

'Vedanta: a new landmark in litigating extraterritorial torts'

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Litigation in the English courts for environmental damage and violations of socioeconomic human rights committed abroad by subsidiaries of United Kingdom (UK) based parent companies is becoming increasingly important in the quest for corporate accountability. Victims of the operations of multinational companies face insurmountable difficulties when seeking to obtain justice locally and, in the absence of an internationally binding instrument addressing violations of human rights and environmental damage caused by private actors, tort litigation in the home country of the parent company is often the only realistic option. We addressed some of these issues in a recent article in *Transnational Environmental Law (TEL)*, 'Litigating Extraterritorial Nuisances under UK Common Law and UK Statute'.¹ The article considered the litigation against Shell in the UK Courts brought by the Bodo community.² The *Bodo* case was eventually settled out of court but the discussion on jurisdiction over UK parent companies and their subsidiaries remains highly relevant.

The recent decision of the Court of Appeal in *Lungowe and Ors. v. Vedanta Resources Plc and Konkola Copper Mines Plc (Vedanta)*³ is the latest in a series of recent high profile cases in the English courts to examine whether non-UK resident claimants can bring a claim in England against both the English parent company and the non-UK based subsidiary for alleged breach of a duty of care in negligence, nuisance and/or human rights abuses occurring abroad.⁴ Vedanta shares many issues with the recent and ongoing Shell law suits and may become a new landmark in extraterritorial tort litigation.

The Court's decision in *Vedanta* revolves around three main concerns which are present in most cases of extraterritorial tort litigation in the courts of parent companies: 1) The existence of an autonomous duty of care from the parent company; 2) avoiding divergent outcomes in parallel proceedings; and 3) accepting jurisdiction because of concerns regarding access to justice in the country of operation of the subsidiary.

Establishing an autonomous duty of care of the parent company matters because it enables jurisdiction to be exercised more easily over the parent company as the

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¹ This short reflection follows on our discussion in E. Blanco & B. Pontin, 'Litigating Extraterritorial Nuisances under UK Common Law and UK Statute' (2016) 6(2) *Transnational Environmental Law*, pp. 285-308.

² *Bodo Community of Nigeria v Shell Petroleum Development Company of Nigeria* [2014] EWHC 2170 (TCC).

³ [2017] EWCA Civ 1528.

⁴ See 'Bodo', discussed in Blanco & Pontin, n. 1 above. Also, *His Royal Highness Emere Godwin Bebe Okpabi and others v (1) Royal Dutch Shell plc (2) The Shell Petroleum Development Company of Nigeria Ltd (the Ogale Claims) Lucky Alame and others v (1) Royal Dutch Shell plc (2) The Shell Petroleum Development Company of Nigeria Ltd (Billile Claims)* 2017 EWHC 89 (TCC) < AAA and *Anor v Unilever Plc and Anor* [2017] EWHC 371.

relevant actions –breach of the duty of care- will be deemed to have taken place in UK soil (known as jurisdiction as of right). It also places the case under the Brussels I Regulation Recast⁵ jurisdictional rules by suing the defendant in the court of its domicile (Article 4) ‘without the wasteful and time consuming ritual of *forum non conveniens*’.⁶

To establish an autonomous duty of care on parent companies, four factors must be met: the business of parent and subsidiary are identical or similar; the parent has or ought to have superior or specialist knowledge compared to the subsidiary; the parent has knowledge of the subsidiary’s work; and the parent ought to have foreseen that the subsidiary was relying on its superior knowledge to protect the claimants.⁷ 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.

One of the most innovating aspects of the Vedanta judgment relates to the role attributed to soft law in the determination of an autonomous duty of care. Among its considerations, the judgement relied on a statement in a voluntary code of conduct published by Vedanta Resources, which asserted that the Vedanta Executive Board had oversight over all Vedanta subsidiaries, to conclude that the thresholds for the finding of an autonomous duty of care were met. Such codes of conduct are often published with the sole intention of greenwashing the company’s reputation or allaying consumers’ misgivings over environmental or human rights issues. However, companies should not be able to claim that self-regulation through voluntary codes of conduct is the most appropriate way of regulating their conduct and then deny any intention to actually fulfil the promises that they have themselves set. It is gratifying that the court appears to have held the company to its own published values in this way. is the *Vedanta* judgement signals the first time an internal voluntary code is used to infer a duty of care.

Another important aspect of the case concerns the claim against the Zambian subsidiary, Konkola Copper Mines plc (KCM). Once jurisdiction was established against Vedanta Resources, it was found that England was also the appropriate forum for the trial against Konkola Copper Mines as a ‘necessary and proper party’ to the proceedings.⁸ The Court of Appeal endorsed the High Court’s judgment that parallel proceedings against the UK company in the English courts and the Zambian company in the Zambian courts would be unthinkable, making England and Wales the proper place for the claims against both the defendants (given the similarity of the facts and legal rules and principles at issue).

⁵ Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2012] OJ L351/1.

⁶ 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>

⁷ The duty of care of a parent company to the employees of a subsidiary was established in *Chandler v. Cape* [2012] EWCA 525.

⁸ Under Paragraph 3.1 (3) of Practice Direction 6B

Crucially, the Court also accepted the claimants' argument that they were precluded from bringing the claims in Zambia because of deficiencies in access to justice in the Zambian justice system. The Court commented that the evidence against the Zambian justice system was so 'overwhelming' that it was almost certain that the claimants would be unable to obtain justice in the Zambian courts. Many of the Court's concerns regarding access to justice in Zambia converged around the familiar problem of cost of proceedings, such as the absence of contingent fee arrangements and the difficulty of securing ad hoc funding. Another issue was expertise, in that few private lawyers in Zambia have the necessary experience in handling complex environmental tort claims. Local expert witnesses, too, are in short supply. A further factor was KCM's 'obdurate' approach to litigation in Zambia, which in the judge's view, would add enormously to the time and therefore the cost. KCM had in the past pursued 'an avowed policy of delaying so as to avoid making due payments'. The trial judge, Simon LJ acknowledged, was troubled by the suggestion that he might be taken as criticizing the Zambian legal system. He cautioned that 'there must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally'.⁹

Vedanta confirms that conventional tort litigation in the country of the parent company can be used to hold multinational companies accountable for damages caused in developing countries. To this end, three factors need to be present: 1) the existence of a duty of care; 2) the need to avoid divergent outcomes in parallel proceedings and, 3) concerns regarding access to justice in the country of operation of the subsidiary. This will necessarily depend on the facts of each case, making establishing jurisdiction a crucial and protracted process despite the simplification introduced by the mandatory jurisdictional rules introduced by the Brussels I Regulation.

Should the appeal on jurisdiction in *Vedanta* fail, it is likely that the case will settle (like *Bodo*). Such a settlement would perpetuate the ongoing jurisdictional battles relied upon by multinational companies to avoid liability although may provide much needed relief for the Zambian plaintiffs. On the other hand, if *Vedanta* proceeds to trial, it may finally change the odds in favour of the victims of multinational corporations' polluting activities abroad.

⁹ *Vedanta*, para. 1.