

VEDANTA, A LONG AWAITED LANDMARK IN EXTRATERRITORIAL TORT LITIGATION AGAINST PARENT COMPANIES

Reflections on 'Vedanta's' Supreme Court decision on jurisdiction

On 10 April 2019 the much awaited decision of the British Supreme Court on whether the case of 1826 Zambian villagers against Vedanta Resources Plc (“Vedanta”), a British mining company and Konkola Copper Mines (“KCM”), its subsidiary could proceed in the UK was published.¹ The Supreme Court’s decision had been eagerly awaited by victims of multinational corporation operations abroad on the one hand and by companies domiciled in the UK with subsidiaries, branches and suppliers abroad and who may, potentially, be held responsible for actions taking place in foreign countries. This case note begins with a brief introduction to the case before considering the inter-related issues of a) jurisdiction of the English courts over parent companies and subsidiaries for actions of the subsidiary abroad and b) the existence and extent of a duty of care of parent companies. The note concludes with some brief reflections on the future of extraterritorial litigation and on the so-called ‘direction of travel’ in business and human rights litigation generally.

The Case:

*Vedanta*² is one of a group of extraterritorial tort litigation cases brought to UK courts in last few years³ and of similar cases being also brought up to courts in Europe⁴ and beyond.⁵ The common denominator in the cases is an attempt to obtain justice for victims of human rights violations and environmental damage in the country of domicile of the parent company.

Vedanta Resources, is an Anglo-Indian mining giant. It bought at 51% share in Zambia’s larger copper mine, Konkola Copper Mines (KCM) in 2004. It increased its share to 79.4% in 2005.⁶ In 2006 a pipe burst releasing highly toxic waste into the River Kafue causing damage to health and livelihood for farmers and fishermen living alongside the river. Litigation initially was started in Zambia⁷ and compensation originally granted to the claimants but the Zambian Supreme Court reduced the quantum and number of those entitled to compensation to only 12.⁸ In 2015 1826 farmers represented by British law firm Leigh Day commenced an

¹ Vedanta Resources PLC and Another (Appellants) v Lungowe and Others (Respondents) [2019] UKSC 20 (Vedanta n 1). On appeal from [2017] EWCA Civ 1528.

² *Lungowe and Others v Vedanta Resources Plc and Another* [2017] EWCA Civ 1528

³ Other cases include *Bodo Community of Nigeria v. Shell Petroleum Development Company of Nigeria* [2014] EWHC 2170 (TCC); *His Royal Highness Emere Godwin Bebe Okpabi and Ors v. (1) Royal Dutch Shell plc, (2) The Shell Petroleum Development Company of Nigeria Ltd* (the Ogale claims); *Lucky Alame and Ors v. (1) Royal Dutch Shell plc (2) The Shell Petroleum Development Company of Nigeria Ltd* (the Billile claims) 2017 EWHC 89 (TCC); *AAA and Anor. v. Unilever plc and Anor.* [2017] EWHC 371.

⁴ KiK in Germany <https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan> ; In the Netherlands (*Akpan v Royal Dutch Shell PLC Arrondissementsrechtbank Den Haag*, 30 January 2013 Case No C/09/337050/HA ZA 09-1580) and the UK (*AAA and Anor v Unilever PLC and Anor* [2017] EWHC 371)

⁵ In Canada (*Choc v Hudbay Minerals Inc* [2013] ONSC 1414).

⁶ ‘Vedanta’s Billions. Regulatory failure, environment and human rights.’ Foil Vedanta (2018) at 10 <http://www.foilvedanta.org/news/vedantas-billions-regulatory-failure-environment-and-human-rights-report-released/>

⁷ *Nyasulu and Others vs Konkola Copper Mines Plc and Others* (2007/HP/1286)[2011] ZMHC 86 (1 January 2011)

⁸ *Konkola Copper Miners Plc v James Nyasulu and 2000 others* (2015)

action against Vedanta Resources Plc, the parent company, and KCM, its subsidiary, in the UK for continuous pollution of their water supply since 2004.

Jurisdiction, access to justice and abuse of EU law

The claim was served on the parent's company English address by virtue of Article 4.1 of Brussels Recast⁹ and permission to serve the claim out of the jurisdiction on KCM was granted pursuant the Civil Procedure Rules Practice Direction 6B under the jurisdictional gateway "necessary and proper party".¹⁰ Both defendants (Vedanta and KCM) challenged the jurisdiction of the court.

Establishing jurisdiction under the Recast Brussels Regulation has considerably simplified the lengthy jurisdictional disputes which often surround extraterritorial cases in common law jurisdictions. Article 4 establishes that the defendant can always be sued in the courts of its domicile whatever the domicile of the claimants, and, moreover, the courts of the country of domicile cannot resort to national rules of jurisdiction to decline hearing the case,¹¹ dispensing, largely, with what had been described as 'the wasteful and time consuming ritual of *forum non conveniens*'.¹² Despite this a jurisdictional challenge was mounted by the defendants claiming 'abuse of EU law' and questioning that England was the 'proper place' to conduct the litigation. The claimants, in the defendants allegations, had abused Article 4 of the Recast Brussels Regulation establishing jurisdiction over Vedanta as the 'anchor defendant', deeming it a 'device' so as to make KCM a 'necessary or proper party' under section 3.1 CPR Practice Direction 6B. The court dismissed the argument of abuse of EU law as alleged by the defendant and declared that any potential abuse could only take place where EU law is invoked collusively to subvert other EU provisions.¹³

There are many and often concurrent reasons for litigating in the country of domicile of the parent company.¹⁴ The parent company is often located in a country where access to justice is more readily available, a factor that can prove crucial to the possibility of bringing a claim.¹⁵ The Supreme Court gave due weight to this argument, indicating that the impossibility of gaining access to legal aid and the complexity of the claim with numerous claimants all living in extreme poverty which together with the unlawfulness of contingent fee agreements in Zambia,¹⁶ persuaded the court to decide that there was a 'real risk that substantial justice

⁹ Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351/1.

¹⁰ For a more detailed account please see E. Blanco & B. Pontin, '[Litigating Extraterritorial Nuisances under UK Common Law and UK Statute](#)' (2016) 6(2) *Transnational Environmental Law*, pp. 285–308.

¹¹ *Owusu v Jackson* (Case C-281/02) [2005]QB 801.

¹² R. Meeran, 'Tort Litigation against Multinationals ("MNCs") for Violation of Human Rights: An Overview of the Position Outside the US', available at: <https://business-humanrights.org/sites/default/files/media/documents/richard-meeran-tort-litigation-against-mnacs-7-mar-2011.pdf>

¹³ *Vedanta* (n1) [36]

¹⁴ For a more detailed discussion on this topic please see E. Blanco & B. Pontin, '[Litigating Extraterritorial Nuisances under UK Common Law and UK Statute](#)' (2016) 6(2) *Transnational Environmental Law*, pp. 285–308.

¹⁵ *Id.*

¹⁶ *Vedanta* (n 1) [89-90] Lord Briggs.

would not be obtainable in the foreign jurisdiction'.¹⁷ Thus, it concluded that although Zambia was, perhaps, the 'proper place' for the litigation under a summary examination of connecting factors and, taking into account Vedanta Resources' offer to submit to the jurisdiction of the Zambian courts, there was a real risk that substantial justice will not be obtainable in Zambia.

It is important to note that most cases of extraterritorial litigation involving multinational companies are stalled at the jurisdictional stage without even proceeding to trial to discuss the merits. Indeed, this is the battleground where 'lawfare' and dilatory techniques can be used by multinational companies to force cash strapped victims and their lawyers to settle or give up the case. The Supreme Court made a special mention to the 'disproportionate way in which these jurisdiction issues have been litigated' in this case.¹⁸

Real triable issue: Duty of care of parent companies.

As it is common in jurisdictional challenges the question of whether there is a real triable issue against one or both defendants was also raised. The claimants' action is both based on common law negligence and statutory breach. They argue that the parent company had a duty of care to the subsidiary's employees and to the general public of the country where the subsidiary operates.¹⁹ The applicable law to the substance of the dispute²⁰ is a combination of Zambia's statutory standards and tort law rules, based on British common law as developed and consolidated by the Supreme Court. English common law tort principles²¹ are applicable in respect of a 'duty of care' from parent company to subsidiary in a transnational setting.²²

*Chandler*²³ had already established that parent companies have a duty of care to employees of subsidiary companies if certain indicia are present, namely: (i) the business of parent and subsidiary are identical or similar; (ii) the parent has or ought to have superior or specialist knowledge compared with the subsidiary; (iii) the parent has knowledge of the subsidiary's work; and (iv) the parent ought to have foreseen that the subsidiary was relying on its superior knowledge. Vedanta was found to satisfy all four factors but the Court went further, introducing a significant shift by extending the parent company's duty of care not only to the employees of the subsidiary but also towards third parties and relying on an internal company

¹⁷ Id.[88] Lord Briggs

¹⁸ Vedanta (n 1) [6] Lord Briggs.

¹⁹ For a detailed account on litigation of extraterritorial torts see E. Blanco & B. Pontin, '[Litigating Extraterritorial Nuisances under UK Common Law and UK Statute](#)' (2016) 6(2) *Transnational Environmental Law*, pp. 285–308.

²⁰ Regulation (EC) No [864/2007](#) on the law applicable to non-contractual obligations (Rome II)

²¹ Due to the application of article 4 (1) and article 7 (choice of law for victims between country where the event giving rise to the damage occurred) according to the Rome II Regulation (EC) No 864/2007 a discussion of which is beyond the scope of this note.

²² For a more detailed account please see E. Blanco & B. Pontin, '[Litigating Extraterritorial Nuisances under UK Common Law and UK Statute](#)' (2016) 6(2) *Transnational Environmental Law*, pp. 285–308.

²³ R. Meeran, 'Tort Litigation against Multinationals ("MNCs") for Violation of Human Rights: An Overview of the Position Outside the US', available at: <https://business-humanrights.org/sites/default/files/media/documents/richard-meeran-tort-litigation-against-mncs-7-mar-2011.pdf>

report ‘Embedding Sustainability’ to infer the existence of the *Chandler* indicia.²⁴ The court, further applied the *Caparo*²⁵ test, namely, that there is: (a) reasonable foreseeability of harm to the claimant, (b) proximity or neighborliness between the claimant and defendant, and (c) that it is ‘fair, just and reasonable’ to impose a duty of care in such situation. It is generally accepted that Lord Bridge’s third element, ‘fair, just and reasonable’, combines policy factors with what is regarded as being just between the parties.²⁶ At the Supreme Court hearing Mr Gibson for Vedanta, repeatedly stated that this was not ‘a Chandler case’ only to be rebutted by Lord Justice Wilson and Lady Justice Black who clearly stated that although ‘there is not an automatic duty of care... one can be established if all other conditions are right’²⁷ showing an encouraging willingness to make an ‘incremental development of the law’.

One of the main objections from Mr Gibson, Vedanta’s counsel, to the establishment of an independent duty of care from Vedanta to KCM (and to those affected by KCM’s operations) was Vedanta’s corporate structure. During the Supreme Court appeal, Mr Gibson, for Vedanta, claimed that ‘the corporate structure itself tends to militate against the requisite proximity’ making what Richard Hermer, the defence counsel, deemed a ‘ludicrous demand of a right to not be responsible for the operations of a subsidiary’.²⁸ The local subsidiary, in this case KCM, is often little more than an empty shell, with few funds available in the country where it conducts operations while earnings are siphoned abroad through a complex web of interlinked holding companies.²⁹ Now that Vedanta will proceed to trial it could establish a powerful precedent in respect of addressing the liability gaps exploited by the corporate structure.

Conclusion

Vedanta seeks to establish and potentially extend the boundaries of the responsibility of multinational corporations, and more specifically, of parent companies, for the working conditions of their subsidiaries or main suppliers abroad and for the effects of their activities in the wider community and on the environment in the countries where they operate. This is a much overdue development which fall within UN Guiding Principles (UNGPs)³⁰ commitments on access to remedy on business and human rights operations. However, jurisdictional disputes, not limited to but including lengthy *forum non conveniens* challenges, and the opacity of the corporate structure itself remain as potential barriers of access to justice. Vedanta, alongside other multinational companies enjoys the benefits of globalisation

²⁴ Vedanta (n 2) at [84] LJ Simon.

²⁵ *Caparo Industries Plc v Dickman* [1990] UKHL

²⁶ *Id.*

²⁷ *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 (*‘Vedanta’*). Samarendra Das ‘Can Zambian claimants get justice in the UK?’ Report on the Supreme Court hearing in the case of *Lungowe v Vedanta*. (January 20, 2019) available at Foilvedanta.org

²⁸ *Id.*

²⁹ In pages 6 and 7 of Vedanta’s Billions. Regulatory failure, environment and human rights.’ Foil Vedanta (2018) <http://www.foilvedanta.org/news/vedantas-billions-regulatory-failure-environment-and-human-rights-report-released/> Unlike many other cases where control may be factual but it is difficult to prove, Vedanta Plc owns, directly, 79.42% of KCM therefore satisfying the test of proximity.

³⁰ <https://www.business-humanrights.org/en/un-guiding-principles>

while exploiting the regulatory gaps and fractures produced by the contrast between the global scale of production and the local scale of accountability through national courts. Companies that operate and profit extra-territorially must be accountable extra-territorially too. The Supreme Court judgement is a welcome step in making this possible.