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Supreme Court finds that UK-domiciled parent company may owe duty of care to third parties for the acts of its foreign subsidiaries

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On 10 April 2019, the Supreme Court in *Vedanta Resources Plc v Lungowe, determined*[1] that a UK-domiciled parent company may owe a duty of care to third parties affected by operations of its foreign subsidiary**.**

This is the latest in a series of cases on duty of care of UK-domiciled parent companies to third parties for the actions of their foreign subsidiaries (and the only one so far to make it to the Supreme Court). Our previous publication examining other Court of Appeal decisions on the same issue can be found here.

Facts

On 31 July 2015, 1826 Zambian citizens (the "Claimants") resident in the Chingola region of Zambia commenced proceedings against Vedanta Resources Plc ("Vedanta"), incorporated in the UK, and Konkola Copper Mines Plc ("KCM"), incorporated in Zambia. Vedanta is the holding company of KCM, which is the owner-operator of the Nchanga copper mine.

The Claimants are primarily subsistence farmers relying on land and local waterways to sustain basic agrarian livelihoods. They alleged that they suffered personal injury, damage to property and loss of income, amenity and enjoyment of land as a result of pollution and environmental damage caused by discharges of harmful effluent from the Nchanga copper mine since 2005.

The Claimants also alleged that both Vedanta and KCM owed them a duty of care to ensure that KCM's mining operations did not cause harm to the environment or local communities in Zambia.

The Supreme Court's Approach

Vedanta and KCM challenged the Court of Appeal's finding that there was an arguable case that Vedanta owed the Claimants a duty of care. A key issue for the Supreme Court was therefore the proper approach to establishing whether a duty of care exists where a claimant seeks to sue a foreign subsidiary and its UK-domiciled parent company for negligence.

The Supreme Court held that liability of a UK-domiciled parent company cannot be pigeonholed into specific categories (as the Court of Appeal had attempted) because there is "*no limit*" to the models of management and control deployed by a multinational group of companies. The starting point is that the UK-domiciled parent company does not owe a duty of care to third parties affected by the actions of its subsidiaries solely because

[1] Vedanta Resources Plc and another v Lungowe and others [2019] UKSC 20

of its status as a parent company. Instead, whether a duty of care is owed "*depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary*".[2]

In the Court's view, many factors may be relevant and even determinative in considering whether a duty of care may arise for UK-domiciled parent companies, including:

(1) issuance of group-wide policies and guidelines by a UK-domiciled parent company, which are implemented by a subsidiary;

(2) circumstances where a UK-domiciled parent company goes beyond merely proclaiming group-wide policies, but takes active steps, by training, supervision and enforcement, to secure implementation by subsidiaries; and

(3) publication of materials in which a UK-domiciled parent company holds itself out as exercising a degree of supervision and control of its subsidiaries, *even if it does not in fact do so*.

The Supreme Court found on the facts that the last two scenarios were applicable. Vedanta's published materials about the standards of control over its subsidiaries and the implementation of these standards through training, monitoring and enforcement, made it *arguable* that Vedanta owed a duty of care to the Claimants.[3]

In addition to the issue of duty of care of a UK-domiciled parent company for the actions of a foreign subsidiary, the Supreme Court appeal also covered several other issues, including the proper place for proceedings involving multiple defendants from different jurisdictions. Despite finding that Zambia would have been the proper place for conduct of the litigation, the Supreme Court dismissed KCM's and Vedanta's appeal on the basis that the Claimants would have been unable to obtain substantial justice in Zambia. This was a highly influential factor in the decision, with reference made specifically to the limited funding arrangements in Zambia (including the lack of legal aid or Conditional Fee Agreements), and the absence of sufficiently sizeable and suitably experienced legal teams in Zambia for prosecution of cases of this size and complexity.

Significance of the Decision

As a preliminary point, it is important to highlight that the Supreme Court was considering the jurisdictional question of whether there was an *arguable* case against Vedanta. It did not have to consider whether Vedanta in fact owed a duty of care to the Claimants, which will now be determined on the merits before the High Court. It would be premature to conclude that UK-domiciled parent companies will generally owe a duty of care to third parties for the actions of their foreign subsidiaries.

That said, this decision is important in a number of respects. The Supreme Court has confirmed that a UK-domiciled parent company is capable of owing a duty of care to third parties for the actions (and omissions) of its foreign subsidiaries and that the duty can be established by reference to general principles of tort (and not specific factors relevant only to the parent/subsidiary relationship). It is also the first instance where the Supreme Court has provided some guidance on when a UK-domiciled parent company may owe a duty of care for the actions of its subsidiary, and does not limit that analysis to the "straitjacket" of *indicia* in *Chandler v Cape*.[4]

There are wider implications of this case for the litigation of current (and future) cases where defendants are domiciled in multiple jurisdictions. In particular, the decision potentially sets a precedent in favour of claimants from less developed or under-resourced judicial systems in fighting against jurisdictional challenges on the basis that there is real risk that substantial justice will not be obtained in the foreign jurisdiction. Even in circumstances where England is not the proper place to commence proceedings, the Supreme Court has confirmed that claimants still have the opportunity to avail themselves of the English court's jurisdiction where they can evidence a real risk that substantial justice will not be obtainable in the foreign jurisdiction. For clients

2 Vedanta Resources Plc and another v Lungowe and others [2019] UKSC 20 at [49]

3 Vedanta Resources Plc and another v Lungowe and others [2019] UKSC 20 at [61]

4 Chandler v Cape [2012] EWCA Civ 525

with operations in emerging markets with less-developed legal systems, this could prove a growing issue as the UK-domiciled parent company may now be found to be an anchor-defendant for English proceedings.

Finally, in light of this potential widening of the scope of circumstances when a duty of care may be imposed on a UK-domiciled parent company, multinational companies may want to evaluate their current corporate structure, policies and procedures. In particular, a UK-domiciled parent company may now want to fully consider the level of detail it provides in publicly available corporate documents or reports, and the actions it takes (or does not take) in implementing those policies. Such considerations will need to be balanced against three obvious demands:

- Any legal or other disclosure obligations and responsibilities (e.g. undertaken through participation in industry groups) to adhere to certain standards in its supply chains, including in relation to anti-bribery, criminal finances and social and environmental impact.
- Investors – both large institutional investors and small shareholders – are increasingly demanding such disclosure as a condition of their investment.
- Using the understanding companies have of human rights risks in their operations, transactions and supply chain to take effective measures to prevent such harm arising in the first place. Company boards may feel that making these activities publicly known is necessary or valuable for reputational or market considerations.

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