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Parent company liability in England following *Vedanta* and *Shell*: weakening the corporate veil

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Abstract: The question of parent company liability for the actions of overseas subsidiaries has received substantial attention from the English courts in recent years, including two recent judgments from the UK Supreme Court. Where such claims may previously have been seen as ambitious, the recent jurisprudence shows that in the right circumstances they can be advanced successfully. Whilst the judicial reasoning is based on orthodox tort principles, it is now being applied against a backdrop of group-level accountability particularly in the context of Environmental, Social and Governance (ESG) policy and elsewhere.

This article explores whether these developments mean that, while piercing the corporate veil continues to be exceptional, the extent of protection that the veil provides is not what it used to be. Given that large publicly owned multinational companies are listed on the London Stock Exchange and headquartered in this jurisdiction, claims here relating to the failings of operational subsidiaries abroad are increasingly an option, particularly for claimants looking to take advantage of a burgeoning litigation funding market and an evolving collective redress regime.

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Introduction

The basic pattern of (alleged) facts is all too familiar: a large multinational company has a local subsidiary in a poorer country; by its acts or omissions a local community is injured (often through an environmental disaster); those affected lack the means to bring claims for compensation; and the local legal system is not set up to give them effective redress.

In many instances this would be a case of an injustice without remedy. However, in two recent cases, a group of claimants (with the assistance of English lawyers acting under a liberalised contingency fee regime) have shown a potential pathway for claimants to seek justice in the UK courts – at least where the parent company is UK-domiciled.

In *Vedanta v Lungowe*[1] the claim was brought by some 2,500 Zambian citizens against the UK-listed mining giant Vedanta Resources plc and its Zambian subsidiary, Konkola Copper Mines plc (KCM), alleging that toxic discharges from KCM's mine had damaged both their health and their livelihoods. They claimed against KCM in negligence and for breach of statutory duty, on the basis that it was the operator of the mine. But they would never have been able to sue KCM alone in the English courts – after all, that claim had no real connection to England and every connection to Zambia. However, the claimants also sued Vedanta itself, on the basis of the "*very high level of control and direction*" that it

[1] *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20

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was said to have exercised over KCM's mining operations "*and its compliance with applicable health, safety and environmental standards*". As a company incorporated in England and Wales, Vedanta was subject to the English court's jurisdiction pursuant to Article 4 of the Brussels Regulation.[2] The question then was whether the claimants could persuade the English court to accept jurisdiction over KCM as a "necessary or proper party" under English private international law rules. After a jurisdiction battle lasting nearly four years and spanning two appeals, in 2019 the UK Supreme Court ruled that the claim against the parent was not fanciful and did give rise to a real issue to be tried. It also ruled that although Zambia would ordinarily be the proper place to bring the claim, there was a real risk that the claimants would not obtain substantial justice there, such that the English court should accept jurisdiction over KCM as well (upholding the decisions of the courts below). That landmark ruling set the stage for a comprehensive settlement announced in January 2021.[3]

Following a more tortuous but ultimately successful path (for now, at least) was the decision in *Okpabi v Shell*.[4] The fact pattern was similar to that in *Vedanta*, in that the Nigerian subsidiary (SPDC) of the UK-listed Royal Dutch Shell plc (RDS) was the operator of an oil pipeline that had allegedly led to oil spills causing harm to over 40,000 individuals living in Rivers State, who opted to bring claims in England against both RDS and SPDC. Once again, in addition to alleging breaches of statutory and common law duties against SPDC, the claimants alleged that RDS owed them a direct common law duty of care because it was said to have "*exercised significant control over material aspects of SPDC's operations*" and/or assumed responsibility for those operations. Again, jurisdiction over RDS was established on the basis that it was domiciled in England. On the basis of having RDS as an anchor defendant, the claimants sought to bring SPDC into the jurisdiction as a necessary or proper party. Unlike in *Vedanta*, however, the claimants failed both at first instance and in the Court of Appeal to persuade the English court to accept jurisdiction over SPDC. On both occasions it was found that there was no arguable case against the parent, and in the absence of such a case there should be no jurisdiction over the subsidiary. In February 2021, however, the UK Supreme Court overturned the decisions below and found that the claimants' claim against RDS "*clearly raises triable issues*". It remitted back the other questions on jurisdiction to the courts below (particularly the questions of appropriate forum and access to justice in Nigeria).

In both cases the threshold for showing arguable claims against the parent companies was met in large part by relying on their own public statements about their group-wide environmental policies and the ways in which these were implemented. Whilst that unified approach to corporate policymaking and standard-setting is very much in line with what governments, regulators and investors may want and expect, it seems that it is that same approach that opens the door for parents to incur liability to those persons that their subsidiaries may have (allegedly) injured.

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[2] EU Regulation 1215/2012. As established in *Owusu v Jackson* (Case C-281/02) [2005] QB 801, the Regulation applies so that a defendant domiciled in an EU member state may be sued in its home jurisdiction, even where the claimant is from a third country. Where the Regulation applies, it displaces the common law test of *forum non conveniens*, so (unless Article 4 is displaced by another provision of the Regulation itself) a claimant may sue a defendant in the latter's home jurisdiction as of right.

[3] https://www.reuters.com/article/us-zambia-mining-vedanta-idUSKBN29O1EL

[4] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.

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English law on parent-subsidiary separation – the prior authorities

For questions of limited liability, English law jealously guards the doctrine of the corporate veil, and will only pierce it in very limited circumstances (e.g. where it is used as a sham, to disguise impropriety).

However, even where the veil is not pierced, questions can arise as to whether parents and subsidiaries should be treated as operationally integrated, such that the acts of one may be imputed to the other. Even here, English law has traditionally been fairly conservative, as shown by the courts' approach in *Adams v Cape Industries*.[5] Cape was the parent company of a worldwide corporate group engaged in the mining and marketing of asbestos. In 1978-1979, a group of plaintiffs brought claims against Cape and its US subsidiary in Texas. Cape maintained that the Texas court did not have jurisdiction over it, declined to participate, and allowed summary judgment to be entered against it. It then resisted enforcement of the Texas judgment in England on the ground that although it had a subsidiary in the United States operating a related business, it was not itself 'present' in the jurisdiction, and its operations were sufficiently distinct from those of its subsidiaries that it should not have been made subject to the Texas court's jurisdiction. The English Court of Appeal agreed, ruling that it would be inappropriate to pierce the corporate veil, and that its subsidiaries' presence in the United States was insufficient to give the Texas courts jurisdiction over the English parent.

The precursor to the recent run of parent liability cases came in another asbestos-related claim, resulting in the 2012 Court of Appeal decision in *Chandler v Cape*.[6] In that case, a former employee of a subsidiary of Cape plc sought damages from the parent company on the basis that it had assumed a responsibility towards him so as to be liable for his asbestos-related illness (the subsidiary that had employed him having long been dissolved). The key issue was whether Cape had "*accepted responsibility for the health and safety of employees*". The Court of Appeal found that it had, for various reasons including because the illness had been caused by systemic issues in working practices of which Cape was aware (and indeed had itself designed), and because of the degree of Cape's interventions in its subsidiary's operations. Having found that Cape owed a duty to its subsidiary's employees, the court found it had breached that duty because it knew or ought to have known about the risks inherent in the operations at the claimant's workplace, and yet did not act to prevent or mitigate them. That had caused the loss because, whether it had requested a different practice or demanded one, the reality was that the subsidiary would have followed its wishes. This is thought to be the first case in England where a parent company was found liable to its subsidiary's employees for health and safety failings (although prior judgments had contemplated this possibility).

Multinational group structures opening pathways to liability?

One might think that *Chandler v Cape* was a unique case on its facts: the parent had actually designed the site that the subsidiary would later operate, the injury was caused by defects in that design, the parent would regularly intervene in the subsidiary's management, and the duty of care was found to be owed to group employees, not third parties.

[5] *Adams and others v Cape Industries plc and another* [1990] 2 WLR 657.
[6] *Chandler v Cape plc* [2012] EWCA Civ 525.

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However, both the recent UK Supreme Court decisions show the potentially wide ambit of parent company liability. In both decisions, it was emphasised that parent company liability was not a novel category in tort law, and there was no need to satisfy the three-part test in *Caparo*[7] which applied to extensions of the tort of negligence beyond established cases (which is how the Court of Appeal had proceeded). Rather, as the Supreme Court explained in *Vedanta*, "*there is nothing special or conclusive about the bare parent/subsidiary relationship, [and] it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all.*" The Supreme Court cited the 1970 decision of the House of Lords in *Dorset Yacht Co Ltd*,[8] where the Home Office was held liable to compensate for damage caused by Borstal boys who had escaped from its custody and damaged a yacht moored nearby. The key issues were foreseeability of the damage, the nature of the relationship between the Home Office and the Borstal boys, and the fact that the yacht was in the vicinity of the place from where the boys had escaped. Similar analysis could be applied to the parent-subsidiary relationship, but the mere existence of a controlling shareholding would not be sufficient. As explained by Lord Briggs in *Vedanta* (at para. 49):

> *"Direct or indirect ownership by one company of all or a majority of the shares of another company ... 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 ... 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."*

In *Vedanta*, the defendants argued that merely having group-wide policies or guidelines on their own could never be enough to establish a duty of care on a parent company. Even though a parent may have the power to intervene in the subsidiary's management if it so wished, it did not owe a duty to the subsidiary's employees or neighbours to do so. The court declined to accept that submission, noting that a systemic defect in a policy promulgated by a parent may be sufficient to establish liability. The court also observed that liability may arise in other circumstances, such as where the parent is involved in the implementation of the policy (perhaps by way of training, supervision or enforcement) or where the parent holds itself out as exercising supervision and control, even where it has not done so in practice. The court noted that where a parent has said it would exercise such control, the fact that it has not done so in practice may itself form part of the basis of a claim. The risks in making sweeping, ambitious and virtue-signalling statements in policy documents and annual reports are thus clear to see. Certainly, where a parent takes active steps to implement or enforce group-wide policies, its exposure seems to be greater.

Against that backdrop, it is perhaps noteworthy that the claimants in *Shell* had such a difficult time in the lower courts. They had relied (amongst other matters) upon allegations that the parent, RDS, had: (1) developed a global policy for health, security, safety and the environment (HSSE) which included mandatory standards; (2) monitored its subsidiaries' compliance with that policy; (3) retained overall responsibility for HSSE implementation and social performance at the group executive level; (4) put in

[7] *Caparo Industries plc v Dickman* [1990] 2 AC 605.
[8] *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004

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place reporting systems along business and functional lines (rather than strictly according to the legal corporate structure); and (5) acquired specific knowledge of environmental damage in the Niger Delta caused by its subsidiary. These allegations were underpinned by published documents such as Sustainability Reports and other corporate literature. Also deployed in support were two internal Shell control framework documents (one obtained from a former SPDC employee, and the other obtained by way of disclosure in the jurisdiction dispute) and witness evidence from former Shell employees. They also asserted that the key documents that could establish RDS's liability were in the Shell companies' possession, and when these documents would eventually be produced in disclosure, there was good reason to believe they would support the claimants' case.

However, RDS strongly disputed these allegations, maintaining that it did not engage in the control and oversight of SPDC as alleged, and that SPDC made its own operational decisions. What is striking is how much this was a factual and evidential dispute. The English courts have warned repeatedly that jurisdiction disputes should not turn into mini-trials, and that the question is merely whether the claimant's case is arguable. That does not mean that a claimant is free to make whatever factual allegations it likes, however fanciful, on the basis that the allegations cannot be disproved until disclosure has taken place. The courts have repeatedly criticised speculative claims based on "*Micawber-like*" hopes that "*something will turn up later on disclosure*". However, where the evidence already gathered shows there is a real possibility that either side's factual allegations could turn out to be established at the evidential stage, the court should be slow to make factual findings in favour of one side or another at the jurisdiction stage.

Nonetheless, both the first instance judge and the majority of the Court of Appeal made "*findings*" on the factual disputes that went in favour of RDS. On the basis of those findings, they held that there was no real prospect of the claimants establishing a duty of care owed by RDS (and accordingly the English Court should not accept jurisdiction over SPDC). The Chancellor, Geoffrey Vos, noted in particular that it would be "*surprising if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility*" for their operations, that RDS "*did not have the wherewithal*" to do any more than to ask that SPDC operate a system of supervision and oversight, that SPDC's evidence "*was not really capable of challenge*", and that it was inherently unlikely that "*an international parent like RDS [would undertake] a duty of care to all those affected by the operations of all its subsidiaries*".

The Supreme Court overturned both the decisions below, and agreed with the lone dissenting voice in the Court of Appeal (Sales LJ). It cited its prior decision in *Vedanta* and noted that when the question was whether the parent company had intervened sufficiently in the management of the subsidiary's activities so as to attract liability, it was "*blindingly obvious that the proof of that particular pudding would depend heavily upon the contents of documents internal to each of the defendant companies ... currently unavailable to the claimants, but in due course disclosable*". It was therefore wrong of the courts below to make factual findings. The only question it had to answer was whether the claim against the parent was arguable. Even if the evidence presently available did not establish that the parent had acted in such a way as to assume a duty of care to the subsidiary's neighbours, it was entirely plausible (based on the evidence then seen) that there will be sufficient evidence on disclosure to make the claim good. That threshold is likely to be eminently achievable in other cases.

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It should be noted that this run of cases has not all been one-way traffic: in *AAA v Unilever*,[9] the Court of Appeal decided that employees of a Unilever subsidiary operating a tea plantation in Kenya could not establish a duty of care on the parent company to protect them from post-election violence: it was not reasonably foreseeable from past experience that post-election violence would spread to the plantation, the parent did not have superior knowledge or expertise in relation to local political or ethnic matters, the group policy was to manage crises "*as close to the issue / incident as possible*", and the subsidiary had its own crisis management policy (produced without specific or detailed advice from the parent). Similarly, a recent attempt to establish jurisdiction against the UK and Australian parent companies of the BHP Billion group in the English courts in connection with the Fundão dam disaster in Brazil failed largely because of the existence of ongoing litigation and compensation schemes in Brazil against local subsidiaries, and a sense in which those parallel proceedings would (a) render the English proceedings unmanageable; and (b) provide adequate recourse to victims.[10]

Nonetheless, there will no doubt be more cases where the fact pattern is closer to *Vedanta* and *Shell* than it is to *Unilever* or *BHP*. And while *Chandler v Cape* may be the only case where parent company liability was ultimately established (it was merely found to be arguable in *Vedanta* and *Shell*), claimants' objectives will often be fulfilled even if they do not ultimately establish parent liability at trial. They will often have a stronger claim against the subsidiary, and the real objective of bringing the claim against the parent may be to enable them to draw the subsidiary into the jurisdiction of the English courts, where the claimants will have access to third party funding, sophisticated lawyers and experts, and an experienced judiciary well-versed in managing large and complex litigation. A successful outcome on jurisdiction can often lead to a settlement, as it did in *Vedanta*.

The wider context – limited room for corporates to mitigate litigation risk

Ordinarily, a setback in litigation will usually result in corporates changing their practices to mitigate the risk of future losses along the same lines. However, here that is challenging. There is ever-increasing focus on ESG matters, and a growing expectation among governments, regulators and socially conscious investors that corporate leaders should take more responsibility (not less) for ensuring consistently high ESG standards across their global operations. A suggestion that parent companies do not have the "*wherewithal*" to demand better ESG performance from their subsidiaries will not wash. Paper policy alone will not be seen as good enough. The more that parent companies do to be good corporate citizens by enacting, and not merely drafting, ambitious policies, paradoxically the greater their risk of liability to subsidiaries' employees and neighbours.

Nor are these issues necessarily limited to environmental issues. The UK's Bribery Act and the US Foreign Corrupt Practices Act also create an impetus for group-wide policymaking and enforcement. Where a parent company operates a global anti-bribery policy, has it assumed responsibility in tort for those who might foreseeably be harmed by its failings? Similarly, while the UK's Modern Slavery Act imposes no more than a disclosure obligation on British companies, the wider market expectation is that they should take active steps to root out slavery in their supply chains (not just in their subsidiaries). One global technology company states in its anti-slavery statement that it "*works to minimise*" risks associated with slavery and human trafficking in its supply chain, it "*hold[s] ... [its]*

[9] *AAA and others v Unilever Plc and another* [2018] EWCA Civ 1532
[10] *Município de Mariana and others v BHP Group Plc and another* [2020] EWHC 2930 (TCC)

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supply chain accountable", and "*considers*" each supplier's conduct when awarding or renewing business with that supplier. Those are all active verbs, carrying the associated risk that it has undertaken duties to those who might be harmed if it falls short.

The extent to which the English courts will impose liability on parents for matters going beyond environmental disasters is, of course, untested. But the *Vedanta* and *Shell* decisions provide a template for seeking justice against English parents and overseas subsidiaries alike. And similar trends can be seen elsewhere, too: the International Finance Corporation's attempt to plead blanket immunity against claims by Indian fisherfolk for losses caused by its alleged failure to police its environmental covenants in a loan facility granted to a coal plant developer was rejected by the US Supreme Court in 2019,[11] and in January 2021 a Dutch court found Shell's Nigerian subsidiary liable to compensate farmers for oil spills in the villages of Oruma and Goi in 2004 and 2005, while also imposing a responsibility on both the Dutch parent and the Nigerian subsidiary to fit a leak detection system on one of the pipelines.[12] Interesting times, indeed.

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[11] *Jam v International Finance Corp.* 586 U.S. ___ (2019) 139 S. Ct. 759

[12] https://www.reuters.com/article/us-shell-nigeria-court-idUSKBN29Y1D2