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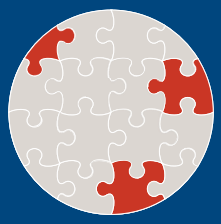


Cross-border disputes

Forum/jurisdiction and parallel proceedings:

One hand tied, but the other not paralysed, when English Courts assess proper forum and the ends of justice

A. Summary

1. In *Vedanta Resources Plc and another v Lungowe and others* [2019] UKSC 20, the UK Supreme Court decided that the English Courts had, and should exercise, jurisdiction to hear claims concerning pollution in Zambia made by 1,826 Zambian villagers, against both:
    - a Zambian mining company, Konkola Copper Mines Plc ("**KCM**"), which operated the mine from which it was alleged that toxic emissions had emanated; and
    - its English parent Vedanta Resources Plc ("**Vedanta**"), which was alleged to have exercised very high levels of control and direction over its subsidiary.
2. It made that ruling despite the fact that:
    - the claimants' main target was KCM, and a principal (although not the sole) reason why they were pursuing Vedanta was to utilise it as "anchor defendant" to enable them to sue KCM in England, which would not otherwise have been possible; and
    - it considered (in contrast to the first instance Judge and Court of Appeal) that the "proper forum" for determination of the dispute was Zambia.
3. The basis of its decision was that:
    - the claim against Vedanta disclosed a real triable issue, did not constitute an abuse of process of EU law, and could not be stayed in favour of Zambia under EU rules; and
    - although the fact that England was not the proper forum for the dispute would ordinarily have resulted in a stay of the English claim against KCM, that claim should also proceed since there was a real risk that substantial justice could not be obtained in Zambia.
4. The first instance Judge and Court of Appeal had concluded that, although Zambia was the natural forum (at least for the claim against KCM), England was in fact the proper forum for the determination of the dispute and so the English Courts should hear both claims regardless of the point on "substantial justice". That was so, they had said, in view of the risk of parallel proceedings and irreconcilable judgments if the English claim against KCM were stayed in favour of Zambia but the claim against Vedanta proceeded.

5. The Supreme Court reversed them on that point however, since the risks they had highlighted arose solely from the claimants' choice to proceed against the English parent in England despite an ability to sue both parent and subsidiary in Zambia (the English parent having agreed to submit to the Zambian Courts). Consequently, the Supreme Court ruled that Zambia was the proper forum for the dispute as a whole. Thus, unlike the Judge and Court of Appeal, it would have stayed the English claim against KCM had substantial justice been available in Zambia.

B. Basis of jurisdiction of the English Courts

As against Vedanta (English parent) – under EU rules

6. The English Courts had jurisdiction to hear the claim, since Vedanta was domiciled in England (Article 4 of the Recast Brussels I Regulation[1]).

7. Further, since there were no prior parallel proceedings in Zambia (a "non- EU/Lugano country"[2]), the English Courts had no discretion to stay or decline jurisdiction over that claim in favour of Zambia (pursuant to the principle in *Owusu v Jackson*[3]) even if Zambia was the more appropriate forum for determination of the dispute[4].

As against KCM (Zambian subsidiary) – under the English common law

8. Since the EU/Lugano rules were not applicable to the claim against the Zambian-domiciled subsidiary, permission was needed to serve the proceedings on KCM out of the jurisdiction to enable the claim to be heard in England. That required the claimants to establish that:

    - there was a good arguable case for the existence of a CPR gateway connecting the dispute to England – the relevant gateway here being that KCM was a proper party to the proceedings against Vedanta (the "anchor defendant") over which the English Courts did have jurisdiction; and
    - there was a real issue between the claimants and Vedanta (as "anchor defendant") that it was reasonable for the Courts to try; and
    - there was a serious issue to be tried as against KCM – i.e. the claim against KCM had a real prospect of success; and
    - the English Courts were clearly the proper place for the dispute to be heard (i.e. the *forum conveniens*), or that there otherwise existed special circumstances by reason of which justice required that the claim should be heard in England.

C. The issues for the Supreme Court

9. The issues considered by the Supreme Court were, broadly, as follows:

    - Was there a real issue between the claimants and Vedanta (as "anchor defendant") that it was reasonable for the Courts to try?

1 I.e. Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2 I.e. countries not subject to either the Recast Brussels I Regulation or the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (i.e. countries other than EU Member States and Iceland, Norway and Switzerland).

3 *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* (C-281/02); [2005] Q.B. 801, ECJ.

4 Had prior similar or related proceedings existed in Zambia, a discretion to stay may have existed in principle under Articles 33 or 34 of the Recast Brussels I Regulation.

- Since the Claimants' "main target" was in fact KCM, was it an abuse of process of EU law for them to sue Vedanta as anchor defendant in the Courts of its domicile (on the basis of EU rules) with a view to enabling them to also sue KCM in England (under the common law)?
- Were the English Courts the proper place (or *forum conveniens*) for the determination of the dispute such that KCM could also be sued there - bearing in mind that, although Zambia was the natural forum, the claim against Vedanta would continue in the English Courts regardless?
- If England was not the proper forum, should the English Courts nevertheless hear the claim against KCM too in any event, on the basis of an argument that there was cogent evidence that substantial justice could not be obtained in Zambia?

D. The decision of the Supreme Court

10. The Supreme Court decided that there was material on which the judge at first instance could properly decide, as he did, that there was a triable issue between the claimants and Vedanta.

11. It also ruled that it was not an abuse of EU law to sue Vedanta in the Courts of its domicile in circumstances in which the claim against Vedanta was a triable one, the claimants genuinely desired to obtain judgment for damages against Vedanta, and it was not the case that the sole reason for suing Vedanta was to be able to also sue KCM in England.

12. As regards the *forum conveniens* issue, both the Judge at first instance and the Court of Appeal had decided that, despite Zambia being the natural forum (at least for the claim against KCM), the English Courts were nevertheless the proper place for the claim to be determined, since:

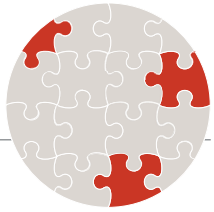
    - the claim against Vedanta would progress regardless (the English Courts having no discretion to stay it under the EU rules); and
    - if the claim against KCM could not also progress in England, parallel proceedings (and a risk of irreconcilable judgments) in England and Zambia would otherwise thus result.

13. The Supreme Court disagreed. It considered that the risk of parallel proceedings (and potentially conflicting judgments) was not such a determining factor in circumstances in which the claimants could have elected to pursue both subsidiary and parent in Zambia (the English parent having submitted to the Zambian Courts) and thereby avoid the need for parallel proceedings, but had instead chosen to exercise their right to pursue the English parent in its country of domicile.

14. The Supreme Court said that to hold otherwise would mean that:

    > "*the English court would not merely have one hand tied behind its back because of its inability to stay the proceedings against the* [England-domiciled] *anchor defendant* [under the Owusu principle], *but the other hand paralysed by the almost inevitable priority to be given to the risk of irreconcilable judgments, where claimants chose to exercise their right to continue against the anchor defendant in England*".

15. The Supreme Court therefore decided that, contrary to the decisions of the first instance Judge and the Court of Appeal, England was not the proper place for determination of the dispute as a whole.



16. However, despite that ruling, the Supreme Court nevertheless decided that the English Courts should hear the claims against KCM as well as Vedanta in any event. That was because it was satisfied with the findings of the first instance judge (and the Court of Appeal), made on the basis of cogent evidence, that there was a real risk that substantial justice would not be obtainable in Zambia.

17. This risk was not because of any lack of independence or competency of the Zambian judiciary or any lack of a fair procedure suitable for handling large group claims, but rather because of the practical impossibility of funding such group claims in Zambia and the absence of sufficiently substantial and suitably experienced legal teams to enable such sizeable and complex litigation to be prosecuted effectively.

E. The effect of the decision and its practical and commercial implications

18. In principle, a claim may be brought in the English Courts against an English parent notwithstanding that one of the principal reasons for so doing was to use the parent as "anchor defendant" to enable an English claim also to be made against its non- EU/Lugano subsidiary in circumstances in which the English Courts would otherwise not have had jurisdiction over the latter.

19. However, if the claim against the English parent in fact disclosed no real issue to be tried (i.e. if its claim could not survive an application for summary judgment), that would mean the claim against the subsidiary could not be brought in the English Courts either.

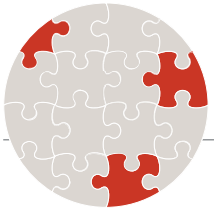
20. If there was a real triable issue against the English parent then, in the absence of prior parallel proceedings in the Courts of the other non- EU/Lugano country:

    - the English parent would ordinarily be unable to contest jurisdiction in favour of the non- EU/Lugano country[5] and the claim would proceed against it in England; and
    - the question of whether a claim could be pursued in England against the subsidiary too would depend upon whether England was the proper place for determination of the dispute as a whole and, if not, whether there were any special circumstances by reason of which justice required that the trial should, nevertheless, take place in England.

21. Where the English Courts were not the natural forum, they might still be the proper place for the dispute to be heard if the consequence of finding otherwise would be parallel proceedings against the subsidiary in another country and a risk of irreconcilable judgments. Indeed, that might well be the decisive factor, even where all other connecting factors appear to favour a non- EU/Lugano jurisdiction, if it was not possible to bring both claims together in that natural forum.

22. However, if the claimants in fact could have brought both claims in the Courts of the non- EU/Lugano country (and thus avoided the need for parallel proceedings), but they instead elected to pursue the English parent in the country of its domicile, the prospect of parallel proceedings (and potentially conflicting judgments) as a factor in determining the proper forum is much reduced in weight.

5 Unless there was an exclusive choice of court agreement in favour of the Courts of the non- EU/Lugano country, or it could be said that such non- EU/Lugano Courts should be afforded "exclusive jurisdiction" because of the nature of the claim. In that event, an ability to stay might exist by giving "reflexive effect" to those provisions of the Recast Brussels I Regulation/ the 2007 Lugano Convention which, in limited circumstances, allot exclusive jurisdiction to the Courts of an EU/Lugano State - see e.g. Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] E.C.R. I-9337, at [19], *Konkola Copper Mines Plc v Coromin* [2005] EWHC (Comm) 898, affirmed [2006] EWCA Civ 5 and *Plaza BV v Law Debenture Trust Corp plc* [2015] EWHC 43 (Ch), and see *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm), respectively. However, note the recent decision to the contrary of John Kimbell QC (sitting as a Deputy High Court Judge) in *Gulf International Bank BSC v Sheik Badr Fahad Ibrahim Aldwood* [2019] EWHC 1666 (QB).



23. One way of demonstrating that both claims could have been brought in the Courts of the non- EU/Lugano country (and thus increase the chances of a stay of the English claim against the subsidiary) is for the English parent to agree to submit to those other Courts, and it could do so prior to the jurisdiction hearing even if the English proceedings had already been commenced.

24. Submission by an English parent to such non- EU/Lugano Courts comes with its own risks however. Those include the following:

    - such submission would probably give jurisdiction to the non- EU/Lugano Courts to hear a claim against the English parent where none may otherwise have existed, and the proceedings in the non- EU/Lugano country may not be favourable to the English parent;
    - such submission may result in the English Courts being bound by a potentially adverse decision of the non- EU/Lugano Courts against the English parent, and render that decision enforceable in England and/or other countries.

25. Of course, if the English claim against the subsidiary is stayed in favour of the non- EU/Lugano Courts then, regardless of any submission by the parent to those Courts, parallel proceedings might in fact result in any event if the claimants nevertheless elected to progress the claim against the parent in England instead.

26. Further, even if it is established that the English Courts are not the proper place for determination of the dispute, they might, in exceptional circumstances, still allow the claim against the subsidiary to proceed in England in any event if it is established, on the basis of cogent evidence, that there is a real risk that substantial justice will not be obtainable in the non- EU/Lugano jurisdiction.

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