INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter.

This week we feature articles from Tom van der Klugt (on river pollution in England); Stephanie David (on overseas toxic torts: parent company liability); as well as Stephen Tromans QC's review of "The Rule of Five: Making Climate History at the Supreme Court", which itself provides an interesting insight into the workings of the US Supreme Court. We hope that you enjoy the read.

In other news, details of our ongoing series of webinars can be found at: www.39essex.com/category/webinars/ where you can also book your slot. Our next webinar has a regional focus – this time it is South & South East. Keep checking back via the link for news of further webinars coming soon.

Contents

RIVER POLLUTION IN ENGLAND: THE REGULATORY FRAMEWORK & POSSIBLE DIRECTIONS OF TRAVEL

Tom van der Klugt

The state of England's rivers

England's rivers received significant news coverage last month, following the Environment Agency's (EA) release of water quality statistics on 17 September. Newspapers reported that only 14% of English rivers are currently of a *"good ecological standard"*, while none are of a *"good chemical standard"*, with raw sewage discharge and agricultural run-off cited as key issues.

The applicable water standards are set out in the EU Water Framework Directive (Directive 2000/60/EC). Following our recent *"39 from 39"* webinar, on 30 September, covering *"Pollution – Home and Away"*, this article takes a brief look at this legislation and possible future developments. It seems an appropriate moment to take stock, not just because of the EA data, but also because it was World Rivers Day was on 27 September.

The EU Water Framework Directive

The Directive is the product of several decades of legislative evolution. Early European water legislation, from the mid-1970s onwards, focussed on setting standards for rivers and lakes used for drinking water abstraction. A second wave of European water legislation, from the late 1980s through into the 1990s, began to address pollution from urban waste water and from agriculture. But by the mid-1990s, there was growing pressure for a 'fundamental rethink' of EU water policy. Although considerable progress had been made in tackling individual issues, water policy was fragmented, both in terms of its aims, and the means used to achieve them. There was a growing consensus that a single piece of framework legislation was required, taking a more holistic and ecological approach to water quality.

This was the background to the framing of the Directive, which entered into force on 22 December 2000. The recitals state:

> *"(1) Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such."*

This mission statement was reflected in the new approach to river basin management provided for under the Directive. It introduced River Basin Districts (RBDs), areas designated not according to traditional administrative or political boundaries, but according to a river's basin (i.e. the spatial catchment area of the river) as a natural geographical and hydrological unit. These units would then be managed in accordance with River Basin Management Plans.

The Directive established two central concepts in relation to the protection of surface water quality. Firstly, *"good ecological status"*, defined in terms of the quality of the biological community, hydrological characteristics and chemical characteristics of the river. Secondly, *"good chemical status"*, defined in terms of compliance with quality standards established for chemical substances at European level.

The Directive assesses ecological and chemical status according to four criteria:

- Biological quality (e.g. fish, benthic invertebrates, aquatic flora);
- Hydromorphological quality (e.g. river bank structure, river continuity, substrate);
- Physical-chemical quality (e.g. temperature, oxygenation, nutrient conditions); and
- Chemical (environmental quality standards for river basin specific pollutants).

Under the *"one out all out"* rule, if rivers fail to meet the applicable standards in any of these four categories, then they cannot achieve the required "good status".

The Directive has generally been seen as a very ambitious piece of legislation, but it is here to stay – at least in Europe. Following a two-year

evaluation process, the European Commission concluded in December 2019 that the legislation remained fit-for-purpose, and in June 2020 it confirmed that the Directive will not be amended, with the focus instead being on implementation and enforcement.

Possible directions of flow

After decades of evolving European water legislation, English rivers now sit at something of a regulatory juncture. On the one hand, the Directive will remain in UK law following Brexit, and the Environment Bill 2020, although it contains provisions relating to water management in Part 5, does not fundamentally reform the legislative structure established under the Directive. A new national framework for water resources *("Meeting our future water needs: a national framework for water resources")* was published by the EA in March and the Environment Agency has just closed[1] a consultation *("River basin planning: Challenges and Choices consultation")* following which updated river basin management plans will be drafted, again in line with the structure of the Directive.

On the other hand, some voices have begun to raise the possibility of more significant reform. In a speech to the London Chamber of Commerce on 4 August 2020, Sir James Bevan (Chief Executive of the EA) said:[2]

> *"I think we should also consider reforming one of the totemic EU laws, the Water Framework Directive. The WFD, as it is known to the practitioners, was a landmark piece of legislation. It set high standards and demanding deadlines for improving water quality in rivers, lakes, estuaries and groundwater, and it has driven much of the work that the EA and others have done over the last twenty years to secure those improvements.*
>
> *There are lots of great things about the WFD, in particular its recognition that water quality is perhaps the biggest single X factor for the environment; that water bodies need to be managed in an integrated way as part of catchments; and that the health of rivers is not just about the chemicals that should or shouldn't be in them but their biology and hydromorphology: the depth, width, flow, river bank structure – all of which should respect nature as far as possible, rather than forcing rivers into engineered straitjackets from which they are all too likely to burst.*
>
> *However, the WFD is not perfect.*
>
> *It has a famous "one out all out" rule, under which rivers fail to meet the required status if they fail on any of the four categories in the directive: biological (phytoplankton, macroalgae, fish, invertebrates, etc), physical-chemical (temperature, pH, dissolved oxygen, ammonia, etc), chemical (concentrations of pollutants like arsenic and iron), and hydromorphological.*
>
> *There are two problems with this approach.*
>
> *The first is that it can underplay where rivers are in a good state or where improvements have been made to those that aren't. Right now only 14% of rivers in England qualify for good status under the WFD, because most of them fail on one or other of the criteria. But many of those rivers are actually in a much better state than that, because most of them now meet most of the criteria: across England, 79% of the individual WFD indicators are at good status.*
>
> *The second problem with the one out all out rule is that it can force regulators and others to focus time and resources on indicators that may not make much difference to the actual water quality, or where we realistically cannot achieve one of the criteria – some of England's heavily engineered rivers in urban centres, for example, will never be restored to their natural state.*
>
> *So, the WFD is not in my view a candidate for repeal – because it has driven a lot of improvement in our waters – but it is a candidate for thoughtful reform to deliver even better outcomes."*

1 On 24 September 2020.

2 https://www.gov.uk/government/speeches/in-praise-of-red-tape-getting-regulation-right

These comments attracted significant attention, not least because of concerns that the water quality regime may be weakened following Brexit. Not only this, but water legislation is highly interrelated to other areas of policy (for example, agriculture) where the regulatory environment may also change, impacting in turn on water quality issues.

Meanwhile, the EA's water quality statistics have prompted not only a spate of news coverage, but also reports of a potential judicial review of the EA by Feargal Sharkey, river campaigner and former lead singer of the Undertones, and Jolyon Maugham QC and the Good Law Project.

Given a potentially turbulent regulatory environment, and the polluted state of English rivers, could water quality once again become a focus (or battleground) for public interest environmental litigation and policy debate – in a similar manner, perhaps, to the role assumed by air quality issues over the last few years?

The text of this article is based on our recent "39 from 39" webinar on "Pollution – Home and Away" (30 September 2020).

OVERSEAS TOXIC TORTS: PARENT COMPANY LIABILITY – *VEDANTA RESOURCES PLC V LUNGOWE*

Stephanie David

On 10 April 2019, the Supreme Court handed down judgment in *Vedanta Resources plc v Lungowe* [2019] 2 W.L.R 1051. The appeal arose from a claim for breach of statutory duty and in negligence brought by 1,826 Zambians regarding toxic emissions from the Nchanga Copper Mine that had damaged their health and farming. The defendants were: the owners of the mine, Konkola Copper Mines plc ("KCM") incorporated in Zambia ("foreign defendant"); and the parent company, Vedanta Resources plc ("Vedanta") incorporated and domiciled in the UK ("anchor defendant"). The Claimants were relying on Article 4 of the Recast Brussels Regulations[3] in bringing the claim against Vedanta; and the *"necessary or proper party"* gateway of the civil procedure rules for permitting service outside the jurisdiction and on KCM.[4]

The defendants argued that using article 4 to establish jurisdiction against Vedanta for the collateral purpose of establishing jurisdiction against the foreign defendant – the real target of the claim – was an abuse of EU law.[5] The result would be that litigation about environmental harm around the world could be brought against the parent company in England.[6]

This issue raised a technical point as to the extent that article 4 fetters the English *forum conveniens* jurisprudence. To avoid the risk of irreconcilable judgments, the English courts had previously refused permission to serve the foreign defendant and stayed the proceedings against the anchor

3 Parliament and Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

4 See CPR, r 6.36-6.37; PD 6B

5 [23]

6 [39]

defendant.[7] Following *Owusu v Jackson,*[8] the English court could no longer stay the proceedings because that would constitute a derogation of article 4.[9] The English courts were therefore effectively disabled from concluding that any other jurisdiction could be the *forums conveniens*.[10] A possible remedy, observed Lord Briggs, could be to *"temper the rigour of the need to avoid irreconcilable judgments"*, particularly where the defendant consents to the foreign jurisdiction.[11]

The court further considered whether the claim against the anchor defendant disclosed a real issue to be tried in the context of KCM's application to set aside permission to serve outside the jurisdiction. The main issue was whether Vedanta owed a duty of care to the claimants.

On the particular facts, Lord Briggs formulated the question thus:[12]

> "[W]hether Vedanta sufficiently intervened in the management of the mine owned by its subsidiary KCM to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants or (on the claimants' expert evidence) a fault-based liability under the Zambian environmental, mining and public health legislation in connection with the escapes of toxic materials from the mine alleged to have caused the relevant harm. 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."

Counsel for both parties agreed that there is no special doctrine of legal responsibility in tort for parent companies in relation to the activities of their subsidiaries, citing Sales LJ in *AAA v Unilever plc* [2018] BCC 959, para 36:[13]

> "A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case."

Lord Briggs considered that there was no reliable limiting principle, as contended for by counsel for the Defendants, namely *"that a parent could never incur a duty of care in respect of activities of a subsidiary merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them."*[14] He observed that:[15]

> "Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties. […]
>
> "Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of

7 [38]-[39]

8 Case C-281/02 [2005] QB 801 – The Court of Justice held that the article 4 conferred a right on any claimant (regardless of their domicile) to sue an English domiciled defendant in England, free from jurisdictional challenge upon forum non conveniens ground (which was essentially being used as means of derogating from article 4), even where the competing candidates for jurisdiction were England (part of a member state) and a non-member state.

9 [40]

10 [40]

11 [40], [87]

12 [44]

13 [50]

14 [52]

15 [52]-[53]

> supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken."

He determined that, based upon the published materials, Vedanta asserted its own assumption of responsibility for the maintenance of proper standards of environmental control.[16] It was accordingly well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the mine may be demonstrable at trial, after full disclosure full the relevant internal documents.[17]

Lord Briggs proceeded to determine whether England was the proper place to bring proceedings against KCM.[18] He considered that even if the court concludes that the foreign jurisdiction is the proper place in which the case should be tried, the court may nonetheless permit service of proceedings on the foreign defendant if satisfied that there is a real risk that substantial justice will not be obtained.[19]

Since the Supreme Court's judgment, there have been two key cases. The first is the appeal from the Court of Appeal's decision in *HRH Okpabi & Oths v Royal Dutch Shell* [2018] EWCA Civ 191, which specifically considers the duty of care in the context of a joint venture operation. The claims in that case were for damages for pollution and environmental damage caused by oil leaks from pipelines and associated infrastructure in the Niger Delta; and was brought against two defendants: Royal Dutch Shell ("RDS") and the Nigerian subsidiary incorporated in Nigeria. The Court of Appeal (with Sales LJ dissenting) determined that there was no arguable case that RDS owed a duty of care to the claimants in Nigeria on the grounds that (i) sufficient proximity had not be established and (ii) in any event, it would not be fair, juts and reasonable to impose a duty. The Supreme Court (including Lord Briggs) heard the claimants' appeal on 23 June 2020; and judgment is awaited. In the second case, *Jalla v Royal Dutch Shell plc* [2020] EWHC 459 (TCC), Stuart-Smith J followed *Vedanta* in determining that the claimants' reliance on Article 4 of the Recast Brussels Regulations.

What are the implications of Vedanta for achieving environmental justice?

Many commentators frame analysis of *Vedanta* in terms of corporate accountability and human rights.[20] Whilst there might be some value in adopting the language of human rights (such as the Ruggie principles[21]), as a powerful political tool, ultimately *Vedanta* confirmed that establishing a duty of care against a particular parent company will turn on the facts of a particular case and required the application of the fundamental principles of tort law. Lord Briggs was quite clear that there is *"no limit to the models of management and control which may be put in place within a multinational group of companies."*[22] At the one end, a particular parent might be no more than a passive investor; whilst at the other, the parent may carry out *"a thoroughgoing vertical reorganisation of the group's businesses"* as if they were a single commercial undertaking.[23] Hence, the Supreme Court's decision in Okpabi will be particularly interesting; as it will shed light on the possible approach to joint venture operations.

It then raises a broader question (beyond the scope of this article), as to what environmental justice requires in the context of overseas

16 [61]
17 ibid
18 [87]
19 [88]-[101]
20 See, for example, Business and Human Rights Journal. 2020, 5(1), 130-136 *"Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability"*
21 Office of the High Commissioner on Human Rights, "Guiding principles on business and human rights" (2011). That is not to underplay the role of human rights in the contexts of other claims relating to environmental justice such as *Kiobel v Shell* [2019] ECLI:NL:RBDHA:2019:4233 in the Netherlands and the unlawful arrest, detention and execution of the claimants' husbands.
22 [51]
23 ibid

pollution? Are we concerned with seeking a remedy (notably compensation) for those whose livelihoods and health have been harmed? Is it the need for an economic deterrent to ensure that parent companies ensure that health, safety and environmental legislation are properly implemented by their subsidiaries? Is the focus corrective justice?

THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT. RICHARD J. LAZARUS. THE BELKNAP PRESS OF HARVARD UNIVERSITY PRESS, CAMBRIDGE, MASSACHUSETTS AND LONDON, ENGLAND, 2020.

Stephen Tromans QC

Both the title of this book, published this year, and its subject matter are particularly poignant at the time of writing this review. We have all become all too familiar with the "Rule of Six" and prior to his hospitalisation for COVID-19 (having plainly not observed any "Rule of Six"), President Trump has ignited controversy with his nomination of Judge Amy Coney Barrett to the Supreme Court – a procedure now itself thrown into doubt by the President's diagnosis and that of two Republican members of the Judiciary Committee of the Senate, according to the New York Times of 2 October 2020.

The title of course refers to the majority for decisions of the nine-judge US Supreme Court, and the book chronicles, in engrossing detail, the events which led to the 5/4 majority decision of the Court on 2 April 2007 in the most important case on environmental law yet decided by that Court, *Massachusetts v United States Environmental Protection Agency.* The book is fascinating and important at a number of levels. I discuss three.

First, it provides a unique insight into the workings of the US Supreme Court. Professor Lazarus teaches courses on environmental law and Supreme Court decision-making at Harvard University. Before that he has acted in over 40 cases in the Supreme Court, and advanced oral argument in 14. He is therefore able to bring a wealth of detail and experience, which makes the book a treasure house for lawyers interested in the complex dynamics of Supreme Court litigation, the pitfalls of presentation of time-constrained oral argument to the Court, and the decision making processes of the Justices. Compared with the UK Supreme Court, where there is so much more stress on oral argument, presented at some length, the US system makes the maximum of thirty minutes allotted to each advocate a high stakes exercise – each minute and each sentence has to count. It is worth saying however, that presenting argument to the UK Supreme Court is equally nail-biting: it is quite possible to lose a case in a two-minute exchange. Both courts are characterised by judicial questioning, which can be both helpful and destructive. In the *Massachusetts* case, Jim Milkey, presenting the case for the plaintiffs, faced 23 questions from sceptical and hostile Justice Antonin Scalia, each one a potentially lethal hand grenade. No less exciting is the account of the later decision making conference of the Justices, resulting in the 5/4 majority in favour of the plaintiffs. Irrespective of the environmental subject matter of the case, the book is worth reading from that perspective alone.

Second, the book provides a salutary account of the difficulties of getting complex and controversial environmental litigation off the ground. The case was initiated by Joe Mendelson, a public interest attorney with a very small, shoestring environmental organisation. Aggrieved by the failure of the Clinton Administration to take effective action against emission of greenhouse gases from vehicles and power stations, he petitioned the US EPA to regulate carbon dioxide emissions from new cars and trucks under section 202 of the Clean Air Act, on the basis that climate change could "reasonably be anticipated to endanger public health or welfare". This was a step initially opposed by the giant environmental NGOs, Sierra Club and Natural Resources Defense

Council, on the basis that a failure or political fall-out would drastically set back their cause. They did eventually come on board, as did a number of States, including Massachusetts, with some 30 parties in all challenging to EPA's denial of Mendelson's petition: the "Carbon Dioxide Warriors" as they styled themselves. The account of the dynamics within the US EPA is itself enlightening. Support of the big NGOs and States was a mixed blessing, leading to huge and brutal conflict over how the case should be presented on paper, who should deliver the oral argument, and how such argument should be presented strategically. It is really amazing in some respects that the case got off the ground at all.

Thirdly, for students of environmental politics, the book is important too. When President Clinton was elected in 1992, his past record on environmental matters as Governor of Arkansas was abysmal on matters such as toxic waste, deforestation, agricultural pollution, and chemicals regulation. Clinton chose Al Gore as his running mate to a large extent to boost his own environmental credentials, Gore having just written the "definitive" book on climate change, *Earth in the Balance*. However, Gore's personal ambitions to become President in 2000 meant that he was unwilling to grasp the political nettle of climate change, fearful that strong views on the matter might harm him politically. Hopes were pinned on Carol Browner, Gore's protégée and Clinton's appointee as EPA Administrator, dubbed by *Time* magazine as "the queen of clean air". However, the victory of George W Bush in 2000 led to her successor, Christine Todd Whitman, being thwarted in her efforts to regulate carbon dioxide by machinations led by Vice President Dick Cheney, who persuaded Bush to sign a letter (without consulting either the EPA or Department of Justice) stating that carbon dioxide was not a "pollutant" and that there was no power to regulate it as such under the Clean Air Act. This created the battle line which was fought over in *Massachsetts v EPA*.

Ultimately, while Supreme Courts can interpret the law, as they did in the case, power resides with the elected government. A decade after the Supreme Court decision, the election of President Donald Trump in 2016 presented a threat to environmental protection law which as Lazarus says (p. 286) is "without modern historical parallel". A massive deregulatory agenda followed, with anti-regulation and pro-coal and oil appointments to senior administrative posts, such as EPA Administrator and Energy Secretary. A wholesale cull of the previous administration's orders took place and the US notified withdrawal from the Paris Agreement on Climate Change. Appointments of right leaning judges have been made to courts at all levels. All is possibly not yet lost, but things certainly would look bleak if Trump were re-elected.

Richard Lazarus' final assessment of the legacy of the case is that while the sort of transformative change that was sought by those bringing a case can begin in a courthouse, "it never ends there" – "every litigation victory is necessarily provisional". Progress requires not just judicial votes 5/4, but political votes by individuals globally, to elect sufficiently forward-thinking and inspirational leaders willing to tackle climate change. The public's record on electing such leaders does not at present, unfortunately, inspire confidence.

CONTRIBUTORS

Stephen Tromans QC

stephen.tromans@39essex.com

Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

Jonathan Darby

jon.darby@39essex.com

Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.

Stephanie David

stephanie.david@39essex.com

Stephanie accepts instructions across all areas of Chambers' work, with a particular interest in planning matters (including environmental offences). Stephanie makes regular court appearances, undertakes pleading and advisory work and has a broad experience of drafting pleadings, witness statements and other core documents. She has been instructed to advise on a range of matters, including enforcement notices, environmental offences (such as fly-tipping), and applications for planning statutory review. She has also appeared before the Magistrates Court to obtain entry warrants on behalf of Environmental Health Officers. To view full CV click here.

Tom van der Klugt

tom.vanderklugt@39essex.com

Tom accepts instructions across all of chambers' practice areas. Before transferring to the Bar, Tom trained as a commercial solicitor at Freshfields, qualifying into the firm's litigation practice with a specialism in environmental, product liability and regulatory disputes. He worked on a number of major corporate investigations and class actions, as well as general commercial litigation and advisory pieces. During pupillage Tom assisted on a number of environmental law matters and, including advice in relation to the CITES regime. To view full CV click here.

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan
Deputy Senior Clerk: Andrew Poyser

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
28 Maxwell Road #04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085