GOWLING WLG

VEDANTA RESOURCES PLC & ANOTHER V LUNGOWE & OTHERS - SUPREME COURT RULES UK CORRECT JURISDICTION TO BRING CLAIM AGAINST ZAMBIAN SUBSIDIARY

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In a judgment that could have far reaching effects for UK incorporated companies with foreign subsidiaries, the Supreme Court has decided that 1,826 Zambian citizens (the claimants) are entitled to bring a group action in the UK courts in respect of alleged harm to their health and farming activities arising out of toxic discharges into waterways from the nearby Nchanga Copper Mine over many years.

The Nchanga Copper Mine (one of the largest open cast mines in the world) is owned by Konkola Copper Mines plc ("**KCM**"), a company incorporated in Zambia. It employs around 16,000 people.

Vedanta Resources Plc ("**Vedanta**"), the ultimate parent company of KCM, is incorporated in the UK and has only 19 employees of its own (eight of whom are its directors). The Vedanta group has 82,000 employees worldwide.

The claimants brought claims against both KCM and Vedanta in common law negligence and breach of statutory duty. The claim against Vedanta was alleged to arise due to the control and direction that Vedanta exercised over KCM's mining activities and operations.

Should the trial be heard in the UK or in Zambia?

Vedanta had submitted to the jurisdiction of Zambia and the Supreme Court decided that Zambia would plainly have been the proper place for this litigation as a whole, provided substantial justice was available to the parties.

However, the claimants wanted to have the claim heard in the English courts (rather than in Zambia) on the basis that:

1. They could not get legal aid in Zambia;
2. They could not enter into a conditional fee agreement (aka a "no win no fee" agreement) in Zambia; and
3. there were no sufficiently substantial and suitably experienced legal teams in Zambia to deal effectively with litigation of this size and complexity.

The Supreme Court concluded that the claimants would not obtain access to substantial justice

Was there a triable issue against Vedanta?

In order to determine whether the case could be properly tried in the UK against **both** Vedanta and KCM it was necessary to determine whether a triable issue existed against Vedanta in negligence.

The defendant sought to set aside the permission granted to serve the claim against Vedanta which claim (they argued) had no real prospect of success and which they said had only been made in order to enable a claim against "the real defendant" KCM to be heard in the UK.

This court had to decide whether the claim against Vedanta could be disposed of or rejected **summarily** without the need for a trial.

The Supreme Court made it clear that it should not conduct a "mini trial" at this stage and indeed was not impressed with the nearly 300 pages of written case, 9,000 pages of electronic bundles and 142 cited authorities presented before them thereby ignoring the requirement for proportionality in jurisdiction disputes of this kind, which they said only involved one difficult point of law.

The Supreme Court said that the key question was "whether Vedanta sufficiently intervened in the management of the mine owned by KCM itself (rather than by vicarious liability) such that it owed a common law duty of care to the claimants in connection with the escape of toxic material from the mine alleged to have caused the relevant harm".

The Court held that:

1. "The level of intervention… requisite to give rise to a duty of care… is (as is agreed) a

matter of Zambian law, but the question whether that level of intervention occurred in the present case is a pure question of fact";

2. "the liability of parent companies in relation to the activities of subsidiaries is not of itself a distinct category of liability in common law negligence. Ownership of subsidiaries may enable parents to take control of the management of the operations of the relevant business owned by the subsidiary but it does not impose any duty upon the parent to do so. All that the existence of the parent subsidiary relationship shows is that the parent had an opportunity to do so but nothing more";
3. "Parent companies and their subsidiaries are separate legal persons and the four indicia of a duty of care provided by the Court of Appeal in Chandler v Cape Plc [2012] 1 WLR 3111 did not lay down a separate test distinct from the general principle for the imposition of a duty of care in relation to a parent company. The Chandler indicia are no more than particular examples of circumstances in which a duty of care may affect a parent and did not identify a wider basis in law for the recognition of the relevant parental duty of care than the law actually provides"; and
4. "the published materials in which Vedanta asserted its own assumption of responsibility for the maintenance of proper standards of environmental controls over the activities of its subsidiaries, and in particular the operations at the mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, were sufficient on their own to show that it was arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the mine may be demonstrable at trial after full disclosure of the relevant internal documents of Vedanta and KCM and of communications passing between them".

In essence the Supreme Court agreed with the conclusion reached by the lower courts that (based on the evidence provided) the claim that Vedanta had taken a sufficient part in the running of the mine or assumed sufficient responsibility for doing so (although not straight forward) was sufficient to require determination at a trial.

It should be noted that the merits of the case will be determined on the facts of the case at the future trial where the claimant will need to prove its claim against Vedanta and KCM.

What are the consequences of the judgment?

Although this case was all about the jurisdiction of the UK courts to deal with the claims against both Vedanta and KCM, this judgment will be of particular interest to multinational

parent companies headquartered in the UK.

Such parent companies may want to examine and understand (and distinguish) the circumstances in which they may (in the future) be judged to have availed themselves of the opportunity to take over, intervene, control, supervise or advise the management of their subsidiaries overseas operations and in doing so find themselves liable to third party claims.

The analysis coming out of the eventual trial of this case (and a number of others which are now likely to follow) may provide valuable guidance in this respect.

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