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BRIEFING

WHOSE MINE IS IT ANYWAY? JURISDICTION AND PARENT COMPANY LIABILITY FOR FOREIGN SUBSIDIARIES

APRIL 2019

- UK SUPREME COURT HOLDS THAT BRINGING CLAIM AGAINST ENGLISH PARENT TO "ANCHOR" CLAIM AGAINST FOREIGN SUBSIDIARY NOT ABUSE OF EU LAW
- PARENT COMPANIES CAN OWE A DUTY OF CARE TO THIRD PARTIES AFFECTED BY THE ACTIONS OF A SUBSIDIARY
- THE NEED FOR PARTIES TO OBTAIN SUBSTANTIAL JUSTICE CAN BE A TRUMP CARD, EVEN IF ENGLAND IS NOT THE PROPER PLACE FOR PROCEEDINGS

The UK Supreme Court's recent judgment in *Vedanta Resources PLC v Lungowe*[1] is a significant decision on jurisdictional issues arising where a claim is made against an English defendant as a means to bring another (non-domiciled) defendant within the English courts' jurisdiction. The decision contains important comments on determination of the proper place for proceedings and the overriding importance of obtaining substantial justice. It also includes useful commentary on the circumstances in which a parent company may be deemed to owe a duty of care to third parties affected by the actions of a subsidiary.

Background

The underlying claim arose from allegations brought by a group of 1,826 Zambian citizens who said their health and farming activities had been damaged by the discharge of toxic matter from a copper mine into local watercourses. They brought claims for common law negligence and breach of statutory duty against the immediate owner of the mine, Konkola Copper Mines plc ("KCM", a public company incorporated in Zambia) and the ultimate parent company of KCM, Vedanta Resources plc ("Vedanta"), a company incorporated and domiciled in the UK).

Vedanta and KCM each brought jurisdictional challenges which were dismissed by the English High Court and Court of Appeal before being appealed to the Supreme Court.

[1] [2019] UKSC 20

Necessary or proper party gateway

Vedanta, as an English company, was sued in England pursuant to article 4.1 of the Recast Brussels Regulation[2] (and was accordingly the "anchor defendant"). The claimants sought to bring the foreign domiciled KCM within the jurisdiction pursuant to the "necessary or proper party" gateway set out in CPR PD 6B, para 3.1[3]. The crux of the jurisdictional challenge raised by Vedanta and KCM as appellants was that the claimants were using the necessary or proper party gateway purely as a vehicle for attracting English jurisdiction against their real target, KCM and that this was an abuse of EU law.

A claimant relying on the necessary or proper party gateway must show that: (i) there is a real issue to be tried; (ii) it is reasonable for the English court to try that issue; (iii) the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) the claims against the foreign defendant have a real prospect of success; and (v) either England is the proper place to bring the combined proceedings or that there is a real risk that the claimants would not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum.

Abuse of EU law?

"AN ABUSE OF LAW ARGUMENT COULD ONLY SUCCEED WHERE THE ANCHOR DEFENDANT … IS JOINED TO A PROCEEDING FOR THE *SOLE PURPOSE* OF ENABLING THE CLAIMANT TO SUE THE FOREIGN DEFENDANT…"

The Supreme Court concluded that an abuse of law argument could only succeed where the anchor defendant (i.e. Vedanta) is joined to a proceeding for the *sole purpose* of enabling the claimant to sue the foreign defendant (KCM) outside of that foreign party's domicile or (in cartel cases) where there is collusion between the claimant and the anchor defendant to pursue such a route.

This conclusion was reached on the basis of a number of decisions of the Court of Justice which have re-emphasised the centrality of article 4 of the Recast Brussels Regulation and the need to construe any exceptions or derogations from it restrictively. The Supreme Court determined that the restrictive sole purpose test was not satisfied in this case and that there was therefore no abuse of EU law. It did so having noted the High Court's finding of fact that, although attracting English jurisdiction against KCM was a contributing factor to the decision to sue Vedanta, Vedanta was sued in England for the genuine purpose of obtaining damages in circumstances where KCM might prove to be of doubtful solvency.

Can a parent company owe a duty of care to third parties affected by the actions of a subsidiary company?

As to whether the claim against Vedanta (as the anchor defendant) involved a real issue to be tried, the question was whether Vedanta had "sufficiently intervened in the management of the Mine owned by its subsidiary KCM to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants or … a fault-based liability [under relevant legislation]".

Vedanta argued that all it had done as a parent company was lay down group-wide policies with an expectation that subsidiaries would comply with these, and that as a general principle, a parent could never incur a duty of care in respect of activities of a subsidiary in these circumstances. It said that to conclude that it owed a duty of

[2] Which states that "… persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state".

[3] This rule enables a party to serve a claim (brought against a defendant domiciled in England in order to engage English jurisdiction) out of the jurisdiction on another party "who is a necessary or proper party to that claim".

care to the claimants would be "… a novel and controversial extension of the boundaries of the tort of negligence". The resolution of this issue is therefore of broader relevance to the litigation risks commonly faced by parent companies.

As a starting point, the Supreme Court stated that all a parent/subsidiary relationship demonstrated was that a parent had an opportunity to take control of management of the operations of business or land owned by a subsidiary. The nature of that relationship did not impose a duty on a parent to do so. Instead "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".

"THE SUPREME COURT REJECTED THE SUGGESTION THAT A PARENT COMPANY COULD NEVER INCUR A DUTY OF CARE TO THIRD PARTIES AFFECTED BY ACTIVITIES OF A SUBSIDIARY."

As such, the Supreme Court rejected the suggestion that a parent company could never incur a duty of care to third parties affected by activities of a subsidiary. Such a duty could be incurred by issuing policies and guidelines for subsidiaries containing systemic errors which, when implemented by the subsidiary, then cause harm to third parties; by going further and taking active steps (e.g. by training, supervision and enforcement) to ensure that such policies and guidelines are implemented; and/or by holding itself out in published materials as exercising a particular degree of supervision and control of subsidiaries even when it did not in fact exercise such control.

On the material provided, the Supreme Court was satisfied that the judge at first instance and the Court of Appeal were correct to conclude that a sufficient level of intervention by Vedanta may be demonstrable at trial and that no novel and controversial new category of common law duty of care either arose or was required for that conclusion to be reached.

The 'proper place' for proceedings

The Court then went on to consider "the most difficult issue" in the appeal: whether England was the "proper place" for the proceedings.

The risk of irreconcilable judgments from two different jurisdictions was one important factor relevant to the evaluative task of identifying the proper place. In the past, courts have treated the claimants' choice to bring proceedings in England as decisive in favour of England being the proper place for the litigation, even when all other factors favoured the foreign jurisdiction and the defendants have undertaken to submit to it[4]. However, the Supreme Court considered that this approach was wrong. It noted that where an English domiciled defendant has agreed to submit to the jurisdiction of the foreign defendant, the claimants' choice to nevertheless pursue litigation in two jurisdictions meant that the risk of irreconcilable judgments "ceases to be a trump card".

In the present case, Vedanta had agreed to submit to Zambian jurisdiction and all other connecting factors also overwhelmingly pointed to Zambia being the proper place for the conduct of the proceedings. The Supreme Court was therefore satisfied that England was not the proper place for the litigation.

[4] *OJSC VTB Bank v Parline Ltd* [2013] EWCHR 3538 (Comm)

Substantial justice

However, the final (and ultimately determinative) point to consider was whether substantial justice was available to the parties in Zambia. If it was not, this would mean that *despite* England not being the proper place, the English proceedings could nonetheless be served on the foreign defendant, enabling the litigation to take place in England.

The Supreme Court upheld the High Court judge's findings in this regard, concluding that substantial justice was most likely not available in Zambia. This view was reached as a result of two 'access to justice' factors: (i) the practical impossibility of funding the group claims in Zambia where the claimants were all in extreme poverty; and (ii) the absence within Zambia of sufficiently substantial and suitable experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively. The Supreme Court therefore concluded that, despite finding in favour of the appellants on the proper place for proceedings, the appeal should fail as a result of the substantial justice issue.

"EVEN IF ENGLAND IS NOT THE "PROPER PLACE" FOR THE PROCEEDINGS TO TAKE PLACE, THE ENGLISH COURT MAY PERMIT ... SERVICE OUT OF THE JURISDICTION WHERE THERE IS A REAL RISK THAT THE PARTIES WILL NOT RECEIVE SUBSTANTIAL JUSTICE IN THE FOREIGN JURISDICTION."

Conclusion

Key takeaways from this judgment are that:

- A claimant (A) may bring proceedings in England against an English domiciled defendant (B) and a foreign defendant (C), for the purpose of engaging English jurisdiction against C, as long as A's reason to sue B is not for the sole purpose of engaging English jurisdiction;
- Submission by B to the jurisdiction of the courts where C is domiciled may help (but will not be determinative of) an argument that England is not the proper place for the proceedings. Parties should in any event carefully compare the advantages and disadvantages of the jurisdictions involved (and risks/liabilities assumed) before making a decision to submit to the foreign jurisdiction;
- Even if England is not the "proper place" for the proceedings to take place, the English court may permit (or refuse to set aside) service out of the jurisdiction where there is a real risk that the parties will not receive substantial justice in the foreign jurisdiction;
- Whether a parent company will be found to owe a duty of care to third parties affected by actions of its subsidiaries will be fact dependent. Parent companies should be aware that the parent/subsidiary structure will not be enough to protect them from incurring a duty of care; and
- Last but not least, the Supreme Court's judgment includes a pointed warning that there will be costs consequences if jurisdictional challenges are advanced in a disproportionate manner.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with the authors below or your regular contact at Watson Farley & Williams.

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