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Vedanta v Lungowe – issues in cross-border compliance

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A recent Supreme Court judgment has dramatically raised the potential exposure of London-listed corporates to issues in their overseas subsidiaries and joint ventures.

A large group of claimants brought proceedings against Vedanta (a London-listed corporate) and Konkola Copper Mine ('KCM'). KCM is a Zambian joint venture company in which Vedanta has a controlling interest (the Zambian government has a significant minority stake). KCM operates the eponymous mine. The claimants allege breaches of tortious and statutory duty against Vedanta based on the way in which the Konkola mine was run. A recent Supreme Court judgment (Vedanta Resources Plc v Lungowe [2019] UKSC 20) has held that proceedings against Vedanta can take place in London even though the tort was committed by a foreign subsidiary (KCM) in a foreign jurisdiction (Zambia), and all other relevant factors point to the foreign jurisdiction as the proper place to bring proceedings. The one consideration that overrides all other factors is whether that claimant would have access to justice in their home jurisdiction.

This decision could fairly be described as seismic – not just for litigators and insurers, but for international corporates as a whole. Depending on the outcome of the underlying dispute there are huge governance and risk implications for international corporates in how they manage and control their subsidiaries and joint ventures. It is from this standpoint that we approach Vedanta in this article.

The court made a number of findings on jurisdictional matters. These, while significant for practitioners, are of less interest to corporates than the outcome. However, in order to establish jurisdiction, the court needed to determine whether there was a real triable issue against Vedanta. (It was common ground that there was a real triable issue against KCM, the Zambian subsidiary.) This issue raises concerns for all sorts of corporates, because the critical question was whether Vedanta could be held to owe a duty on its own account – and not just vicariously – for the operation of the Mine.

Vedanta argued that this was not a factual matter which should wait until disclosure, suggesting that the claimants were seeking to extend the law on categories of party that could conceivably owe a duty of care. Vedanta invited the court to rule on this as an issue of law. If the court found there to have been no way that Vedanta could conceivably have owed a duty of care, then no matter what evidence might emerge there was no real triable issue.

The court was clear, however, that the claimants were emphatically not seeking to create a novel category of duty. The court viewed parent and subsidiary as separate legal persons, and would only find that a parent had assumed a duty of care in relation to the activities of its subsidiary if the general principles for imposing such a duty were satisfied in a particular case. The leading case on this topic (Chandler v Cape) was not to be viewed as a 'straitjacket', but as providing helpful guidance only. The judgment raised the following points on the circumstances where a court might impose such a duty of care:

- If a parent issues group guidelines containing systemic errors, and those errors cause harm to third parties, then the parent will likely owe a duty of care to those third parties affected.
- If a parent owes a duty of care to a subsidiary's employees in respect of a specific harm, then the parent is likely to owe such a duty to third parties as well. (If a harmful substance escapes to a factory floor, and the parent owes a duty to the factory employees, the parent will likely owe a duty to third parties if the substance escapes the factory walls and affects those living, working or enjoying recreation outside.)
- A parent having guidelines for its subsidiaries may not on its own be enough to establish a duty of care. But the parent may well assume a duty of care through training, supervision and enforcement measures to ensure that its subsidiaries do implement those guidelines.
- Even if a parent does not take steps to ensure that its subsidiaries actually implement the parent's guidelines, if the parent holds itself out in published materials as exercising control over its subsidiaries then this may suffice to establish a duty of care.

The court recognised that there was "no limit to the models of management and control which may be put in place within a multinational group of companies." A parent might simply be a passive investor in its subsidiaries. Or it might have adopted a unified management structure "with boundaries of legal personality and ownership within the group becoming irrelevant". While a common-sense recognition of the realities of modern corporate governance, this statement marks a step away from the doctrine of separate legal personality and could have long-reaching consequences. (For further considerations in this regard, see our article on the relationship between private equity funds and their subsidiaries here)

The Vedanta decision raises significant issues for how international groups should deal with their subsidiaries. Numerous large London corporates have subsidiaries all over the world. In many of these jurisdictions, a court might find that claimants – and especially a large class of them – are unable to obtain substantive justice in their home jurisdictions. The court did not think the claimants in Vedanta would be unable to obtain justice in Zambia because the Zambian courts would be anything other than fair. Rather, the court was concerned that the claimants might be denied substantive justice given the absence of sophisticated lawyers, courts and funding arrangements in this complex and weighty litigation. The same considerations might apply to numerous jurisdictions where there is no suggestion of bias on the part of the relevant legal system. (Albeit, where government bodies are 'sleeping owners' of natural resources companies – as in many hydrocarbons Production Sharing Contracts – we could certainly see local courts coming under pressure.)

How, then, is a London corporate to protect itself in a post-Vedanta world? The following seem to be helpful lessons:

1. The best way to eliminate such issues is to prevent harm arising in the first place. Any changes to corporate policies / structures post-Vedanta should not prejudice this overriding concern.
2. Companies should undertake a risk assessment to assess how much control is exerted (i.e. whether Group policies and procedures adopted wholesale are controlled and monitored from the centre) or how arm's length it is from its joint venture/subsidiary interests.
3. If a corporate says that is exercising control over the activities of its subsidiaries, it must mean it. Failing to do so "may constitute the abdication of a responsibility which it has publicly undertaken", in the eyes of the court.
4. There may be circumstances where it is better not to exercise control from headquarters – a parent company cannot necessarily be expected to know, say, jurisdiction-specific environmental regulation better than its local subsidiary. The local subsidiary may also have technical expertise that the parent lacks. But if this is the case, the parent should say so.
5. A parent should be transparent internally and externally about the extent of its control and how it manages (or not) its joint ventures and subsidiaries. The Annual Report seems a good place to start. It won't be the deciding factor necessarily, but a court is likely to find this document persuasive.
6. Corporates should eliminate systemic errors in their guidelines. This is easier said than done. However, if this comes down to resourcing, it is worth emphasising that this investment may avoid the significant costs / damages involved in group litigation such as Vedanta.
7. Finally, we would suggest corporates review their liability insurance in a post-Vedanta world to ensure they have in place a global programme that insures them for any civil liability arising from their subsidiaries' activities.

None of this is new, of course. But the potential exposure for London-based corporate groups has just been raised dramatically.

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