

ALLEN & OVERY

Vedanta: Supreme Court rules that Zambians can seek legal redress in the UK against parent company

Vedanta Resources PLC and another v Lungowe and others [2019] UKSC 20
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The UK Supreme Court has decided that a claim for negligence and breach of statutory duty against a Zambian mining company and its English parent can be heard by the English courts. The much anticipated decision has important ramifications for British multinationals whose subsidiaries and suppliers operate abroad, particularly in those regions where there is a higher risk of adverse environmental and human rights impacts and claimants face practical barriers to accessing effective judicial remedies. It also is an important decision for potential claimants motivated to seek access to judicial remedies against multinational corporations in their home jurisdictions. Here we discuss the most salient points from the decision and what it means for the environmental and human rights policies and practices of UK-domiciled multinational companies, and the litigation strategies of potential claimants.

Background

The claimants in this case are 1,826 villagers from the Chingola District of Zambia, home to a copper mine operated by Zambian company Konkola Copper Mines plc (**KCM**). In 2015, these villagers lodged a claim in the English courts against KCM and its English parent company, Vedanta Resources PLC (**Vedanta**), alleging that their health and farming activities had been damaged by toxic water pollution caused by the mine. KCM and Vedanta challenged the jurisdiction of the English courts to hear this claim.

The main findings

The Supreme Court held, in line with the High Court and the Court of Appeal, that the English courts may hear the claim against both Vedanta and KCM. It made three important findings, each considered in more detail below:

- i) it affirmed the potential liability of parent companies in relation to the activities of their subsidiaries, noting that everything depends on the extent to which, and the way in which, the parent company takes over, intervenes in, controls, supervises or advises on the relevant operations of the subsidiary;
- ii) it overruled the lower courts and found that, where a parent company has submitted to the jurisdiction of the relevant foreign court, the risk of irreconcilable judgments may be said to arise from the claimant's choice to, nevertheless, sue the parent in England and therefore may not justify the English court accepting jurisdiction over a foreign subsidiary; **but**
- iii) it also found that, where there are serious practical barriers to claimants obtaining substantial justice in their home jurisdictions, their claims against the foreign subsidiary may still be heard by the English courts.

In all areas of the case, the Supreme Court was reluctant to interfere with the findings of fact made by the High Court. It emphasised that the standard of proof is very low at this jurisdictional stage – it is merely designed to root out cases that are not fit for trial. The case can now proceed to a full trial on the merits and the focus can turn to the resolution of factual disputes between the parties.

Claim against Vedanta could not be stayed

Before making its main findings, the Supreme Court first dealt with a preliminary issue as to whether it should exercise jurisdiction over Vedanta. It observed that it essentially had “one hand tied behind its back” with respect to this question. Even if it wanted to, it could not have stayed the proceedings against Vedanta on the grounds that Zambia was a more convenient forum to hear claims against it (a *forum non conveniens* argument). It had to accept jurisdiction over

Vedanta because of EU law, in particular Article 4.1 of the Recast Brussels Regulation¹, which provides that claimants have the right to sue EU-domiciled defendants in their home country courts, and a European Court of Justice decision, *Owusu v Jackson*², establishing that proceedings brought in reliance on Article 4.1 cannot be stayed on *forum non conveniens* grounds. It was not an abuse of EU law for the claimants to take advantage of this right, as Vedanta contended.

The situation was not so simple with respect to KCM, however. Jurisdiction over a non-EU-domiciled defendant, whom the claimants seek to join to a case against a defendant who is domiciled in England (the “anchor defendant”), is obtained by satisfying the so-called “necessary or proper party” gateway tests³. One of those tests requires that there is “a real issue...which it is reasonable for the court to try” between the claimant and the English anchor defendant (in this case, Vedanta). The claimants therefore needed to show that it was at least arguable that Vedanta could be held liable for the alleged acts of its Zambian subsidiary, KCM.

Vedanta was potentially liable for KCM’s activities

The Supreme Court dismissed the popular, but misguided, notion that the English courts would be imposing a new duty of care on parent companies in relation to harm caused to third parties by the activities of a subsidiary. The parent-subsidiary relationship (essentially, the ownership by one company of all or the majority of the shares of another company) by its nature may afford the parent the opportunity to assume such a duty. Whether it actually has done so depends on the extent to which, and the way in which, the parent has in fact availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of that third party. The Supreme Court suggested that there was nothing novel in this at all.

After affirming that it all depends on the facts, the Supreme Court cautioned against attempts to identify general principles to guide the factual analysis. The Court of Appeal had attempted to “shoehorn” all cases of the parent’s liability into instances where the parent had engaged in “management” or given “advice”; while in an earlier case it had used the “straitjacket” of “superior knowledge” of systems of work⁴. The Supreme Court observed that, while these were helpful categories for the purposes of analysis, they were merely examples. There is no limit on the types of activities that might demonstrate that a parent exercised *de facto* control over, or close involvement in, the activities of a subsidiary.

In the instant case, the Supreme Court agreed with the High Court that certain materials showed that there was a triable issue as to whether Vedanta had intervened sufficiently in the conduct of the operations of the mine to have assumed a duty of care. The Supreme Court focused in particular on a report (entitled “Embedding Sustainability”) in which it found Vedanta to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, including their implementation by training, monitoring and enforcement.

Risk of irreconcilable judgments not a “trump card”

Although the English courts’ hands are tied with respect to jurisdiction over EU-domiciled defendants, the *forum non conveniens* argument remains open to non-EU-domiciled defendants. Thus, a further requirement that had to be satisfied under the “necessary or proper party” gateway for jurisdiction over KCM was whether Zambia was the most appropriate forum to hear the case against it, even though there was a real issue triable issue to be heard in the UK against Vedanta.

A *forum non conveniens* analysis requires a summary examination of connecting factors between the case and the jurisdictions in which it could be litigated. Those factors include matters of practical convenience, the system of law

¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

² (Case C-281/02) [2005] QB 801.

³ Paragraph 3.1 of CPR Practice Direction 6B.

⁴ This was a reference to the four *indicia* in *Chandler v Cape plc* [2012] EWCA Civ 525 when considering whether a parent company assumes liability for the actions of its subsidiary. These are: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge.

which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred. Zambia was the proper place for the claim against KCM to be tried according to these connecting factors. However, the High Court had concluded that, despite this, the case against KCM should proceed in the UK simply because a case would also proceed against Vedanta in England, and the risk of irreconcilable judgments was “unthinkable”. The Court of Appeal affirmed this decision.

The Supreme Court overruled the lower courts on this point and, in doing so, has changed English *forum non conveniens* jurisprudence. It held that, if an English anchor defendant indicates that it is willing to submit to the jurisdiction of a foreign court (as Vedanta did), the risk of irreconcilable judgments would no longer be a “trump card” to assert jurisdiction over a subsidiary in the UK. The risk of irreconcilable judgments becomes a risk of the claimants’ own making and may not justify the courts’ acceptance of jurisdiction over the subsidiary (in this case KCM).

Claimants unlikely to obtain substantial justice in Zambia

After concluding that Zambia was the proper place for the case against KCM to be tried, the Supreme Court still had to satisfy itself that there was cogent evidence that the claimants could not obtain substantial justice against KCM in Zambia. If so, the Court could still permit service of English proceedings on KCM.

The Supreme Court agreed with the High Court that the enquiry was not about the independence of the Zambian judiciary or the availability of procedures for mass claims in Zambia. The English courts were not reviewing the Zambian legal system, but rather evidence about whether the particular claimants would get access to justice if their claims were pursued in Zambia. On that basis, despite an intervention by the Zambian Attorney General, the Supreme Court upheld the High Court’s finding that there was a real risk that the claimants would not have access to substantial justice in Zambia. The Supreme Court cited two principal factors:

- legal aid was unavailable and conditional fee arrangements are illegal in Zambia, meaning that, even if lawyers were willing to act *pro bono*, the claimants would still have had to partially fund the litigation, which would have made it essentially impossible for the villagers to bring their claims to court; and
- the claimants would have been unlikely to find a Zambian legal team with suitable expertise, sufficient resources and experience to manage an environmental case of this scale and complexity against a sophisticated and well-resourced opponent.

Thus, the Supreme Court found that, overall, Zambia was not the proper forum for the claim against KCM on the grounds that the claimants would have been unlikely to obtain substantial justice there. As a result, the claims against both Vedanta and KCM can now proceed to a review of their merits in the English courts.

COMMENT

In the hours after the judgment in Vedanta was handed down, commentators began raising concerns about the Supreme Court’s finding that Vedanta’s group-wide sustainability policy and method of implementing it suggested that there was a triable issue as to whether Vedanta had assumed a duty of care to the claimants. These commentators fear that the decision will prompt companies to scrap their environmental and social policies and take a hands-off approach towards the risks associated with their subsidiaries.

This concern seems overblown. Most companies will realise that the legal risks associated with not adopting such policies, and seeking to exercise or gain leverage to influence their subsidiaries’ conduct with respect to them, far outweigh the legal risks of being seen to have assumed a duty of care. Even if the English courts are unwilling to impose such a duty, it is, in essence, no longer an option for companies today to avoid adopting such policies and practices, as regulators, legislators, shareholders, contractual counterparties, lenders and insurers demand that they do so and mete out penalties if they do not.

Moreover, the potential existence of a duty of care is not the end of the story: even if one can be established, no finding of negligence will be made unless it can also be shown that the parent company breached that duty, causing harm to a claimant. Most companies recognise that an important way to mitigate the risk of being sued successfully in England is to take positive steps to ensure compliance with group-wide policies. The primary aim is, naturally, to avoid any breach,

but the ancillary effect may be to ensure that, if there is a breach, the parent company can show that it discharged its duty of care to the required standard.

The other concern that has been expressed arises from the Supreme Court's approval of the Court of Appeal's comments in *Unilever*⁵ that the legal principles that apply to whether a duty of care is owed by a parent for the actions of a subsidiary "are the same as would apply in relation to the question whether any third party ... was subject to a duty of care in tort owed to a claimant dealing with the subsidiary". This might be taken to suggest that a company could have a duty of care in relation to the actions of, for example, its suppliers, if it requires those suppliers to comply with its environmental and social policies and enforces such compliance. However, while the same legal principles will apply, the factual circumstances are obviously quite different. The Supreme Court noted that the level of management and control of a parent over a subsidiary will vary from, at one extreme, where the parent is "no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries" to, at the other end, where the group's businesses are "carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant". While the Supreme Court did not seek to draw a firm line as to where on this continuum a duty of care might be said to arise, it is likely to be a rare situation where the level of control of a customer over its supplier is such that it can be regarded as akin to being part of the same corporate group, let alone to such an extent that the legal boundaries between the entities have started to break down.

A few companies may be relieved by the one definitive change in the law brought about by the *Vedanta* decision. With the risk of irreconcilable judgments no longer a determinative factor in English *forum non conveniens* analysis, more parent companies are likely to submit to the jurisdiction of the courts where the subsidiary is located when being sued jointly with their subsidiaries in England.

This change will be of little comfort, however, to those companies that operate in the poorest countries of the world where similar arguments as to what the court termed "access to justice" are likely to be relevant. This decision suggests that the English courts may be more willing to hear claims against English parent companies of multinationals in respect of activities undertaken by their subsidiaries. Thus, despite the new law on irreconcilable judgments, the decision suggests that there is likely to be an increase in the cases before the English courts regarding the alleged environmental and human rights impacts of multinational businesses. For many, this will be a reminder to ensure that the highest standards of environmental behaviour are applied when operating internationally. It also confirms that companies should devise robust environmental and human rights policies and ways to enforce them without taking control of the operation and day-to-day activities of their subsidiaries.

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⁵ *AAA & Ors v Unilever Plc & Anor* [2018] EWCA Civ 1532.