Leigh Day

Legal Briefing

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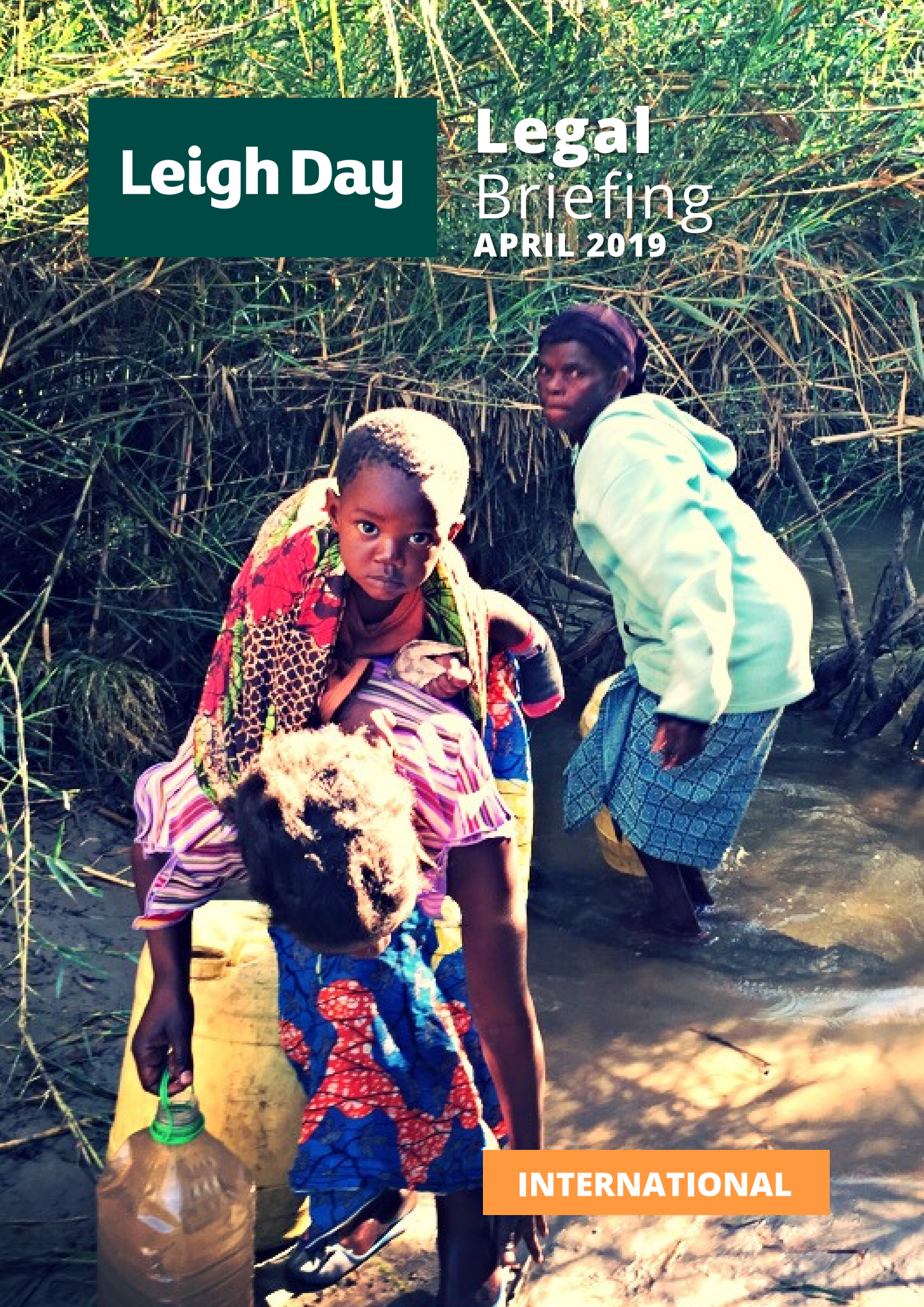


INTERNATIONAL

Wednesday 10 April 2019

Lungowe & Others v Vedanta and KCM

Parent company liability clarified

Victory in the Supreme Court

On Wednesday 10 April 2019, some four years since the claimants first instructed Leigh Day to bring these claims in the English courts, the Supreme Court has handed down the final judgment in Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines [2019] UKSC 20. The judgment is the culmination of a lengthy dispute over the jurisdiction of the Courts of England and Wales to hear the claims of some 2,000 Zambians regarding alleged environmental pollution from Vedanta's Zambian copper mine.

Read the judgment

Background

The Claimants are 1,826 Zambian citizens who have brought proceedings against Vedanta, a UK domiciled multinational mining company, and its Zambian subsidiary Konkola Copper Mines ("KCM"), a copper mining company operating one of the largest copper mines in the world.

The Claimants allege that as a result of the Defendants' toxic effluent discharge from their Nchanga Copper Mine they have suffered loss of income through damage to the land and waterways on which they rely. They further contend that many are suffering from personal injuries as a result of having to consume and use polluted water. They are seeking damages, remediation and cessation of the continual pollution that they say is gravely impacting their lives.

Following service of proceedings in August 2015 both Defendants challenged the jurisdiction of the English Courts, filing applications which sought, inter alia, a declaration that the court does not have jurisdiction to try the claims. In April 2016 Mr Justice Coulson (now Lord Justice Coulson), heard submissions and evidence from all parties during a three day hearing in the Technology and Construction Court.

Coulson LJ's judgment of 27 May 2016 found emphatically in favour of England as the most appropriate forum for the resolution of the claims allowing the claims to proceed against both Defendants.

Vedanta and KCM both appealed the first instance decisions and their a ppeals were heard over two days by the Court of Appeal in July 2017. Simon LJ (with whom Jackson LJ and Asplin LJ agreed) upheld the entirety of Coulson J's conclusions.

The Defendants sought and obtained permission to appeal to the Supreme Court in March 2018 and a 2 day hearing was listed for January 2019. The hearing took place on 14-15 January 2019 before Lady Hale, Lord Wilson, Lord Hodge, Lady Black, and Lord Briggs. Judgment was handed down on Wednesday 10 April 2019 with Lord Briggs giving the leading judgment to which the other panel members all agreed.

Vedanta and KCM's appeals

As Lord Briggs' judgment states at the outset, this appeal concerns the "jurisdiction of the courts of England and Wales to determine those claims against both defendants" [4].

The issues on appeal The English courts apply two separate sets of rules to determine jurisdiction in cases before it: 1) The rules contained in the Recast Brussels Regulation for defendants domiciled within the EU, particularly Article 4.1 which states "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". This applied to Vedanta, the parent company, based in London.

2) For defendants domiciled outside of the EU (such as African subsidiaries of UK mutinationals) the court looks to the necessary or proper party gateway as set out in the Civil Procedure Rules Part 6 Practice Direction B paragraph 3.1, where the claimant must demonstrate:

i. that the claims give rise to a real issue to be tried against the "anchor defendant";

ii. if so, that it is reasonable for the court to try that issue;

iii. that the "foreign defendant" is a necessary or proper party to the claims against the anchor defendant;

iv. that the claims against the foreign defendant have a real prospect of success;

v. that England is the proper place to bring the claims or that there is a real risk that the claimants will not obtain substantial justice in the foreign jurisdiction.

A main feature of these appeals was whether the claims give rise to a real triable issue against Vedanta, the English parent company. However, it was accepted that should the Claimants overcome this hurdle it would be reasonable for the English court to try that issue and that KCM would be at least a proper party to the claims against Vedanta. It was also common ground that the claims against KCM had a real prospect of success.

1 Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

2 See the Judgment at paragraphs 16-21

The issues on appeal and the order in which they were addressed by Lord Briggs were as follows:

1) Whether the claim against Vedanta is an abuse of EU law and should be stayed.

2) Whether the claims disclose a real triable issue against Vedanta.

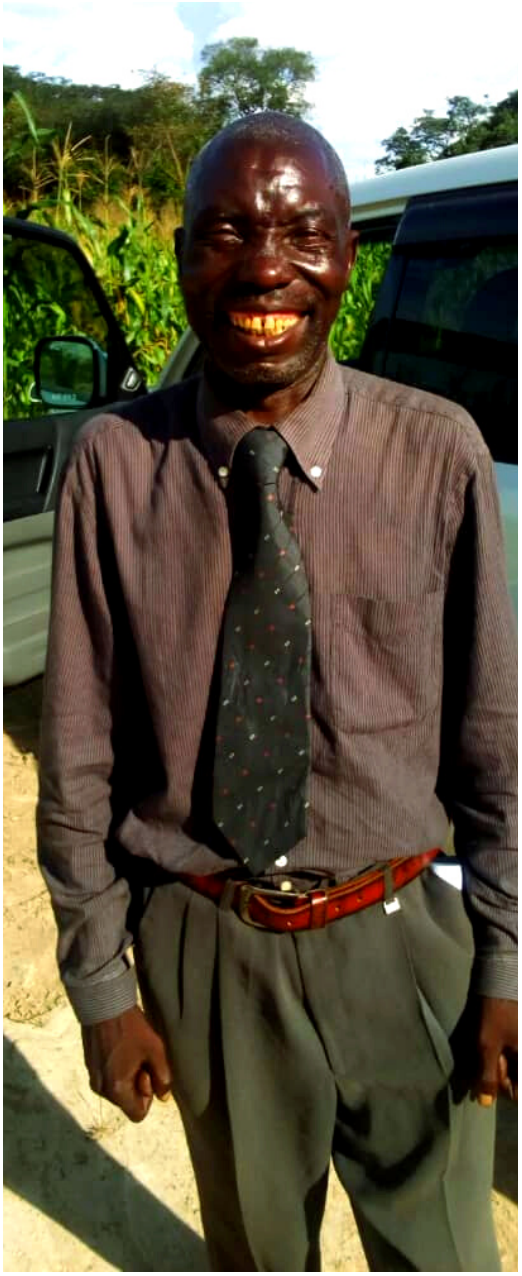
3) Whether England is the proper place to bring these claims.

4) Whether, if the claims were remitted to being brought in Zambia, there is a real risk that the Claimants would not obtain substantial justice in that jurisdiction.

Lord Briggs' findings in respect of each of the issues on appeal are addressed and analysed under each of the above headings.

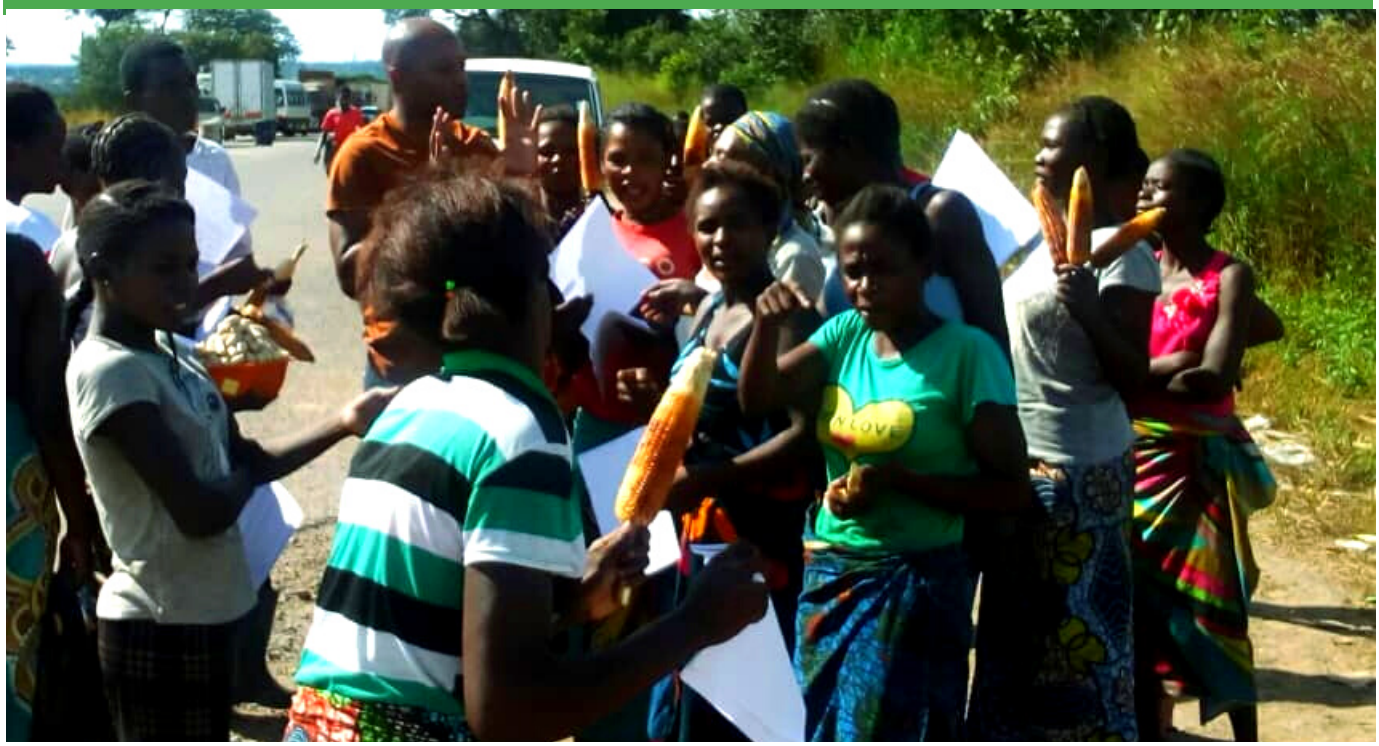
Abuse of EU Law

The Claimants relied on the judgment of Court of Justice of the European Union (the "CJEU") in Owusu v Jackson [2005] QB 801, where it was held that a national court is precluded from declining the mandatory jurisdiction conferred on it by Article 4 of the Recast Brussels Regulation on the grounds of forum non conveniens. The Appellants argued that the Claimants' primary reason for bringing the claims against Vedanta was to rely on Article 4 and Owusu to establish an anchor defendant in England in order to persuade the court to exercise jurisdiction over KCM and that this was an abuse of EU law.



The Appellants' raised arguments that Article 4.1 and Owusu had a very wide effect and meant that an English incorporated company could be sued in England by any number of claimants around the world in respect of damage arising from the operations of its subsidiaries. In his response to this argument Lord Briggs said the following:

"In my view, if there is a remedy for this undoubted problem, it lies in an appropriate adjustment of the English forum conveniens jurisprudence, not so as to permit the English court to stay the proceedings against the anchor defendant, if genuinely pursued for a real remedy, but rather to temper the rigour of the need to avoid irreconcilable judgments which, thus far, served to disable the English court from concluding that any jurisdiction other than its own is the forum conveniens or proper place for the litigation of the claim against the foreign defendant." [40]



Lord Briggs' decided that the concerns regarding the wide effect of Article 4.1 would be best addressed under the "necessary or proper party gateway" under the third issue on appeal. His Lordship there fore resolved the abuse of EU law issue in favour of the Claimants a nd decided against making a reference to the Court of Justice.

Real issue to be tried as against Vedanta

It is established that the test under the necessary or proper gateway is the same as the summary judgment test which Lord Briggs affirmed in this judgment: *"The task of the judge under this heading was to decide whether the claim against Vedanta could be disposed of, and rejected, summarily, without the need for a trial" [42].* His Lordship accepted that this can cause difficulties as jurisdiction disputes by their nature arise very early in proceedings usually prior to having the benefit of disclosure and only having the assistance of the claimant's pleadings. His Lordship recognised that the absence of disclosure in a case such as this where it turns on the extent of control and intervention exercised by the parent company over its subsidiary in respect of its mining operations can cause a quandary for judges.

Lord Briggs addressed the Appellants' submission that this case involves a new category of common law negligence by making some important findings:

"…the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence. Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything 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. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity." [49]

His Lordship then went on to address Sales LJ's judgment in AAA v Unilever plc [2018] EWCA Civ 1532 in which his Lordship summarises the law in respect parent company liability and identifies two basic situations where a parent company may incur a duty of care to third parties (advice to a subsidiary and management control of a subsidiary). Whilst Lord Briggs agreed with Sales LJ's summary, his Lordship was *"reluctant to shoehorn all cases of the parent's liability into specific categories of that kind" finding that "there is no limit to the models of management and control which may be put in place within a multinational group of companies" [51].* His Lordship identified these as ranging from a parent company being a "passive investor" at one end through to carrying on *"as if they were single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant until the onset of insolvency" [51].*

The Appellants sought to argue that a parent company could never incur a duty of care in respect of the activities of a subsidiary simply by setting group wide policies and guidelines and expecting the management of the subsidiary to comply with them. It was submitted that the evidence presented by the Claimants in respect of Vedanta was of this nature. Lord Briggs disagreed with the Appellants' submission stating that he was *"not persuaded that there is any such reliable limiting principle. Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties" [52].*

His Lordship continued and provided further important clarifications as to when a parent company may be liable for the operations of their subsidiaries:

> *"Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken." [53] [Emphasis added]*

Lord Briggs identified the material published by Vedanta in which it asserted responsibility for environmental standards and controls, for their implementation throughout the group and for their monitoring and enforcement as *"sufficient on their own to show that it is well 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" [61]*. His Lordship therefore surmised that there was sufficient evidence for the courts below to have reached the conclusions that they did in respect of both the common law duty of care as well as the breach of statutory duty by Vedanta.

Is England the proper place to bring the claim against KCM?

The legal test in order to establish whether England is the appropriate forum was set out by Lord Collins in Altimo where he explained that *"the task for the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice".* As Lord Briggs identifies in his judgment answering that test involves considering practical matters such as accessibility to courts for witnesses and availability of a common language as well as connecting factors such as the system of law which will be applied to decide the issues and the place where the wrongful act or omission occurred.

Lord Briggs placed significant weight on the fact that Vedanta had at the time of the hearing offered to submit to the jurisdiction of the Zambian courts to enable the case to be heard there. His Lordship acknowledged that this would not necessarily end the risk of irreconcilable judgments as the Claimants could still sue Vedanta in the English courts in any event, but the irreconcilable judgments would be *"because the claimants have chosen to exercise that right to continue against Vedanta in England, rather than because Zambia is not an available forum for the pursuit of the claim against both defendants" [75]*.

Lord Briggs agreed with the Appellants' submissions that the risk of irreconcilable judgments should not be determinative in every case where the claimants have a right to sue the anchor defendant in England under article 4 regardless of the strength of the factors that suggest the foreign jurisdiction is the appropriate forum: *"the English court would not merely have one hand tied behind its back because of its inability to stay the proceedings against the anchor defendant, but the other hand paralysed by the almost inevitable priority to be given to the risk of irreconcilable judgments" [78].* Significantly, the Court found that when the Parent Company has offered to submit to the foreign jurisdiction then the risk of irreconcilable judgments should not be a decisive factor, given that the risk has been created by the Claimants decision to sue the Parent Company in England as opposed to the foreign jurisdiction.

His Lordship summarised nine connecting factors with Zambia which led him to the conclusion that Zambia is the appropriate forum for the trial of these claims provided substantial justice is available to the Claimants, concluding that *"it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants' choice to proceed against one of the defendants in England rather than, as is available to the, against both of them in Zambia" [87].*

A real risk that the Claimants will not obtain substantial justice in Zambia?

Where a court has concluded that a foreign jurisdiction is the proper place in which the case should be tried, the court may still join the foreign defendant to the English proceedings if satisfied that there is a real risk that substantial justice will not be available in the foreign jurisdiction. Coulson J concluded in his judgment that there was a probability that the claimants would not obtain access to justice in Zambia (a margin beyond the real risk that is required) for two primary reasons: i) the lack of funding in Zambia for impecunious claimants; and ii) the lack of suitably experienced and resourced lawyers to enable group litigation of this nature and complexity, particularly against a Defendant that would likely prove obstinate.

The Court of Appeal affirmed Coulson J's judgment noting that it would be extremely difficult to overturn findings of fact from an experienced Judge who had explicitly had regard to all of the evidence. Nevertheless the Appellants advanced the same arguments before the Supreme Court attacking Coulson J's analysis of the evidence and supporting their submissions with an intervention from the Attorney General of Zambia.

Lord Briggs robustly upheld the findings of the courts below rejecting the Appellants' arguments that Coulson J had misdirected himself in law and therefore the appeal failed as otherwise *"it is no more or less than a challenge to judicial fact-finding" [98].*

Conclusion

Lord Briggs' well received judgment provides closure to this long lasting jurisdiction battle for these Claimants.

From a wider perspective, it provides some clarity on the issue of parent company liability identifying that if a corporate entity holds themselves out as taking responsibility for the actions of a subsidiary then they may be held to account if things go wrong. Whilst providing a necessary temper on claimants being able to rely on the irreconcilable judgment argument to bring the claim in the English courts against a foreign defendant, his Lordship rightly recognised the importance of access to justice in the foreign jurisdiction.

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Leigh Day

Pushing the boundaries, taking a stand

Leigh Day is a British law firm that works for individuals or communities who have been harmed or treated unlawfully. Our international human rights and environmental specialists represent people all over the world fighting for justice and challenging powerful corporate and government interests.

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