

# 39 from 39 Webinar Series – Episode 13: Pollution Home and Away

Richard Wald QC

Steph David

Tom van der Klugt

30 September 2020

Overseas toxic torts: parent company  
liability – the implications of *Vedanta  
Resources Plc v Lungowe* [2019] 2 W.L.R.  
1051

Steph David

# Introduction



# *Chandler v Cape plc* [2012] EWCA Civ 2331

Relevant circumstances justifying the existence of a duty of care on behalf of parent company

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.
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.

# HRH Okpabi & Oths v Royal Dutch Shell (2) Shell Development Co of Nigeria & Oths [2018] EWCA Civ 191

- Actions for damages from pollution and environmental damage caused by leaks of oil from pipelines and associated infrastructure in or around Niger Delta for which Ds are responsible
- **Key q: whether, to the standard required, RDS owed a duty of care to those affected by oil leaks from pipelines and associated infrastructure in the Rivers State of Nigeria?**

# HRH Okpadi (2) – duty of care

- Sufficient evidence to establish the foreseeability of harm
- Proximity –no arguable case that a sufficient degree of control by RDS of SPDC’s operations in Nigeria to establish the necessary degree of proximity at trial
- Fair, just and reasonable –
  - Importance of MNC parent companies and international standards
  - Environmental protection in Nigeria vs the statutory scheme
  - Policies?

# Sales LJ, dissenting

- Setting global standards alone to guide conduct of operating subsidiaries not sufficient to lead to imposition of duty of care, but significant in context of Cs' case as a whole (para 161)
- Good arguable case against RDS (considering evidence of Prof Siegel, Shell Control Framework and HSSE & SP control framework); and very real possibility that documents will emerge on disclosure that will provide substantial support for their case at trial

# *Vedanta Resources Plc v Lungowe*

- Claim in common law negligence and for breach of statutory duty
- Brought by 1,826 Zambians regarding toxic emissions from the Nchanga Copper mine that had damaged their health and farming
- Defendants:
  - owners of the mine, Konkola Copper Mines plc (“KCM”) incorporated in Zambia;
  - parent company, Vedanta Resources plc (“Vedanta”) incorporated and domiciled in the UK



# *Vedanta Resources Plc v Lungowe*

**Issue:** whether the English courts had jurisdiction to determine the claims against both defendants

- Against Vedanta – Recast Brussels Regulations, article 4
- Against KCM – “necessary or proper party” pathway, CPR PD 6B, para 3.1

# Real triable issue....

Did Vedanta sufficiently intervene in the management of the mine owned by KCM to have incurred itself (rather than by vicarious liability) **a common law duty of care to the Cs?**  
(Briggs, para 44)

- No special doctrine of the law of tort of legal responsibility for parent companies (*AAA v Unilever plc* [2018] BCC 959)
- Group policies about minimising the impact of inherently dangerous activities may be shown to contain errors which, when implemented by a subsidiary, cause harm to third parties.
- Duty of care might - where the parent takes active steps (by training, supervision and enforcement) to implement the policy; or where the parent “holds itself out as exercising that degree of supervision” of its

“...I regard the **published materials** in which Vedanta may fairly be said to have asserted its **own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the mine**, and not merely to have laid down but also **implemented those standards by training, monitoring and enforcement**, as sufficient on their own to show that it is **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 of the relevant internal documents of Vedanta and KCM, and of communications passing between them...” (Lord Briggs, para 61)

# Substantial justice and proper place

- Real risk of the denial of substantial justice in a particular jurisdiction
- Practical impossibility of funding such group claims where Cs are all in extreme poverty
- Absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable the litigation of this size and complexity to be prosecuted effectively

# Post-Vedanta

*Jalla v Royal Dutch Shell plc* [2020] EWHC 459

- Negligence and nuisance claims by over 27,500 Cs relating to oil spill off coast of Nigeria
- Number of applications made (inc limitation and jurisdiction)
- As to jurisdiction, followed *Vedanta* (not an abuse of EU law), English courts had jurisdiction (subject to limitation) against STASCO and SNEPCO

*Okpabi & Oths v Royal Dutch Shell plc & Anr* in the

Supreme Court

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

 Essex  
CHAMBERS

# Broader implications?

- Claims in the law of tort
- More powerful or complementary to the UN Guiding Principles for Business and Human Rights?
- Proceedings in The Netherlands

# Pollution – Home & Away

River pollution in England:  
The regulatory framework & possible  
directions of travel

**Tom van der Klugt**  
**30 September 2020**

# Shocking state of English rivers revealed as all of them fail pollution tests

**Data reveals just 14% of good ecological standard and none of good chemical standard**





# Environment Agency statistics

## September 2020

- 14% of England's rivers are of a “good ecological standard”
- None is of a “good chemical standard”
- No water rivers in overall good health
- Agricultural run-off and raw sewage discharge cited as key issues
- Lots of news coverage

# Current legal framework: EU Water Framework Directive

*“Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such”*

Holistic approach to river basin management  
River Basin Districts

**EU Water Framework Directive 2000 (2000/60/EC)**

# Current legal framework: EU Water Framework Directive

- “*Good ecological status*”
- “*Good chemical status*”
- The four tests
  - Biological
  - Hydromorphological
  - Physical-chemical
  - Chemical
- The “one-out-all-out” rule

# Possible directions of flow: regulatory reform

- Brexit & the Water Framework Directive
- Environment Bill 2020 (Part 5)
- New national framework for water resources (March 2020)
- Consultation: “*River basin planning: Challenges and Choices*” (closed 24 September)

# Possible directions of flow: regulatory reform

**Sir James Bevan (Chief Executive of the Environment Agency)  
London Chamber of Commerce and Industry, 4 August 2020**

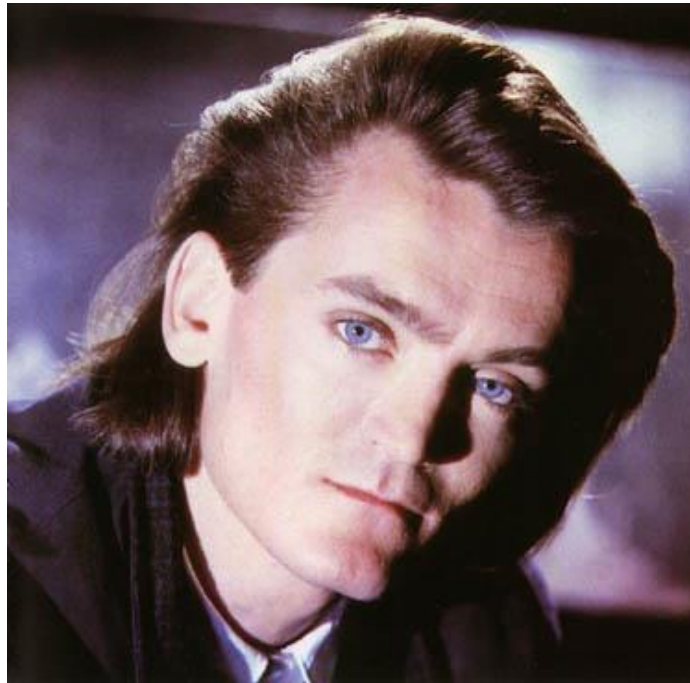
*“I think we should also consider reforming one of the totemic EU laws, the Water Framework Directive...The first is that it can underplay where rivers are in a good state or where improvements have been made to those that aren’t. Right now only 14% of rivers in England qualify for good status under 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.”*

# Possible directions of flow: regulatory reform

*“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.”*

# Possible directions of flow: increased legal action?



Could water quality be the new air quality?