the appeal on the basis of the arguments of two points by the appellants.[56] In treating the point on lifting the corporate veil, he placed reliance on Professor Gower's *Modern Company Law* to the effect that there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group.[57] A group of two or more separately incorporated companies may be treated as one concern. According to Denning, M.R., This is especially the case when a parent company owns all the shares of the subsidiaries - so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.[58] In addition, to the foregoing, Goff, L.J., in giving his ruling in the case allowed the appeal on three grounds. The ground relevant to this article is the second one, in which his Lordship stated that one is entitled to look at the realities of the situation and to pierce the corporate veil. He went ahead to caution that it was not in every case where there is a group of companies that the courts will be entitled to pierce the veil of incorporation. According to him, the decision of whether or not to lift the corporate veil is one which should be made on a case-by-case basis, and in this case, the court was entitled to lift the veil.[59]

It is pertinent to stress here that in the cases of *Smith, Stone and Knight Ltd v Birmingham Corporation* and *D.H.N. Food Distributors Ltd v Tower Hamlets London Borough Council* covered above, when the courts lifted the corporate veil, it was with the intention of conferring a benefit on the parent company and not a liability. However, the thrust of the principles enunciated in both of these cases is such that they not only can be applied with a view to conferring a benefit, but may also be applied by the courts to attach liability to a parent company where it can be successfully established that the parent company and its subsidiary are effectively one and the same entity and/or where the parent company has such control over the subsidiary that the subsidiary can be deemed to be an agent of the parent company. This has been effectively proven in the cases of *Odyssey Re (London) Limited and Alexander Howden Holdings Limited v OIC Run-Off Limited (Formerly Orion Insurance Company Plc)*[60] and *Stocznia Gdanska SA v Latvian Shipping Co. & Others*[61]. At this juncture, it cannot be overstressed that the local courts are loath to apply liability to parent companies for the actions of their subsidiaries by lifting the corporate veil unless it would be an injustice should they fail or refuse to do so.[62] Moreover, it has been argued that the issue of control as raised in the *DHN Food* case and the *Smith, Stone and Knight Ltd* case is not one that can be easily

[55] In addition to the aforementioned cases, in the cases of *Odyssey Re (London) Limited and Alexander Howden Holdings Limited v OIC Run-Off Limited (Formerly Orion Insurance Company Plc)* [2000] 97 (13) LSG 42 and *Stocznia Gdanska SA v Latvian Shipping Co. & Others* [2002] EWCA Civ 889, the courts have for various reasons lifted the veil of incorporation in order to establish the liability of the parent company for the actions of its subsidiary.

[56] The first being that DHN had an irrevocable licence over the property in question, and the second point/ground being that under the circumstances of the case, the courts were required to lift the veil of incorporation with a view to determining the actual owner of the property in question. It must be stated here that these two points raised here were actually points two and three of the appellants' arguments, and success on either ground would have sufficed to make the court allow the appeal. For the purpose of this work however, the focus shall be on the point which relates to lifting the corporate veil.

[57] See Laurence C.B. Gower, *Principles of Modern Company Law* (London: Stevens, 3rd Ed. 1969) Pg. 216.

[58] See *D.H.N. Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 at Pg. 861.

[59] See *D.H.N. Food Distributors Ltd v Tower Hamlets London Borough Council* (Supra) at Pg. 862. In the exact words of Goff, L.J., '... in my judgment, this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever....'

[60] [2000] 97 (13) LSG 42.

[61] [2002] EWCA Civ 889.

[62] See *Woolfson v Strathclyde Regional Council* (Supra). This was also a case involving compulsory acquisition of land (by Glasgow Corporation). It was brought before the House of Lords, which distinguished the case of *D.H.N. Food Distributors Ltd v Tower Hamlets London Borough Council* and in dismissing the appellants case affirmed the decision of the lower court. In particular, Lord Keith of Kinkel (who delivered the lead judgment) found the reasoning of the trial court judge unimpeachable. The trial judge had referred to another judgment by Ormerod L.J. in *Tunstall v. Steigmann* ([1962] 2 All ER 417) in arriving at his own decision. It was to the effect that any departure from a strict observance of the principles laid down in *Salomon v Salomon* has been made to deal with special circumstances when a limited company might well be a facade concealing the true facts (See pg. 161 of the Woolfson judgment). It is pertinent to note however that nowhere did Lord Keith of Kinkel state in his judgment that the court could not and would not pierce the veil of incorporation. What he actually said was that 'In my opinion there is no basis consonant with principle upon which on the facts of this case the corporate veil can be pierced to the effect of holding Woolfson to be the true owner of Campbell's business or of the assets of Solfred'. It can be argued that the court actually did look behind the corporate veil, but its findings were not in favour of the appellants. Lord Keith expressed some doubts as to whether in the DHN Foods case, the Court of Appeal had properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts. However, the *DHN Food* case was only distinguished and not overruled or overturned and thus, remains good law (although it has not been followed by many courts in recent years). It is necessary to note here that the *DHN Foods* case had toed the line of the case of In *Littlewoods Mail Order Stores Ltd v McGregor* [1969] 3 All ER 85, in which Lord Denning had stated that the principle put forward in *Salomon v. Salomon* had to be carefully watched. He was of the opinion that that Parliament had shown the way as regards the scrutiny of groups of companies and it was left to the courts to follow this lead.

identified or defined in every case[63] and therefore, this control principle as laid down in these two cases has failed to lay clear cut precedents by providing certain or predictable guidelines for subsequent cases to follow.[64]

At this stage, a discussion of the concept of lifting the veil of incorporation will not be complete without dealing with the seminal decision of the Court of Appeal in the landmark case of *Adams v. Cape Industries PLC.*[65] In this case, Cape Industries was a multinational company which was based in England. It had various subsidiary companies, some of which carried out mining operations of asbestos at various locations in South Africa and some marketed some of its products in the USA. Cape Industries and some of its subsidiaries were sued by its workers who had developed asbestos related diseases/illnesses. Cape Industries had liquidated the assets of one of its subsidiaries when it became unprofitable to continue running the business while some others filed for bankruptcy. Cape Industries argued that the court lacked jurisdiction over it and decided not to defend the suits in the US courts or to pay any damages awarded. It contended that it did not do business in the US and any judgements obtained from the US courts could not be enforced in England. Judgement was entered by the courts against the defendants and since Cape Industries no longer had any assets in the US, the plaintiffs sought to enforce the judgement in England. They could only do so if Cape Industries had consented to the US court's jurisdiction or if it could be determined that Cape Industries was present in the US. In order to determine whether Cape Industries was present in the US, the English court would have had to lift the veil of incorporation to determine if Cape Industries and its subsidiaries were the same. The trial judge in the case to enforce the judgement in England agreed that the subsidiaries had been an integral part of the Cape group and they operated worldwide as a single economic entity. He further agreed that the arrangement between Cape Industry and its subsidiary was a facade set up to do business in America while at the same time avoiding liability. However, he stated that the subsidiary was a separate legal entity and the corporate veil could not be lifted simply because justice demanded it. Thus, he dismissed the plaintiff's case for enforcement of judgement. On appeal, the Court of Appeal upheld the lower court's decision and refused to overturn it. It was a unanimous judgement by the Court of Appeal and commenting on the structure of Cape Industries and its subsidiaries, the court stated *interalia*, Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. ... in our judgement Cape was in law entitled to organise the group's affairs in that manner ...

Although the decision in *Adams v Cape Industries* has been hailed as the path the courts in the UK are likely to follow, especially in light of the fact that the Court of Appeal in the *Woolfson* case refused to follow the decision and reasoning in the *DHN Food* case, it must be strongly reiterated that the decision in the *DHN Food* case still stands and has not been overturned. Moreover, the liability of a parent company for the act of its subsidiary can be ascertained in a foreign jurisdiction without the need to resort to lifting the corporate veil. It might simply boil down to whether the parent company could be said to owe the victim a duty of care and has breached this duty. The case of *Lubbe & 4 Others v Cape Plc*,[66] (another asbestos related suit) is instructive in this regard. In this case, the plaintiffs brought a suit against a parent company (Cape PLC) in England over acts of its subsidiary which had occurred and damages/injury suffered in South Africa. The House of Lords had to decide whether the plaintiffs' suit should be allowed to go to trial in the UK instead of South Africa and whether the stay of proceedings which the second appellate court had put on the suit should be discharged so that the suit could continue in the UK. The House of Lords removed the stay of proceedings that the second appellate court had placed on the plaintiffs' suit and stated– 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....

The second segment of the cases involves the personal injury issues relevant to each individual: diagnosis, prognosis, causation (including the contribution made to a plaintiff's condition by any sources of contamination for which the defendant was not responsible) and special damage....[[67]] More interesting, the House of Lords also allowed the plaintiffs' to sue in the UK on the following ground –

The plaintiffs submitted that to stay these proceedings in favour of the South African forum would violate the plaintiffs' rights guaranteed by Article 6 of the European Convention since it would, because of the lack of funding and legal

[63] Especially as the issue of whether or not to pierce the veil of incorporation is one which (as Goff, L.J., clearly stated in the *DHN Food* case) must be decided on a case-by-case basis.
[64] Roman Tomasic, S. Bottomley and R. McQueen, *Corporations Law in Australia* (Australia: The Federation Press, 2002) Pg. 48.
[65] [1990] Ch. 433 (can also be found at [1991] 1 All ER 987).

[66] [2000] 1 WLR 1545. (The judgement can also be accessed online at http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm) (Last accessed on 30/03/2023)
[67] Per Lord Bingham of Cornhill, who delivered the lead judgement. Emphasis supplied.

representation in South Africa, deny them a fair trial on terms of litigious equality with the defendant. For reasons already given, I have concluded that a stay would lead to a denial of justice to the plaintiffs. As *Spiliada* makes clear, a stay will not be granted where it is established by cogent evidence that the plaintiff will not obtain justice in the foreign forum. I cannot conceive that the court would grant a stay in any case where adequate funding and legal representation of the plaintiff were judged to be necessary to the doing of justice and these were clearly shown to be unavailable in the foreign forum although available here. I do not think Article 6 supports any conclusion which is not already reached on application of *Spiliada* principles. I cannot, however, accept the view of the second Court of Appeal that it would be right to decline jurisdiction in favour of South Africa even if legal representation were not available there.[[68]] In the US case of *Larry Bowoto v Texaco Corporation*,[69] Chevron-Texaco was found to be liable for the acts of its subsidiary operating in Nigeria under the Alien Torts Claims Act (ATCA).[70] In the Australian case of *CSR v Wren*,[71] the court held the parent company liable on the ground that the disease the plaintiff contracted was on account of the parent company's negligence.[72]

Thus, in light of the foregoing,[73] it is not farfetched that multinational companies which operate within the Nigerian oil and gas industry and which have foreign parent companies can have the liability for their actions which severely impact negatively on the environment and the lives and living conditions of Nigerian locals, attributed to those foreign parent companies, not only by the application of the single economic unit or entity principle or via the agent principle, but because the parent company owes them a duty of care. . This is because, for many of those parent companies, the conducts, operations, accounts and profits from the local operating oil companies form a vital part of their business, accounts and profits. Most (if not all) of these conglomerates have corporate records of their group operations, publish group annual reports and financial accounts every year which comprise the annual report and accounts of both the parent company and its subsidiaries, and often delimits the income attributable to each shareholder as a result of that year's business, as well as profits where applicable.[74] The issue of the corporate governance[75] and the *modus operandi* of multinational oil companies operating in Nigeria is pertinent to this work as the conduct of business in these companies and the decisions taken by the board of directors affect the lives of those people who live within close proximity of the operations of those companies and on a grander and wider scale, the local and global environment. These decisions and operations also have an impact in some form or the other on the world at large. The importance of the provisions contained within Sections 1159 and 1162 of the United Kingdom's 2006 Companies Act and Section 381 of Nigeria's 2020 Companies and Allied Matters Act,[76] cannot be over-emphasised since they establish the legislative parameters within which legal liability can be formed viz-a-viz parent and subsidiary companies.[77] The structure of companies can be complex, especially when there are parent companies and several subsidiary companies within a group of companies. Parent companies have the power to personally hold their subsidiaries[78] accountable for their acts and decisions where such subsidiary companies are not wholly owned subsidiaries.[79] Where a subsidiary is a wholly owned subsidiary, the parent company wholly controls that subsidiary and thus the actions of the subsidiary can be attributed to the parent company as those actions can be presumed to have emanated from the parent company.[80] However, a parent company may be held accountable for the actions of a subsidiary which is not wholly owned

[68] Per Lord Bingham of Cornhill. Emphasis supplied.
[69] [200] US Dist LEXIS 4603 (22 March 2004, US Dist Ct ND Cal).
[70] Of 1789. Also referred to as the Alien Tort Statute.
[71] [1997] 44 NSWLR 463 (CA NSW).
[72] It should be stated here that in this case the parent company was in control of the subsidiary's management as it was a wholly owned subsidiary.
[73] Particularly the precedents set in the cases of *Lubbe v. Cape Plc.*, *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* and *Smith, Stone and Knight Ltd v Birmingham Corporation* et al.
[74] See https://reports.shell.com/annual-report/2019/ for Royal Dutch Shell's PLC's 2019 annual report; See also https://corporate.exxonmobil.com/Investors/Annual-Report for ExxonMobil's 2019 summary annual report; Also see https://www.chevron.com/annual-report for Chevron's 2019 annual report; and see https://www.total.com/system/files/documents/2021-03/2020-universal-registration-document.pdf for Total's 2020 Universal Registration document which contains Total's consolidated financial statements. (All sites were last accessed on 31/03/202.
[75] i.e. a company's 'internal system encompassing policies, processes and people, which serves the needs of shareholders and other stakeholders, by directing and controlling management activities with good business savvy, objectivity, accountability and integrity' [See Gabrielle O'Donovan, 'A Board Culture of Corporate Governance', *Corporate Governance International Journal*, Vol. 6 Issue 3 (2003)].
[76] Both referred to above.
[77] With regards to the United Kingdom and Nigerian jurisdictions respectively.
[78] Via the board of directors and on a lower level, the subsidiary's officers.
[79] Especially those subsidiaries in which they hold a majority of the equity. This also applies in the cases of those subsidiaries in which the parent company though may not hold the majority of the share capital but nevertheless has enough equity to significantly influence voting in the subsidiary.
[80] This is generally the stance taken by the European Court. See the cases of *ICI v Commission* [1972] ECR 619 (Case 48/69) *Geigy v Commission* [1972] ECR 787 (Case 52/69) and *Europemballage and Continental Can v Commission* [1973] ECR 215 (Case 6/72). It should also be borne in mind that a subsidiary does not have to be a wholly owned subsidiary for the European Court to allow a presumption that the parent exercises a decisive influence over the commercial policy of the subsidiary. See the cases of *Akzo Nobel*

if that parent company owns more than fifty percent of that subsidiary's share capital or voting rights and can (and has) by virtue of this majority stake exercise influence and control over the subsidiary's board of directors. This is because this majority power allows the parent company to overrule/override any opposing or competing decisions and actions that minority stakeholders in the subsidiary company may take. It should be borne in mind that majority stake alone does not automatically make the parent company liable for the actions of its subsidiary. There also has to be the exercise of control by the parent company over its subsidiary.[81]

The September 2009 decision of the European Court of Justice (ECJ) in the case of *Akzo Nobel NV v Commission*[82] shows how the court views the relationship of parent companies and their wholly owned subsidiaries. In the *Akzo Nobel* case[83] the ECJ confirmed the decision of the court of first instance[84] and dismissed the appellants' case. It was the ECJ's decision that a 100% shareholding of a parent company in a subsidiary creates a rebuttable presumption that the parent company exercised decisive influence over the commercial policy of the subsidiary, no other elements being necessary to establish the presumption.[85] This ECJ decision appears to have followed an earlier decision in the case of *AEG Telefunken AG v Commission*[86] in which the court in that case had come to the conclusion that where a subsidiary was wholly owned by the parent company, this could be interpreted as a presumption that the parent company had exercised decisive influence over the subsidiary company. The appellants in the *Akzo* case had tried to argue that the court should base its decision on the precedent it set in the case of *Stora Kopparbergs Bergslags v Commission*,[87] where the ECJ had placed reliance not only on the one hundred percent ownership of the subsidiary company by the parent company, but also on other issues.[88]

The *Stora* case appeared to endorse the argument that before a presumption of decisive influence can be made, it is not enough to show that the subsidiary was wholly owned by the parent company.[89] In other words, one must show that in addition to the 100% ownership of the subsidiary by the parent company, there are extra or additional circumstances that indicate that the parent company exercised decisive influence over the subsidiary company. In the *Stora* case, it was the appellant's contention[90] that the court of first instance had held that the infringement of Article 85 of the Treaty committed by its subsidiary had to be attributed to the appellant without having taken into consideration the Commission's inability to establish whether the appellant had actually exercised an influence on its subsidiary's commercial policy and also the appellant's further argument that the trial court had held that the infringements committed by the appellant's subsidiaries before and after their acquisition by the appellant had to be attributed to the appellant because it could not have been unaware of their participation in the infringement and did not adopt the appropriate measures to prevent the continuation of the infringement. According to the appellants, the court of first instance attributed its subsidiary's conduct to it solely on the ground that, as a wholly-owned subsidiary, it must necessarily have followed a commercial policy laid down by the bodies which determined the parent company's policy under its statutes, but that the Court did not attempt to ascertain whether the parent company (the appellants) had in fact exercised an influence over its subsidiary. The appellants further submitted that in coming to this decision, the Court of First Instance did not take cognisance of the decisions of the Court of Justice in the cases of *International Chemical Industries v Commission*,[91] *BMW Belgium and Others v Commission*[92] and *P British Gypsum v Commission*,[93] which specify that for a parent company to be held accountable for the actions of its subsidiary, it must be determined that management power was actually exercised by that parent company over the subsidiary. In other words, it is not enough to show that there is a hundred percent ownership of the shareholding of a subsidiary company without more, as this cannot be used on its own to prove the existence of actual control by the parent company and therefore attach liability to the parent company. The ECJ expressly addressed the appellant's contentions as regards the issue that there must be an actual exercise of decisive influence by the parent company over its subsidiary for it to be held liable for the

NV v Commission (Case C- 97/08) and *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925 (Case 286/98), both treated more extensively below.

[81] See *Smith, Stone & Knight v Birmingham Corporation* [1939] 4 All ER 116.

[82] Case C- 97/08.

[83] Which though on competition and not oil and gas or environmental matters, states the court's decision and opinion on the liability of parent companies for the action(s) of their wholly owned subsidiary companies.

[84] Which had in turn confirmed the 2004 decision of the European Commission in which it imposed a fine on the appellants for cartel activities.

[85] *Akzo Nobel* case (Supra).

[86] Case 107/82, [1983] ECR 3151.

[87] Case 286/98, [2000] ECR I-9925 (An alternative citation is [2000] All ER D 1852).

[88] These included *interalia*, the fact that it had not been disputed by the parties that the parent company exercised influence over the commercial policy of the subsidiary and that both the parent and subsidiary companies were jointly represented at the administrative procedure.

[89] Whether or not this is actually the case is dealt with below when the decision of the court in the ***Stora*** case (as regards parent and subsidiary company liability) is examined in-depth.

[90] In the first plea.

[91] A.K.A. *ICI v Commission* [1972] ECR 619 (Case 48/69) at Paragraphs 132 to 141.

[92] [1979] ECR 2435 (Joined Cases 32/78 and 36/78 to 82/78) at Paragraph 24.

[93] [1995] ECR I-865 (Case C-310/93) at Paragraph 11.

actions of the said subsidiary and however, the court found that contrary to the appellant's contention, the court of first instance did not hold that a hundred percent shareholding in itself sufficed for a finding that the parent company was responsible.[94] Thus, it could be argued that the *Stora* case was authority for the position that whole ownership cannot be a presumption of decisive influence without more,[95] and this was the appellants' contention in the *Akzo Nobel* case. Before continuing with the *Akzo Nobel* case, it is extremely pertinent to note that the court in the *Stora* case clearly stated that – It should remembered that, as the Court of Justice has held on several occasions, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company,[96] especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.[97]

The first thing that can be gleaned from the foregoing is that there was no qualification to wholly owned subsidiaries. Secondly, the court was clearly in agreement with the position that liability could attach to a parent company on account of its subsidiary's actions (not only) but particularly where there is control by the parent.[98] Thirdly, the court appeared mindful of the fact that parent companies could not seek to evade liability for the acts of their subsidiaries simply by hiding behind the separate legal entity principle. With specific reference to the wholly owned status of the appellant's subsidiary, the court further stated that As that subsidiary was wholly owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct...[99]

Returning back to the *Akzo Nobel case*, the ECJ dismissed the appellants' case[100] in its entirety. The court unequivocally debunked the appellants' interpretation of the *Stora* case. It stated as follows – 'It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities'.[[101]] That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraphs 54 and 55 of this judgment. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent

[94] In fact, the ECJ found that the Court of First Instance had relied on the fact that the appellant had not disputed the fact that it was in a position to exert a decisive influence over its subsidiary's commercial policy and that it had not submitted any evidence to support its assertion that the subsidiary was autonomous. The court held that the appellants had misread the judgment of the Court of First Instance in stating that that court had relied purely on the wholly owned subsidiary status in coming to its decision and thus rejected this part of the first plea. It should be borne in mind that the failure of the appellant to dispute that it was in a position to exert a decisive influence amounts to additional circumstances which go to strengthen the presumption that the parent company was in control (alongside the fact that during the administrative procedure the appellant had presented itself as being, as regards companies in the Stora Group, the European Commission's sole interlocutor concerning the infringement in question).

[95] i.e. there must be actual exercise of decisive influence, not just a showing that the parent company could have exercised decisive influence over the subsidiary company without it definitely or actually doing so.

[96] See Paragraph 26 (Emphasis supplied).

[97] It referred to the cases of *ICI v Commission* (Supra) at Paragraphs 132 and 133, *Geigy v Commission* [1972] ECR 787 (Case 52/69) at Paragraph 44 and *Europemballage and Continental Can v Commission* [1973] ECR 215 (Case 6/72) at paragraph 15. These cases have clearly provided the European Court's position parent companies can be held accountable and liable for the actions of their subsidiary companies.

[98] It is clear at this point that from the preceding dictum of the court in Paragraph 26 of the judgment (which was in no way an *obiter dictum*), a parent company can be held liable for its subsidiary's actions irrespective of the fact that that subsidiary is a separate legal entity. Furthermore, there does not have to be actual proof made that the parent company has exercised control over the subsidiary. See Paragraph 29 (which is also addressed in the main text below). If it is argued that the dictum of the court in See Paragraph 26 is indeed an *obiter dictum*, it nevertheless is still of persuasive authority. It is important at this stage of this work to note that whilst the court found that the Court of First Instance did not base its decision on the sole fact of a hundred percent holding of the subsidiary's stock by the parent company, it did not itself stipulate that there must be additional conditions which must be met before liability for a subsidiary's actions can be attached to the parent company. All it did as regards, the appellant's contention was debunk the argument or claim that the Court of First Instance had based its decision solely on the wholly owned status of the subsidiary company, because it had indeed not done so. As a matter of fact, the only opinion the appellate court gave on this very issue was that expressed in Paragraph 26 (discussed above) which was a reminder that the courts had already settled the issue in previous cases to the effect that parent company cannot as a matter of course hide behind the separate legal entity rule to evade liability for the acts of their subsidiary.

[99] See Paragraph 29 (Emphasis supplied). Thus, in such a situation, a presumption arises automatically, and the onus then falls on the parent company to show that it had not indeed exerted or exercised decisive influence and control over its subsidiary.

[100] And thereby its argument relying on (and its interpretation of) the *Stora* case.

[101] Emphasis supplied. This part of the court's judgment appears on all fours with the dictum of the court in the ***Stora*** case. (See Paragraph 26 dealt with previously).

company, without having to establish the personal involvement of the latter in the infringement. In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community …rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently…. As the court of first instance rightly held in paragraph 61 of the judgment under appeal, while it is true that at paragraphs 28 and 29 of Stora the Court of Justice referred, not only to the fact that the parent company owned 100% of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption mentioned [above] subject to the production of additional indicia relating to the actual exercise of influence by the parent company.[[102]]

The Court of First Instance in the *Stora* case, in a part of its judgment stated clearly that the defendant was to be held accountable for the infringements[103] committed by its subsidiaries because it could not have been unaware of their participation in the infringement and did not adopt the appropriate measures to prevent the continuation of the infringement.[104] The reason for the European Court's stance can be justified by the fact that parent and subsidiaries accrue the benefits of being considered a single or joint entity,[105] thus one can say that it is only fair and proper that burdens and liability should correspondingly be attributed.[106] Nevertheless, where a subsidiary company is not wholly owned by the parent company, once a parent company has over fifty percent of the subsidiary, it has control of that subsidiary and in appropriate circumstances can be held liable for the actions of that subsidiary. *A parent company[107] typically has the same powers over the subsidiary which a majority owner has and by virtue of this fact, it has hiring and/or appointing powers over the board of directors and can also exercise its powers to appoint hire or influence the hiring of the officers of the subsidiary company. A subsidiary company is effectively controlled and can be curtailed by the parent's company's exercise of these powers. It thus follows that a parent company may be held liable for the actions of its subsidiary if can be shown that the subsidiary company is an instrument of the parent company.*

4. Conclusion

Some may come up with the argument that even where a parent company can be held attributable for the actions of its subsidiary within another territory, there will still lie the massive hurdle of lack of jurisdiction which might be raised as a form of defence by those foreign parent companies. This is undoubtedly because the parent company cannot be sued locally in the jurisdiction where the complaint arose since they are not recognised legal personalities incorporated in Nigeria. The potential plaintiffs (those adversely affected by the actions of their subsidiaries within Nigeria), would be unable to bring an action in the home country of the parent company as the action complained about occurred outside the jurisdiction of the court of the country in which the parent company is incorporated. However, it seems this problem is being addressed. The English Supreme Court gave a judgment on the 12th of February 2021 in the case of *Okpabi & Ors. v Royal Dutch Shell Plc & Anor*.[108] This recent English judgment is regarded as a landmark[109] and pivotal decision in environmental protection and

[102] See Paragraphs 60 to 62. Emphasis supplied.
[103] i.e. infringements of Article 85(1) of the EC Treaty (which is now Article 81(1) EC).
[104] See paragraph 83 of the judgment of the Court of First Instance in the *Stora* case. This position forms one of the major pillars for the argument presented in this work regarding foreign parent company liability for the acts of their subsidiary company in developing countries.
[105] John Kallaugher, and Andreas Weitbrecht, 'Developments under the Treaty on the Functioning of the European Union, Articles 101 and 102, in 2008/2009' (2010) *European Competition Law Review (E.C.L.R.)*, Issue 8, pg. 316. The writers in this article argue that 'The ultimate justification for this rule, if there is a justification, lies in the fact that parent and subsidiaries also benefit from being considered as one undertaking.'
[106] Geoffrey Tweedale, and Laurie Flynn, 'Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard' (2007) Enterprise & Society, Volume 8, Issue 2, 02 June 2007, Pgs. 268 and 292. As regards accountability to third parties where a subsidiary company is responsible for certain acts and/or omissions, but it would be difficult or impossible to achieve victory by going after that subsidiary either due to solvency or jurisdictional difficulties (or any other reason), it can successfully be argued that the refusal of the courts to lift the corporate veil could have the effect of resulting in significant injustice to the victims or claimants who otherwise would have gotten justice, but are locked out due to a legal straight jacket. See Tweedale and Flynn, Ibid.
[107] In this instance, one who holds majority of the equity of its subsidiary company.
[108] [2021] UKSC 3.

human rights. The court unanimously ruled that the Claimants could bring and continue an action in the UK against a UK domiciled multinational company (Shell) which was a parent company of a subsidiary company incorporated and operating in Nigeria. The court held that the UK parent company owed a duty of care to those allegedly harmed by the acts of a foreign subsidiary. According to Daniel Leader,[110] the ruling …also represents a watershed moment in the accountability of multinational companies. Increasingly impoverished communities are seeking to hold powerful corporate actors to account and this judgment will significantly increase their ability to do so.[111] The English Supreme Court's decision is not the only decision that shows the tide is turning in holding foreign multinational companies accountable for the actions of their subsidiaries in another jurisdiction, as an appeals court in The Hague ordered the Netherlands based Royal Dutch Shell to pay damages to Nigerian farmers after it found that Royal Dutch Shell's Nigerian subsidiary was responsible for oil spills in the Niger Delta of Nigeria.[112] Going by the foregoing decisions, it is clear that momentum is building with regards to the attachment of liability to foreign parent companies for the actions or infractions of their subsidiaries committed in another jurisdiction. This bodes week for issues concerning environmental protection and the protection of biodiversity as these are issues that are of global importance and concern which should not be let to lie solely in the hands of States that have shown little political will to call multinational companies to order and make environmental concerns paramount over financial gains and considerations.

[109] See Gibson Dunn, *Okpabi v Shell: Clarification from the English Supreme Court on Jurisdiction and Parent Company Liability* [https://www.gibsondunn.com/okpabi-v-shell-clarification-from-the-english-supreme-court-on-jurisdiction-and-parent-company-liability/] (Last accessed on 20/02/2023).

[110] Partner at Leigh Day (counsel to the Claimants).

[111] See Payne, J., and K. Ridley, *Nigerians Win UK Court OK to Sue Shell Over Oil Spills* (Reuters, 12 February 2021) [https://www.reuters.com/article/us-britain-shell-nigeria-judgement/nigerians-win-uk-court-ok-to-sue-shell-over-oil-spills-idUSKBN2AC16A] (Last accessed on 20/02/2023).

[117] Raval, A. and N, Munshi, *Shell Loses Dutch Case Over Nigeria Oil Spills* [https://www.ft.com/content/663c6261-338e-4f6a-8ae4-11416607db71] (Last accessed on 20/02/2023).