United Kingdom Supreme Court—extraterritorial jurisdiction—business and human rights—civil claims

VEDANTA RESOURCES PLC AND ANOTHER V. LUNGOWE AND OTHERS. [2019] UKSC 20. Judgment. *At* https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf. UK Supreme Court, April 10, 2019.

In *Vedanta v. Lungowe*, the United Kingdom Supreme Court determined that civil claims for negligence brought by Zambian claimants against an English parent company (Vedanta) and its Zambian subsidiary (Konkola Copper Mines plc (KCM)) for damages experienced in Zambia can proceed in English courts. While framed as a domestic tort law case, the decision is significant for international efforts aimed at holding businesses accountable for their "negative impacts" on human rights.[1] Writing for a unanimous Court, Lord Briggs's judgment hinged narrowly on the right of victims to access substantial justice. More broadly, Lord Briggs suggested that parent companies that hold themselves out in public disclosures as overseeing the human rights, environmental, social, or labor standards employed by their subsidiaries assume a duty of care to those harmed by the subsidiary. This suggestion has the potential to transform current corporate approaches to human rights due diligence and accountability.

The plaintiffs are 1,826 Zambians, mostly farmers, who live in four communities in the country's Chingola District. The claimants alleged that the Nchanga Copper Mine polluted watercourses they rely on for personal consumption and for farming purposes. KCM owns and operates the Nchanga Copper mine; Vedanta and the Zambian government jointly own KCM. While KCM is a joint enterprise, the Court noted that "materials published by Vedanta state that its ultimate control of KCM is not . . . to be regarded as any less than it would be if wholly owned" (para. 2). The claimants argued that Vedanta set health, safety, and environmental standards that KCM was to comply with, and exercised a "very high level of control and direction" over the subsidiary (para. 3).

The defendants' appeal[2] centered on an assertion that the claimants were wrongfully pursuing Vedanta in order to force KCM to defend itself in English courts. The Court's judgment discussed two issues that are significant for international and transnational law.[3] First, the Court outlined the standards by which to assess a parent company's responsibility for harms caused by its subsidiaries in common law negligence. This issue is significant for international human rights law, in particular for implementation of the 2011 United Nations

[1] As businesses do not have obligations under international law, the leading authority on business responsibilities for human rights under international law, the United Nations Guiding Principles on Business and Human Rights, have adopted the term "impacts" rather than "abuses" or "breaches." UN Guiding Principles on Business and Human Rights, Principles 3(d), 11, 13, UN Doc. A/HRC/17/31 (2011), and the official Commentary to these Principles. This leads to complex questions about what constitutes an "impact." For an extensive examination of that issue, see David Birchall, *Any Act, Any Harm, to Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights*, 1 U. OXFORD HUM. RTS. HUB J. 120 (2019).

[2] Technically, each defendant brought its own appeal, but the Court concluded that the two appeals should be treated as one (para. 15).

[3] The judgment also addresses two legal issues that are internal to either the European Union (EU) or Zambia: how to reconcile English common law standards with EU rules on jurisdiction; and the potential for a statutory duty under Zambia's mining laws. This note sets these two issues aside.

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Guiding Principles on Business and Human Rights (Guiding Principles).[4] Second, in considering whether England or Zambia is the "proper place" to hear claims against KCM, the Court affirmed an approach that recognizes that claimants can only be guaranteed "substantial justice" in jurisdictions where they have access to appropriate legal representation.

The defendants argued that the claimants pursued Vedanta for the purpose of securing English jurisdiction over their real target, Vedanta's subsidiary KCM. The claimants' case against Vedanta rested largely on several group-wide policies and guidelines adopted by the parent company regarding operations and management at the mining sites. Applying Zambian law, the trial court found that Zambian courts would arguably interpret principles of negligence in line with the English common law (para. 56). The trial court also concluded that Vedanta's group-wide policies created a real, triable issue against the parent company (para. 24). The claimants' interest in pursuing Vedanta therefore included, but extended beyond, the benefit of securing the court's jurisdiction over KCM.

On appeal, the defendants argued that using group-wide policies to find that Vedanta owed a duty of care for the impact of its subsidiary would require creating "a new category of common law negligence" (para. 49). Lord Briggs rejected this assertion. While a parent company can influence the conduct of its subsidiary, English common law does not require it to do so. Whether the parent assumes a duty of care toward third parties "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" (*id.*). The claims against Vedanta rested not on the fact that it owned KCM. That relationship merely creates an opportunity for the parent to control the subsidiary's operations. Lord Briggs identified three means by which group-wide policies could give rise to a duty of care for the conduct of a subsidiary: (1) where the guidance itself is defective; (2) where the "parent does not merely proclaim them, but takes active steps" to ensure the guidance is implemented; and (3) where the parent "in published materials . . . holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so" (paras. 52–53). It is clear that Lord Briggs did not intend for this to be an exhaustive list, but rather representative of how a parent company might assume a duty of care distinct from but related to its subsidiaries.

The second significant finding concerns the Court's examination of the appropriate venue for the case against KCM. Under the European Union's (EU) Recast Brussels Regulation, allegations against EU companies can be (and, in many circumstances, must be) brought in the courts of the member state in which the business is domiciled (the "home state").[5] The Court of Justice for the European Union has determined that this confers a right on non-EU claimants to file claims against a business in its home state.[6] The rules of civil procedure for England and Wales provide that a claim against an English defendant can "anchor" the case, allowing the courts to exercise jurisdiction over another "necessary or proper party" to the claim (para. 15).[7] The rules prohibit a court from exercising this authority unless it is

[4] Guiding Principles, *supra* note 1.

[5] Recast Brussels Regulations, EU 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Arts. 4(1), 8.

[6] European Court of Justice, Owusu v. Jackson, C-281/02 (2005).

[7] Civil Procedure Rules, Practice Direction 6B.

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"satisfied that England and Wales is the proper place in which to bring the claim."[8] This rule of *forum conveniens* requires courts to consider various factors that relate to the interests of the courts and the burden placed on the parties by litigating in any of the potential jurisdictions in which the case could be heard. One factor that is often given prominence is the risk of duplicative processes and conflicting judgments. Finally, the court may allow a case to proceed where it would otherwise find another forum proper if "there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction" (para. 88).

The trial judge found that Zambia would be the proper place for the case against KCM but for the "closely related claim against Vedanta" (para. 71). The risk of irreconcilable judgments led the court to conclude that the case against KCM should be heard in England. Additionally, the trial court concluded that the claimants would be denied "access to justice" if the case were heard in Zambia because they would be unable to secure a suitable and experienced legal team to represent them (para. 89).

On appeal, the defendants advanced two arguments. First, they asserted that the trial court's approach would mean that "the risk of irreconcilable judgments is likely to be decisive in every case" where EU law provides a claimant with the right to sue other defendants in England or Wales (para. 78). Second, they claimed that the trial judge did not pay sufficient attention to issues of international comity and inappropriately considered the problems the claimants would face in financing and accessing legal representation.

First, Lord Briggs found the trial court erred in concluding that England is the "proper place" for the case. The risk of irreconcilable judgments does not transform the right to sue one defendant in English courts into a right to sue all defendants in England. While this risk is a significant factor, the weight it is to be given depends on the availability of an alternative forum that all defendants accept (paras. 81–83). Vedanta was willing to submit to Zambia's jurisdiction. The claimants are under no obligation to accept that offer, but Lord Briggs determined that Vedanta's willingness to defend itself in Zambia presented the claimants with a choice. They could either pursue separate cases in England and Zambia, risking irreconcilable judgments, or they could choose to pursue a single case against both defendants in Zambia and avoid the risk (para. 82). The risk of irreconcilable judgments may still be considered by the lower court, but given the circumstances in this case, it is only one factor that should not be given priority over others (para. 84).

Many of the connecting factors at hand pointed to Zambia as the "proper place": the applicable law; the place of the causation and harm; that many of the claimants do not speak English, would need translation, and would have difficulty traveling from Zambia to England; the location of many witnesses; the need to translate documentary evidence; and that a Zambian judgment is enforceable in English courts. Documents and relevant Vedanta employees are likely to be located in England, but modern technology makes it easy to address these factors in order to ensure the case proceeded appropriately. Consequently, Lord Briggs concluded, "[i]f substantial justice was available to the parties in Zambia as it is in England, it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England" (para. 87).

When examining the issue of substantial justice, however, Lord Briggs found the lower court had appropriately analyzed the law. The trial court found that most forms of litigation

[8] Civil Procedure Rules, Practice Direction 6.37(3).

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funding in Zambia were unavailable in this case. The only available means of financing the lawsuit "would not attract a legal team which was both prepared to act, and able to do so with the requisite resources and experience" (para. 93). This proved crucial to both the trial court and Lord Briggs. The litigation is expected to be complex and to demand significant disbursements for expert evidence and analysis. Lord Briggs found that the trial court had rightly considered "whether the unavoidable scale and complexity of this case (wherever litigated) could be undertaken at all with the limited funding and legal resources" available to the claimants in Zambia (para. 95). Without judging the Zambian legal system, the trial judge concluded that the claimants in this particular case could not secure the legal representation necessary with the funding available to them (para. 97). This was, according to Lord Briggs, an appropriate approach for the trial judge to take and justified the exercise of jurisdiction.

* * * *

In many respects, *Vedanta* is a rather mundane case about the difficult but routine considerations a domestic court must undertake in transnational cases where the parties disagree about which forum is preferable. Yet, the Supreme Court's findings may have a profound impact on business and human rights, a subfield of international human rights law.

The 2011 Guiding Principles provide an authoritative understanding of the responsibilities and obligations in this area. They recognize the existing obligations on states to protect human rights by regulating the conduct of businesses and to ensure victims whose human rights are harmed by businesses have access to effective remedies.[9] Businesses, on the other hand, have a responsibility to respect human rights by adopting policies and practices that identify and mitigate any risks they pose.[10] Where a business causes or contributes to a negative impact, it should ensure the victims can access appropriate remedies. Businesses are to consider their direct and indirect impacts, examining not only their own operations but also how their business partners impact human rights.[11] Among other things, this means that parent companies should address the impacts of their subsidiaries.[12] While the need to secure remedies for victims is central to the Guiding Principles, it has often been the "forgotten pillar,"[13] and there remains a disconnect between the international expectations and the ability of victims to enforce those expectations through domestic legal systems.

The legal principle that shareholders are not liable for the acts of a company in which they invest poses a particular challenge for victims, for whom the direct cause of the harm is usually a local subsidiary.[14] Local courts may not have jurisdiction over the deeper pockets of the known and branded parent company, whose home state may also be unable or unwilling

[9] *See* Guiding Principles, *supra* note 1, Principle 1.

[10] *Id.*, Principle 11.

[11] *Id.*, Principle 13.

[12] *Id.*, Principle 14.

[13] *See* Lorna McGregor, *Activating the Third Pillar of the UNGPs on Access to an Effective Remedy*, EJIL:*Talk*! (Nov. 23, 2018), *at* https://www.ejiltalk.org/activating-the-third-pillar-of-the-ungps-on-access-to-an-effective-remedy.

[14] For an extensive examination of this issue, see Gwynne Skinner, *Rethinking the Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 Wash. & Lee L. Rev. 1769 (2015).

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to hold the business accountable. Conversely, the parent company's home state is unlikely to have—and is often unwilling to assert—jurisdiction over the acts of an overseas subsidiary. Merely finding a venue in which victims can bring their claims can therefore be daunting.

In the 1990s, victims and their advocates responded to this challenge by bringing claims against corporations and other business entities under the Alien Tort Statute (ATS). The ATS allows foreigners to sue in U.S. federal courts for violations of customary international law.[15] Claimants often—and controversially—invoked the statute to encourage U.S. courts to hear claims against parent and subsidiary corporations for injuries occurring in other countries. Never an ideal tool for redressing human rights violations by businesses,[16] the U.S. Supreme Court sharply curtailed the utility of the ATS for such claims in *Kiobel v. Royal Dutch Petroleum Co.*[17] and *Jesner v. Arab Bank.*[18]

As use of the ATS became more difficult, claimants and their representatives began to consider European courts as potential venues for business and human rights litigation. Cases in England have generally focused on proving a parent company assumed a duty of care, often by relying on a parent company's claims that they control or oversee the conduct of subsidiaries in areas of particular sensitivity, including economic and social governance.[19] It is common for parent companies to assert robust group-wide policies on these issues. Until now, it was unclear how much weight a trial court should give to such public statements. Companies have often claimed that these statements do not create an assumption of responsibility for those the policies are supposedly protecting. The UK Supreme Court's decision indicates that what parent companies might have viewed as "puffery" is actually an assumption of responsibility that gives rise to a duty of care. Businesses are not yet required by English law to engage in human rights due diligence or related activities like environmental governance, but they can be held to the standards they claim to observe.

Additionally, the Court's recognition that concerns over "substantial justice" arise when claimants are unable to secure appropriate legal counsel for complex claims may prove important in future business and human rights cases. These claims are often time-consuming for attorneys and demand scientific or other expertise. Victims are often unable to pay for these costs. Unless a forum provides for legal assistance, contingency fees, or another means of securing significant legal assistance, a victim's only choice may be to find counsel elsewhere. The Court's judgment indicates that this is a relevant factor when determining the appropriate forum, and it may even overcome competing issues of international comity. This may make it easier for victims to pursue multinational corporations in English courts.

There are concerns that Lord Briggs's approach could create a perverse incentive: parent companies might divest themselves of any responsibility for the operations of their subsidiaries. However, this is unlikely to become a standard, or even a dominant, practice amongst

[15] 28 U.S.C. § 1350.

[16] For more on the limitations of the ATS, see *Agora: Reflections on* Kiobel, 107 AJIL UNBOUND (2013), *at* https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/agora-reflections-on-kiobel.

[17] 133 S. Ct. 1659 (2013).

[18] 138 S. Ct. 1386 (2018). *See also* Rebecca J. Hamilton, Jesner v. Arab Bank, 112 AJIL 720 (2018).

[19] For other examples, see, for example, Court of Appeal, Chandler v. Cape Plc [2012] EWCA Civ 525; Court of Appeal, AAA & Others v. Unilever Plc and Unilever Tea Kenya Ltd. [2018] EWCA Civ 1532; Court of Appeal, Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd. [2018] EWCA Civ 191 (right to appeal granted by the UK Supreme Court on September 2, 2019).

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businesses. Parent companies claim responsibility over the practices of their subsidiaries because doing so provides them with clear advantages. First, many institutional investors demand their investees adopt and disclose their policies and practices. Businesses that fail to do so risk losing the support of these investors. Second, businesses in inherently dangerous industries, such as mining or oil and gas extraction, rely on their group-wide experiences and policies to secure licenses for new operations. By divesting from environmental and social oversight, businesses in their fields risk undermining their bids for new opportunities. Finally, developments at the national and international levels suggest the accountability gap is closing. France has adopted legislation requiring certain companies to undertake human rights due diligence.[20] There are ongoing efforts to develop similar legislation for the EU, UK, Finland, and Switzerland. Internationally, states continue to debate a binding treaty on business and human rights that would oblige states to adopt human rights due diligence. It may soon be unsustainable for large multinational corporations to refuse to meet the responsibilities established by the Guiding Principles throughout their corporate group.

The decision may have even wider-reaching implications. As Lord Briggs explained, Vedanta did not owe a duty of care merely because it was KCM's parent. Rather, that relationship provided an opportunity for the parent company to exercise oversight, and the parent company's actions created the duty of care. One could envision similar outcomes with so-called "powerful or influential purchasers"[21] or social auditors[22] who assert that they supervise or audit for human rights abuses throughout their supply chains. Efforts to hold powerful purchasers accountable for human rights violations in their supply chains have been less successful than efforts at parent company responsibility. It appears that, to date, no court has found a purchaser responsible for human rights abuses in its supply chain. A claim against the German apparel company KiK for damages stemming from a fire at one of its Pakistani suppliers appeared promising,[23] but was dismissed when the German court concluded Pakistani law provided for a two-year statute of limitations that could not be waived by the parties.[24]

It remains unclear how the UK's impending exit from the European Union (which at the time of writing seems likely) might impact future decisions. When the UK leaves the EU, it will cease to be bound by the Brussels Regulation. If, as is expected, the English courts revert to the common law approach to *forum non conveniens*, they would not be required to exercise jurisdiction over English companies when cases have extensive contacts with another jurisdiction. This could alter the balance of factors relevant to jurisdictional challenges, and encourage courts to use *forum non conveniens* more frequently to dismiss claims against parent companies

[20] LOI n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'order.

[21] *See, e.g.*, Anil Yilmaz-Vastardis & Sheldon Leader, *Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains*, Essex Bus. & Hum. Rts. Project, at 7 (2017), *available at* https://www1.essex.ac.uk/ebhr/documents/Improving-Paths-to-Accountability-for-Human%20Rights-Abuses-in-the-Global-Supply-chains-A-Legal-Guide.pdf.

[22] For an argument that this duty of care already exists and should be recognized, see Tara Van Ho & Carolijn Terwindt, *Assessing the Duty of Care for Social Auditors*, 27 Eur. Rev. Private L. 379 (2019).

[23] The trial court awarded legal aid for the claimants upon a finding that they were more likely than not to succeed at trial.

[24] For an English overview of the case, see *KiK: Paying the Price for Clothing Production in South Asia*, ECCHR, *at* https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia.

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for harms caused by the operations of their subsidiaries. For now, however, the *Vedanta* judgment opens up avenues for victims of corporate human rights abuses by clarifying two important issues in English law: parent companies can assume a duty of care for the impacts of their subsidiaries by issuing group-wide policies; and when evaluating whether a claimant can access "substantial justice" in another fora, English courts can and should consider whether the claimants can financially access appropriate legal counsel.

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UN Convention on the Law of the Sea—jurisdiction of the International Tribunal for the Law of the Sea—existence of a "dispute"—indispensable third parties' freedom of navigation—flag state jurisdiction—good faith and abuse of rights—calculation of compensation

THE MV "NORSTAR" CASE (PANAMA V. ITALY). ITLOS Case No. 25. Preliminary Objections. *At* https://www.itlos.org.
International Tribunal for the Law of the Sea, November 4, 2016.

In the *MV "Norstar" Case* (*Norstar Case*), the International Tribunal for the Law of the Sea (ITLOS) produced two reasoned decisions. In the first, the Tribunal established jurisdiction over the relevant dispute and the admissibility of Panama's claims.[1] In the second, it found that Italy had violated Panama's right to freedom of navigation on the high seas.[2] In the latter decision, the Tribunal relied on an expansive understanding of flag state jurisdiction—prompting a vociferous joint dissent by seven of its twenty-three judges.[3] The majority's understanding of the jurisdictional exclusivity of the flag state as extending to prescriptive as well as enforcement jurisdiction is a significant expansion of flag state rights—and will have a corresponding impact on the way that shipping is regulated internationally.

Between 1994 and 1998, the MV *Norstar* (*Norstar*)—a Panamanian-flagged oil tanker—was engaged in the supply of gasoil to mega yachts off the coasts of Italy, France, and Spain. On September 25, 1998, it was arrested by the Spanish authorities following an August 11, 1998 request for mutual assistance by the public prosecutor of the Court of Savona in Italy, based, in turn, on a Decree of Seizure of the same date. The arrest occurred while the *Norstar* was anchored in the bay of Palma de Mallorca—Spanish internal waters.

At the point of its arrest, the only thing Panamanian about the *Norstar* was the flag it sailed under. It was owned by a Norwegian shipping company and chartered by a Maltese shipping company. The "bunkering" activity (i.e., the supply of fuel to seagoing vessels) in which it was engaged was at the direction of an Italian company and took place in the Mediterranean.

[1] M/V "Norstar" Case (Pan. v. It.), ITLOS Case No. 25, Preliminary Objections Judgment of Nov. 4, 2016 (hereinafter Prelim. Obj.).

[2] M/V "Norstar" Case (Pan. v. It.), ITLOS Case No. 25, Judgment of Apr. 10, 2019, 58 ILM 673 (2019) (hereinafter Judgment).

[3] Twenty-one permanent judges plus 2 *ad hoc*.