Neutral Citation Number: [2017] EWCA Civ 1528

Case No: A1/2016/2502 & 2504

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
(The Hon Mr Justice Coulson)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2017

Before :

LORD JUSTICE JACKSON
LORD JUSTICE SIMON
and
LADY JUSTICE ASPLIN

- -

Between :

Dominic Liswaniso Lungowe and others	**Respondents**
- and -	
(1) Vedanta Resources Plc	**Appellants**
(2) Konkola Copper Mines Plc	

- -
- -

Charles Gibson QC, Geraint Webb QC and Ognjen Miletic (instructed by **Herbert Smith Freehills LLP**) for the **Appellants**

Richard Hermer QC, Marie Louise Kinsler QC and Edward Craven (instructed by **Leigh Day**) for the **Respondents**

Hearing dates : 5 and 6 July 2017

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Approved Judgment

Lord Justice Simon:

1. The respondents (whom it is convenient to refer to as the claimants) are Zambian citizens who live in the Chingola region of the Copperbelt Province in the Republic of Zambia. On 31 July 2015, they brought proceedings against the first and second appellants ('Vedanta' and 'KCM' respectively) alleging personal injury, damage to property and loss of income, amenity and enjoyment of land, due to alleged pollution and environmental damage caused by discharges from the Nchanga copper mine ('the Nchanga mine') since 2005.

2. The mine is owned and operated by KCM, which is a public limited company incorporated in Zambia. Vedanta, which is incorporated in this country, is a holding company for a group of base metal and mining companies, which include KCM.

3. The claimants' solicitors served the claim form and Particulars of Claim on Vedanta on the basis of its domicile in this country. On 19 August 2015, the claimants were granted permission to serve the claim form and Particulars of Claim out of the jurisdiction on KCM.

4. On 15 September 2015, Vedanta applied for a declaration that the Court did not have jurisdiction to try the claims; alternatively, that it should not exercise such jurisdiction that it might have, pursuant CPR Part 11(1)(a) and/or (b); and a stay of proceedings pursuant to CPR Part 11(6)(d) and/or CPR Part 3.1(2)(f).

5. On 5 October 2015, KCM applied for a declaration that the Court did not have jurisdiction to try the claims, or alternatively, that it should not exercise any jurisdiction that it had, pursuant to CPR Part 11(1)(a) and/or (b); and an order setting aside the order of 19 August giving permission to serve out of the jurisdiction, or alternatively, a stay of proceedings.

6. By an order dated 16 June 2016, following a judgment dated 27 May, Coulson J ('the Judge') dismissed the jurisdictional challenges brought by Vedanta and KCM, who appeal against that order.

7. This judgment is divided into the following parts:

   A. The hearings and an outline of the claimants' claim

   B. Vedanta's applications

   C. KCM's applications

   D. Conclusion

A. The hearings and an outline of the claimants' claim

1. The hearings

8. The hearing before the Judge took three days; and the appeal lasted two full days before us. A large amount of factual material and legal authority, contained in many bundles, was deployed on both occasions. In addition to the material before the Judge, the parties thought that we would benefit from a transcript of the hearing before the Judge.

2. An outline of the claims

9. It will be necessary later in this judgment to look with greater precision at the claim against Vedanta, but the nature of the claims can be summarised at this point.

10. Although the Nchanga mine began operating in 1937, it is convenient to pick up the history in 2004 when Vedanta Resources Holdings Limited ('VRHL'), a subsidiary of Vedanta, acquired a 51% interest in KCM; the remaining 49% being held by ZCCM-Investment Holdings Plc ('ZCCM'), a State-owned company. In February 2008 VRHL increased its shareholdings, via call options, to 79.42%. The remaining 20.58% of the shares in KCM are still owned by the Zambian State through ZCCM.

11. KCM operates the mine pursuant to statutory authority in the form of a mining licence. Only a Zambian domiciled company can be the holder of a mining licence. KCM also holds a number of discharge licences which, subject to various conditions, permit it to make discharges from the mine into local waterways.

12. As a holding company, Vedanta has a number of subsidiaries. The Judge noted references in the papers to it being worth around £37 billion. It has 19 employees, of which eight are directors, with the remainder in corporate or administrative support roles. By contrast, the group employs some 82,000 people worldwide through its subsidiary companies. These operating companies, like KCM, are involved in all kinds of mining and manufacturing, as well as oil, gas and power generation. Mr Gibson QC contrasts the small number of Vedanta's employees with the very large number employed by its subsidiaries.

13. KCM is the largest private employer in Zambia; and employs approximately 16,000 people there, the vast majority of them at Nchanga. The Nchanga mine operates in demanding conditions given a high annual rainfall and the high water-table. There are waterways in the area of the mine which flow into the Kafue river; and it is this river and the adjacent waterways which are at the heart of the claimants' claim in the proceedings.

3. The pleaded claims

14. It is convenient to divide the Particulars of Claim into: (i) those parts which are common to both appellants, (ii) the parts which are directed to the claim against Vedanta, (iii) the parts that are directed to the claim against KCM and (iv) the relief sought.

(i) The parts common to the claim against both appellants (paragraphs 1-77)

15. At paragraphs 5-7, the pleading describes the claimants' reliance on the waterways as 'their primary source of clean water for drinking, bathing, cooking, cleaning and other domestic and recreational purposes'. It is said that the waterways irrigate crops and sustain livestock (paragraph 6), are a source of fresh fish and that, in consequence, the waterways are 'of critical importance to [the claimants'] livelihoods and their physical, economic and social wellbeing' (paragraph 7).

16. Paragraphs 8-27 deal with the Nchanga mine and the processing and disposal of tailings and other effluent. References are made to the licence granted to KCM.

17. There are then a series of specific allegations relating to the discharge of harmful effluent into the waterways and the local environment. It is alleged that Vedanta and KCM were both aware of these; and reliance is placed on the result of a report in 2006 ('the ECZ Pollution Report') on acidic material which found its way into the Kafue River from KCM's operation of the Nchanga mine. This was an incident that gave rise to the *Nyasulu litigation* which figures later in this judgment.

18. From paragraph 39, the Particulars of Claim sets out other matters relevant to pollution from the mine, including a report commissioned by KCM in 2010 from SNC Lavelin into 'the frequency and severity of spillage release into the environment', a KCM internal report in 2013 and a report from the Zambian Government Auditor General in 2014, which found that effluent discharged from the Nchanga mine into surface water contained material quantities of toxic metals and other substances which significantly exceeded permitted levels. This report contained criticisms of KCM's mining operation (paragraphs 39-45). This particular section of the pleading concludes at paragraph 46 with a summary of the environmental damage which had been caused as a consequence of the pollution.

19. There is then a lengthy section dealing with the applicable law (which, it is common ground, is the law of Zambia) and the relevant causes of action under Zambian law. These are described as common law causes of action (tortious liability) and statutory causes of action deriving from (among other sources) the Zambian Mines and Minerals Act 2008, the Environment Management Act 2011 ('the EMA'), the Environment Protection and Pollution Control Act 1990 and the Public Health Act 1930.

(ii) The claim against Vedanta (paragraphs 78-94)

20. At paragraphs 78-89 (pages 32-47) the case is pleaded against Vedanta in negligence. Paragraph 79 alleges that Vedanta owed a duty of care to the claimants as a result of its:

> … assumption of responsibility for ensuring that [KCM]'s mining operations do not cause harm to the environment or local communities, as evidenced by the very high level of control and direction that [Vedanta] exercise at all material times over the mining operations of [KCM] and [KCM's] compliance with applicable health, safety and environmental standards.

21. At paragraph 80, there is a plea of a relationship of proximity between Vedanta and the claimants. It is said that, in those circumstances, the imposition of a duty of care is fair, just and reasonable in the light of four specific factors:

> (a) the businesses of [Vedanta] and [KCM] are in a relevant respect the same, namely they are both involved in the business of mining, processing, refining and selling natural mineral resources;
>
> (b) [Vedanta] knew or ought reasonably to have known that [KCM's] operations and equipment at Nchanga Copper Mine

> were unsafe and were discharging harmful effluent into the waterways and local environment;
>
> (c) [Vedanta] had or/ought reasonably to have had superior expertise, knowledge and resources in relation to relevant aspects of health, safety and environmental protection in the mining industry;
>
> (d) [Vedanta] knew and/or ought to have foreseen that [KCM] would rely on [Vedanta's] superior expertise, knowledge and resources in respect of health, safety and environmental protection in the mining industry.

22. It will be necessary to consider these factors in more detail later in this judgment in the context of the appellants' argument that the iteration of these factors which were found to give rise to a duty of care in *Chandler v. Cape Plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111, is not sufficient to give rise to a properly arguable duty of care in the present case.

23. The Particulars of Claim then sets out the matters relied on in support of the existence of Vedanta's duty of care to the claimants: (i) its assumption of responsibility and control over health, safety and environmental standards at the Nchanga mine (paragraph 83); (ii) its superior expertise and resources concerning relevant aspects of health safety and environmental protection (paragraph 84); (iii) its knowledge of KCM's unsafe and environmentally harmful mining practices (paragraph 85); and (iv) its knowledge that KCM would rely on its 'superior expertise, knowledge and resources concerning relevant aspects of health, safety and environmental protection' (paragraph 86). Although set out in four paragraphs, this section of the Particulars of Claim runs to 12 pages.

24. On this basis, the claimants plead that Vedanta 'knew or ought reasonably to have known that the [KCM] and its employees would rely on [Vedanta's] superior expertise, knowledge and resources concerning relevant aspects of health, safety and environmental protection' (paragraph 87).

25. From paragraph 90 onwards, an alternative claim is advanced against Vedanta based on its liability under the Zambian statutes identified above. This liability is said to be founded on Vedanta's alleged direction and control over the operations of KCM.

(iii) the claim against KCM

26. The specific allegations against KCM are set out at paragraphs 95-111 of the Particulars of Claim. These set out causes of action in negligence, nuisance, the rule in *Rylands v. Fletcher*, trespass, and liability under the Zambian statutes.

27. The Judge drew attention to two points in relation to the pleading against KCM. First, with the exception of the breadth of the duty and the particulars of breach of that duty, the pleadings are much shorter than those that found the claims against Vedanta. Secondly, KCM is said to be 'strictly liable' to the claimants as the owners and operators of the mine, under the identified statutory provisions. As the Judge noted, the existence of such strict liability claims against KCM would ordinarily be the focus of a claimant's claim.

B. Vedanta's applications

28. Although the focus of Mr Gibson's oral argument was directed to the position of KCM, it is logical to start with the position of Vedanta.

29. The claimants relied on the terms of article 4 of the Recast Brussels Regulation to establish jurisdiction to try the claim against Vedanta in the courts of England and Wales.

30. Article 4 of the Recast Brussels Regulation provides:

> Subject to the Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

31. This is the successor to the earlier provision: article 2 of the Brussels Convention which was expressed in substantially the same terms, with the word 'Convention' being used instead of 'Regulation'. It is common ground between the parties that none of the exceptions within the Regulation apply to the claimants' claim against Vedanta.

32. The claimants' case is that the terms of article 4 provide a clear and unqualified right to sue Vedanta in this jurisdiction, since Vedanta is a company domiciled in England and Wales; and that the Court has no discretion to decline the jurisdiction conferred by article 4 on the basis that a court of a non-contracting State (here, Zambia) would be a more appropriate forum. In support of this proposition, the claimants relied on the decision of the European Court of Justice ('the ECJ') in *Owusu v. Jackson* (case c-281/02) [2005] QB 801, a case on the application of article 2 of the Brussels Convention.

33. Vedanta raises a number of arguments as to why *Owusu v. Jackson* is not dispositive of this aspect of the jurisdiction issue. It is said, first, that *Owusu v. Jackson* was a case on its own particular facts and does not apply to the present case; secondly, that the rule in *Owusu v. Jackson* was not intended to apply where, as in the present case, non-EU claimants are using the existence of the claim against an EU domiciled party as a device to ensure that their real claim, against another defendant, is litigated in this jurisdiction rather than in the natural forum; thirdly, that the reasoning of the ECJ was flawed and should not be followed in the circumstances of the present case, or alternatively that there should be a reference to the ECJ on the effect of *Owusu v. Jackson* in the circumstances of the present case; fourthly, that the approach in *Owusu v. Jackson* cannot apply where the proceedings amount to an abuse of EU law; and fifthly, that either there is no real issue between Vedanta and the claimants or, if there is, the claim against Vedanta is so weak that this should be reflected in the exercise of the court's discretion in allowing KCM's application; in which case a stay of the claim against Vedanta is justified.

34. I can take the first, second and third arguments together. In my judgement, these arguments are not open to Vedanta. The effect of the ECJ decision in *Owusu v. Jackson* is that article 4 of the Recast Regulation precludes the English Court from declining what is a mandatory jurisdiction where the defendant is a company domiciled in England and Wales.

35. In *UBS AG v. HSH Nordbank AG* [2009] 2 Lloyd's Rep 272, Lawrence Collins LJ said at [103]:

> The prevailing view is that there is no scope for the application of *forum conveniens* to remove a case from a court which has jurisdiction under the Regulation, even as regards a defendant who is not domiciled in a Member State …

36. The observations of Lady Hale JSC in *A v. A (Children: Habitual Residence)* [2014] AC 1 at [31] are to similar effect:

> In *Owusu v Jackson* … the Court of Justice of the European Communities held that the rule in article 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Measures 1968, which required that 'persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state', meant that the courts of that state had to assume jurisdiction, even though there was a third country which also had jurisdiction and even though that country was, on the face of it, the more appropriate forum in which to bring the action. Thus, the English court was not only empowered but obliged to assert and exercise jurisdiction rather than leave the parties to the jurisdiction of a state (Jamaica) which was not party to the Convention.

37. I reject the suggestion that either the position is somehow unclear, or that the ECJ did not intend that jurisdiction was mandatory in the present type of case, or that there should be a reference. The wording in article 4 of the Recast Regulation is materially the same as article 2 of the Brussels Convention. In my view, Vedanta is seeking to argue points that are no longer open to EU domiciled defendants. In the words of Professor Briggs, the position since *Owusu v. Jackson* is clear 'and the debate has moved on', see *Briggs, Civil Jurisdiction and Judgments* (6th edition) §2.304.

38. So far as Vedanta's fourth argument is concerned, while I would accept that a party may in principle be able to mount an argument that the invocation of the jurisdictional rules in the Recast Regulation amounts to an abuse of EU law, such an argument will only succeed where there is sufficient evidence to show that the party against whom the complaint is made has conducted itself in such a way as 'to distort the true purpose of that rule of jurisdiction', see, for example, the opinion of Advocate General Jääskinen in *(CDC) Hydrogen Peroxide SA v. Akzo Nobel NV and others* (Case C-352/13) [2015] QB 906 at [86]. As the Judge indicated, at [58] of his judgment, there is a high threshold to be overcome for an abuse argument to succeed. It does not do so in the present case.

39. The fifth and final argument is whether there is a real issue to be tried between the claimants and Vedanta. Logically, this is part of KCM's argument to which I now turn.

C. KCM's applications

Introduction

40. The Judge conveniently set out the rival contentions on this part of the case:

> 93. KCM submit that the entire focus of this case is on Zambia. That is where the alleged torts were committed; that is where the damage occurred; that is where all the claimants live; that is where KCM are themselves domiciled; that is the law that applies. Accordingly, they say, on straightforward *forum non conveniens* grounds, the order permitting service out of the jurisdiction should be set aside. They submit that it makes no difference that there is a claim against Vedanta in the UK but, to the extent that it does or might matter, they maintain that the claim is an illegitimate hook being used to permit claims to be brought here which would otherwise not be heard in the United Kingdom. Further and in any event, they say that, the claimants' alternative argument – that even if the United Kingdom is not the appropriate place for the trial, the claimants would not obtain justice in Zambia – is wrong on the evidence.
>
> 94. The claimants say that, because there is a real issue between themselves and Vedanta, which they intend to pursue to trial in the United Kingdom, it is reasonable for this court to try that issue in the United Kingdom, so that is therefore the appropriate place for their claims against KCM. If they are wrong about that they rely on access to justice issues, and what they say is the impossibility of trying these claims in Zambia. Although Mr Hermer accepts that the mere fact of the Vedanta claim in the United Kingdom does not automatically lead to the conclusion that service out should not be set aside, he said that it 'weighed very heavily' in favour of such a conclusion.

41. The basis of the claimants' application to serve KCM out of the jurisdiction in Zambia was paragraph 3.1 of Practice Direction 6B - Service out of the Jurisdiction. This provides, so far as relevant:

> 3.1. The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> General grounds
>
> …
>
> (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
>
> …

This is often referred to as the 'necessary or proper party' gateway.

42. However, even if the claimants can bring themselves within this gateway, CPR Part 6.37(3) provides that the court still retains a discretion:

> The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

43. The terms of paragraph 3.1(3) give rise to a number of issues which the Judge enumerated as follows: (1) whether the claimants' claim against KCM has a real prospect of success; (2) if so, whether there is a real issue between the claimants and Vedanta; (3) whether it is reasonable for the court to try that issue; (4) whether KCM is a necessary and proper party to the claim against Vedanta; and (5) whether England is the proper place in which to bring that claim?

44. The parties agreed that this was a correct approach to the ultimate jurisdiction issue as between the claimants and KCM.

45. Before turning to the developed arguments on these questions, it is convenient to consider two threshold issues.

46. The first is how an appellate court should approach evaluative judgments of first instance judges in this type of case. Not all aspects of the decision will involve the exercise of discretion or evaluative judgment, but many will; and it is in relation to those discretionary and evaluative steps that an appellate court has to be careful not to be drawn into substituting its own views. This, what might be described as, diffident approach is clear from a number of cases.

47. In *Lubbe and ors v. Cape Plc* [2000] 1 WLR 1545 at 1556A Lord Bingham made clear that appeals against a judge's decision on applications to set aside service or to stay on *forum non conveniens* grounds are circumscribed:

> This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for or against a foreign forum.

48. This warning has been more recently endorsed in *VTB Capital Plc v. Nutritek International Corp* [2013] 2 AC 337, at [93], where Lord Neuberger PSC said:

> … appellate courts should be vigilant in discouraging appellants from arguing the merits of an evaluative interlocutory decision reached by a judge, who had to balance the various factors relevant to the appropriate forum, when the complaint is, in reality, that the balance should have been struck differently.

See also, Lord Mance JSC in the same case at [69]:

> The case is one in which an appellate court should refrain from interfering, unless satisfied that the judge made a significant error of principle, or a significant error in the considerations taken or not taken into account.

49. To similar effect are the observations of Beatson LJ in *Trust Risk Group SpA v. AmTrust Europe Limited* [2015] EWCA Civ 437 at [33]:

> … where the issue is *forum non conveniens* or where the documentary evidence contains a sharp clash of evidence about the facts, the exercise carried out by the judge is an evaluative one, sometimes with a 'predictive' element, and with more than one possible 'right' answer. The evaluation of the factors relevant to the determination of the appropriate forum and of disputed evidence is very much the province of the first instance judge ... In such cases an appellate court should only interfere where it is clear that an error of principle has been made or that the result falls outside the range of potentially 'right' answers.

50. In my view, the claimants are entitled to rely on these broad statements so far as they go. They remind appellate courts of the need to respect evaluative judgments at first instance where these are in issue.

51. The second threshold issue relates to how this court should approach the decision of Fraser J in *Okpabi and others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC), which is relied on by the appellants in the present appeal.

52. Fraser J was invited by the *Okpabi* claimants to follow the decision of the Judge in the present case, see the *Okpabi case* at [47]. Fraser J declined to do so and, at [48] identified facts which distinguished the two cases. In the event, he concluded that there was no arguable duty of care owed by Royal Dutch Shell Plc to the *Okpabi* claimants, see [107]-[117]. That decision is under appeal.

53. Just as the Okpabi claimants sought to persuade Fraser J to adopt the Judge's approach in that case, so the appellants in the present appeal invited this court to adopt the approach and reasoning of Fraser J. In my view, the *Okpabi case* provides little real assistance on this appeal for three interlinked reasons. First, as Fraser J pointed out there were materially different facts. Secondly, if the appellants' invitation were to be accepted, it would be necessary to carry out a close analysis of the facts of the *Okpabi case*. As already noted, this is 'a field in which differing conclusions can be reached by differing tribunals' when considering the same case (see *Lubbe and ors v. Cape Plc*, above), *a fortiori* when considering different cases. Thirdly, it seems to me to be objectionable in principle for this court to express views about another case which is itself under appeal, without the parties to that appeal being in a position to argue their case. That is not to say that the appellants cannot argue the points in a way which found favour with Fraser J, provided they were argued below in the present case. What they cannot do is rely on Fraser J's judgment in support of those arguments.

Question (1): whether the claimants' claim against KCM has a real prospect of success?

54. The test is conveniently summarised in the judgment of the Privy Council (Lord Collins) in *Altimo Holdings and Investment Ltd v. Kyrgyz Mobil Tel Ltd and other*s [2012] 1 WLR 1804, at [71]:

> On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: *Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457, at [24].

55. Subject to two linked points, the Judge was satisfied that the claimants had a real prospect of success against KCM.

56. Bearing in mind the importance of courts not expressing general views about the underlying merits when faced with a jurisdiction challenge, I would confine myself to agreeing with that conclusion, and for the reasons expressed at [99]: KCM was the operator of the Nchanga mine, there had been recorded discharges of toxic effluent from the mine, under some of the Zambian statutes there is strict liability for consequences of toxic discharges and the underlying basis of the claimants' claim has not been challenged.

57. The two interlinked points relate to what the Judge considered to be pleading deficiencies in relation to the claimants' claim for loss and damage, and the ultimate impracticability of an injunction claim that would require the Courts of England and Wales to oversee the enforcement of its order in Zambia. The Judge felt that these were matters that should be dealt with after a review of the pleadings, and there can be no justifiable criticism of that approach.

Question (2): whether there is a real issue between the claimants and Vedanta?

58. This gives rise to KCM's first ground of appeal and the issue arises as part (a) of the 'necessary or proper party' gateway (see above).

59. An initial question arises as to how the court should approach an issue of law in the underlying litigation which may be fundamental to the court's jurisdiction.

60. The point was addressed by the Privy Council in the *Altimo Holdings case* (see above):

> 81. A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to existence of the jurisdiction, the court will normally

> decide it, rather than treating is as a question whether there is a good arguable case …

61. However, as the judgment of the Privy Council also made clear:

> 84. The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide controversial questions of law in developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts. …

62. Lord Collins then dealt with an inherent tension between these two propositions by reference to *The Brabo* [1949] AC 326.

> 86. … In that case it was held that the claim against D1 was bound to fail because the claim against it was made as agent of the Crown and it was therefore entitled to Crown immunity (as it then was). That was not a case where the point of law was a difficult one. Lord Porter said (at 341) that 'when the various Acts and provisions are collated the answer is clear.' Consequently the observations of the members of the Appellate Committee are obiter, but although they do not all put it in the same way, the overall effect of the decision is that if the question is whether the claim against D1 is bound to fail on a question of law it should be decided on the application for permission to serve D2 (or on the application to discharge the order granting permission), but not where there is an exceptionally difficult and doubtful point of law: Lord Porter at 341, and cf at 338, per Lord Porter; Lord du Parcq at 351 …

63. In my judgment, this analysis leads to the following conclusions. (1) In general, a real issue between the relevant parties is to be equated with a properly arguable case or serious question to be tried. (2) Where the argument or question goes to the existence of the jurisdiction, it should be decided if the facts are clear. (3) However, if the facts are not clear or the point of law is exceptionally difficult and doubtful, the test should remain that set out in (1) above. (4) This leaves open the question of the extent to which the facts are clear, and what amounts to 'exceptionally difficult and doubtful' points of law. As to the former point, the observations in [84] of the *Altimo Holdings case* suggest that the court should proceed on the basis of a pleaded case. So far as the latter point is concerned, it might be thought that the more doubtful the point of law, the more cautious the court should be, since the question of law goes to the existence of the jurisdiction.

(i) The claimants' Zambian statutory claims

64. The Judge dealt with these claims in his judgment at [125]. In short, he concluded that the evidence of the claimants' expert on Zambian law (Mr Mwenye, a State Counsel of Zambia and former Attorney-General) supported some of the claims under Zambian law, 'at least to the extent that they have a realistic prospect of success.'

65. In his argument on the present appeal, Mr Hermer QC began with these claims, doubtless because it enabled him to say that the issue, whether there was a real issue between the claimants and Vedanta in relation to this way of advancing the claim, turned on expert evidence, which was a matter of fact for the Judge's evaluation.

66. The claimants advance a number of statutory causes of action under Zambian law against Vedanta. Among these are claims under (a) s.4 of the EMA, and/or (b) s.110 of the EMA (including breaches of ss.32, 35 and 46), (c) s.123 of the Mines and Minerals Development Act 2008, and (d) s.24 of the Environmental Protection and Pollution Control Act 1990. In relation to these causes of action, the Judge was entitled to rely on the opinion of Mr Mwenye to the extent he did. Subject to proof that Vedanta assumed the requisite degree of responsibility or control over local safety and environmental standards, liability was not limited to KCM as the mine licence holder and there was a real prospect of success against Vedanta under these statutory provisions on the basis that it exerted the relevant control over KCM's operations.

(ii) The claim based on a duty of care in English law

67. It is sensible to consider this issue next, since the issue under the Zambian law of negligence was whether the Zambian courts would follow English law. Plainly, as Mr Hermer conceded, if this court concluded that no common law duty of care could arise as a matter of English law, the foundation of the claimants' expert view on Zambian law would be decisively undermined.

68. The English common law confines a duty of care because otherwise, to adapt the well-known phrase of Chief Justice Cardozo in *Ultramares Corporation v. Touche,* 174 N.E. 441 (1932), a defendant may be exposed to an indeterminate class, for an indeterminate amount, for an indeterminate time.

69. In *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 the House of Lords set out a three-part test which was intended to yield a binary answer to whether a duty of care was owed in a particular case: a test of foreseeability, proximity and reasonableness. Whether a duty of care will arise in the particular case will depend on whether these three elements are established. In the present case, it is clear that Vedanta is a holding company of a group which includes the operator of the Nchanga mine, KCM; and it is also clear that this fact alone would not make it arguable that Vedanta owed a duty of care to the claimants, and that it would be necessary to identify additional circumstances before a properly arguable claim could be established.

70. Whether or not the claimants could establish these additional circumstances to the necessary extent was the focus of much of the argument on the appeal.

71. The first case in which it was held that a parent company might arguably owe a duty of care to the employees of its subsidiary was *Ngcobo and others v. Thor Chemicals Holdings Ltd* (November 1996, per Maurice Kay J, unreported). An application was made to strike out a claim against a parent company. The application was refused, with the judge noting:

> … the fact that the law does not impose liabilities upon companies in respect of the acts or omissions of other companies in the same group simply by reason of their

> common membership of the same group does not mean that circumstances cannot arise where in more than one company in the same group each incurs liabilities in respect of damage caused to a particular plaintiff.

72. Maurice Kay J held that it was necessary to look at the evidence in the particular case to see whether there was a potential for liability attaching to more than one company in the group. He identified a number of factual matters (including common directors) which led him to conclude that it was arguable that a claim existed against the parent company.

73. In *Connelly v. RTZ Corporation Plc* [1999] C.L.C. 533, a claim was made by employees of a subsidiary against the parent. Wright J identified the relevant part of the pleading and the conclusions that might be drawn from it:

> … the first defendant had taken into its own hands the responsibility for devising an appropriate policy for health and safety to be operated at the Rossing mine and either the first defendant or one or other of its English subsidiaries implemented that policy and supervised the precautions necessary to ensure so far as reasonably possible, the health and safety of the Rossing employees through the RTZ supervisors …
>
> The situation would be an unusual one; but if the pleading represents the actuality then, as it seems to me, the situation is likely to comprehend the three elements of proximity, foreseeability and reasonableness required to give rise to a duty of care …

74. In both the *Ngcobo* case and the *Connelly* case, the claims were made by former employees of the subsidiary company, and the matter was being considered at an interlocutory stage.

75. *Lubbe and others v. Cape Plc* (see above) was another interlocutory decision. However, in that case the House of Lords was dealing with claims against a parent company by employees of a subsidiary and those living close to the factory where asbestos was being produced. At p.1551A, Lord Bingham identified the main issue:

> Whether a parent company which is proved to exercise *de facto* control over the operations of a (foreign) subsidiary and knew, through its directors, that those operations involved risks to the health of workers employed by the subsidiary and/or persons in the vicinity of the factory … owes a duty of care to those workers and/or other persons in relation to the control it exercises over and the advice it gives to the subsidiary company?

76. At p.1555G he identified the ingredients of the claim against the parent company:

> The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of

> health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence.

77. In *Chandler v. Cape Plc* (see above), the issue arose directly since there had been a trial in which Wyn Williams J had held that a claim by an employee of a subsidiary succeeded against its parent company. Arden LJ (giving the leading judgment), rejected a number of the parent company's submissions: first, that the duty of care could only exist if the parent company had absolute control of the subsidiary; and second that, in determining whether there had been an assumption of responsibility by a parent company, the court was confined to consideration of 'matters which might be described as not being normal incidents of the relationship between a parent and subsidiary company', at [60]. 'The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees,' see [70].

78. On the facts of the case, Arden LJ held that, given the parent company's 'state of knowledge' about the factory, and 'its superior knowledge about the nature and management of asbestos risks', there was 'no doubt' that it was appropriate to find that the parent company assumed a duty of care to advise the subsidiary on what steps it had to take to in the light of the knowledge then available to provide employees with a safe system of work or to ensure that those steps were taken, see [78].

79. She summarised the position more generally at [80]:

> … this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.

80. This passage plainly forms the basis of the claimant's pleading identified in [21] above.

81. In *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635, the Court of Appeal considered again the circumstances in which a duty of care may be owed by a parent company to the employee of a subsidiary. The employer companies were not viable and had no insurance, and the claimant brought his claim against the parent holding company, which appealed against a finding at first instance that it owed him a duty of care. At [33], Tomlinson LJ (giving the leading judgment) considered the passage at [80] in the judgment of Arden LJ in *Chandler v. Cape Plc*:

> It is clear that Arden LJ intended this formulation to be descriptive of circumstances in which a duty might be imposed rather than an exhaustive list of the circumstances in which a duty may be imposed. I respectfully adopt the formulation of the editors of *Clerk & Lindsell on Torts*, 20th edition, 3rd supplement 2013 at para 13-04:
>
> > The factors set out in (1)-(4), however, do not exhaust the possibilities and the case merely illustrates the way in which the requirements of *Caparo v Dickman* may be satisfied between the parent company and the employee of the subsidiary.

82. The Court of Appeal in *Thompson v. The Renwick Group Plc* concluded that the 'exiguous evidence' before the judge on the hearing of a preliminary issue was insufficient to establish a duty of care owed by the parent company to the claimant as the employee of the subsidiary. At [37] Tomlinson LJ stated:

> There is no evidence that the Renwick Group Limited at any time carried on any business at all apart from that of holding shares in other companies, let alone that it carried on either a haulage business or, as would in fact be required were the Respondent's case to have a prospect of success, a business an integral part of which was the warehousing or handling of asbestos or indeed any potentially hazardous substance. Thus, the first of Arden LJ's indicia is not satisfied. This is no mere formalism, for as the balance of Arden LJ's indicia indicate, what one is looking for here is a situation in which the parent company is better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary companies against the risk of injury and moreover where, because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge in order to protect its employees from risk of injury.

83. It seems to me that certain propositions can be derived from these cases which may be material to the question of whether a duty is owed by a parent company to those affected by the operations of a subsidiary. (1) The starting point is the three-part test of foreseeability, proximity and reasonableness. (2) A duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary, in certain circumstances. (3) Those circumstances may

arise where the parent company (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim. (4) *Chandler v. Cape Plc* and *Thompson v. The Renwick Group Plc* describe some of the circumstances in which the three-part test may, or may not, be satisfied so as to impose on a parent company responsibility for the health and safety of a subsidiary's employee. (5) The first of the four indicia in *Chandler v. Cape Plc* [80], requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary. If both parent and subsidiary have similar knowledge and expertise and they jointly take decisions about mine safety, which the subsidiary implements, both companies may (depending on the circumstances) owe a duty of care to those affected by those decisions. (6) Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary. (7) The evidence sufficient to establish the duty may not be available at the early stages of the case. Much will depend on whether, in the words of Wright J, the pleading represents the actuality.

84. The claimants rely on a number of factors, which include:

(1) The Vedanta report entitled 'Embedding Sustainability', which stresses that the oversight of all Vedanta's subsidiaries rests with the Board of Vedanta itself and expressly refers to problems with discharges into water. That section of the report makes an express reference to the particular problem at the mine in Zambia, and states that, 'we have a governance framework to ensure that surface and ground water do not get contaminated by our operations.'

(2) A Management and Shareholders Agreement by which Vedanta was under a contractual obligation to provide KCM with, among other things (a) 'geographical and mining services', (b) 'employee training services', (c) 'metallurgical consulting services', (d) 'administrative and financial support services,' (e) 'assistance with management systems and technical and information technology and other services', (f) 'strategic planning, business and corporate strategy and planning including product development and management'. Further, under the KCM Shareholder Agreement, Vedanta was required amongst other things to undertake or procure feasibility studies into various large-scale mining projects and to do so in accordance with 'acceptable mining, metal treatment and environmental practices conducted in Southern Africa'.

(3) Vedanta's provision of environmental and technical information and Health Safety and Environmental training 'across the Group' on a range of health, safety and environmental issues, including, 'training on specific topics such as health and safety management, environmental incidents'. The training is detailed and specific, and conducted by the Vedanta Group under the auspices of the Vedanta's Sustainability Framework, and in conjunction with Vedanta's Sustainability Committee.

(4) Vedanta's financial support for KCM. Vedanta has stated that it has invested approximately US$3 billion in KCM since it acquired the company in 2004. According to Vedanta's documents, it 'has continuously supported the company financially', including loans to KCM of hundreds of millions of dollars and acting as a guarantor for over half a billion dollars of external financing, which, the claimants contend, goes considerably beyond a conventional parent-subsidiary relationship.

(5) Vedanta's various public statements regarding its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure. For example, a document which explains that, 'most of the infrastructure that Vedanta acquired when it purchased KCM was old and in need of modernization.' As a result, 'Vedanta inherited several legacies, including … old tailings pipelines, susceptible to frequent leaks.' In addition, 'Once Vedanta acquired KCM, we immediately designed a comprehensive and well-funded program to address the legacy environmental issues. We particularly focused on the areas that most affected the surrounding communities when modernizing infrastructure to local and global industrial norms.'

(6) Evidence from a former KCM employee about the extent of Vedanta's control of KCM. Davies Kakengela, who was employed by KCM for over a decade until January 2015, has made a witness statement in which he gives evidence of the high degree of control Vedanta exercised over KCM's operational affairs: 'once Vedanta took over KCM, working practices changed significantly. It became clear that cost cutting was the supreme objective. This compromised other areas of work … Almost all senior positions at KCM were given to people from Vedanta Group companies.' He adds that, 'when Vedanta took over most of the existing management and operational policies were discarded or became irrelevant.'

85. Mr Gibson submitted that the case against Vedanta 'cannot get better than the pleaded case', but common experience suggests otherwise.

86. The Judge approached the issue on the basis that it was inappropriate for the court to engage in a mini-trial of the issues, particularly since the process of disclosure had not even begun; but that on the basis of the pleading and the material he had seen, the claimants' case against Vedanta was arguable.

87. The appellants were critical of the Judge's analysis. They submitted that Vedanta neither devised any relevant policy nor controlled any material operation. It never operated a mine and could not in law operate a mine in Zambia. It was a holding company with reporting obligations, few staff and no particular mining expertise or operational knowledge that was superior or equal to that of its operating subsidiary, KCM.

88. Mr Gibson also pointed out that there had been no reported case in which a parent company had been held to owe a duty of care to a person affected by the operation of a subsidiary. That may be true, but it does not render such a claim unarguable. If it were otherwise the law would never change.

89. The Judge also expressed provisional views about the merits of the claim against Vedanta. Mr Gibson was also critical of those views, set out in [121] of the judgment. The Judge expressed himself 'unenthusiastic' about expressing any view beyond his judgment that the claimants' case was arguable; but did so because Mr Gibson wished to say that if the claim was properly characterised as arguable but weak, this would be relevant to the exercise of the court's discretion. In my judgment, the Judge should not have been invited to express any view of the case on the basis of one side's pleading.

90. I have concluded that the Judge was entitled to reach the conclusion he did on the basis of the way in which the case had been pleaded and such supporting evidence as there was at the current stage. The claimants may or may not succeed against Vedanta

at trial; but their claim cannot be dismissed as not properly arguable. To put it another way, I would accept that there is a serious question to be tried which should not be disposed of summarily, notwithstanding the question goes to the court's jurisdiction.

(iii) The claim based on a duty of care in Zambian law

91. The Judge made the following material findings:

> 123. I have an enormous amount of evidence on the issue of whether, in Zambian law, the sort of duty identified in *Chandler v Cape* would be imposed on Vedanta. Former Chief Justice Sakala says that no such duty would be imposed and he gives detailed reasons for that conclusion. On the other hand, Mr Mwenye SC … is of the view that … the duty of care pleaded by the claimants has a realistic prospect of success.
>
> 124. I agree with Mr Hermer that, in the light of this clear dispute between the Zambian law experts, there is little that the court can do at this stage, other than to say that it is obviously arguable that Zambian law would impose the relevant duty ... Thus, having concluded that the claim is arguable in English law, I reach the same conclusion in respect of Zambian law.

92. Although I am doubtful that a disagreement between experts necessarily or 'obviously' makes it arguable either way, since one expert may be shown to be plainly wrong even in his or her written evidence, I am clear that the Judge reached a conclusion to which he was entitled to come.

Question (3): whether it is reasonable for the court to try the issue between the claimants and Vedanta?

93. It is common ground that the claimants must satisfy the court that it is reasonable to try the issue between the claimants and Vedanta; and in his judgment at [129]-[137] the Judge concluded that it was.

94. The appellants submit that he was wrong; and they rely in support of this submission on a decision of this court: *Erste Group Bank AG, London Branch v. JSC 'VMZ Red October' and ors* [2015] EWCA Civ 379 ('the *Red October case*'). It is clear from the *Red October case*, see [38], as it is from the terms of paragraph 3.1(3)(a), that a claimant must demonstrate both that there is a real issue to be tried against the anchor defendant and that it is reasonable for the court to try it. In doing so the court must examine the nature of the claim against the anchor defendant, here Vedanta, on the assumption that there would be no additional joinder of the foreign defendant, here KCM. In the *Red October case* the court concluded that notwithstanding the agreement between the bank and the first and second defendant as to English jurisdiction, on a proper analysis of the facts of the case, there was no real issue between the bank and these two anchor defendants. The substance of the claim was between the bank and the third and fifth defendants. The bank had issued proceedings against the first and second defendants in order to sue the third and fifth defendants and execute a judgment against their assets wherever located. The case was overwhelmingly a Russian case and had no connection whatsoever with England

other than the exclusive jurisdiction clause that applied to the contractual relations between the bank and the first and second defendants.

95. On the facts of the *Red October case* one can readily see why the Court of Appeal concluded that it was not reasonable for the Commercial Court in London to try the issues between the bank and the anchor defendants: none existed.

96. The present case is different. First, the claimants sue Vedanta within the jurisdiction pursuant to a mandatory jurisdictional rule. Secondly, it cannot be said that the claimants have no interest in suing Vedanta other than for the purposes of bringing KCM within the jurisdiction: the claimants wish to proceed against Vedanta as a company that has sufficient funds to meet any judgment of the English court. They have grounds to believe, and evidence to show, that KCM may be unable or unwilling to meet such a judgment.

97. In my view, the Judge was plainly right in his conclusion on this question; but in any event, on an issue of reasonableness, it was a conclusion that was plainly open to him.

Question (4): whether KCM is a necessary and proper party to the claim against Vedanta?

98. This issue did not figure substantially in the argument and I can deal with it shortly.

99. The claimants' claims against Vedanta and KCM are based on the same facts, they rely on similar legal principles; and, if KCM were already within the jurisdiction, it would plainly be a proper defendant in the proceedings.

100. In my view, the Judge was entitled to conclude that Vedanta and KCM can be regarded as broadly equivalent defendants; and, as he pointed out, the claim against KCM is the more obvious claim because KCM owns and operates the mine and may be strictly liable for the discharges of toxic waste.

Question (5): whether England and Wales is the proper place in which to bring that claim?

101. The Judge approached this issue by reference to CPR 6.37(3):

> The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim.

102. He then referred, at [148], to the familiar test set out by Lord Goff in *Spiliada Maritime Corp v. Cansulex Ltd* [1987] 1 AC 460, at 475-6, as summarised by Lord Collins in the *Altimo case* (see above) at [88]:

> … the task of the court is to identify the forum in which the case can be suitably tried in the interests of all the parties and for the ends of justice …

103. The Judge next posed what he described as the two relevant questions: first, whether England and Wales was the appropriate place to try the claimants' claims against KCM; secondly, and if not, whether the claimants would get access to justice in Zambia.

104. The second question arises if there is a choice between the most appropriate forum and the forum where the claimant can obtain access to justice. The implicit tension was described by Lord Goff in *Connelly v. RTZ Corporation Ltd* [1998] 854, at 866C by reference to the judgment of Sir Thomas Bingham MR from which the appeal on this point was unsuccessful:

> But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights.

105. Adopting this approach, the Judge reached three relevant conclusions. First, ignoring the claim against Vedanta, it was 'plain and obvious that England is not the appropriate forum for these claims and that Zambia is obviously the appropriate forum …'. However, secondly, taking into account the claim against Vedanta, he concluded that England was the most appropriate place to try the claims against KCM. Thirdly, if he were wrong about this, in any event:

> … the claimants will almost certainly not get access to justice if these claims were pursued in Zambia.

106. Sensibly, no issue is taken by the claimants as to the Judge's first conclusion. The claimants are all Zambian citizens, resident in Zambia. The claims involve personal injury or damage to land; the injuries were suffered in Zambia and the land that was damaged is also in Zambia; the alleged discharges into the waterways occurred in Zambia, so the place of the commission of the alleged tort is Zambia; the Nchanga mine is owned and operated by KCM, a Zambian company, operated pursuant to the terms of a Zambian licence; the proper regulation of the mine would have to be considered by reference to Zambian statutes and regulations; and the applicable law is Zambian law, see judgment at [153].

107. The appellants contend that the Judge erred in his second and third conclusion (grounds 2 and 3).

(i) Ground 2: the relevance of the claim against Vedanta

108. Mr Gibson argued that the Judge erred in concluding that the fact that there was a claim against Vedanta had the consequence that England was necessarily the appropriate forum. The place of commission of the tort (here Zambia) was a relevant starting point when considering the appropriate forum for a tort claim, see Lord Mance JSC in *VTB Capital Plc v. Nutritek International Corp* (see above) at [51]. The Judge had failed to identify the fundamental focus of the litigation and the prejudice to KCM in having to meet claims from a very large number of Zambian claimants which were not advanced in Zambia.

109. The appellants also argued that the Judge failed to take into account the importance of not bringing foreign defendants within the jurisdiction simply to avoid litigation in more than one jurisdiction, see for example the *Red October case* at [139], referring to a passage in the judgment of Lord Collins in the *Altimo Holdings case* [74], itself citing with approval a passage from the judgment of Lloyd LJ (as he then was) in

Golden Ocean Assurance Mariner and World Mariner Shipping SA v. Martin (*The Goldean Mariner*) [1990] 2 Lloyd's Rep 215, at 222:

> … caution must always be exercised in bringing foreign defendants within our jurisdiction under Ord 11, r1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires the more than one suit in more than one different jurisdiction.

110. Mr Gibson submitted that there was nothing inherently objectionable in parallel litigation in England and Zambia in relation to the distinct issues raised in the claims against each appellant. It was by no means certain that the claimants would proceed with their claims against Vedanta in the absence of KCM and, if they did, such claims were capable of being confined. In any event, Vedanta had agreed to submit to the jurisdiction of the Zambian courts.

111. Mr Hermer submitted that the Judge had reached the right conclusion on this question, largely for the reasons he gave.

112. The Judge referred to a number of textbooks and authorities which provided guidance to the proper approach to this issue. For present purposes, it is sufficient to refer to a passage from *Dicey, Morris and Collins on the Conflict of Laws* (15th edition) and to observations from two decisions in the Commercial Court.

113. At paragraph 12-033, the editors of *Dicey* note the classic exposition of Lord Goff's *forum non conveniens* test in the *Spiliada case*, but add:

> Lord Goff could not have foreseen, however, the subsequent distortion which would be brought about by the decision of the European Court in *Owusu v Jackson*. The direct effect of that case is that where proceedings in a civil or commercial matter are brought against a defendant who is domiciled in the United Kingdom, the court has no power to stay those proceedings on the ground of *forum non conveniens*. Its indirect effect is felt in a case in which there are multiple defendants, some of whom are not domiciled in a Member State and to whom the plea of *forum non conveniens* remains open: it is inevitable that the ability of those co-defendants to obtain a stay (or to resist service out of the jurisdiction) by pointing to the courts of a non-Member State which would otherwise represent the *forum conveniens*, will be reduced, for to grant jurisdictional relief to some but not to others will fragment what ought to be conducted as a single trial … There is no doubt, however, that the *Owusu* factor will have made things worse for a defendant who wishes to rely on the principle of *forum non conveniens* when a co-defendant cannot.

114. In *Credit Agricole Indosuez v. Unicof Ltd and Others* [2003] EWHC 2676 (Comm), at [19] Cooke J said this:

> Although the burden is on a claimant to show, when seeking leave to serve out of the jurisdiction, that England is the appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice, the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognise the undesirability of duplication of proceedings and the *lis alibi pendens* cases make this clear. Although there are connecting factors with Kenya to which I refer later in this judgment, if proceedings are going on in this jurisdiction on the self-same or linked issues, this is clearly the most appropriate forum for those common or connected issues to be tried between all relevant parties

115. The observations of Leggatt J in *OJSC VTB Bank v. Parline Ltd* [2013] EWHC 3538 (Comm) at [5] are to similar effect:

> I accept that if the claim against the second defendant were a freestanding claim, all those factors would point overwhelmingly to Russia being the appropriate forum for the claim. However, the context is that the claim against the second defendant is not a freestanding claim, and it has to be considered in circumstances where the claimant has chosen to bring, and is entitled to bring, claims against the first and third defendants in England, which it says it anyway wishes to pursue, regardless of whether the second defendant is brought into these proceedings or not. What therefore has to be considered, as [counsel for] the claimant submits, is not whether England or Russia is the more suitable forum for the claim against the second defendant, other things being equal, but whether it is appropriate to have proceedings against the second defendant in Russia in circumstances where proceedings involving identical or virtually identical facts, all the same transactions, witnesses and documents, will anyway be taking place in England. The real question, in other words, is whether the factors which connect the claim against the second defendant with Russia carry weight in circumstances where to require the claim to be pursued in Russia would result in duplication of cost and the risk of inconsistent judgments - the same factors which make the second defendant a necessary or proper party.

116. Mr Gibson submitted that a distinction is to be drawn between these two cases where there was no natural forum and a single claimant, and the present case where there is a natural forum and likely to be a very large number of group action claimants, some of whom might wish to sue in Zambia.

117. Notwithstanding these points, in my view the Judge was entitled to the view that it was inappropriate for the litigation to be conducted in parallel proceedings involving identical or virtually identical facts, witnesses and documents, in circumstances where the claim against Vedanta would in any event continue in England; and that this made

England the most appropriate place to try the claims against KCM. Accordingly, I would reject ground 2.

(ii) Ground 3: the challenge to the Judge's conclusion in relation to access to justice

118. This ground of appeal faces formidable difficulties in the light of the observations about challenges to a judge's evaluative judgment, to which I have already referred to. Such a judgment necessarily involves balancing various factors relevant to the appropriate forum. It is insufficient to say that the balance might, or even should, have been struck differently. An appellant has to show that a judge has made a significant error of principle or has taken into account some immaterial matter or left out of consideration some material matter, see the references to the judgments of Lord Mance and Lord Neuberger in the *VTB Capital case* (see above).

119. The legal test provides a burden on the claimants to show that there is a real risk that substantial justice cannot be obtained in Zambia, see the *Altimo Holding case*, Lord Collins at [95]. At [97] he added:

> Comity requires that the Court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court and that is why cogent evidence is required to establish the risk.

120. Mr Gibson argued, in summary, that the claimants had not discharged this high evidential burden of proving that there was a real risk that they would not obtain substantial justice in Zambia, and that the Judge's conclusions on the point were against the weight of the evidence.

121. Before dealing with the detail of the Judge's approach, I must deal shortly with the argument that he reversed the evidential burden of proof and proceeded as if that burden lay on the appellants to prove that the claimants would have access to justice in Zambia. I reject that submission. The Judge specifically referred to the passage in the *Altimo Holding case*, at [95], as well as a passage from the judgment of Blackburne J at first instance in *Pacific International Sports Clubs Limited v. Surkis and others*, which was approved by the Court of Appeal [2010] EWCA Civ 753 at [13]:

> 33. … allegations as to why the appropriate forum should be displaced must amount to an allegation that the forum is or will be unavailable for the trial of the claim. This must be clearly demonstrated against an objective standard and supported by positive and cogent evidence.

122. The reference to 'cogent evidence' echoes the observation of Lord Diplock in the *Abidin Daver* [1984] 1 AC 398 at 411 and Lord Goff in the *Spiliada case* (see above) at 478D-F.

123. Whatever the weight to be attached to it, the Judge was certainly faced with a considerable body of evidence. He condensed the material and identified seven factors which, in his view, when taken together amounted to 'cogent evidence that, if these claimants pursued KCM in Zambia, they would not obtain justice', (see the judgment at [177]).

124. First, the claimants earn considerably below the national average in Zambia; and given that Zambia is one of the world's poorest countries, where most people live at subsistence levels, he could conclude that the vast majority of the claimants would not be able to afford the cost of any legal representation, (see [178]).

125. Secondly, in consequence of their poverty, the only way in which the claimants could ordinarily bring the present claims in Zambia would be by a Conditional Fee Agreement (CFA). However, it was common ground that CFAs were not available in Zambia and were unlawful, (see [179]).

126. Thirdly, there was no prospect of the claimants obtaining legal aid from the Zambian state. The evidence of the Director of the Legal Aid Board was 'emphatic': the Legal Aid Board would not be able to provide funding for a large environmental claim on behalf of 1,800 claimants, (at [180] – [181]).

127. Fourthly, the prospect of ad hoc litigation funding was entirely unrealistic. Considering the evidence as a whole the Judge concluded that it was 'fanciful' to suggest that the claims could be funded by Zambian lawyers on such a basis, see [185]:

> This is complex and expensive litigation involving over 1,800 claims. Detailed evidence is going to be necessary in respect of personal injuries, land ownership and damage to land; and expert evidence as to pollution, causation and medical consequences. On the evidence before the court, it is quite unrealistic to suppose that the lawyers would fund such large and potentially complex claims, essentially out of their own pockets, for the many years that litigation might take to resolve.

128. Fifthly, no private lawyers with relevant experience were willing and capable of taking on such claims in Zambia (at [186]). The Bureau for Institutional Reform and Democracy reported in 2012 on the lack of lawyers and the consequences for its citizens. It was only recently, and in answer to this evidence, that KCM was able to identify a lawyer (Mr Musenga Musukwa) who would be willing to represent the claimants. However, Mr Musukwa was a sole practitioner without apparent expertise in the field and, although he was 'extremely keen' to take on the claimants' case, it was unclear how he could do so. In any event, he had only committed himself to funding 'the initial gathering of instructions from a sample of plaintiffs and preliminary enquiries as to merits'. Another identified lawyer expressed himself willing to act but only when he had made an assessment of the merits which he had not done. As the Judge noted, there was no commitment on his part to act at all; and little evidence that a number of lawyers might combine for the purposes of representing the claimants (see [186]-[189]).

129. Sixthly, previous environmental litigation in Zambia had failed in respect of some or all of the claimants for various reasons. The Judge referred specifically to two cases: *Benson Shamilimo and 41 others v. Nitrogen Chemicals of Zambia Ltd* (2007/HP/0725); *Nyasulu and 2,000 others v. KCM* (2007/HP/1286). The *Benson Shamilimo case* failed because the claimants had been unable to obtain expert evidence to prove a connection between proven illnesses and the proven exposure to radiation. The *Nyasalu case* ended disastrously with the claimants succeeding on liability but 1,989 of them failing in the Supreme Court because they had not

submitted medical reports with the consequence that they were held not to be entitled to any damages at all. The Judge also referred to another case in 2007, *Sinkala and others v. KCM,* in which KCM's attitude and approach was described as collaborative, but where there remained a dispute as to whether many of the claimants had received their entitlement to compensation. The Judge said he could not resolve that dispute on the papers before him (see [191] - [193]); and nor can we, despite attempts to persuade us that we could.

130. Seventhly, the Judge took into account what he described as KCM's likely 'obdurate' approach to litigation in Zambia, which in his view, would add enormously to the time and therefore the cost. KCM had in the past pursued 'an avowed policy of delaying so as to avoid making due payments', (see [195]) - [196]).

131. In conclusion, the Judge found that, although the claimants only needed to establish a real risk that they would not obtain substantial justice, the evidence was so overwhelming that he reached the conclusion that they would 'almost certainly' not obtain justice in Zambia (see [198]).

132. Mr Gibson was critical of the extent if not the substance of some of these findings and challenged the conclusion based on them. He took us to evidence which partially contradicted the Judge's findings in relation to some of these factors, particularly in relation to the third, fifth and sixth factors. However, in my view the criticism amounted to what might be described as nibbling around the edges rather than making any substantial bites into the cogency of the Judge's findings. Some witnesses expressed themselves confident that the claimants could be competently represented by properly funded lawyers (possibly with the assistance of NGOs); and that they would achieve justice in the courts of Zambia; but there was also clear evidence which, in the light of the seven factors identified by the Judge, clearly pointed to a different conclusion. It was this evidence that the Judge accepted.

133. I should perhaps mention one further matter which troubled the Judge: namely, that his findings might be regarded as amounting to criticisms of the Zambian legal system. He made clear that it was no part of his function to review the Zambian legal system: only to make findings on specific issues on the evidence before him. That observation was plainly correct. I would only add one point, and it is doubtless one that the claimants' lawyers are aware of. There must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally.

134. Accordingly, I would reject ground 3.

135. KCM's ground 4 focuses on the exercise of discretion, see CPR 6.37(3) (referred to above). This ground was not pressed independently in oral submissions beyond the arguments to which I have already referred and adds nothing to the other grounds. Accordingly, I need say nothing further about it.

D. Conclusion

136. In summary, I have concluded that there are no proper grounds for re-opening the Judge's decision. The appellants have not persuaded me that the Judge misdirected himself on the law, nor that he failed to take into account what mattered or that he

took into account what did not matter. How the various matters weighed with him, either individually or together, was for him to decide, provided that he did not arrive at a conclusion that was plainly wrong. In my view, he did not reach a view that was wrong; he reached a conclusion that was in accordance with the law.

137. In the light of the above, I would dismiss the appellants' appeals.

Lady Justice Asplin

138. I agree.

Lord Justice Jackson

139. I also agree.