UK: Landmark Supreme Court judgment reviews the jurisdiction of the English courts to hear tort claims against UK multinational groups.

Vedanta Resources Plc and another v Lungowe and others [2019] UKSC 20, is an important decision in setting the future direction for multinational tort claims before the English courts. It makes important observations on issues of parent company liability, which multinational enterprises should be aware of. On the other hand, whilst England will remain a destination for such claims against UK domiciled parent companies, the case also helps redress the jurisdictional balance in certain ways.

Executive Summary

- The Supreme Court’s view as to the substance of parent company liability in this case is an important development. It emphasises the primacy of the facts of any given case and, unlike previous Court of Appeal decisions, avoids an approach based on categorisation.

- This may encourage courts to be more open to arguments that MNC practices and policies should not only be subject to detailed scrutiny, but may also be found to be the basis of duties of care owed by the parent.

- Multinational enterprises with governance and compliance systems will need to be aware of this development in calibrating their approach to risk management as it goes to the question of the extent and nature of their policies and procedures, and how these are implemented.

- Whilst claimants will no doubt continue to bring such claims in the English courts where there are strategic and funding advantages to do so, certain aspects of the Supreme Court’s judgment erect somewhat higher jurisdictional hurdles than before.
Introduction: the facts of Vedanta and the jurisdictional background

Vedanta concerns alleged pollution caused by a mine in Zambia. Local residents affected by this brought claims, in England, against both the Zambian company operating the mine (KCM) and its English parent company (V).

Although these claims were based on tortious and statutory causes of action under Zambian law, the grounds upon which the claimants brought them in the English courts were as follows.

First, the claimants’ relied on the fact that the parent company was domiciled in the jurisdiction so the English court had mandatory jurisdiction over V as a result of Article 4 EU Regulation 1215/2012. Second, this meant that, as against KCM, the claimants could use V as an “anchor” for the purposes of taking jurisdiction on the basis of CPR PD6B 3.1(3) (KCM being a non-EU defendant against which common law jurisdiction rules were consequently available). That rule would permit KCM to be sued in England if:

- the claims against V involved a real issue which it was reasonable for the court to try;
- KCM was a necessary and proper party to those claims and the claims against KCM had a real prospect of success, and
- England was the proper place to bring the combined claims (this last limb involving an application of the doctrine of forum non conveniens).

Vedanta – the key issues

At first instance, both the judge and the Court of Appeal found in favour of the claimants on the above issues. Whilst those judgments necessarily dealt with a number of matters, there were two which raised matters of more general importance, and which form the core points of the Supreme Court’s judgment. We examine these, and what the Supreme Court had to say about them (in a unanimous judgment delivered by Lord Briggs), in further detail below (references in square brackets are to paragraphs of the Supreme Court’s judgment).

➢ Parent Company liability in negligence for the activities of its subsidiaries - whether the claim against V was arguable

As part of establishing a “real issue” against V for the purposes of the jurisdictional test applicable to KCM set out above, any claims against V had to be arguable. If not, those would fall away and there would be no

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1 As interpreted by the CJEU in Owusu v Jackson C-281/02
2 [2016] EWHC 975 (TCC)
3 [2017] EWCA Civ 1528

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jurisdiction over KCM. Thus, one issue in the case was whether or not the claims in negligence against V were arguable.

In this respect, recent years have seen a spate of cases involving parental negligence liability for the activities of subsidiaries go as far as the Court of Appeal (but none, until now, have reached the Supreme Court). The first were Chandler v Cape \(^4\) and Thompson v Renwick Group. \(^5\) Those cases, both being full trials on liability, concerned domestic (UK) situations involving injuries suffered by employees of the relevant subsidiary. In them, the Court of Appeal indicated that, although a highly fact-dependant enquiry, claimant employees of a subsidiary relying on generalised evidence of a group identity, or generalised group links, to establish a duty of care owed to them by a parent (to protect them against harm in their employment) were likely to face an uphill battle. \(^6\)

In Vedanta, when considering the question of arguability of this point, the Court of Appeal identified a number of factors showing specific links between V and KCM of potential relevance to the particular risks which were alleged to have harmed the claimants. These included specific matters referred to by the judge at first instance \(^7\) and other evidence (such as the provision of specific health and safety, and environmental, training “across the group”, the provision of significant financial support to the relevant subsidiary, and various public statements regarding the parent’s commitment to address environmental risks at the subsidiary). Based on these, the Court of Appeal concluded that it could not interfere with the judge’s conclusion that the claim against the parent was at least arguable.

Since then, in the cases of Okpabi \(^8\) and AAA \(^9\) (which also concerned jurisdiction hearings involving similar claims against a UK domiciled parent and its local, non-EU, subsidiary), the Court of Appeal had found that the negligence claims made against the parents were not arguable – the apparent links between parent and subsidiary in those cases being less direct than those in Vedanta. Whilst it was therefore apparent that each case would turn on its facts the trend of those latter cases appeared to be, insofar as English law is concerned, \(^10\) to look for some specific involvement.

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4. [2012] EWCA (Civ) 525
5. [2014] EWCA (Civ) 635
6. This was the case in Thompson where the claim failed. In Chandler the evidence of direct links between parent and subsidiary was far more specific.
7. Including: (a) a report by the parent stressing that oversight of its subsidiaries rested with its board, and making express reference to the local problem in the case; (b) a management agreement in place between the parent and subsidiary with a number of services being provided by the former of potential relevance to the claim; (c) evidence of important roles being played by employees of the parent; and (d) a witness statement of a former employee of the subsidiary giving direct evidence as to the parent’s control over the subsidiary.
8. [2018] EWCA Civ 191
9. [2018] EWCA Civ 1532
10. In each of Vedanta, Okpabi and AAA, it happened to be agreed that the negligence under discussion could be assessed by reference to English law (generally because the otherwise applicable local law would have followed English law on the point in any event). Depending on the facts, however, this may not always be the case - particularly in an international tort action.

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in the affairs of a subsidiary; whilst generalised standards/policy setting might not be enough.

Against that background, the precise argument relied upon by V and KCM before the Supreme Court in Vedanta was that the Court of Appeal (and the trial judge) had erred in summarily reviewing the evidence. More specifically, they asserted that any finding that V owed a duty of care to third parties other than KCM’s employees was a novel duty of care calling for a cautious approach and a detailed investigation of the claimants’ case. This was rejected by the Supreme Court, which therefore refused to interfere with the lower courts’ conclusions. In so doing it did, however, make a number of important observations about the nature of such liability. In particular that:

- This was not a case of the assertion, for the first, time of a novel and controversial new category of a duty of care [60] and the liability of parent companies for the activities of their subsidiaries was not a special category beyond which general principles applied [49, 54].

- In the application of those principles, Lord Briggs remarked that whilst a parent/subsidiary relationship may enable the parent to take control of the latter’s activities it does not impose a duty to do so. Instead, everything depends upon the extent to which the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations. [49]

- Whilst, consistent with the above, Lord Briggs then went on to approve a summary of the position by Sales LJ (as he then was) in AAA (which emphasised that the existence of a duty of care in such cases involved the application of general principles), Lord Briggs also expressed “reluctance” at attempting to shoe horn cases into specific categories. In this regard, for example, Sales LJ, in AAA, had stated that cases where parent companies may incur a duty of care in relation to the activities of their subsidiaries would usually involve the parent either having in substance taken over the management of the relevant activity of the subsidiary, or having given relevant advice to it. Lord Briggs emphasised, however, that whilst such categorisation would be helpful for the purposes of analysis, what matters in the end is the facts of the case. Or, in his words, “There is no limit to the models of management and control which may be put in place within a multinational group of companies” [50-51]

- Consistent with that approach, Lord Briggs also turned to a submission made by V and KCM that Okpabi and AAA also showed that a parent could not incur such a duty of care where it simply set group policies and left subsidiaries to comply with them. Lord Briggs was not persuaded that such a general principle existed. He cited examples of where a group policy promulgated by a parent contained systemic
errors or unsafe practices as instances where a parent could nonetheless be held responsible to affected third parties. He further pointed out that even where that was not the case, policies could give rise to a duty of care if the parent does not just proclaim them but takes active steps, by training, supervision and enforcement, to see that they are implemented - or holds itself out as exercising that degree of control/supervision but then fails to do so [52-53].

Although the Supreme Court’s analysis in this area was, as discussed above, primarily aimed at assessing whether the lower courts had erred in the procedural test to be applied to the evidence, Lord Briggs did express the view that he thought it was well arguable that a sufficient level of intervention by V in the mine may be demonstrable (after disclosure of relevant documents). He based this view on published materials in which V asserted an assumption of responsibility for the maintenance of proper standards at its subsidiaries (and, in particular, the operations at the mine in question) and the fact that V did not merely lay down those standards but implemented them by training, monitoring and enforcement [61].

➢ The effect of mandatory jurisdiction over a UK domiciled parent company in establishing jurisdiction over a “necessary and proper” party under CPR PD6B 3.1(3)

This point, regarded by the Supreme Court, as the “most difficult” issue in this appeal raised an important question regarding the correct approach to the application of the forum non conveniens doctrine in relation to non-EU defendants who are sued in England on the basis of CPR PD6B 3.1(3). It is a point which has often arisen, although not exclusively, in multinational tort cases where the “anchor defendant” for the purposes of that rule is a UK domiciled company. In such circumstances, as noted above, insofar as EU Law applies, the English court has mandatory jurisdiction over the anchor defendant (i.e. it cannot decline jurisdiction over that defendant on the basis of forum non conveniens). The question has then become to what degree does that fact influence the court’s approach to the non-EU defendant (against whom, in a tortious claim, the application of forum non conveniens would generally be available). Previous cases (including the lower courts in Vedanta) had identified the risk that staying proceedings against the subsidiary may lead to irreconcilable judgments and treated this as a decisive factor in favour of England – even if the other factors in the case all pointed towards the relevant local jurisdiction (in this case Zambia).

However, in a case where that local jurisdiction was an available forum for a trial against both defendants (as was the case here since V was prepared

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11 One aspect of the Supreme Court’s judgment concerns an attempt by V to attack this feature of the Brussels I Recast on the basis that to allow it to function as the “anchor” in such a case involved an “abuse of EU Law” [23-41]. This is not examined in further detail in this note as the Supreme Court clearly saw no application for this where there was a genuine desire to obtain a remedy against the anchor defendant – the answer, instead, lying in an appropriate application of the forum non conveniens doctrine against the local non-EU defendant [40]
to submit to the Zambian courts) Lord Briggs held that this approach should not be followed in future. In such a situation, it was the claimants’ decision to bring proceedings in England which gave rise to the risk of irreconcilable judgments and, that being the case, it followed that it should not be treated as a trump card in the identification of the proper place for the claim to be heard. [75,84]. As the courts below committed this error, the Supreme Court then went on to summarise the factors connecting the case with Zambia (virtually all the material factors pointed to Zambia) and concluded that the proper place for the claim against KCM would be Zambia.

*Forum non conveniens*, however, has a second limb. Even if the above analysis leads away from England, if there is a risk that the claimant would not obtain substantial justice in the other forum then the English courts may nonetheless accept jurisdiction. The first instance judge had found that this was the case as the claimants would have difficulty securing funding in Zambian proceedings (legal aid and/or CFAs being unavailable in that jurisdiction) and a suitably experienced local legal team. The Supreme Court found that criticism of the judge’s approach in assessing these issues was ill-founded and refused to overrule him. The end result being that, despite its conclusion on the first limb of the *forum non conveniens* test, it would not decline jurisdiction over the claims against KCM.

**Conclusions – what does this mean for future actions against multinational groups in England?**

The Supreme Court’s view as to the substance of parent company liability is an important development. Although it must be remembered that the case was not a trial on the merits of the case (which will now proceed in England), the Supreme Court’s judgment emphasises the primacy of the facts of any given case. Whilst these were always paramount, eschewing any approach based on categorisation or generalisation only widens the scope for future debate and may encourage courts to be more open to the suggestion that MNC practices and policies should not only be subject to detailed scrutiny, but may also be found to be the basis of duties of care owed by the parent. Although the gist appears to remain one of requiring some active participation in the subsidiary’s affairs, or default in any “standard-setting” role the parent has otherwise assumed, the Supreme Court, simply put, was reluctant to set down any hard and fast rules in this respect. Under the Supreme Court’s approach, for example, it may be questioned whether a case such as *Okpabi* - in which the Lord Justice in the minority saw the claim as arguable on its facts – might be viewed somewhat differently, at least at the summary/jurisdictional stage.
Multinational enterprises with governance and compliance systems will need to aware be of this development in calibrating their approach to risk management. It goes to the question of the extent and nature of their policies and procedures, and how these are implemented to deal with group governance issues. Although sophisticated corporate groups will know that the risk of litigation against parent companies is the corollary to the commercial benefits that considered group strategies can bring, following the Supreme Court’s judgment there may be less certainty as to where the dividing line sits.

Of course, the question of ultimate liability of a parent company is different from the question of the degree to which they, and local subsidiaries, are actually likely to face proceedings in England which go as far as trial. In this regard, whilst establishing arguability of a case may not be a high threshold (particularly as a result of the Supreme Court’s observations on duty of care), its ruling may influence future claims of this profile in England in other ways. In particular, whilst claimants will no doubt continue to bring such claims in the English courts where there are strategic and funding advantages to do so, it makes it more likely that, under the current regime, any claims against a non-EU subsidiary will face a higher jurisdictional hurdle than before (subject to an analysis of whether substantial justice would be forthcoming in the forum conveniens). In this, there may be also be a glimpse of the broader direction of future travel in such matters. In particular, the jurisdictional framework upon which claims such as Vedanta, Okpabi and AAA have largely been hung turns substantially on the application of the Brussels I Recast and the mandatory jurisdiction over the UK parent afforded by it. But, as and when the UK’s exit from the EU results in the revocation of that legislation (and assuming it were not to be replaced by any future arrangement) then the whole claim, including that against the UK domiciled defendant, would be once again be subject to a forum non conveniens analysis.

A copy of the Supreme Court’s judgment can be viewed here.

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