

# Litigating about where to Litigate: *Vedanta Resources Plc v Lungowe* [2019] UKSC 20

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## INTRODUCTION

This is the latest judgment in a case brought by African claimants against a big multinational corporation (MNC) and its African subsidiary in the United Kingdom (UK) for harm suffered as a result of the activities of the subsidiary in Africa. Two similar appeals are currently pending in England.<sup>1</sup>

## THE FACTS

The claimants were a group of very poor rural farmers, about 1 826 in total, from the Chingola District in Zambia. They claimed that the watercourses they used as drinking water (for themselves and their livestock) and for irrigation of crops, had been contaminated by discharges of toxic matter from the Nchanga Copper Mine since 2005. As a result, their health and farming activities had been adversely affected.

The defendants were Konkola Copper Mines plc (KCM) and Vedanta Resources plc (Vedanta). KCM is the Zambian owner of the mine, employing about 16 000 people, which makes it the largest private employer in Zambia. KCM is a subsidiary of Vedanta, the parent company of an MNC, which employs about 82 000 people around the world. Vedanta is incorporated and domiciled in the UK. Although KCM is not a 100 per cent subsidiary of Vedanta—the Zambian government holds a significant minority stake—Vedanta controls KCM as if KCM were wholly owned by it. This appeared from materials published by Vedanta itself.

## THE CLAIMS

The claims against both defendants, which amounted to serious human rights infringements, were based on common-law negligence (tort) and breach of statutory duty. KCM was sued in its capacity as operator of the mine and Vedanta by reason of its control over KCM.

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<sup>1</sup> *Okpabi v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC) and *AAA v Unilever plc* [2017] EWHC 371 (QB).

## THE ISSUE: JURISDICTION

The only issue on appeal was jurisdiction. Jurisdiction had been established in different ways over the two defendants and this had significant implications for the final determination of the jurisdiction of the English court.

Jurisdiction over Vedanta was based on European Union (EU) law: Article 4 of Brussels I Recast<sup>2</sup> determines that ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

Jurisdiction over KCM was based on the traditional English procedural rule that provides for service of proceedings out of the jurisdiction on a foreign defendant who is a ‘necessary or proper party’ to the claims being pursued against another defendant (in this case Vedanta) in England.<sup>3</sup> In other words, Vedanta was the anchor defendant in England.

The different bases of jurisdiction in respect of the two defendants were important as far as challenges to the existence and/or exercise of jurisdiction were concerned. Since the decision in *Owusu v Jackson*,<sup>4</sup> defendants served under the Brussels regime (in terms of Article 2 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, subsequently Article 2 of the Brussels I Regulation)<sup>5</sup> can no longer protest the exercise of jurisdiction by a UK court on the basis of *forum non conveniens*.<sup>6</sup> Vedanta fell into this category. It is possible, though, for a defendant to apply for a claim to be struck out as an abuse of process or as disclosing no reasonable cause of action, or to seek summary judgment on the ground that the claim does not disclose a triable issue against it. Vedanta did not pursue summary judgment, but Vedanta and KCM alleged that the claimants’ case did not disclose a triable issue against Vedanta, because Vedanta was not sufficiently involved in the running of the mine in Zambia. In addition, Vedanta argued that, even if there was a triable issue against it, proceedings should be stayed based on the abuse of EU law—the claimants were using EU law to secure Vedanta as the anchor defendant in order to establish English jurisdiction over KCM as the *real* defendant, through the necessary or proper party gateway.

KCM had been served under the traditional English rules in terms of which the claimants, amongst other things, would have had to prove that England was the proper place (*forum conveniens*)<sup>7</sup> to bring the combined claim in order to obtain leave to serve proceedings on KCM in Zambia.<sup>8</sup>

<sup>2</sup> Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast) 2012 OJ L351/1.

<sup>3</sup> Civil Procedure Rules, r 6.36; Part 6 Practice Direction B para 3.1.

<sup>4</sup> Case C-281/02 [2005] ECR I-1383.

<sup>5</sup> Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2001 OJ L12/1, currently Art 4 of Brussels I Recast.

<sup>6</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) 476C–478E.

<sup>7</sup> *ibid* 478F–480G.

<sup>8</sup> Civil Procedure Rules r 6.37(3).

Under the English regime a defendant, served abroad in this way, may contest the existence of jurisdiction. In the final analysis, it may come down to whether a claimant is able to demonstrate that it will not obtain justice in a foreign court and therefore it must proceed in an English court.<sup>9</sup> This, indeed, was the issue that became the decider in the appeal before the Supreme Court.

## THE JUDGMENT

Judgment was given by Lord Briggs (with Lady Hale, Lord Wilson, Lord Hodge and Lady Black agreeing). He addressed several important issues regarding cross-border litigation, with specific reference to the issue of jurisdiction.

### Proportionality

This was a classic case of litigating about where to litigate.<sup>10</sup> Proceedings were first served on Vedanta and KCM in July and August 2015 respectively. Both defendants' challenges to jurisdiction were dismissed in 2016 and, on appeal, in 2017.<sup>11</sup> This was the final appeal, argued in January 2019. It comes as no surprise that Lord Briggs regarded the litigation of the jurisdictional issue in this case as 'disproportionate'.<sup>12</sup>

With reference to *Spiliada Maritime Corp v Cansulex Ltd*,<sup>13</sup> *Cherney v Deripaska*<sup>14</sup> and *VTB Capital plc v Nutritek International Corp*,<sup>15</sup> Lord Briggs emphasised yet again that jurisdiction was essentially a matter for the trial judge to decide and that appeal courts should be slow to intervene.<sup>16</sup> Litigation concerning jurisdictional issues should be contained in terms of time and cost in order to prevent wealthier litigants from wearing down poorer ones. Resources could be put to better use fighting the merits of a case instead of long, protracted jurisdictional battles.<sup>17</sup> Lord Briggs was extremely critical of the volume of material submitted by the parties:

The extent to which these well-known warnings have been ignored in this litigation can be measured by the following statistics about the materials placed before this court. The parties' two written cases (ignoring annexes) ran to 294 pages. The electronic bundles included

<sup>9</sup> Paul Torremans, *Cheshire, North and Fawcett: Private International Law* (15 edn, Oxford University Press 2017) 372–373.

<sup>10</sup> *Spiliada* (n 6) 464G–H.

<sup>11</sup> *Vedanta Resources Plc v Lungowe* [2016] EWHC 975 (TCC) and *Vedanta Resources Plc v Lungowe* [2018] 1 WLR 3575.

<sup>12</sup> *ibid* para 6.

<sup>13</sup> *Spiliada* (n 6).

<sup>14</sup> (*No 2*) [2010] 2 All ER (Comm) 456.

<sup>15</sup> [2013] UKSC 5.

<sup>16</sup> *Vedanta Resources* (n 11) paras 6 and 7.

<sup>17</sup> *ibid* para 8.

8,945 pages. No less than 142 authorities were deployed, spread over 13 bundles, in relation to an appeal which, on final analysis, involved only one difficult point of law.<sup>18</sup>

Lord Briggs acknowledged that

[A]n issue whether substantial justice is obtainable in one of the competing jurisdictions, may require a deeper level of scrutiny, not least because a conclusion that a foreign jurisdiction would not provide substantial justice risks offending international comity. Such a finding requires cogent evidence, which may properly be subjected to anxious scrutiny. Nonetheless, the fact that such an issue arises in a particular case (as in this appeal) is no excuse for ignoring the requirement for proportionality in relation to all the other issues.<sup>19</sup>

### **Real Issue to be Tried against Vedanta**

This was a pivotal issue, since a finding that there was no real triable issue against Vedanta (as the anchor defendant) would have wiped out the jurisdictional gateway to add KCM as a necessary or proper party to the litigation in the English court. Whether such a real triable issue existed, depended on ‘whether Vedanta sufficiently intervened in the management of the Mine’<sup>20</sup> in order to establish a common-law duty of care in respect of the claimants, and/or breach of statutory duty. Lord Briggs made it clear that

The level of intervention in the management of the Mine requisite to give rise to a duty of care upon Vedanta to persons living, farming and working in the vicinity is (as is agreed) a matter of Zambian law, but the question whether that level of intervention occurred in the present case is a pure question of fact.<sup>21</sup>

Mindful of the fact that not all evidence was available at the jurisdiction stage of proceedings and that disclosure still lay ahead, Lord Briggs emphasised that it was for the claimant to demonstrate that it had a case that could not be decided against it without a trial.<sup>22</sup> The claimants based their allegation that Vedanta had a sufficiently close involvement with the running of the mine, in order to incur a duty of care to the claimants, mainly on the following: material published by Vedanta, asserting responsibility for the establishment, implementation through training, monitoring and enforcement of group-

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<sup>18</sup> *ibid* para 10.

<sup>19</sup> *ibid* para 11.

<sup>20</sup> *ibid* para 44.

<sup>21</sup> *ibid*.

<sup>22</sup> *ibid* paras 43 and 45.

wide environmental control and sustainability standards; a management services agreement between Vedanta and KCM; and a witness statement by a middle manager of KCM detailing management changes since KCM became part of the Vedanta Group.<sup>23</sup> All of these were considered by the trial judge to decide that there was, indeed, a triable issue against Vedanta. In particular, the trial judge referred to a report entitled ‘Embedding Sustainability’ (that formed part of Vedanta’s published material) which, according to him, emphasised that the board of Vedanta itself had oversight of all subsidiaries and included particular reference to issues concerning discharges into water, as well as detailing specific problems arising at the mine.<sup>24</sup> This was confirmed on appeal.<sup>25</sup> Lord Briggs agreed, albeit that he would have been less persuaded by the management services agreement or the evidence of the middle manager from KCM. However, the information contained in Vedanta’s published material was sufficient on its own to satisfy the standard for a triable issue. Importantly, it did not matter whether the Supreme Court reached the same conclusion as the trial judge; there had been sufficient material before the judge to reach a decision.<sup>26</sup>

### Abuse of EU Law

The defendants argued that it was an abuse of EU law to establish jurisdiction under the Brussels regime over the anchor defendant, Vedanta, in an English court with the sole purpose of adding KCM through the traditional English gateway of a necessary or proper party to the litigation. However, the trial judge found that, while it was true that the claimants wanted to sue Vedanta in England to enable them to join KCM as a defendant, they had a real triable issue against Vedanta and desired to obtain judgment for damages against Vedanta, as well as KCM, in case KCM turned out to be of doubtful solvency.<sup>27</sup>

Following *Owusu v Jackson*<sup>28</sup> it is no longer possible for defendants to argue *forum non conveniens* under the Brussels regime.<sup>29</sup> As a result, provided a claimant can prove a triable issue against a defendant domiciled in the UK, jurisdiction will stand. The potential for irreconcilable judgments, in an English court and the court of the country where the actual damage occurred, becomes a ‘formidable, often insuperable obstacle to the identification of any jurisdiction other than England as the *forum conveniens*.’<sup>30</sup> According to the defendants this meant that any parent

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<sup>23</sup> *ibid* para 55.

<sup>24</sup> *ibid* para 58.

<sup>25</sup> *ibid* para 59.

<sup>26</sup> *ibid* para 62.

<sup>27</sup> *ibid* para 24.

<sup>28</sup> Case C-281/02 [2005] ECR I-1383.

<sup>29</sup> On *forum conveniens* see *Spiliada* (n 6) 476C–478E.

<sup>30</sup> *Vedanta Resources* (n 11) para 39.

company, domiciled in England, could be sued in England, for worldwide environmental harm, regardless where the immediate damage occurred as a result of a subsidiary's operations.

Finding that there was no abuse of EU law, Lord Briggs addressed the risk of irreconcilable judgments as follows:

In my view, if there is a remedy for this undoubted problem, it lies in an appropriate adjustment of the English forum *conveniens* jurisprudence, not so as to permit the English court to stay the proceedings against the anchor defendant, if genuinely pursued for a real remedy, but rather to temper the rigour of the need to avoid irreconcilable judgments which has, thus far, served to disable the English court from concluding that any jurisdiction other than its own is the forum *conveniens* or proper place for the litigation of the claim against the foreign defendant. As will appear, I consider that there is a solution to this difficulty along those lines, where the anchor defendant is prepared to submit to the jurisdiction of the domicile of the foreign defendant in a case where, as here, the foreign jurisdiction would plainly be the proper place, leaving aside the risk of irreconcilable judgments.<sup>31</sup>

This brings us to the one aspect where the Supreme Court reached a different conclusion from the trial judge and the Court of Appeal, namely the appropriate forum for the claim against KCM.

### **Was England the Proper Place to Bring the Claim Against KCM?**

In order to obtain permission to serve KCM abroad, the claimants would have had to demonstrate that England was the 'proper place to bring the claim'.<sup>32</sup> With reference to Lord Goff's original formulation of the *forum conveniens* principle in *Spiliada Maritime Corp v Cansulex Ltd*<sup>33</sup> Lord Briggs emphasised that, in a multi-defendant case, 'the court is looking for a single jurisdiction in which the claims against all the defendants may be most suitably tried.'<sup>34</sup> Therefore, the enquiry into the proper forum in respect of KCM also included consideration of the anchor defendant, Vedanta—it was concerned with 'the case as a whole'.<sup>35</sup>

Apart from the normal connecting factors considered in determining the appropriate forum,<sup>36</sup> a question arises as to the risk of irreconcilable

<sup>31</sup> *ibid* para 40.

<sup>32</sup> Civil Procedure Rules r 6.37(3).

<sup>33</sup> *Spiliada* (n 6).

<sup>34</sup> *Vedanta Resources* (n 11) para 68.

<sup>35</sup> *ibid*.

<sup>36</sup> These factors include accessibility to courts for parties and witnesses, availability of a common language, the law applicable to the dispute, the place where the wrongful act or omission occurred, the place where harm occurred, etc: see *Vedanta Resources* (n 11) para 66.

judgments—is it a decisive factor or not? The trial judge, despite finding that, as far as KCM was concerned, all the connecting factors pointed towards Zambia, regarded the risk of irreconcilable judgments in different jurisdictions as the decisive factor in deciding that England was the proper place for the claim:

The alternative – two trials on opposite sides of the world on precisely the same facts and events – is unthinkable.<sup>37</sup>

Clearly, the trial judge’s conclusion on *forum conveniens* was driven by the fact that Vedanta had been sued as the anchor defendant in England under the Brussels regime, in terms of which a stay of proceedings based on *forum non conveniens* was no longer possible.

Lord Briggs took the trial judge to task for not focusing on the fact that, by the time of the hearing, Vedanta had offered to submit to the jurisdiction of the Zambian courts, so that the whole case could be tried in Zambia.<sup>38</sup> This had no effect on the jurisdiction of the English court over Vedanta, established under the Brussels regime, however.

[I]t does lead to this consequence, namely that the reason why the parallel pursuit of a claim in England against Vedanta and in Zambia against KCM would give rise to a risk of irreconcilable judgments is because the claimants have chosen to exercise that right to continue against Vedanta in England, rather than because Zambia is not an available forum for the pursuit of the claim against both defendants. In this case it is the claimants rather than the defendants who claim that the risk of irreconcilable judgments would be prejudicial to them. Why (it may be asked) should that risk be a decisive factor in the identification of the proper place, when it is a factor which the claimants, having a choice, have brought upon themselves?<sup>39</sup>

Lord Briggs was of the view that the risk of irreconcilable judgments was not completely removed from the *forum conveniens* enquiry, but it ceased to be a ‘trump card’.<sup>40</sup> Conducting the *forum conveniens* enquiry afresh

[t]his case seeks compensation for a large number of extremely poor Zambian residents for negligence or breach of Zambian statutory duty in connection with the escape within Zambia of noxious substances arising in connection with the operation of a Zambian mine. If substantial justice was available to the parties in Zambia as it is in England, it would

<sup>37</sup> *Vedanta Resources* (n 11) para 71.

<sup>38</sup> *ibid* para 75.

<sup>39</sup> *ibid*.

<sup>40</sup> *ibid* para 84.

offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants' choice to proceed against one of the defendants in England rather than, as is available to them, against both of them in Zambia. For those reasons I would have concluded that the claimants had failed to demonstrate that England is the proper place for the trial of their claims against these defendants, having regard to the interests of the parties and the ends of justice.<sup>41</sup>

This dictum leads into the final hurdle that the claimants had to overcome—proving that they would not obtain justice in a Zambian court.

### Substantial Justice

Even if a foreign jurisdiction is indicated as the proper place for the trial (in this case Zambia) the English court may nonetheless refuse to set aside service on the foreign defendant if there is a real risk, based on cogent evidence, that substantial justice will not be obtainable in that foreign forum. Although this forms part of the *forum conveniens* enquiry, the substantial justice issue calls for different evidence from that presented in regard to connecting factors pointing to the proper place for the trial.<sup>42</sup>

In this case, according to the trial judge, it was an 'access to justice' issue—it did not concern the independence or competence of the judiciary or the civil procedure rules relating to big group claims. Rather, it was focused on two factors: the funding of such a group claim where the claimants were extremely poor, and the lack of sufficiently experienced legal teams in Zambia to conduct effectively litigation of this size and complexity, given the formidable opponent they were facing in KCM.<sup>43</sup> Crucially, the trial judge established that the claimants would not obtain legal aid in Zambia and that conditional fee arrangements were unlawful in Zambia.<sup>44</sup>

Apart from a careful analysis of available funding, legal resources and requisite expertise in Zambia, the trial judge also addressed the defendants' arguments in respect of similar cases that had been litigated (successfully, according to the defendants) in Zambia. Two of these cases were referenced by Lord Briggs on appeal and they are insightful. In the one case, *Nyasulu v Konkola Copper Mines plc*,<sup>45</sup> medical reports evidencing personal injuries for only twelve out of 2 000 claimants were submitted—the remaining claimants did not have the financial resources to obtain the requisite medical evidence and their claims were dismissed. Similarly, in *Shamilimo*

<sup>41</sup> *ibid* paras 85–87.

<sup>42</sup> *ibid* para 88.

<sup>43</sup> *ibid* para 89.

<sup>44</sup> *ibid* para 90.

<sup>45</sup> [2015] ZMSC 33.

*v Nitrogen Chemicals of Zambia Ltd*,<sup>46</sup> the claimants failed because they were unable to fund the requisite expert evidence to prove causation.<sup>47</sup>

This case is an excellent example of scrupulous analysis by the trial judge of the evidence presented by the parties. He based his finding, that there was a real risk that the claimants would not obtain substantial justice in Zambia, on cogent evidence, without judging the Zambian legal system itself:

I am conscious that some of the foregoing paragraphs could be seen as a criticism of the Zambian legal system. I might even be accused of colonial condescension. But that is not the intention or purpose of this part of the judgment. I am not being asked to review the Zambian legal system. I simply have to reach a conclusion on a specific issue, based on the evidence before me. And it seems to me that, doing my best to assess that evidence, I am bound to conclude ... that the claimants would almost certainly not get access to justice if these claims were pursued in Zambia.<sup>48</sup>

#### **WHAT DOES THIS JUDGMENT MEAN FOR AFRICA?**

The significance of this judgment for African victims of cross-border delicts/torts at the hands of large MNCs should not be underestimated. Vedanta, like other large mining multinationals, have significant operations in Africa, including South Africa.<sup>49</sup>

The typical litigational landscape may be described as follows: African claimants, having suffered harm through the actions and/or omissions of African subsidiaries of large MNCs, have a choice to pursue their claims in their home country or in the country where the parent company is domiciled.<sup>50</sup> In most of these cases the reality is that the parent company will have more assets for satisfaction of claims. In addition, funding for litigation, proper procedures, requisite expertise and experience in conducting large group litigation, will often be more readily available in the UK or elsewhere in Europe. From the claimants' perspective there is hardly any point in litigating in their home jurisdiction. For the big multinational defendant, however, subjecting the claimants to litigational inequality in terms of lack of funding and resources in Africa, will be to its advantage. As a result, jurisdiction has become the battleground in these claims.

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<sup>46</sup> 2007/HP/0725.

<sup>47</sup> *Vedanta Resources* (n 11) paras 99 and 100.

<sup>48</sup> *ibid* para 97.

<sup>49</sup> See Vedanta Zinc International website (2019) <<https://www.vedanta-zincinternational.com/our-operations/location>> accessed 2 December 2019.

<sup>50</sup> Following the decision in *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013), it has become more difficult to litigate in the United States under the Alien Tort Statute (1789).

*Vedanta* was decided against the background of *Lubbe v Cape plc*.<sup>51</sup> This case concerned several claims by more than 3 000 South African citizens, resident in South Africa (except for one claimant who was a British citizen resident in England) against an asbestos company, Cape plc, that no longer had a presence or any assets in South Africa by the time that the claims were brought. The claims were brought in England and Cape plc argued for a stay of proceedings based on *forum non conveniens*. On the final appeal it was decided not to stay the proceedings in England because, even though a South African court would have been a more appropriate forum for the litigation, justice would not be obtained in South Africa. The court gave the following reasons: First, the proceedings could ‘only be handled efficiently, cost-effectively and expeditiously on a group basis’ (in the UK).<sup>52</sup> Second, the personal injury claims would involve investigation, preparation and quantification, requiring professional lawyers, as well as expert advice and evidence on medical and other relevant issues (not readily available in South Africa),<sup>53</sup> and third, due to a lack of financial resources (in South Africa).<sup>54</sup> Tellingly, Lord Bingham concluded:

I do, however, think that the absence, as yet, of developed procedures for handling group actions in South Africa reinforces the submissions made by the plaintiffs on the funding issue. It is one thing to embark on and fund a heavy group action where the procedures governing the conduct of the proceedings are known to and understood by experienced judges and practitioners. It may be quite another where the exercise is novel and untried. There must then be an increased likelihood of interlocutory decisions which are contentious, with the likelihood of appeals and delay. It cannot be assumed that all judges will respond to this new procedural challenge in the same innovative spirit ... The procedural novelty of these proceedings, if pursued in South Africa, must in my view act as a further disincentive to any person or body considering whether or not to finance the proceedings.<sup>55</sup>

Considering that *Lubbe* was decided almost twenty years ago, a UK court may now view South Africa differently regarding class actions.<sup>56</sup>

<sup>51</sup> [2000] 1 WLR 1545.

<sup>52</sup> *Lubbe v Cape plc* [2000] 1 WLR 1545 at 1557E–F.

<sup>53</sup> *ibid* (n 52) 1557H.

<sup>54</sup> *ibid* (n 52) 1558D–1559E.

<sup>55</sup> *Lubbe* (n 52) 1560D–E.

<sup>56</sup> See, for example, *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ); see latest developments: Ciaran Ryan and Groundup, ‘Six Mining Groups ask Court to Approve R5bn Silicosis Settlement Case’ (*Timeslive*, Johannesburg 30 May 2019) <<https://www.timeslive.co.za/news/south-africa/2019-05-30-five-mining-groups-ask-court-to-approve-r5bn-silicosis-settlement-case/>> accessed 2 December 2019.

### The Appropriate, Competent Forum

While the *Lubbe* case was an instance of *forum non conveniens* (*Owusu* had not been decided yet), the factors relevant to deciding where the proper forum is, are the same as those considered in a *forum conveniens* enquiry.<sup>57</sup> In essence, it involves a determination of where the natural forum is, based on factors such as the location of the parties, where the tort/delict occurred and where the evidence is, the applicable law, whether judgments will be recognised and enforced against assets in another country, etcetera. In the *Lubbe* and *Vedanta* cases these factors pointed overwhelmingly towards South Africa and Zambia respectively as the natural fora.

However, for a foreign court to be designated an appropriate forum for purposes of *forum (non) conveniens*, that (foreign) court must have jurisdiction in the matter—it must be a competent forum. In both *Lubbe* and *Vedanta* the England-based defendants provided undertakings to submit to the jurisdiction of the South African and Zambian courts respectively. However, this does not mean that the English court will investigate the bases of jurisdiction in the foreign forum. According to Lord Hope

[t]he only purpose of the undertaking is to satisfy the requirement that the other forum is available. The ground on which the jurisdiction of the courts in the other forum is available to be exercised is of no importance either one way or the other in the application to the case of the *Spiliada* principles.<sup>58</sup>

This is understandable in the context of the *Lubbe* case, which was an instance of *forum non conveniens*: if the defendant is successful with this defence, the English proceedings will only be stayed, and the English court will not *exercise* its jurisdiction. Presumably, should the foreign court decide not to assume jurisdiction in the matter, the English proceedings may be continued.

But the *forum conveniens* context of the *Vedanta* case is different. The claimant is seeking to establish jurisdiction over the foreign defendant in an English forum by means of ‘service out’ (serving abroad). So, the jurisdiction of the English court is only established once the claimant has proved, amongst other things, that England is the proper place for the litigation.<sup>59</sup> It seems odd that an untested submission to the foreign (Zambian) jurisdiction by the (English) anchor defendant should be accepted without question at this stage of the proceedings to dislodge the establishment of English jurisdiction over the foreign (Zambian) defendant (assuming that substantial justice was obtainable in Zambia). What happens if the foreign

<sup>57</sup> For the differences between *forum conveniens* and *forum non conveniens*, see *Spiliada* (n 6) 480H–481E.

<sup>58</sup> *Lubbe* (n 52) 1566B–C.

<sup>59</sup> Civil Procedure Rules r 6.37(3).

(Zambian) court does not assume jurisdiction over the (English) defendant? In the *Vedanta* case this would have resulted in the elimination of KCM as a defendant from the English proceedings (the Zambian court being more appropriate), and Vedanta remaining as the sole defendant in the English proceedings (jurisdiction over Vedanta having been established under the Brussels regime). This would have placed the claimants in an unenviable position; proceeding against Vedanta in England and against KCM in Zambia. In this case the risk of not obtaining substantial justice in Zambia prevented this scenario.

The undertaking by Vedanta to submit to Zambian jurisdiction played a significant role in Lord Briggs' decision that Zambia was, indeed, the proper place for the litigation (subject to substantial justice being obtainable in Zambia). It opened Zambia as an available forum and Lord Briggs took the opportunity to address the issue of the potential for irreconcilable judgments in different fora, especially where there is an anchor defendant or other defendants in England. Lord Briggs said that, while this is a relevant consideration in deciding where the proper forum is, it should not be a trump card, in the sense that the threat of potentially irreconcilable judgments should rule out litigation in the foreign, more appropriate forum. However, one must ask if this does not detract from the claimant's position as *dominus litis*, especially in a case, such as *Vedanta*, where the anchor defendant, with more substantial assets, is domiciled in England and has been sued in England—*actor sequitur forum rei*? Also, does this not allow such a defendant, through an undertaking to submit to jurisdiction in the foreign forum, to manipulate litigation in order to subject the claimant to the obstacles of litigating in that foreign country, such as a lack of financial and a other resources? Of course, this can be addressed by the substantial justice consideration inherent in *forum (non) conveniens*, yet anything falling short of 'cogent evidence' that there is a risk that substantial justice will not be obtained in that foreign forum, will not suffice.

It is also important to remember that a parent company defendant, sued in the UK, may succeed in proving that there is no real triable issue against it, due to a lack of sufficiently close involvement with the activities of the African subsidiary. This would leave the claimants with claims only against the subsidiary (in an African forum) which may not have sufficient assets to satisfy the judgment. It is quite conceivable that the involvement of parent companies in the activities of African subsidiaries may not be as well publicised in the future. This will make it more difficult for claimants to establish jurisdiction in the UK.

### **Substantial Justice**

Lord Briggs's judgment means that the chances of African jurisdictions being regarded as the natural fora in these cases are greater and the substantial justice consideration will become the final check in the *forum*

*(non) conveniens* enquiry. In order to litigate in England, the claimant will have to prove that there is a real risk that substantial justice is not obtainable in the African (proper) forum. Importantly, the unavailability of a sophisticated large group claim procedure/system, or requisite expertise or financial resources, will not automatically translate into a risk of not obtaining justice. There must be cogent evidence that there is indeed such a risk. In *Vedanta* such cogent evidence was produced with reference to two cases, proving that inadequate legal and financial resources resulted in severe prejudice and failure to secure damages for claimants. Unless such evidence is available, and it might depend on exactly that—failed litigation in that country—it will be difficult to persuade an English court that there is a risk that substantial justice will not be obtained in an African court. For African victims of exploitation by big MNCs, the road to a remedy has just become more difficult.

## CONCLUSION

Litigating about where to litigate is like failing to see the forest for the trees, so to speak—it diverts the focus from the substantive issues that need to be decided. It drains the resources of both parties, especially when it takes years to decide which court will hear a matter. Once the jurisdictional battle has been won, the parties settle, which means that the real issues, regarding the merits of claims, are not argued in court. This holds serious implications for the development of the law in this area of cross-border torts/delicts—the theoretical development of the law, in terms of rethinking liability and damages, and perhaps seeking more appropriate remedies, is drowned out by the jurisdictional battles.